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Contents

Federal Register

Vol. 85, No. 201

Friday, October 16, 2020

Agency for International Development

RULES

Acquisition Regulation:

Leave and Holidays for Personal Services Contractors,
Including Family and Medical Leave, 65734–65740

Agricultural Marketing Service

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:
Domestic Hemp Production Program, 65788–65789

Agriculture Department

See Agricultural Marketing Service

See Animal and Plant Health Inspection Service

Animal and Plant Health Inspection Service

NOTICES

Environmental Assessments; Availability, etc.:
Cotton Genetically Engineered for Insect Resistance,
65789–65790

Bureau of Safety and Environmental Enforcement

PROPOSED RULES

Risk Management, Financial Assurance and Loss
Prevention, 65904–65937

Centers for Disease Control and Prevention

NOTICES

Order Suspending the Right To Introduce Certain Persons
From Countries Where a Quarantinable Communicable
Disease Exists, 65806–65812

Centers for Medicare & Medicaid Services

RULES

Medicare Program:

Alternative Payment Model Incentive Payment Advisory
for Clinicians' Request for Current Billing
Information for Qualifying Alternative Payment
Model Participants; Correction, 65732

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 65814–65815

Medicare and Medicaid Programs:

Application from DNV–GL Healthcare USA, Inc. for
Continued Approval of its Critical Access Hospital
Accreditation Program, 65812–65814

Meetings:

Medicare Program; Town Hall Meeting on the FY 2022
Applications for New Medical Services and
Technologies Add-On Payments, 65815–65817

Children and Families Administration

RULES

Head Start Designation Renewal System, 65733

Commerce Department

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

Committee for Purchase From People Who Are Blind or Severely Disabled

NOTICES

Procurement List; Additions and Deletions, 65793–65794

Comptroller of the Currency

RULES

Real Estate Appraisals, 65666–65672

Defense Acquisition Regulations System

RULES

Defense Federal Acquisition Regulation Supplement:
Assessing Contractor Implementation of Cybersecurity
Requirements; Correction, 65733
Treatment of Certain Items as Commercial Items;
Correction, 65733–65734

PROPOSED RULES

Defense Federal Acquisition Regulation Supplement:
Source Restrictions on Auxiliary Ship Component;
Correction, 65787

Defense Department

See Defense Acquisition Regulations System

NOTICES

Meetings:

Board of Regents, Uniformed Services University of the
Health Sciences, 65794–65795
Defense Advisory Committee on Investigation,
Prosecution, and Defense of Sexual Assault in the
Armed Forces, 65794

Employment and Training Administration

RULES

Welfare-to-Work Grants, 65693–65694

Energy Department

See Federal Energy Regulatory Commission

NOTICES

Application for Blanket Authorization to Export Liquefied
Natural Gas to Non-Free Trade Agreement Countries on
a Short-Term Basis:

Cheniere Marketing, LLC and Corpus Christi
Liquefaction, LLC, 65795–65797

Application:

Delfin LNG, LLC, 65797–65798

Environmental Protection Agency

RULES

Air Quality State Implementation Plans; Approvals and
Promulgations:

Idaho; 2015 Ozone National Ambient Air Quality
Standards Interstate Transport Requirements, 65722–
65727

Pennsylvania; 1997 8-Hour Ozone National Ambient Air
Quality Standards Second Maintenance Plan for the
Franklin County Area, 65727–65729

Pennsylvania; Reasonably Available Control Technology
Determinations for Case-by-Case Sources Under the
1997 and 2008 8-Hour Ozone National Ambient Air
Quality Standards, 65706–65722

Pesticide Tolerance for Emergency Exemptions:
Methyl Bromide, 65729–65732

PROPOSED RULES

Air Quality State Implementation Plans; Approvals and Promulgations:
California; Infrastructure Requirements for Ozone, 65755–65774
Significant New Use Rules on Certain Chemical Substances, 65782–65787
Standards of Performance for Volatile Organic Liquid Storage Vessels Construction, Reconstruction, or Modification, 65774–65782

NOTICES

Environmental Impact Statements; Availability, etc., 65800

Federal Aviation Administration**RULES**

Airspace Designations and Reporting Points:
Coeur D'Alene, ID, 65677–65678
Airworthiness Directives:
Airbus SAS Airplanes, 65674–65677
ATR-GIE Avions de Transport Regional Airplanes, 65672–65674
Prohibition Against Certain Flights in Specified Areas of the Simferopol and Dnipropetrovsk Flight Information Regions, 65678–65686
Prohibition Against Certain Flights in the Baghdad Flight Information Region (FIR) (ORBB), 65686–65693

Federal Deposit Insurance Corporation**RULES**

Real Estate Appraisals, 65666–65672

NOTICES

Meetings; Sunshine Act, 65800

Federal Energy Regulatory Commission**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 65799–65800
Filing:
East Texas Electric Cooperative, Inc., 65798–65799

Federal Mine Safety and Health Review Commission**NOTICES**

Meetings; Sunshine Act, 65800–65801

Federal Motor Carrier Safety Administration**NOTICES**

Hours of Service of Drivers; Exemption Applications:
Small Business in Transportation Coalition, 65896–65898
Transparency in Property Broker Transactions:
Owner-Operator Independent Drivers Association, Small Business in Transportation Coalition Petitions for Rulemaking, 65898–65899

Federal Railroad Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 65899–65900

Federal Reserve System**RULES**

Real Estate Appraisals, 65666–65672

Federal Trade Commission**NOTICES**

Early Termination of the Waiting Period Under the Premerger Notification Rules, 65801–65806

Federal Transit Administration**NOTICES**

Environmental Impact Statements; Availability, etc.:
Expansion of Light Rail Transit Service From Glassboro, NJ to Camden, NJ, 65900–65901

Fish and Wildlife Service**NOTICES**

Endangered and Threatened Species:
Recovery Permit Applications, 65859–65860
Enhancement of Survival Permit Applications:
Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit; Douglas County, WA, 65866–65868
Environmental Impact Statements; Availability, etc.:
Thurston County Habitat Conservation Plan in Thurston County, WA, 65861–65866

Food and Drug Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Irradiation in the Production, Processing, and Handling of Food, 65825–65827
Premarket Notification for a New Dietary Ingredient, 65830–65832
Electronic Common Technical Document:
Data Standards, 65827–65828
Guidance:
Coronavirus Disease 2019 (COVID–19), 65820–65824
Testing for Biotin Interference in In Vitro Diagnostic Devices, 65817–65819
Listing of Patent Information in the Orange Book, 65819–65820
Quality Management Maturity for Active Pharmaceutical Ingredients Pilot Program for Foreign Facilities, 65828–65830
Quality Management Maturity for Finished Dosage Forms Pilot Program for Domestic Drug Product Manufacturers, 65824–65825
Requests for Nominations:
Public Advisory Panels of the Medical Devices Advisory Committee, 65832–65833

Foreign-Trade Zones Board**NOTICES**

Proposed Production Activity:
PPC Broadband, Inc., Foreign-Trade Zone 90, Syracuse, NY, 65790–65791

Geological Survey**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Ferrous Metals Surveys, 65868

Health and Human Services Department

See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See Indian Health Service
See National Institutes of Health

Health Resources and Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners, 65834–65837
Survey of Eligible Users of the National Practitioner Data Bank, 65833–65834

Homeland Security Department

See U.S. Citizenship and Immigration Services

RULES

Ratification of Department Actions, 65653–65656

NOTICES

Senior Executive Service:
Performance Review Board, 65856–65858

Indian Affairs Bureau**RULES**

Indian Child Protection and Family Violence Prevention:
Minimum Standards of Character, 65704–65706

NOTICES

Environmental Impact Statements; Availability, etc.:
Osage County, OK, 65869

Indian Health Service**NOTICES**

Community Opioid Intervention Pilot Projects, 65845–65855
Competing Supplement:
Urban Indian Education and Research Program, 65837–65845

Institute of Museum and Library Services**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Evaluation of the Reopening Archives, Libraries, and Museums Project, 65878–65879

Interior Department

See Bureau of Safety and Environmental Enforcement
See Fish and Wildlife Service
See Geological Survey
See Indian Affairs Bureau
See National Park Service
See Ocean Energy Management Bureau

International Trade Administration**NOTICES**

Determination of Sales At Less Than Fair Value:
Passenger Vehicle and Light Truck Tires From the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam, 65791

International Trade Commission**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Steel Concrete Reinforcing Bar From Mexico and Turkey, 65873

Justice Department

See Justice Programs Office

Justice Programs Office**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
2020 Law Enforcement Administrative and Management Statistics Survey, 65873–65874

Labor Department

See Employment and Training Administration
See Occupational Safety and Health Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Claim for Continuance of Compensation, 65875
Longshore and Harbor Workers' Compensation Act Pre-Hearing Statement, 65874–65875
Rock Burst Control Plan, (Pertains to Underground Metal/Nonmetal Mines) ACTION: Notice, 65875–65876

National Drug Control Policy Office**RULES**

Freedom of Information Act, 65694–65704

National Foundation on the Arts and the Humanities

See Institute of Museum and Library Services

National Institutes of Health**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
The National Institute of Mental Health Data Archive, 65855–65856
Meetings:
National Institute of Mental Health, 65855

National Oceanic and Atmospheric Administration**RULES**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
Atlantic Highly Migratory Species; Coral and Coral Reefs of the Gulf of Mexico; Amendment 9, 65740–65749

NOTICES

Endangered and Threatened Species:
Draft Recovery Plan and Draft Recovery Implementation Strategy for the Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment; Initiation of 5-Year Review, 65791–65793

National Park Service**NOTICES**

Inventory Completion:
University of California Berkeley, Berkeley, CA, 65870–65873
Repatriation of Cultural Items:
Portland Art Museum, Portland, OR, 65871–65872
University of California Berkeley, Berkeley, CA, 65869–65870

Nuclear Regulatory Commission**RULES**

Miscellaneous Corrections, 65656–65666

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Travel Voucher, 65879–65880
Issuance of Multiple Exemptions in Response to COVID–19 Public Health Emergency, 65880–65882

Occupational Safety and Health Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Powered Industrial Trucks Standard, 65876–65878

Ocean Energy Management Bureau**PROPOSED RULES**

Risk Management, Financial Assurance and Loss Prevention, 65904–65937

Personnel Management Office**RULES**

Guidance Procedures, 65651–65653
Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 65940–65988

Presidential Documents**PROCLAMATIONS**

Crystalline Silicon Photovoltaic Cells; Facilitating Positive Adjustment to Competition From Imports (Proc. 10101), 65639–65642

Special Observances:

Columbus Day (Proc. 10100), 65637–65638
General Pulaski Memorial Day (Proc. 10099), 65635–65636
National School Lunch Week (Proc. 10098), 65633–65634

EXECUTIVE ORDERS

Committees; Establishment, Renewal, Termination, etc.:
One Trillion Trees Interagency Council; Establishment (EO 13955), 65643–65645

Water Resource Management and Water Infrastructure; Modernization Efforts (EO 13956), 65647–65650

Securities and Exchange Commission**RULES**

Update of Statistical Disclosures for Bank and Savings and Loan Registrants, 66108–66143

NOTICES

Meetings; Sunshine Act, 65891
National Market System Plan:
Consolidated Audit Trail To Enhance Data Security, 65990–66106

Self-Regulatory Organizations; Proposed Rule Changes:
Cboe EDGX Exchange, Inc., 65884–65886
ICE Clear Credit, LLC, 65891–65893
Long-Term Stock Exchange, Inc., 65882–65884
NYSE Chicago, Inc., 65888–65891
The Options Clearing Corp., 65886–65888

Small Business Administration**RULES**

Consolidation of Mentor-Protege Programs and Other Government Contracting Amendments, 66146–66199

Social Security Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 65893–65894

State Department**PROPOSED RULES**

Schedule of Fees for Consular Services; Documentary Services Fee, 65750–65755

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Improving Customer Experience, 65894–65895

Meetings:

Defense Trade Advisory Group, 65895

Surface Transportation Board**NOTICES****Exemption:**

Acquisition of Control; OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, and Jaguar Rail Holdings, LLC; Cimarron Valley Railroad, LC; Southwestern Railroad, Inc.; Texas and Eastern Railroad, LLC; Washington Eastern Railroad, LLC; and Wyoming and Colorado Railroad, Inc., 65896

Release of Waybill Data, 65895–65896

Transportation Department

See Federal Aviation Administration

See Federal Motor Carrier Safety Administration

See Federal Railroad Administration

See Federal Transit Administration

Treasury Department

See Comptroller of the Currency

NOTICES**Meetings:**

Debt Management Advisory Committee, 65901

U.S. Citizenship and Immigration Services**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Relief Under the Immigration and Nationality Act, 65858–65859

Unified Carrier Registration Plan**NOTICES**

Meetings; Sunshine Act, 65901–65902

Veterans Affairs Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request for Restoration of Educational Assistance, 65902
Meetings:
Advisory Committee on Cemeteries and Memorials; Amended, 65902

Separate Parts In This Issue**Part II**

Interior Department, Bureau of Safety and Environmental Enforcement, 65904–65937

Interior Department, Ocean Energy Management Bureau, 65904–65937

Part III

Personnel Management Office, 65940–65988

Part IV

Securities and Exchange Commission, 65990–66106

Part V

Securities and Exchange Commission, 66108–66143

Part VI

Small Business Administration, 66146–66199

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR	212.....65733
Proclamations:	217.....65733
10098.....65633	252 (2 documents) .....65733
10099.....65635	Ch. 7.....65734
10100.....65637	Proposed Rules:
10101.....65639	252.....65787
Executive Orders:	50 CFR
13955.....65643	622.....65740
13956.....65647	635.....65740
5 CFR	
120.....65651	
315.....65940	
432.....65940	
752.....65940	
8 CFR	
Ch. I.....65653	
10 CFR	
Ch. I.....65656	
12 CFR	
34.....65666	
225.....65666	
323.....65666	
13 CFR	
121.....66146	
124.....66146	
125.....66146	
126.....66146	
127.....66146	
134.....66146	
14 CFR	
39 (2 documents) .....65672,	
65674	
71.....65677	
91 (2 documents) .....65678,	
65686	
17 CFR	
210.....66108	
229.....66108	
249.....66108	
20 CFR	
645.....65693	
21 CFR	
1401.....65694	
22 CFR	
Proposed Rules:	
22.....65750	
25 CFR	
63.....65704	
30 CFR	
Proposed Rules:	
250.....65904	
290.....65904	
550.....65904	
556.....65904	
40 CFR	
52 (3 documents) .....65706,	
65722, 65727	
180.....65729	
Proposed Rules:	
52.....65755	
60.....65774	
721.....65782	
42 CFR	
414.....65732	
45 CFR	
1304.....65733	
1305.....65733	
48 CFR	
204.....65733	

Presidential Documents

Title 3—

Proclamation 10098 of October 9, 2020

The President

National School Lunch Week, 2020

By the President of the United States of America

A Proclamation

During National School Lunch Week, we celebrate our Nation's commitment to providing nutritious food to millions of students, and we recognize the many dedicated food service professionals and administrators who help carry out this mission. In a typical year, the National School Lunch Program provides meals to nearly 30 million schoolchildren every day across the country. These meals enable students in need to eat nutritious meals, which helps them achieve academic success and reach their full potential.

The National School Lunch Program succeeds because of the strong partnerships between the Federal Government and State governments, food service professionals, and local school leaders. Our Nation's farmers, ranchers, and producers are also essential to providing the food our children eat. Since this program was established in 1946, the collaboration between these key players has been vital to its success, and their cooperation has never been more crucial than during this pivotal time in our Nation's history.

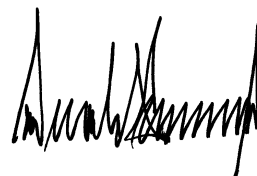
In recent months, it has become increasingly evident just how many families depend on the meals provided at school. As thousands of schools transitioned to remote learning in response to the coronavirus pandemic, I signed the Families First Coronavirus Response Act to ensure schools could continue serving children the meals they need. My Administration also launched the innovative public-private partnership "Meals to You" which delivered more than 40 million nutritious meals to children in rural areas while schools were closed. In the battle with this invisible enemy, resilience and flexibility have been critical to keeping our children safe and fed, and we are thankful for the extra efforts that have been made to achieve this goal.

Throughout the last few months, my Administration has recognized that our children's well-being depends so much on their access to schools. I have encouraged all schools to safely reopen, and we want to ensure that they are as prepared as ever to provide healthy meals to all students. In June, my Administration invested in the health of students by awarding more than \$12.1 million—a record amount—in Farm to School Grants. These funds will help bring clean, fresh, and locally-grown foods into schools and communities as they reopen, and will help foster economic opportunity for America's farmers as we continue our economic comeback. Additionally, on October 9, my Administration extended flexibilities and waived requirements to continue operating the summer meals program and the seamless summer option at no cost until the end of the school year. This program allows any child under 18 to get a free meal at a meal distribution site, and allows parents and guardians to pick up meals for their children. We are proud of these measures and others that we have taken to help ensure that all students have access to nutritious food.

To emphasize the importance of the National School Lunch Program, the Congress, by joint resolution of October 9, 1962 (Public Law 87-780), has designated the week beginning on the second Sunday in October each year as "National School Lunch Week" and has requested the President to issue a proclamation in observance of this week.

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 11 through October 17, 2020, as National School Lunch Week. I call upon all Americans to join the countless individuals who administer the National School Lunch Program in activities that support and promote awareness of the health and well-being of our Nation's children.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth 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.

A handwritten signature in black ink, appearing to be "Donald Trump", located on the right side of the page.

Presidential Documents

Proclamation 10099 of October 9, 2020

General Pulaski Memorial Day, 2020

By the President of the United States of America

A Proclamation

The life of the Polish-American hero General Casimir Pulaski is a testament to our Nation's ideals and a paragon of the cause of human freedom. General Pulaski's devotion to country—and the shared values upon which our Nation and Poland were both founded—accentuates our common commitment to liberty. On General Pulaski Memorial Day, we honor and celebrate his courage and expertise in the Revolutionary War, which helped found a Nation conceived in the ideals he held most dearly.

General Pulaski was a military leader renowned for his bravery and tactical acumen. In Poland, he fought valiantly in defense of his country's sovereignty and against the scourge of foreign tyranny. In 1777, recognizing our burgeoning Nation's cause, Pulaski eagerly joined General George Washington's Continental Army upon the recommendation of Benjamin Franklin. Pulaski spent the next 2 years in service to America and its battle for self-determination and liberty.

Throughout his time in the Continental Army, General Pulaski distinguished himself as a military leader of tactical brilliance and tremendous valor. At the Battle of Brandywine, he famously saved General Washington's life, who later promoted him to Brigadier General and gave him command of a cavalry division. Dubbed the "Pulaski Legion" his division played a key role in the fight for American Independence. Tragically, though, the "Father of the American Cavalry" was mortally wounded while leading his men during the Battle of Savannah in October of 1779.

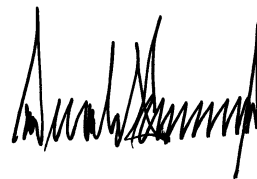
General Pulaski once wrote to General Washington: "I came here, where freedom is being defended, to serve it, and to live or die for it" General Pulaski's ultimate sacrifice for a young Nation that was not his own illustrates what is still true today—America is the shining city on a hill and a symbol of freedom and opportunity for the entire world. The United States of America is more than a name to rally around; it is the land of a people committed to universal values that inspired a young Polish soldier to fight over 200 years ago, thousands of miles from his place of birth, and it continues to inspire freedom-loving people near and far.

As I told the Polish people during a trip to Warsaw in my first year in office, the United States and Poland share a special bond forged by unique histories and national characters, and a fellowship that exists only among people who have fought and bled and died for freedom.

As we join together in celebration of General Pulaski's commitment to the cause of liberty, we reaffirm the enduring bond between our Nation and his native Poland. His legacy, carried in the hearts of nearly 10 million Polish Americans, will forever be etched into the great American story.

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 11, 2020, as General Pulaski Memorial Day. I encourage all Americans to commemorate on this occasion those who have contributed to the furthering of our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth 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.



Presidential Documents

Proclamation 10100 of October 9, 2020

Columbus Day, 2020

By the President of the United States of America

A Proclamation

More than 500 years ago, Christopher Columbus's intrepid voyage to the New World ushered in a new era of exploration and discovery. His travels led to European contact with the Americas and, a century later, the first settlements on the shores of the modern day United States. Today, we celebrate Columbus Day to commemorate the great Italian who opened a new chapter in world history and to appreciate his enduring significance to the Western Hemisphere.

When Christopher Columbus and his crew sailed across the Atlantic Ocean on the *Niña*, *Pinta*, and *Santa María* it marked the beginning of a new era in human history. For Italian Americans, Christopher Columbus represents one of the first of many immeasurable contributions of Italy to American history. As a native of Genoa, Columbus inspired early immigrants to carry forth their rich Italian heritage to the New World. Today, the United States benefits from the warmth and generosity of nearly 17 million Italian Americans, whose love of family and country strengthen the fabric of our Nation. For our beautiful Italian American communities—and Americans of every background—Columbus remains a legendary figure.

Sadly, in recent years, radical activists have sought to undermine Christopher Columbus's legacy. These extremists seek to replace discussion of his vast contributions with talk of failings, his discoveries with atrocities, and his achievements with transgressions. Rather than learn from our history, this radical ideology and its adherents seek to revise it, deprive it of any splendor, and mark it as inherently sinister. They seek to squash any dissent from their orthodoxy. We must not give in to these tactics or consent to such a bleak view of our history. We must teach future generations about our storied heritage, starting with the protection of monuments to our intrepid heroes like Columbus. This June, I signed an Executive Order to ensure that any person or group destroying or vandalizing a Federal monument, memorial, or statue is prosecuted to the fullest extent of the law.

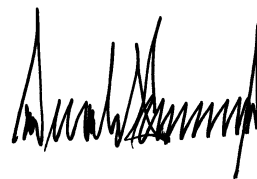
I have also taken steps to ensure that we preserve our Nation's history and promote patriotic education. In July, I signed another Executive Order to build and rebuild monuments to iconic American figures in a National Garden of American Heroes. In September, I announced the creation of the 1776 Commission, which will encourage our educators to teach our children about the miracle of American history and honor our founding. In addition, last month I signed an Executive Order to root out the teaching of racially divisive concepts from the Federal workplace, many of which are grounded in the same type of revisionist history that is trying to erase Christopher Columbus from our national heritage. Together, we must safeguard our history and stop this new wave of iconoclasm by standing against those who spread hate and division.

On this Columbus Day, we embrace the same optimism that led Christopher Columbus to discover the New World. We inherit that optimism, along with the legacy of American heroes who blazed the trails, settled a continent, tamed the wilderness, and built the single-greatest nation the world has ever seen.

In commemoration of Christopher Columbus's historic voyage, the Congress, by joint resolution of April 30, 1934, modified in 1968 (36 U.S.C. 107), has requested the President proclaim the second Monday of October of each year as "Columbus 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 October 12, 2020, as Columbus Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities. I also direct that the flag of the United States be displayed on all public buildings on the appointed day in honor of our diverse history and all who have contributed to shaping this Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth 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.



Presidential Documents

Proclamation 10101 of October 10, 2020

To Further Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)

By the President of the United States of America

A Proclamation

1. On January 23, 2018, pursuant to section 203 of the Trade Act of 1974, as amended (the “Trade Act”) (19 U.S.C. 2253), I issued Proclamation 9693, which imposed a safeguard measure for a period of 4 years that included both a tariff-rate quota (TRQ) on imports of certain crystalline silicon photovoltaic (CSPV) cells, not partially or fully assembled into other products, provided for in subheading 8541.40.6025 of the Harmonized Tariff Schedule of the United States (HTS) and an increase in duties (safeguard tariff) on imports of CSPV cells exceeding the TRQ and imports of other CSPV products, including modules provided for in subheading 8541.40.6015 of the HTS. I exempted imports from certain designated beneficiary countries under the Generalized System of Preferences from the application of the safeguard measure.
2. On February 7, 2020, the United States International Trade Commission (ITC) issued its report pursuant to section 204(a)(2) of the Trade Act (19 U.S.C. 2254(a)(2)), on the results of its monitoring of developments with respect to the domestic solar industry (ITC, Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Monitoring Developments in the Domestic Industry, No. TA–201–075 (Monitoring)). In its report, the ITC found that, following imposition of the safeguard measure, prices for CSPV cells and modules declined in a manner consistent with historical trends but were higher than they would have been without the safeguard measure.
3. With respect to CSPV cells, the ITC found that imports increased following imposition of the safeguard measure and that major domestic CSPV cell producers ceased production, leading to declines in domestic CSPV cell production capacity and production.
4. With respect to CSPV modules, imports initially declined but rose in the first half of 2019 compared with the first half of 2018. Additionally, the ITC found that multiple CSPV module producers opened production facilities in the United States, particularly in the first half of 2019, leading to increases in domestic CSPV module production capacity, production, and market share.
5. On March 6, 2020, the ITC issued an additional report pursuant to a request from the United States Trade Representative under section 204(a)(4) of the Trade Act (19 U.S.C. 2254(a)(4)), regarding the probable economic effect on the domestic CSPV cell and module manufacturing industry of modifying the safeguard measure to increase the level of the TRQ on CSPV cells from the current 2.5 gigawatts (GW) to 4.0, 5.0, or 6.0 GW (ITC, Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Advice on the Probable Economic Effect of Certain Modifications to the Safeguard Measure, No. TA–201–075 (Modification)). In its report, the ITC advised that increasing the TRQ would

help to continue growth in solar module production but that expanded access to imported cells not subject to safeguard duties would put downward pressure on prices for United States cells.

6. The ITC also found that the exclusion of bifacial modules from the safeguard measure will likely result in substantial increases in imports of bifacial modules if such exclusion remains in effect, and that such modules will likely compete with domestically produced CSPV products in the United States market. Furthermore, the ITC found that the benefits to domestic CSPV module producers from an increase in the TRQ would likely be limited if the bifacial module exclusion remained in place. According to the ITC, bifacial modules are likely to account for a greater share of the market in the future and can substitute for monofacial products in the various market segments, such that exempting imports of bifacial modules from the safeguard tariff would apply significant downward pressure on prices of domestically produced CSPV modules.

7. Section 204(b)(1)(B) of the Trade Act (19 U.S.C. 2254(b)(1)(B)) authorizes the President, upon petition from a majority of the representatives of the domestic industry, to reduce, modify, or terminate an action taken under section 203 of the Trade Act when the President determines that the domestic industry has made a positive adjustment to import competition.

8. Section 204(c)(1) of the Trade Act (19 U.S.C. 2254(c)(1)) authorizes the President to request that the ITC investigate whether action under section 203 of the Trade Act continues to be necessary to prevent or remedy serious injury and whether there is evidence that the domestic industry is making a positive adjustment to import competition. Section 204(c)(3) of the Trade Act (19 U.S.C. 2254(c)(3)) establishes the date by which the ITC will transmit the report on its investigation, unless the President specifies a different date.

9. After taking into account the information provided in the ITC's reports, and after receiving a petition from a majority of the representatives of the domestic industry with respect to each of the following modifications, I have determined that the domestic industry has begun to make positive adjustment to import competition, shown by the increases in domestic module production capacity, production, and market share. In addition, I have made the following further determinations:

(a) that the exclusion of bifacial panels from application of the safeguard tariff has impaired and is likely to continue to impair the effectiveness of the action I proclaimed in Proclamation 9693 in light of the increased imports of competing products such exclusion entails, and that it is necessary to revoke that exclusion and to apply the safeguard tariff to bifacial panels;

(b) that the exclusion of bifacial panels from application of the safeguard tariffs has impaired the effectiveness of the 4-year action I proclaimed in Proclamation 9693, and that to achieve the full remedial effect envisaged for that action, it is necessary to adjust the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent.

10. Section 604 of the Trade Act (19 U.S.C. 2483) authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including but not limited to sections 203, 204, and 604 of the Trade Act, do proclaim that:

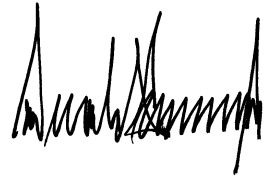
(1) In order to modify the action applicable to imports of CSPV cells under HTS subheading 8541.40.6025 and other CSPV products such as modules under HTS subheading 8541.40.6015, subchapter III of chapter 99 of the HTS is modified as set forth in the Annex to this proclamation.

(2) The United States Trade Representative is authorized to exercise my authority under section 204(c)(1) and (3) of the Trade Act to request that the ITC investigate whether action under section 203 of the Trade Act continues to be necessary to prevent or remedy serious injury and whether there is evidence that the domestic industry is making a positive adjustment to import competition, and to specify a different date for the ITC to transmit its report.

(3) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

(4) The modifications to the HTS made by this proclamation, including the Annex hereto, shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time 15 days after the date of this proclamation, and shall continue in effect as provided in the Annex to this proclamation, unless such actions are earlier expressly reduced, modified, or terminated. One year from the termination of the safeguard measure established in this proclamation, the U.S. note and tariff provisions established in the Annex to this proclamation shall be deleted from the HTS.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth 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.



ANNEX

TO MODIFY CERTAIN PROVISIONS OF CHAPTER 99 OF THE HARMONIZED
TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on October 25, 2020, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified as provided herein:

1. U.S. note 18 to such subchapter III is modified by deleting the following from subdivision (c)(iii) “(15) bifacial solar panels that absorb light and generate electricity on each side of the panel and that consist of only bifacial solar cells that absorb light and generate electricity on each side of the cells;” and by redesignating current subdivisions (c)(iii)(16) and (c)(iii)(17) as subdivisions (c)(iii)(15) and (c)(iii)(16), respectively.
2. U.S. note 18 to subchapter III is further modified by revising subdivisions (f) and (h) to read as follows:

- “(f) For purposes of subheading 9903.45.22 to this subchapter, the duty rate in the Rates of Duty 1- General subcolumn and the Rates of Duty 2 column for all goods entered under such subheading, and not the product of a country enumerated in subdivision (b) of this note, shall be as follows, with the duty rates set forth herein applied in addition to those applicable under subheading 8541.40.60:
- If entered during the period from

February 7, 2018 through February 6, 2019.....30%

If entered during the period from

February 7, 2019 through February 6, 2020.....25%

If entered during the period from

February 7, 2020 through February 6, 202120%

If entered during the period from

February 7, 2021 through February 6, 202218%”
- “(h) For purposes of subheading 9903.45.25 to this subchapter, the duty rate in the Rates of Duty 1- General subcolumn and the Rates of Duty 2 column in any of the periods enumerated below shall be as follows, with the duty rates set forth herein applied in addition to those applicable under subheading 8541.40.60:
- If entered during the period from

February 7, 2018 through February 6, 2019.....30%

If entered during the period from

February 7, 2019 through February 6, 2020.....25%

If entered during the period from

February 7, 2020 through February 6, 202120%

If entered during the period from

February 7, 2021 through February 6, 202218%”

Presidential Documents

Executive Order 13955 of October 13, 2020

Establishing the One Trillion Trees Interagency Council

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. As I declared in Executive Order 13855 of December 21, 2018 (Promoting Active Management of America's Forests, Rangelands, and Other Federal Lands To Improve Conditions and Reduce Wildfire Risk), it is the policy of the United States to promote healthy and resilient forests, rangelands, and other Federal lands by actively managing them through partnerships with States, tribes, communities, non-profit organizations, and the private sector.

Our Nation is home to hundreds of millions of acres of Federal, State, tribal, and private forests and woodlands, which produce tremendous positive economic and environmental effects throughout our country. Recreational and educational visits to National Forests make substantial contributions to our Nation's physical and emotional health as well as to our gross domestic product, all while supporting thousands of full- and part-time jobs. Our Nation's forests and woodlands provide valuable environmental benefits as well, including by serving as wildlife habitats and supporting air and water quality for all Americans. Forests and woodlands sequester atmospheric carbon, and according to the Forest Service, 180 million people in over 68,000 communities rely on our Nation's forested watersheds to capture and filter their drinking water.

These facts demonstrate how our Nation has taken advantage of the tremendous economic and environmental benefits associated with tree growth and forestation. By advancing Federal policies conducive to these practices, under my leadership, the United States has promoted greater use of nature-based solutions to address global challenges.

On January 21, 2020, I announced that to further protect the environment, the United States would be joining the World Economic Forum's One Trillion Trees initiative (Initiative), an ambitious global effort to grow and conserve one trillion trees worldwide by 2030. Following through on my commitment, and given the expansive footprint of our Federal forests and woodlands, this order initiates the formation of the United States One Trillion Trees Interagency Council to further the Federal Government's contribution to the global effort.

Sec. 2. United States One Trillion Trees Interagency Council. There is hereby established a United States One Trillion Trees Interagency Council (Council). The Council shall be charged with developing, coordinating, and promoting Federal Government interactions with the Initiative with respect to tree growing, restoration, and conservation, and with coordinating with key stakeholders to help advance the Initiative. The Council shall remain independent from the Initiative.

The Council shall be co-chaired by the Secretary of the Interior and the Secretary of Agriculture, or by their designees (Co-Chairs). The Assistant to the President for Economic Policy and the Assistant to the President and Deputy Chief of Staff for Policy Coordination, or their designees, shall serve as Vice Chairs.

(a) *Membership.* In addition to the Co-Chairs and Vice Chairs, the Council shall consist of the following officials or their designees:

- (i) the Secretary of State;
- (ii) the Secretary of the Treasury;
- (iii) the Secretary of Defense;
- (iv) the Secretary of Commerce;
- (v) the Secretary of Labor;
- (vi) the Secretary of Housing and Urban Development;
- (vii) the Secretary of Transportation;
- (viii) the Secretary of Energy;
- (ix) the Secretary of Education;
- (x) the Administrator of the Environmental Protection Agency;
- (xi) the Director of the Office of Management and Budget;
- (xii) the Senior Advisor to the President;
- (xiii) the Advisor to the President and Director of the Office of Economic Initiatives and Entrepreneurship;
- (xiv) the Assistant to the President for Domestic Policy;
- (xv) the Chairman of the Council on Environmental Quality;
- (xvi) the Director of the Office of Science and Technology Policy;
- (xvii) the Administrator of the United States Agency for International Development;
- (xviii) the Assistant to the President and Director of Intergovernmental Affairs;
- (xix) the Assistant Secretary of the Army (Civil Works); and
- (xx) the heads of such other executive departments and Federal land management agencies (agencies) and offices as the President, Co-Chairs, or Vice Chairs may, from time to time, designate or invite, as appropriate.

(b) *Administration.* The Co-Chairs, in consultation with the Vice Chairs, shall convene meetings of the Council and direct its work. The Co-Chairs shall keep the Council apprised of all Federal efforts related to the subject of this order. The Co-Chairs and members of the Council shall also coordinate with the Vice Chairs on communications with the Initiative and related parties regarding any Federal Government interactions with the Initiative.

Sec. 3. Agency Roles and Responsibilities. All members of the Council who are heads of agencies shall:

(a) include Council-related activities within their respective strategic planning processes; and

(b) provide to the Co-Chairs, Vice Chairs, and the Director of the Office of Management and Budget, pursuant to the Council protocol established under section 4(e) of this order, regular progress reports on their respective agencies' activities, if any, relating to the growth, restoration, and conservation of trees.

Sec. 4. Council Mission and Functions. The mission of the Council shall be to promote an increase in Federal Government activities and other national efforts that further the Initiative by growing, restoring, and conserving trees. The Council shall:

(a) develop and implement a strategy that includes a methodology that the Federal Government will use to track and measure any Federal activities related to the Initiative, specifically with respect to trees grown, restored, and conserved;

(b) identify statutory, regulatory, and other limitations that inhibit the Federal Government from taking additional actions in furtherance of the Initiative, and recommend potential administrative and legislative actions to remedy such limitations;

(c) identify opportunities to use existing authorities and existing or future authorized and appropriated funds to promote efforts to protect and restore trees, and to promote the active management of existing Federal lands to facilitate growth, restoration, and conservation of trees;

(d) inform State, local, and tribal officials of Federal efforts to protect, grow, and actively manage forests and woodlands on Federal lands; and

(e) establish a protocol for the submission by members of the Council who are heads of agencies of regular progress reports to the Co-Chairs, Vice Chairs, and the Director of the Office of Management and Budget on the activities, if any, of these members' respective agencies relating to the growth, restoration, and conservation of trees.

Sec. 5. Termination. The Council shall terminate on December 31, 2030.

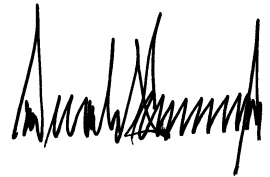
Sec. 6. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(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 13, 2020.

Presidential Documents

Executive Order 13956 of October 13, 2020

Modernizing America's Water Resource Management and Water Infrastructure

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. Abundant, safe, and reliable supplies of water are critical to quality of life for all Americans, fueling our economy, providing food for our citizens and the world, generating energy, protecting public health, supporting rich and diverse wildlife and plant species, and affording recreational opportunities. While America is blessed with abundant natural resources, those resources must be effectively managed, and our water infrastructure must be modernized to meet the needs of current and future generations.

Executive departments and agencies (agencies) that engage in water-related matters, including water storage and supply, water quality and restoration activities, water infrastructure, transportation on our rivers and inland waterways, and water forecasting, must work together where they have joint or overlapping responsibilities. This order will ensure that agencies do that more efficiently and effectively to improve our country's water resource management, modernize our water infrastructure, and prioritize the availability of clean, safe, and reliable water supplies.

Sec. 2. Policy. It is the policy of the United States to:

(a) Improve coordination among agencies on water resource management and water infrastructure issues;

(b) Reduce unnecessary duplication across the Federal Government by coordinating and consolidating existing water-related task forces, working groups, and other formal cross-agency initiatives, as appropriate;

(c) Efficiently and effectively manage America's water resources and promote resilience of America's water-related infrastructure;

(d) Promote integrated planning among agencies for Federal investments in water-related infrastructure; and

(e) Support workforce development and efforts to recruit, train, and retain professionals to operate and maintain America's essential drinking water, wastewater, flood control, hydropower, and delivery and storage facilities.

Sec. 3. Interagency Water Subcabinet. To promote efficient and effective coordination across agencies engaged in water-related matters, and to prioritize actions to modernize and safeguard our water resources and infrastructure, an interagency Water Policy Committee (to be known as the Water Subcabinet) is hereby established. The Water Subcabinet shall be co-chaired by the Secretary of the Interior and the Administrator of the Environmental Protection Agency (Co-Chairs), and shall include the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Energy, the Secretary of the Army, and the heads of such other agencies as the Co-Chairs deem appropriate. The Department of the Interior or the Environmental Protection Agency (EPA) shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support as needed for the Water Subcabinet to implement this order.

Sec. 4. Reducing Inefficiencies and Duplication. Currently, hundreds of Federal water-related task forces, working groups, and other formal cross-agency

initiatives (Federal interagency working groups) exist to address water resource management. Within 90 days of the date of this order, the Water Subcabinet shall, to the extent practicable, identify all such Federal interagency working groups and provide recommendations to the Chairman of the Council on Environmental Quality (CEQ), the Director of the Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy (OSTP) on coordinating and consolidating these Federal interagency working groups, as appropriate and consistent with applicable law.

Sec. 5. *Improving Water Resource Management.* Federal agencies engage in a wide range of activities relating to water resource management. Within 120 days of the date of this order, the Water Subcabinet shall submit to the Chairman of CEQ, the Director of OMB, and the Director of OSTP a report that recommends actions to address the issues described below, and for each recommendation identifies a lead agency, other relevant agencies, and agency milestones for fiscal years 2021 through 2025:

(a) Actions to increase water storage, water supply reliability, and drought resiliency, including through:

(i) developing additional storage capacity, including an examination of operational changes and opportunities to update dam water control manuals for existing facilities during routine operations, maintenance, and safety assessments;

(ii) coordinating agency reviews when there are multi-agency permitting and other regulatory requirements;

(iii) increasing engagement with State, local, and tribal partners regarding the ongoing drought along the Colorado River and regarding irrigated agriculture in the Colorado Basin;

(iv) implementing the “Priority Actions Supporting Long-Term Drought Resilience” document issued on July 31, 2019, by the National Drought Resilience Partnership; and

(v) improving coordination among State, local, tribal, and territorial governments and rural communities, including farmers, ranchers, and landowners, to develop voluntary, market-based water and land management practices and programs that improve conservation efforts, economic viability, and water supply, sustainability, and security;

(b) Actions to improve water quality, source water protection, and nutrient management; to promote restoration activities; and to examine water quality challenges facing our Nation’s minority and low-income communities, including through:

(i) implementing the “Great Lakes Restoration Initiative (GLRI) Action Plan III” issued on October 22, 2019, by the EPA for the GLRI Interagency Task Force and Regional Working Group, established pursuant to the Water Infrastructure Improvements for the Nation Act (Public Law 114–322);

(ii) enhancing coordination among the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force partners to support State implementation of nutrient reduction strategies;

(iii) increasing coordination between agencies and members of the South Florida Ecosystem Restoration Task Force, established pursuant to the Water Resources Development Act of 1996 (Public Law 104–303), and implementing and completing the activities included in the Comprehensive Everglades Restoration Plan, established pursuant to the Water Resources Development Act of 2000 (Public Law 106–541); and

(iv) continuing implementation of the EPA’s memorandum entitled “Updating the Environmental Protection Agency’s Water Quality Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality” issued on February 6, 2019;

(c) Actions to improve water systems, including for drinking water, desalination, water reuse, wastewater, and flood control, including through:

(i) finalizing and implementing, as appropriate and consistent with applicable law, the proposed rule entitled “National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions,” 84 Fed. Reg. 61684 (Nov. 13, 2019);

(ii) implementing the “National Water Reuse Action Plan” issued on February 27, 2020, by the EPA;

(iii) coordinating with the Federal Interagency Floodplain Management Task Force, established pursuant to the National Flood Insurance Act of 1968 (Public Law 90–448), on Federal flood risk management policies and programs to better support community needs; and

(iv) continuing coordination among agencies concerning the Department of Energy’s Water Security Grand Challenge to advance transformational technology and innovation to provide safe, secure, and affordable water; and

(d) Actions to improve water data management, research, modeling, and forecasting, including through:

(i) aligning efforts and developing research plans among the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the National Oceanic and Atmospheric Administration, and the Secretary of the Army, through the Assistant Secretary of the Army (Civil Works), to ensure that America remains a global leader for water-related science and technology capabilities;

(ii) implementing common methods of water forecasting, including the use of snow monitoring tools, on a national and basin scale, supported by weather forecasting on all scales;

(iii) developing state-of-the-art geospatial data tools, including maps, through Federal, State, tribal, and territorial partnerships to depict the scope of waters regulated under the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92–500); and

(iv) implementing actions identified in the “Federal Action Plan for Improving Forecasts of Water Availability” issued on October 18, 2019, by the Department of the Interior and the Department of Commerce pursuant to section 3 of the Presidential Memorandum of October 19, 2018 (Promoting the Reliable Supply and Delivery of Water in the West).

Sec. 6. Report. Within 1 year of submitting the report required by section 5 of this order, and annually thereafter, the Water Subcabinet shall update the Chairman of CEQ, the Director of OMB, and the Director of OSTP on the status of the actions identified in the report.

Sec. 7. Integrated Infrastructure Planning. Agencies oversee a number of programs to enhance coordination of cross-agency water infrastructure planning and to protect taxpayer investments. Within 150 days of the date of this order, the Water Subcabinet shall identify and recommend actions and priorities to the Director of OMB, the Chairman of CEQ, and the Assistant to the President for Economic Policy to support integrated planning and coordination among agencies to maintain and modernize our Nation’s water infrastructure, including for drinking water, desalination, water reuse, wastewater, irrigation, flood control, transportation on our rivers and inland waterways, and water storage and conveyance. The recommendations shall consider water infrastructure programs that are funded by the Department of Defense through the Army Corps of Engineers, and by the Department of the Interior, the Department of Agriculture, the Department of Energy, the EPA, the Federal Emergency Management Agency, the Economic Development Administration, and other agencies, as appropriate. Such programs include the EPA’s Water Infrastructure Finance and Innovation Act program, established pursuant to the Water Resources Reform and Development Act of 2014 (Public Law 113–121) and amended by the America’s Water Infrastructure Act of 2018 (Public Law 115–270), which modernizes the aging

water infrastructure of the United States, improves public health protections, and creates jobs; the Department of Agriculture's rural development programs, which make and support investments in water infrastructure; and the Department of Agriculture's Natural Resources Conservation Service programs, which promote source water protection, improve water quality, and assist with developing new water infrastructure projects.

Sec. 8. *Water Sector Workforce.* Trained water-sector professionals are vital to protecting public health and the environment through strategic planning, operation and maintenance of treatment facilities, and implementation of water management programs. Within 150 days of the date of this order, the Water Subcabinet, in consultation with the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Education, the Secretary of Veterans Affairs, and the heads of other agencies, as appropriate, shall identify actions and develop recommendations to improve interagency coordination and provide assistance and technical support to State, local, tribal, and territorial governments in order to enhance the recruitment, training, and retention of water professionals within drinking water, desalination, water reuse, wastewater, flood control, hydropower, and delivery and storage sectors. Such recommendations shall be submitted to the Chairman of CEQ, the Assistant to the President for Domestic Policy, the Assistant to the President for Economic Policy, and the Chairman of the Council of Economic Advisers.

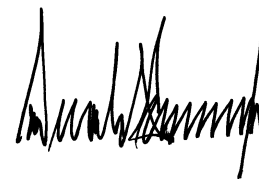
Sec. 9. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(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 in a manner 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 13, 2020.

Rules and Regulations

Federal Register

Vol. 85, No. 201

Friday, October 16, 2020

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 120

RIN 3206-AO01

Guidance Procedures

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: This rule codifies the Office of Personnel Management's policies and procedures for reviewing and clearing administrative guidance documents.

DATES: Effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Alexys Stanley by telephone at (202) 606-1000 or by email at regulatory.information@opm.gov.

SUPPLEMENTARY INFORMATION: This final rule, which adds part 120 to Title 5 of the Code of Federal Regulations, is adopted pursuant to Executive Order 13891, titled: "Promoting the Rule of Law Through Improved Agency Guidance Documents" (84 FR 55235, October 9, 2019). The Executive order requires Federal agencies to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. This final rule also incorporates the requirements of Office of Management and Budget Memorandum M-20-02 of October 31, 2019, which implements the Executive order.

Waiver of Notice of Proposed Rule Making

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of "agency organization, procedure, or practice." See 5 U.S.C. 553(b)(A). The Civil Service Reform Act's additional provisions for rulemaking by OPM incorporate this exception. See 5 U.S.C. 1105. Since this is not a substantive rule but a rule of

agency procedure, notice and comment are not necessary.

Executive Order 12866

This rule is not a significant regulatory action under E.O. 12866.

Executive Order 13771

This rule is not subject to the requirements of E.O. 13771 because this rule is not a significant regulatory action under E.O. 12866 and imposes only *de minimis* costs.

Regulatory Flexibility Act

This regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

Federalism

OPM has examined this rule in accordance with Executive Order 13132, Federalism, and has determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not 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 year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act Requirements

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 120

Administrative practice and procedure.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

For the reasons stated in the preamble, OPM amends title 5 of the

Code of Federal Regulations by adding part 120 as follows:

■ 1. Add part 120 to read as follows:

PART 120—ADMINISTRATIVE GUIDANCE

Sec.

- 120.1 Purpose and scope.
- 120.2 Definitions applicable to this part.
- 120.3 Requirements for clearance.
- 120.4 Public access to guidance documents.
- 120.5 Definition of significant guidance document.
- 120.6 Procedure for guidance documents identified as "significant".
- 120.7 Notice-and-comment procedures.
- 120.8 Petitions to withdraw or modify guidance.
- 120.9 Rescinded guidance.
- 120.10 Exceptional circumstances.
- 120.11 Reports to Congress and GAO.
- 120.12 No judicial review or enforceable rights.

Authority: 5 U.S.C. 552(a)(1); E.O. 13891, 84 FR 55235.

§ 120.1 Purpose and scope.

(a) This part prescribes general procedures that apply to OPM guidance documents.

(b) This part governs all OPM employees and contractors involved with all phases of issuing guidance documents.

(c) This part applies to all OPM guidance documents in effect on or after April 28, 2020.

§ 120.2 Definitions applicable to this part.

(a) Except as provided in paragraph (b) of this section, the term *guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(b) The term *guidance document* does not include:

- (1) Rules promulgated under 5 U.S.C. 553 (or similar statutory provisions);
- (2) Rules of agency organization, procedure, or practice that are not anticipated to have substantial future effect on the behavior of regulated parties or the public;
- (3) Decisions of agency adjudications;
- (4) Internal executive branch legal advice or legal opinions addressed to executive branch officials;
- (5) Agency statements of specific applicability, including advisory or legal opinions directed to particular

parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a Government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(6) Legal briefs, other filings with a court or administrative tribunal, records or communications produced in a legal proceeding, or positions taken in litigation or enforcement actions;

(7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth a new regulatory policy;

(8) Guidance pertaining to military or foreign affairs functions, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services), and any other guidance when application of this order, or any part of this order, would, in the judgment of the Director of OPM, undermine the national security;

(9) Any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(10) Any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(11) Grant solicitations and awards;

(12) Contract solicitations and awards;

(13) Agency documents that are not publicly disseminated, including classified information, information subject to a statutory or regulatory redisclosure restriction, privileged information, and information exempt from disclosure under the Freedom of Information Act;

(14) Purely internal agency policies or guidance directed solely to OPM employees or contractors that are not anticipated to have substantial future effect on the behavior of regulated parties or the public; and

(15) Documents that are directed solely to other agencies (or personnel of such agencies) and that are not anticipated to have substantial future effect on the behavior of regulated parties or the public, including the typical documents issued for government-wide use by OPM.

(c) *OMB* means the Office of Management and Budget.

(d) *OIRA* means the Office of Information and Regulatory Affairs of OMB.

§ 120.3 Requirements for clearance.

Except as described in § 120.6(c), the Director of OPM may delegate any function related to the review and clearance of guidance. OPM's review and clearance of guidance shall ensure that each guidance document proposed to be issued by OPM satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for agency action);

(b) The guidance document identifies or includes:

(1) The term "guidance" or its functional equivalent;

(2) The issuing office name;

(3) A unique identifier, including, at a minimum, the date of issuance, title of the document, and its regulatory identification number (Z-RIN) in the case of a significant guidance document;

(4) The general topic, activity, persons, and/or entities to which the guidance applies;

(5) Citations to applicable statutes and regulations;

(6) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(7) A concise summary of the guidance document's content;

(c) The guidance document avoids using mandatory language, such as "shall," "must," "required," or "requirement," unless it is binding guidance by law or as incorporated in a contract, the language is describing an established statutory or regulatory requirement, or the language is addressed to agency staff or other Federal employees and will not foreclose OPM's ability to consider positions advanced by any affected private parties;

(d) The guidance document is written in plain and understandable English; and

(e) The guidance document includes the following disclaimer prominently: "The contents of this document do not have the force and effect of law and are

not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies." When a guidance document is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, the originating office should modify this disclaimer to reflect either of those facts.

§ 120.4 Public access to guidance documents.

(a) OPM shall ensure all guidance documents in effect are on OPM's Web portal in a single, searchable, indexed database, available to the public.

(b) The Web portal will:

(1) Include an index with each guidance document's name, date of issuance, date of posting, and unique agency identifier; if the guidance document is a significant guidance document, its Z-RIN; the general topic and a brief (1–2 sentence) summary of the guidance document; and a hypertext link to the guidance document;

(2) Note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(3) Note that OPM may not cite, use, or rely on any guidance that is not posted except to establish historical facts unless OMB makes an exception for particular guidance documents or categories of guidance documents;

(4) Include a link to this part and to any **Federal Register** notice referencing the Web portal;

(5) Explain how the public can request the withdrawal or modification of an existing guidance document, including an email address where electronic requests can be submitted, a mailing address where hard copy requests can be submitted, and an office at the agency responsible for coordinating such requests; and

(6) Include the information about proposed significant guidance documents described in § 120.7.

§ 120.5 Definition of significant guidance document.

(a) The term significant guidance document means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

(b) The term significant guidance document does not include the categories of documents excluded by § 120.2 or any other category of guidance documents exempted in writing by OPM in consultation with OIRA.

§ 120.6 Procedure for guidance documents identified as "significant."

(a) OPM will make an initial, preliminary determination about a guidance document's significance. Thereafter, OPM must submit the guidance document to OIRA for its determination whether guidance is significant guidance, unless the guidance is otherwise exempted from such a determination by the Administrator of OIRA.

(b) Significant guidance documents, as determined by the Administrator of OIRA, must be reviewed by OIRA under E.O. 12866 before issuance; and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(c) Significant guidance documents must be signed by the Director of OPM.

§ 120.7 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, all proposed OPM guidance documents determined to be a "significant guidance document" within the meaning of § 120.5 shall be subject to the following informal notice-and-comment procedures. OPM shall publish notification in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available, shall post a link to the **Federal Register** notice and the draft guidance document on its guidance portal, shall invite public comment on the draft document for a minimum of 30 days, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance Web portal, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or

categories of significant guidance documents for which OPM finds good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefore in the guidance issued).

(c) Where appropriate, the originating office may recommend to the Director of OPM that a particular guidance document that is otherwise of importance to OPM's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 120.8 Petitions to withdraw or modify guidance.

(a) Any person may petition OPM to withdraw or modify a particular guidance document as specified by § 120.4(b)(5).

(b) Any person may submit a petition to OPM requesting withdrawal or modification of any effective guidance document by writing to OPM Office of the Executive Secretariat at: *OPMExecSec@opm.gov*, or U.S. Office of Personnel Management Attn: Executive Secretariat 1900 E Street NW, Washington, DC 20415.

(c) OPM will respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

§ 120.9 Rescinded guidance.

(a) In the absence of a petition, OPM may rescind a guidance document on grounds that it is no longer accurate or necessary.

(b) If OPM rescinds a guidance document, the hyperlink to the guidance document will be removed. The name, title, unique identifier, and date of rescission will be listed on the guidance portal for at least one year after rescission.

(c) No employee of OPM may cite, use, or rely on rescinded guidance documents, except to establish historical facts, unless OMB makes an exception for particular guidance documents or categories of guidance documents.

§ 120.10 Exceptional circumstances.

(a) A guidance document may be exempted from the requirements of section 120.6(b) or 120.7(a) by agreement of OPM and OIRA for reasons of exigency, safety, health, or other compelling cause.

(b) In emergency situations or when OPM is required by statutory deadline or court order to act more quickly than normal review procedures allow, OPM will notify OIRA as soon as possible and, to the extent practicable, shall

comply with the requirements of this part at the earliest opportunity. Wherever practicable, OPM should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this part.

§ 120.11 Reports to Congress and GAO.

When OPM adopts final guidance constituting a "rule" under 5 U.S.C. 804, OPM will submit the reports to Congress and GAO and comply with the procedures specified by 5 U.S.C. 801 (commonly known as the Congressional Review Act).

§ 120.12 No judicial review or enforceable rights.

This part is intended to improve the internal management of OPM. As such, it is for the use of OPM personnel only and 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 agencies or other entities, its officers or employees, or any other person.

[FR Doc. 2020-21393 Filed 10-15-20; 8:45 am]

BILLING CODE 6325-38-P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Chapter I

Ratification of Department Actions

AGENCY: Department of Homeland Security (DHS).

ACTION: Ratification.

SUMMARY: The Department of Homeland Security, through its Acting Secretary, is publishing a notice of the ratification of a number of previous actions by the Department. The ratification provides the public with certainty, by resolving any potential defect in the validity of those actions.

DATES: The ratification was signed on October 7, 2020, and relates back to the original date of each action that it ratifies.

FOR FURTHER INFORMATION CONTACT: Leo (Chip) Boucher, Assistant General Counsel, Administrative Law, Office of the General Counsel, Department of Homeland Security Washington, DC 20528, (202) 282-9822.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security, through its Acting Secretary, is ratifying a number of previous actions by former Acting Secretary Kevin K. McAleenan and one previous action by U.S. Citizenship and Immigration Services Deputy Director for Policy Joseph

Edlow. The Department continues to maintain that the prior succession order designating Kevin K. McAleenan as Acting Secretary was valid and that Acting Secretary McAleenan had the authority to take the actions being ratified in the appendix. The

Department issued this ratification and is now publishing it in the **Federal Register** out of an abundance of caution. Neither the ratification nor the publication is a statement that the

ratified actions would be invalid absent the ratification.

Ian Brekke,
Deputy General Counsel, U.S. Department of Homeland Security.

APPENDIX
BILLING CODE 9112–FP–P

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

Ratification of Certain Actions Taken by Former Acting Secretary Kevin McAleenan and One Action Taken by U.S. Citizenship and Immigration Services Deputy Director for Policy Joseph Edlow

I am affirming and ratifying certain delegable actions taken by Acting Secretary McAleenan, *see* 5 U.S.C. § 3348(a)(2), (d)(2), and one delegable action taken by U.S. Citizenship and Immigration Services (USCIS) Deputy Director for Policy, Edlow, as listed below, out of an abundance of caution because of a recent Government Accountability Office (GAO) opinion, *see* B-331650 (Comp. Gen., Aug. 14, 2020), and recent actions filed in federal court alleging that the November 8, 2019, order of succession issued by former Acting Secretary Kevin McAleenan was not valid. *See, e.g., Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019) (“We have repeatedly held that a properly appointed official’s ratification of an allegedly improper official’s prior action . . . resolves the claim on the merits by remedy[ing] the defect (if any) from the initial appointment.”) (internal quotation marks and citation omitted).

When former Acting Secretary McAleenan resigned on November 13, 2019, I began serving as Acting Secretary in accordance with the order of succession former Acting Secretary McAleenan had designated on November 8, 2019, under the Homeland Security Act (HSA), 6 U.S.C. § 113(g)(2) (enacted on Dec. 23, 2016, Pub. L. 114–328, div. A, title XIX, § 1903(a), 130 Stat. 2672). That designation of the order of succession followed former Secretary Kirstjen Nielsen’s April 9, 2019, designation of the order of succession, also pursuant to § 113(g)(2), which resulted in Mr. McAleenan’s serving as Acting Secretary when former Secretary Nielsen resigned.

The Secretary of Homeland Security’s authority to designate the order of succession under § 113(g)(2) is an alternative means to the authority of the Federal Vacancies Reform Act (FVRA) to designate an Acting Secretary of Homeland Security. Section 113(g)(2) provides that it applies “notwithstanding” the FVRA; thus, when there is an operative § 113(g)(2) order of succession, it alone governs which official shall serve as Acting Secretary. Accordingly, I properly began serving as Acting Secretary on November 13, 2019. Because § 113(g)(2) authorizes the designation of an Acting Secretary “notwithstanding chapter 33 of title 5” in its entirety, § 113(g)(2) orders addressing the line of succession for the Secretary of Homeland Security are subject to neither the FVRA provisions governing which officials may serve in an acting position, *see* 5 U.S.C. § 3345, nor FVRA time constraints, *see id.* § 3346.

On September 10, 2020, President Donald J. Trump nominated me to serve as Secretary of Homeland Security. Because I have been serving as the Acting Secretary pursuant to a § 113(g)(2) order of succession, the FVRA’s prohibition on a nominee’s acting service while his or her nomination is pending does not apply, and I remain the Acting Secretary notwithstanding my nomination. *Compare* 6 U.S.C. § 113(a)(1)(A) (cross-referencing the FVRA without the “notwithstanding” caveat), *with id.* § 113(g)(1)–(2) (noting the FVRA provisions and specifying,

Ratification of Certain Actions Taken by Former Acting Secretary Kevin McAleenan and One Action Taken by U.S. Citizenship and Immigration Services Deputy Director for Policy Joseph Edlow
Page 2 of 3

in contrast, that § 113(g) provides for acting secretary service “notwithstanding” those provisions); *see also* 5 U.S.C. § 3345(b)(1)(B) (restricting acting officer service under § 3345(a) by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges that my service is invalid, resting on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. If those contentions were legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid § 113(g)(2) order of succession—then the FVRA would have applied and Executive Order 13753 (published on December 14, 2016, under the FVRA) would have governed the order of succession for the Secretary of Homeland Security from the date of Nielsen’s resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, 5 U.S.C. § 3345(a)(2), when the President submitted my nomination, Peter Gaynor, the Administrator of the Federal Emergency Management Agency (FEMA), would have become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President’s succession order for the Department when the FVRA applies,¹ Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and my nomination would have restarted the FVRA’s time limits, 5 U.S.C. § 3346(a)(2).

Out of an abundance of caution and to minimize any disruption to the Department of Homeland Security and to the Administration’s Homeland Security mission, on September 10, 2020, Mr. Gaynor exercised any authority of the position of Acting Secretary that he had to designate an order of succession under 6 U.S.C. § 113(g)(2) (the “Gaynor Order”). Mr. Gaynor re-issued the order of succession established by former Acting Secretary McAleenan on November 8, 2019, and placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed my authority to continue to serve as the Acting Secretary. Thus, in addition to the authority I possess pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan, the Gaynor Order alternatively removes any doubt that I am currently serving as the Acting Secretary.

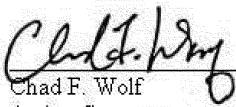
I have full knowledge of the following actions taken by former Acting Secretary McAleenan and USCIS Deputy Director for Policy Edlow, and believe that these actions were legally authorized and entirely proper:

¹ Executive Order 13753, Amending the Order of Succession in the Department of Homeland Security, 81 Fed. Reg. 90667 (Dec. 14, 2016).

Ratification of Certain Actions Taken by Former Acting Secretary Kevin McAleenan and One Action Taken by U.S. Citizenship and Immigration Services Deputy Director for Policy Joseph Edlow
Page 3 of 3

1. Asylum Eligibility. Interim Final Rule. 84 Fed. Reg. 33,829 (July 16, 2019) issued by Former Acting Secretary McAleenan.
2. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements. Notice of Proposed Rulemaking. 84 Fed. Reg. 62,280 (November 14, 2019) issued by Former Acting Secretary McAleenan.
3. Designating Aliens for Expedited Removal. Federal Register Notice. 84 Fed. Reg. 35,409 (July 23, 2019) issued by Former Acting Secretary McAleenan.
4. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications. Notice of Proposed Rulemaking. 84 Fed. Reg. 47,148 (Sept. 9, 2019) issued by Former Acting Secretary McAleenan.
5. Asylum Application, Interview, and Employment Authorization for Applicants. Notice of Proposed Rulemaking. 84 Fed. Reg. 62,374 (Nov. 14, 2019) issued by Former Acting Secretary McAleenan.
6. Inadmissibility on Public Charge Grounds. Final Rule. 84 Fed. Reg. 41,292 (Aug. 14, 2019) issued by Former Acting Secretary McAleenan. Final rule correction. 84 Fed. Reg. 52,357 (Oct. 2, 2019) issued by Former Acting Secretary McAleenan.
7. Guatemala Refugee Protection. Former Acting Secretary McAleenan's October 16, 2019 determination issued by Former Acting Secretary McAleenan.
8. USCIS Deputy Director for Policy, Joseph Edlow's memorandum "Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum" (August 21, 2020) issued by USCIS Deputy Director for Policy, Joseph Edlow.
9. Acting Secretary Kevin McAleenan's memorandum, "Information Regarding First Amendment Protected Activities" (May 17, 2019) issued by Former Acting Secretary McAleenan.

To avoid any possible uncertainty and out of an abundance of caution, pursuant to the Secretary of Homeland Security's authorities under, *inter alia*, the Homeland Security Act of 2002, Pub. L. No 207-296, as amended, and 5 U.S.C. §§ 301-302, I hereby make a detached and considered affirmation and ratification of the above noted actions originally taken and approved by former Acting Secretary McAleenan and USCIS Deputy Director for Policy Edlow.


Chad F. Wolf
Acting Secretary

10/7/2020
Date

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC-2020-0125]

RIN 3150-AK48

Miscellaneous Corrections

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to make miscellaneous corrections. These changes include redesignating footnotes, correcting references, typographical errors, nomenclature, titles, email addresses, and contact information. This document is necessary to inform the public of these non-substantive amendments to the NRC's regulations.

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

ADDRESSES: Please refer to Docket ID NRC–2020–0125 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–2020–0125. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: Carol.Gallagher@nrc.gov.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents Collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to PDR.Resource@nrc.gov.

- *Attention:* The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at PDR.Resource@nrc.gov or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jill Shepherd, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1230, email: Jill.Shepherd@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is amending its regulations in parts 1, 2, 19, 20, 21, 30, 34, 35, 40, 50, 51, 52, 60, 61, 62, 63, 70, 71, 72, 73, 74, 75, 76, 110, and 140 of title 10 of the *Code of Federal Regulations* (10 CFR) to redesignate footnotes, correct references, typographical errors, nomenclature, titles, email addresses, redesignate footnotes, and contact information.

II. Summary of Changes

10 CFR part 1

Correct Nomenclature. This final rule amends § 1.15 to clarify that Atomic Safety and Licensing Boards are designated by either the Commission or the Chief Administrative Judge.

10 CFR part 2

Correct Email Address. This final rule corrects the email address for the E-Filing system in § 2.305(e)(4)(i).

Correct Title and Email Address. This final rule corrects the title for the

Associate General Counsel for Hearings and the email address for service on the NRC staff in § 2.305(g)(1).

10 CFR parts 19, 34, 40, 62, 63, 74, 75, 110, and 140

Correct Reference. This final rule amends §§ 19.8(b), 34.8(b), 40.8(b), 62.8(b), 63.8(b), 74.8(b), 75.9(b), 110.7(b), and 140.9a(b) to add to the OMB information collections sections in each of these parts.

10 CFR parts 20, 21, 30, 40, 50, 70, 72, 73, and 76

Correct Division Title and Email Address. This final rule corrects the division title and email address in the first table entry in appendix D to 10 CFR part 20.

Correct Cross Reference and Title. This final rule revises §§ 20.1906(d), 20.2201(a)(2)(ii), 20.2202(d)(2), 21.2(d), 30.50(c)(1), 40.60(c)(1), 40.67(c) and (d), 50.72(a)(2), 70.50(c)(1), 70.52(a), 72.74(a), 72.75(e)(1), 73.67(e)(3)(vii) and (g)(3)(iii), 73.71(a)(1) and (b)(1), 75.6(c) and (e), and 76.120(a) to correct the title to read “NRC Headquarters Operations Center” (the HOC) and to refer all licensees to the HOC's contact information in appendix A to 10 CFR part 73.

10 CFR part 35

Correct Nomenclature. This final rule revises §§ 35.390(a)(1), 35.490(a)(1) and (b)(2), and 35.690(a)(1) and (b)(2) to correct the name from “Committee” to “Council” and “Post-Graduate” to “Postdoctoral.”

10 CFR part 40, 50, 60, 61, 63, 70, 72, 75, and 76

Correct Reference. This final rule amends §§ 40.8(c)(3), 40.31(g)(1), 50.8(c)(2), 50.78(a), 60.8(c), 60.47(a), 61.8(c), 61.32(a), 63.8(c), 63.47(a), 70.8(c)(1), 70.21(g)(1), 72.9(c), 72.79(a), 75.6(c), 75.9(c)(1), 75.10(d), and 76.35(l)(1) to revise all references to the International Atomic Energy Agency's Questionnaire Form N–71 wherever it appears from “Form N–71 and associated forms” to “IAEA Design Information Questionnaire forms.”

10 CFR part 50

Correct Reference. This final rule amends § 50.55a(b)(2)(ix) to correct the references to paragraph (b)(2)(ix)(A)(2) by italicizing the second “2”.

Correct Typographical Errors. This final rule amends § 50.55a(b)(1)(x)(B), (b)(2)(xxxviii) introductory text, and (b)(2)(xxxviii)(A) and (B) to italicize the paragraph headings.

This final rule also amends § 50.55a(b)(2)(ix)(K) to correct “Table

IWE 2411–1” to read “Table IWE–2411–1” and “IWE 2430” to read “IWE–2430”, and § 50.55a(b)(2)(xxxix)(A) to correct “IWA 4421(c)(1)” to read “IWA–4421(c)(1)”.

Finally, this final rule amends § 50.55a(b)(3)(iv) introductory text to correct an inadvertent error that resulted from the removal of text.

This final rule revises paragraph III.L.1 of appendix R to 10 CFR part 50 to correct a typographical error.

10 CFR Parts 50, 72, 73, and 76

Redesignate footnotes. This final rule redesignates footnotes 4 and 5 as footnotes 3 and 4 in § 50.72(a)(2); footnotes 10 and 11 as footnotes 1 and 2 in § 72.32; footnote 4 as footnote 1 in § 73.72; footnote 2 as footnote 1 in § 76.111; and footnote 4 as footnote 1 in § 76.120(b).

10 CFR Part 51

Correct Typographical Error. This final rule revises § 51.22(c)(14)(xvi) to remove a reference.

10 CFR Part 52

Correct Cross Reference. This final rule corrects the cross reference in §§ 52.29(c), 52.39(a)(1), and 52.303(b) to reference § 52.26 instead of § 52.27.

10 CFR Part 71

Correct Outdated Reference. This final rule removes and reserves § 71.97(c)(3)(i) because the information on governors' designees is now out of date and paragraph (c)(3)(ii) provides the reference to the correct and current contact information.

Correct Typographical Error. This final rule revises the specific activity (TBq/g) entry for Sm-147 in Table A–1–A₁ and A₂ Values for Radionuclides in appendix A to 10 CFR part 71 to read “8.5 x 10¹⁰.”

10 CFR Part 73

Correct Reference. This final rule corrects the reference in § 73.57(b)(2)(iii) to read “Executive Order 13767, as amended by Executive Order 13764,” which replaced Executive Order 10450.

Correct Division Title and Mail Stop. This final rule corrects the division title and mail stop in § 73.57(d)(1) to read “Division of Physical and Cyber Security Policy” and “T–8B20.”

10 CFR Part 110

Correct Contact Information. This final rule revises § 110.50(c)(2) to correct the phone number for the Office of International Programs to 301–287–9096 and to refer all licensees to the HOC's contact information in appendix A to 10 CFR part 73.

III. Rulemaking Procedure

Under section 553(b) of the Administrative Procedure Act (5 U.S.C.553(b)), an agency may waive publication in the **Federal Register** of a notice of proposed rulemaking and opportunity for comment requirements if it finds, for good cause, that it is impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), the NRC finds good cause to waive notice and opportunity for comment on these amendments, because notice and opportunity for comment is unnecessary. The amendments will have no substantive impact and are of a minor and administrative nature dealing with corrections to certain CFR sections or are related only to management, organization, procedure, and practice. Specifically, the revisions correct references, typographical errors, nomenclature, titles, email addresses, footnote designation, and contact information. The Commission is exercising its authority under 5 U.S.C.553(b) to publish these amendments as a final rule. The amendments are effective November 16, 2020. These amendments do not require action by any person or entity regulated by the NRC, and do not change the substantive responsibilities of any person or entity regulated by the NRC.

IV. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in 10 CFR 51.22(c)(2), which categorically excludes from environmental review rules that are corrective or of a minor, nonpolicy nature and do not substantially modify existing regulations. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rule.

V. Paperwork Reduction Act

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

VI. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, “Plain Language in Government Writing,” published June 10, 1998 (63 FR 31883).

VII. Backfitting and Issue Finality

The NRC has determined that the corrections in this final rule do not constitute backfitting and are not inconsistent with any of the issue finality provisions in 10 CFR part 52. The amendments are non-substantive in nature, including correcting references, correcting an address, and correcting a misspelling. They impose no new requirements and make no substantive changes to the regulations. The corrections do not involve any provisions that would impose backfits as defined in 10 CFR chapter I, or that would be inconsistent with the issue finality provisions in 10 CFR part 52. For these reasons, the issuance of the rule in final form would not constitute backfitting or represent a violation of any of the issue finality provisions in 10 CFR part 52. Therefore, the NRC has not prepared any additional documentation for this correction rulemaking addressing backfitting or issue finality.

VIII. Congressional Review Act

This final rule is not a rule as defined in the Congressional Review Act (5 U.S.C. 801–808).

IX. Agreement State Compatibility

Under the “Agreement State Program Policy Statement” approved by the Commission on October 2, 2017, and published in the **Federal Register** on October 18, 2017 (82 FR 48535), NRC program elements (including regulations) are placed into compatibility categories A, B, C, D, NRC, or adequacy category Health and Safety (H&S). Compatibility Category A

program elements are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner in order to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B program elements are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C program elements are those program elements that do not meet the criteria of Category A or B, but contain the essential objectives that an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a national basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D program elements are those program elements that do not meet any of the criteria of Category A, B, or C and, therefore, do not need to be adopted by Agreement States for purposes of compatibility. Compatibility Category NRC program elements are those program elements that address areas of regulation that cannot be relinquished to the Agreement States under the Atomic Energy Act of 1954, as amended, or provisions of 10 CFR. These program elements should not be adopted by the Agreement States. Adequacy category H&S program elements are program elements that are required because of a particular health and safety role in the regulation of agreement material within the State and should be adopted in a manner that embodies the essential objectives of the NRC program.

The portions of this final rule that amend 10 CFR parts 19, 20, 30, 34, 35, 40, 61, 70, and 71 are a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among Agreement State and NRC requirements. The compatibility categories are designated in the following table.

COMPATIBILITY TABLE

Section	Change	Subject	Compatibility	
			Existing	New
Part 19				
§ 19.8(b)	Amend	Information collection requirements: OMB approval	D	D
Part 20				
§ 20.1906(d)	Amend	Access authorization program requirements	H&S	H&S
§ 20.2201(a)(2)(ii) ...	Amend	Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.	C	C
§ 20.2202(d)(2)	Amend	Notification of incidents	C	C
Part 30				
§ 30.50(c)(1)	Amend	Reporting requirements	C	C
Part 34				
§ 34.8(b)	Amend	Information collection requirements: OMB approval	D	D
Part 35				
§ 35.390(a)(1)	Amend	Training for use of unsealed byproduct material for which a written directive is required.	B	B
§ 35.490(a)(1)	Amend	Training for use of manual brachytherapy sources	B	B
§ 35.690(a)(1)	Amend	Training for use of remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units.	B	B
Part 40				
§ 40.8(b)	Amend	Information collection requirements: OMB approval	D	D
§ 40.31(g)(1)	Amend	Application for specific licenses	D	D
Part 61				
§ 61.8(a)	Amend	Information collection requirements: OMB approval	D	D
Part 70				
§ 70.8(c)(1)	Amend	Information collection requirements: OMB approval	D	D
§ 70.21(g)(1)	Amend	Filing	NRC	NRC
§ 70.50(c)(1)	Amend	Reporting requirements	C	C
§ 70.52(a)	Amend	Reports of accidental criticality	NRC	NRC
Part 71				
§ 71.97(c)(3)(i)	Amend	Advance notification of shipment of irradiated reactor fuel and nuclear waste.	B	B

List of Subjects*10 CFR Part 1*

Flags, Organization and functions (Government Agencies), Seals and insignia.

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information; Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties,

Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear Energy, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

10 CFR Part 20

Byproduct material, Criminal penalties, Hazardous waste, Licensed material, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 21

Nuclear power plants and reactors, Penalties, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear energy, Nuclear materials, Penalties, Radiation protection, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 34

Criminal penalties, Incorporation by reference, Manpower training programs, Occupational safety and health, Packaging and containers, Penalties, Radiation protection, Radiography, Reporting and recordkeeping requirements, Scientific equipment, Security measures, X-rays.

10 CFR Part 35

Biologics, Byproduct material, Criminal penalties, Drugs, Health facilities, Health professions, Labeling, Medical devices, Nuclear energy, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Criminal penalties, Exports, Government contracts, Hazardous materials transportation, Hazardous waste, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Source material, Uranium, Whistleblowing.

10 CFR Part 50

Administrative practice and procedure, Antitrust, Backfitting, Classified information, Criminal penalties, Education, Emergency planning, Fire prevention, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalties, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statements, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 52

Administrative practice and procedure, Antitrust, Combined license, Early site permit, Emergency planning,

Fees, Incorporation by reference, Inspection, Issue finality, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Penalties, Reporting and recordkeeping requirements, Standard design, Standard design certification.

10 CFR Part 60

Criminal penalties, Hazardous waste, Indians, High-level waste, Intergovernmental relations, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Radiation protection, Reporting and recordkeeping requirements, Waste treatment and disposal, Whistleblowing.

10 CFR Part 61

Criminal penalties, Hazardous waste, Indians, Intergovernmental relations, Low-level waste, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Waste treatment and disposal, Whistleblowing.

10 CFR Part 62

Administrative practice and procedure, Denial of access, Emergency access to low-level waste disposal, Hazardous waste, Intergovernmental relations, Low-level radioactive waste, Low-level radioactive waste treatment and disposal, Nuclear energy, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 63

Criminal penalties, Hazardous waste, High-level waste, Indians, Intergovernmental relations, Nuclear energy, Nuclear power plants and reactors, Penalties, Radiation protection, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Classified information, Criminal penalties, Emergency medical services, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material, Whistleblowing.

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Incorporation by reference, Intergovernmental relations, Nuclear materials, Packaging and containers, Penalties, Radioactive materials, Reporting and recordkeeping requirements.

10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Indians, Intergovernmental relations, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 73

Criminal penalties, Exports, Hazardous materials transportation, Incorporation by reference, Imports, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 74

Accounting, Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Special nuclear material.

10 CFR Part 75

Criminal penalties, Intergovernmental relations, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Security measures, Treaties.

10 CFR Part 76

Certification, Criminal penalties, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Special nuclear material, Uranium, Uranium enrichment by gaseous diffusion.

10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalties, Exports, Incorporation by reference, Imports, Intergovernmental relations, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Scientific equipment.

10 CFR Part 140

Criminal penalties, Extraordinary nuclear occurrence, Insurance, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553,

the NRC is amending 10 CFR chapter I to read as follows:

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: Atomic Energy Act of 1954, secs. 23, 25, 29, 161, 191 (42 U.S.C. 2033, 2035, 2039, 2201, 2241); Energy Reorganization Act of 1974, secs. 201, 203, 204, 205, 209 (42 U.S.C. 5841, 5843, 5844, 5845, 5849); Administrative Procedure Act (5 U.S.C. 552, 553); Reorganization Plan No. 1 of 1980, 5 U.S.C. Appendix (Reorganization Plans).

§ 1.15 [Amended]

- 2. In § 1.15, remove the word “appointed” and add in its place the word “designated”.

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

- 3. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note.

Section 2.205(j) also issued under 28 U.S.C. 2461 note.

Section 2.205(j) also issued under Sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note).

§ 2.305 [Amended]

- 4. In § 2.305, in paragraph (e)(4)(i), remove the Web address “<http://www.nrc.gov>” and add in its place “<https://www.nrc.gov/site-help/e-submittals.html>” and in paragraph (g)(1), wherever it appears, remove “the Associate General Counsel for Hearings, Enforcement & Administration” and add in its place “Deputy General Counsel” and remove “OgcMailCenter.Resource@nrc.gov” and add in its place “RidsOgcMailCenter.Resource@nrc.gov”.

PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

- 5. The authority citation for part 19 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 63, 81, 103, 104, 161, 223, 234, 1701

(42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 211, 401 (42 U.S.C. 5841, 5851, 5891); 44 U.S.C. 3504 note.

- 6. In § 19.8, revise paragraph (b) to read as follows:

§ 19.8 Information collection requirements: OMB approval.

* * * * *

(b) The approved information collection requirements contained in this part appear in §§ 19.12, 19.13, 19.16, and 19.31.

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

- 7. The authority citation for part 20 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 53, 63, 65, 81, 103, 104, 161, 170H, 182, 186, 223, 234, 274, 1701 (42 U.S.C. 2014, 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2210h, 2232, 2236, 2273, 2282, 2021, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Low-Level Radioactive Waste Policy Amendments Act of 1985, sec. 2 (42 U.S.C. 2021b); 44 U.S.C. 3504 note.

- 8. In § 20.1906, revise paragraph (d) to read as follows:

§ 20.1906 Procedures for receiving and opening packages.

* * * * *

(d) The licensee shall immediately notify the final delivery carrier and the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to part 73 of this chapter, when—

* * * * *

- 9. In § 20.2201, revise paragraph (a)(2)(ii) to read as follows:

§ 20.2201 Reports of theft or loss of licensed material.

(a) * * *

(2) * * *

(ii) All other licensees shall make reports by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter.

* * * * *

- 10. In § 20.2202, revise paragraph (d)(2) to read as follows:

§ 20.2202 Notification of incidents.

* * * * *

(d) * * *

(2) All other licensees shall make the reports required by paragraphs (a) and (b) of this section by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter.

* * * * *

Appendix D to Part 20 [Amended]

- 11. In the first row of the table in appendix D to part 20, remove the title “Division of Incident Response Operations” and add in its place “Division of Preparedness and Response” and remove the email “H001@nrc.gov” and add in its place “Hoo.Hoc@nrc.gov”.

PART 21—REPORTING OF DEFECTS AND NONCOMPLIANCE

- 12. The authority citation for part 21 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 63, 81, 103, 104, 161, 223, 234, 1701 (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

- 13. In § 21.2, revise the last sentence of paragraph (d) to read as follows:

§ 21.2 Scope.

* * * * *

(d) * * * The telephone numbers of the NRC Headquarters Operations Center (answered 24 hours a day—including holidays) are listed in appendix A to part 73 of this chapter.

* * * * *

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

- 14. The authority citation for part 30 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 81, 161, 181, 182, 183, 184, 186, 187, 223, 234, 274 (42 U.S.C. 2014, 2111, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 44 U.S.C. 3504 note.

- 15. In § 30.50, revise the first sentence of paragraph (c)(1) introductory text to read as follows:

§ 30.50 Reporting requirements.

* * * * *

(c) * * *

(1) Licensees shall make reports required by paragraphs (a) and (b) of this section by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter. * * *

* * * * *

PART 34—LICENSES FOR INDUSTRIAL RADIOGRAPHY AND RADIATION SAFETY REQUIREMENTS FOR INDUSTRIAL RADIOGRAPHIC OPERATIONS

- 16. The authority citation for part 34 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 81, 161, 181, 182, 183, 223, 234, 274 (42 U.S.C. 2111, 2201, 2231, 2232, 2233, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); 44 U.S.C. 3504 note.

§ 34.8 [Amended]

- 17. In § 34.8(b), add “34.111,” in numerical order.

PART 35—MEDICAL USE OF BYPRODUCT MATERIAL

- 18. The authority citation for part 35 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 81, 161, 181, 182, 183, 223, 234, 274 (42 U.S.C. 2111, 2201, 2231, 2232, 2233, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); 44 U.S.C. 3504 note.

§ 35.390 [Amended]

- 19. In § 35.390(a)(1), remove “Committee on Post-Graduate Training” and add in its place “Council on Postdoctoral Training”.

§ 35.490 [Amended]

- 20. In § 35.490, in paragraph (a)(1), remove “Committee on Post-Graduate Training” and add in its place “Council on Postdoctoral Training” and in paragraph (b)(2), remove “Committee on Postdoctoral” and add in its place “Council on Postdoctoral”.

§ 35.690 [Amended]

- 21. In § 35.690, in paragraph (a)(1), remove “Committee on Post-Graduate Training” and add in its place “Council on Postdoctoral Training” and in paragraph (b)(2), remove “Committee on Postdoctoral” and add in its place “Council on Postdoctoral”.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

- 22. The authority citation for part 40 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 62, 63, 64, 65, 69, 81, 83, 84, 122, 161, 181, 182, 183, 184, 186, 187, 193, 223, 234, 274, 275 (42 U.S.C. 2092, 2093, 2094, 2095, 2099, 2111, 2113, 2114, 2152, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2022); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Uranium Mill Tailings Radiation Control Act of 1978, sec. 104 (42 U.S.C. 7914); 44 U.S.C. 3504 note.

§ 40.8 [Amended]

- 23. In § 40.8, in paragraph (b) add “40.14,” in numerical order, and in paragraph (c)(3) remove “Forms N-71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 40.31 [Amended]

- 24. In § 40.31(g)(1), remove “Form N-71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.
- 25. In § 40.60, revise the first sentence of paragraph (c)(1) introductory text to read as follows:

§ 40.60 Reporting requirements.

* * * * *

(c) * * *
(1) Licensees shall make reports required by paragraphs (a) and (b) of this section by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter. * * *

* * * * *

- 26. In § 40.67, revise paragraphs (c) and (d) to read as follows:

§ 40.67 Requirement for advance notice for importation of natural uranium from countries that are not party to the Convention on the Physical Protection of Nuclear Material.

* * * * *

(c) The licensee shall notify the Director, Office of Nuclear Security and Incident Response, by telephone at the numbers for the NRC Headquarters Operations Center specified in appendix A to part 73 of this chapter when the shipment is received in the receiving facility.

(d) A licensee who needs to amend a notification shall notify the Director, Office of Nuclear Security and Incident Response, by telephone at the numbers specified for the NRC Headquarters Operations Center in appendix A to part 73 of this chapter.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

- 27. The authority citation for part 50 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 101, 102, 103, 104, 105, 108, 122, 147, 149, 161, 181, 182, 183, 184, 185, 186, 187, 189, 223, 234 (42 U.S.C. 2014, 2131, 2132, 2133, 2134, 2135, 2138, 2152, 2167, 2169, 2201, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2239, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, sec. 306 (42 U.S.C. 10226); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C.

3504 note; Sec. 109, Pub. L. 96–295, 94 Stat. 783.

§ 50.8 [Amended]

- 28. In § 50.8(c)(2), remove “Form N-71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.
- 29. In § 50.55a:
- a. In paragraph (b)(1)(x)(B), revise the paragraph heading;
- b. In paragraph (b)(2)(ix) introductory text, remove the reference “(b)(2)(ix)(A)(2)” wherever it appears and add in its place the reference “(b)(2)(ix)(A)(2)”;
- c. In paragraph (b)(2)(ix)(K), remove “Table IWE 2411–1” and add in its place “Table IWE–2411–1” and remove “IWE 2430” and add in its place “IWE–2430”;
- d. In paragraph (b)(2)(xxxviii) introductory text and paragraphs (b)(2)(xxxviii)(A) and (B), revise the paragraph headings;
- e. In paragraph (b)(2)(xxxix)(A), remove “IWA 4421(c)(1)” and add in its place “IWA–4421(c)(1)”;
- f. In paragraph (b)(3)(iv) introductory text, revise the first sentence.

The revisions read as follows:

§ 50.55a Codes and standards.

* * * * *

(b) * * *

(1) * * *

(x) * * *

(B) *Visual examination of bolts, studs, and nuts: Second provision.* * * *

* * * * *

(2) * * *

(xxxviii) *Section XI condition: ASME Code Section XI Appendix III Supplement 2.*

* * * * *

(A) *ASME Code Section XI Appendix III Supplement 2: First provision.*

* * *

(B) *ASME Code Section XI Appendix III Supplement 2: Second provision.*

* * *

* * * * *

(3) * * *

(iv) * * * Appendix II of the ASME OM Code, 2003 Addenda through the 2015 Edition, is acceptable for use with the following requirements. * * *

* * * * *

- 30. In § 50.72, revise paragraph (a)(2) and redesignate footnotes 4 and 5 as footnotes 3 and 4.

The revision to read as follows:

§ 50.72 Immediate notification requirements for operating nuclear power reactors.

(a) * * *

(2) If the Emergency Notification System is inoperative, the licensee shall

make the required notifications via commercial telephone service, other dedicated telephone system, or any other method which will ensure that a report is made as soon as practical to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter.

* * * * *

§ 50.78 [Amended]

- 31. In § 50.78(a), remove “Form N–71, and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

Appendix R to Part 50 [Amended]

- 32. In paragraph III.L.1 of appendix R to part 50, remove “of rupture of the containment boundary” and add in its place “or rupture of the containment boundary”.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

- 33. The authority citation for part 51 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 161, 193 (42 U.S.C. 2201, 2243); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); National Environmental Policy Act of 1969 (42 U.S.C. 4332, 4334, 4335); Nuclear Waste Policy Act of 1982, secs. 144(f), 121, 135, 141, 148 (42 U.S.C. 10134(f), 10141, 10155, 10161, 10168); 44 U.S.C. 3504 note.

Sections 51.20, 51.30, 51.60, 51.80, and 51.97 also issued under Nuclear Waste Policy Act secs. 135, 141, 148 (42 U.S.C. 10155, 10161, 10168).

Section 51.22 also issued under Atomic Energy Act sec. 274 (42 U.S.C. 2021) and under Nuclear Waste Policy Act sec. 121 (42 U.S.C. 10141).

Sections 51.43, 51.67, and 51.109 also issued under Nuclear Waste Policy Act sec. 114(f) (42 U.S.C. 10134(f)).

§ 51.22 [Amended]

- 34. In § 51.22(c)(14)(xvi), remove the parenthetical “(Category 14)”.

PART 52—LICENSES, CERTIFICATIONS, AND APPROVALS FOR NUCLEAR POWER PLANTS

- 35. The authority citation for part 52 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 103, 104, 147, 149, 161, 181, 182, 183, 185, 186, 189, 223, 234 (42 U.S.C. 2133, 2134, 2167, 2169, 2201, 2231, 2232, 2233, 2235, 2236, 2239, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 44 U.S.C. 3504 note.

§ 52.29 [Amended]

- 36. In § 52.29(c), remove the reference to “§ 52.27(b)” and add in its place “§ 52.26(b)”.

§ 52.39 [Amended]

- 37. In § 52.39(a)(1), remove the reference to “§§ 52.27” and add in its place “§§ 52.26”.

§ 52.303 [Amended]

- 38. In § 52.303(b), remove the reference to “52.27” and add in its place “52.26”.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

- 39. The authority citation for part 60 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 223, 234 (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 42 U.S.C. 2021a; National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 114, 117, 121 (42 U.S.C. 10134, 10137, 10141); 44 U.S.C. 3504 note.

§ 60.8 [Amended]

- 40. In § 60.8(c), remove “Forms N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 60.47 [Amended]

- 41. In § 60.47(a), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

- 42. The authority citation for part 61 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 57, 62, 63, 65, 81, 161, 181, 182, 183, 223, 234 (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2231, 2232, 2233, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 206, 211 (42 U.S.C. 5841, 5846, 5851); Low-Level Radioactive Waste Policy Amendments Act of 1985, sec. 2 (42 U.S.C. 2021b); 44 U.S.C. 3504 note.

§ 61.8 [Amended]

- 43. In § 61.8(c), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 61.32 [Amended]

- 44. In § 61.32(a), remove “Form N–71 and associated forms” and add in its

place “IAEA Design Information Questionnaire forms”.

PART 62—CRITERIA AND PROCEDURES FOR EMERGENCY ACCESS TO NON-FEDERAL AND REGIONAL LOW-LEVEL WASTE DISPOSAL FACILITIES

- 45. The authority citation for part 62 continues to read as follows:

Authority: Atomic Energy Act of 1954, sec. 161 (42 U.S.C. 2201); Energy Reorganization Act of 1974, secs. 201 (42 U.S.C. 5841); Low-Level Radioactive Waste Policy Amendments Act of 1985, secs. 2, 6 (42 U.S.C. 2021b, 2021f); 44 U.S.C. 3504 note.

§ 62.8 [Amended]

- 46. In § 62.8(b), add “62.5,” in numerical order.

PART 63—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC REPOSITORY AT YUCCA MOUNTAIN, NEVADA

- 47. The authority citation for part 63 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 223, 234 (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 42 U.S.C. 2021a; National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 114, 117, 121 (42 U.S.C. 10134, 10137, 10141); 44 U.S.C. 3504 note.

§ 63.8 [Amended]

- 48. In § 63.8, in paragraph (b) add “63.6,” in numerical order, and in paragraph (c) remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 63.47 [Amended]

- 49. In § 63.47(a), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

- 50. The authority citation for part 70 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57(d), 108, 122, 161, 182, 183, 184, 186, 187, 193, 223, 234, 274, 1701 (42 U.S.C. 2071, 2073, 2077(d), 2138, 2152, 2201, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2297f); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

§ 70.8 [Amended]

■ 51. In § 70.8(c)(1), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 70.21 [Amended]

■ 52. In § 70.21(g)(1), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

■ 53. In § 70.50, revise the first sentence of paragraph (c)(1) introductory text to read as follows:

§ 70.50 Reporting requirements.

* * * * *

(c) * * *

(1) Licensees shall make reports required by paragraphs (a) and (b) of this section, and by § 70.74 and appendix A of this part, if applicable, by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter. * * *

* * * * *

■ 54. In § 70.52, revise paragraph (a) to read as follows:

§ 70.52 Reports of accidental criticality.

(a) Each licensee shall notify the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to part 73 of this chapter within 1 hour after discovery of any case of accidental criticality.

* * * * *

PART 71—PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

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

Authority: Atomic Energy Act of 1954, secs. 53, 57, 62, 63, 81, 161, 182, 183, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232, 2233, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, sec. 180 (42 U.S.C. 10175); 44 U.S.C. 3504 note.

Section 71.97 also issued under Sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note).

§ 71.97 [Amended]

■ 56. In § 71.97, remove and reserve paragraph (c)(3)(i).

Appendix A to Part 71 [Amended]

■ 57. In Appendix A to part 71, in Table A–1, amend the entry radionuclide Sm–147, by removing “ 8.5×10^{-1} ” and adding in its place “ 8.5×10^{-10} ”.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 58. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

§ 72.9 [Amended]

■ 59. In § 72.9(c), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 72.32 [Amended]

■ 60. In § 72.32, redesignate footnotes 10 and 11 as footnotes 1 and 2.

■ 61. In § 72.74, revise paragraph (a) to read as follows:

§ 72.74 Reports of accidental criticality or loss of special nuclear material.

(a) Each licensee shall notify the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to part 73 of this chapter within 1 hour of discovery of accidental criticality or any loss of special nuclear material.

* * * * *

■ 62. In § 72.75, revise paragraph (e)(1) to read as follows:

§ 72.75 Reporting requirements for specific events and conditions.

* * * * *

(e) * * *

(1) Licensees shall make reports required by paragraphs (a), (b), (c), or (d) of this section by telephone to the NRC Headquarters Operations Center at the numbers specified in appendix A to part 73 of this chapter.¹

¹ Those licensees with an available Emergency Notification System (ENS) shall use the ENS to notify the NRC Headquarters Operations Center.

* * * * *

§ 72.79 [Amended]

■ 63. In § 72.79(a), remove “Form N–71 and associated forms” and add in its

place “IAEA Design Information Questionnaire forms”.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

■ 64. The authority citation for part 73 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 147, 149, 161, 170D, 170E, 170H, 170I, 223, 229, 234, 1701 (42 U.S.C. 2073, 2167, 2169, 2201, 2210d, 2210e, 2210h, 2210i, 2273, 2278a, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

Section 73.1 also issued under Nuclear Waste Policy Act secs. 135, 141 (42 U.S.C. 10155, 10161).

Section 73.37(b)(2) also issued under Sec. 301, Public Law 96–295, 94 Stat. 789 (42 U.S.C. 5841 note).

Section 73.37(f) also issued under Sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note).

§ 73.57 [Amended]

■ 65. Amend 73.57:

■ a. In paragraph (b)(2)(iii), remove “Executive Order 10450” and add in its place “Executive Order 13767, as amended by Executive Order 13764,”.

■ b. In paragraph (d)(1), wherever it appears, remove “Division of Facilities and Security” and add in its place “Division of Physical and Cyber Security Policy” and remove “TWB 05B32M” and add in its place “T–8B20”.

■ 66. In § 73.67, revise paragraphs (e)(3)(vii) and (g)(3)(iii) to read as follows:

§ 73.67 Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance.

* * * * *

(e) * * *

(3) * * *

(vii) Notify the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to this part within one hour after the discovery of the loss of the shipment and within one hour after recovery of or accounting for such lost shipment in accordance with the provisions of § 73.71 of this part.

* * * * *

(g) * * *

(3) * * *

(iii) Conduct immediately a trace investigation of any shipment that is lost or unaccounted for after the estimated arrival time and notify the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to this part within 1 hour after the discovery of the loss of the

shipment and within 1 hour after recovery of or accounting for such lost shipment in accordance with the provisions of § 73.71 of this part.

* * * * *

■ 67. In § 73.71, revise paragraphs (a)(1) and (b)(1) to read as follows:

§ 73.71 Reporting of safeguards events.

(a)(1) Each licensee subject to the provisions of § 73.25, § 73.26, § 73.27(c), § 73.37, § 73.67(e), or § 73.67(g) shall notify the NRC Headquarters Operations Center by telephone within 1 hour after discovery of the loss of any shipment of SNM or spent fuel, and within 1 hour after recovery of or accounting for such lost shipment. Contact numbers for the NRC Headquarters Operations Center are found in appendix A to this part.

* * * * *

(b)(1) Each licensee subject to the provisions of § 73.20, § 73.37, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67 shall notify the NRC Headquarters Operations Center by telephone within 1 hour of discovery of the safeguards events described in paragraph I (a)(1) of appendix G to this part. Licensees subject to the provisions of § 73.20, § 73.37, § 73.50, § 73.51, § 73.55, § 73.60, or each licensee possessing strategic special nuclear material and subject to § 73.67(d) shall notify the NRC Headquarters Operations Center within 1 hour after discovery of the safeguards events described in paragraphs I (a)(2), (a)(3), (b), and (c) of appendix G to this part. Licensees subject to the provisions of § 73.20, § 73.37, § 73.50, § 73.51, § 73.55, or § 73.60 shall notify the NRC Headquarters Operations Center within 1 hour after discovery of the safeguards events described in paragraph I (d) of appendix G to this part. Contact numbers for the NRC Headquarters Operations Center are found in appendix A to this part.

* * * * *

§ 73.72 [Amended]

■ 68. In § 73.72, redesignate footnote 4 as footnote 1.

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

■ 69. The authority citation for part 74 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 57, 161, 182, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2201, 2232, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

§ 74.8 [Amended]

■ 70. In § 74.8(b), add “74.7,” in numerical order.

PART 75—SAFEGUARDS ON NUCLEAR MATERIAL—IMPLEMENTATION OF SAFEGUARDS AGREEMENTS BETWEEN THE UNITED STATES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

■ 71. The authority citation for part 75 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 53, 63, 103, 104, 122, 161, 223, 234, 1701 (42 U.S.C. 2073, 2093, 2133, 2134, 2152, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

§ 75.6 [Amended]

■ 72. In § 75.6, in paragraph (c), in the table, remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms” and in paragraphs (c) and (e), in the tables, remove “(commercial telephone number 301–816–5100)” and add in its place “by telephone at the numbers specified in appendix A to part 73 of this chapter”.

§ 75.9 [Amended]

■ 73. In § 75.9, in paragraph (b), add in numerical order “75.3,” and in paragraph (c)(1), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

■ 74. In § 75.10, revise the introductory text of paragraph (d) to read as follows:

§ 75.10 Facilities.

* * * * *

(d) The information specified in paragraphs (b) and (c) of this section, except for the information specified in paragraph (b)(5) of this section, must be prepared on IAEA Design Information Questionnaire forms or other forms supplied by the NRC. The information must be sufficiently detailed to enable knowledgeable determinations to be made in the development of Facility Attachments or amendments thereto, including:

* * * * *

PART 76—CERTIFICATION OF GASEOUS DIFFUSION PLANTS

■ 75. The authority citation for part 76 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 122, 161, 193(f), 223, 234, 1701 (42 U.S.C. 2152, 2201, 2243(f), 2273, 2282, 2297f); Energy Reorganization Act of 1974,

secs. 201, 206, 211 (42 U.S.C. 5841, 5846, 5851); 44 U.S.C. 3504 note.

§ 76.35 [Amended]

■ 76. In § 76.35(l)(1), remove “Form N–71 and associated forms” and add in its place “IAEA Design Information Questionnaire forms”.

§ 76.111 [Amended]

■ 77. In § 76.111, redesignate footnote 2 as footnote 1.

■ 78. In § 76.120, revise paragraph (a) introductory text and in paragraph (b), redesignate footnote 4 as footnote 1 to read as follows:

§ 76.120 Reporting requirements.

(a) *Immediate report.* The Corporation shall notify the NRC Headquarters Operations Center by telephone at the numbers specified in appendix A to part 73 of this chapter within 1 hour after discovery of:

* * * * *

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

■ 79. The authority citation for part 110 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 51, 53, 54, 57, 62, 63, 64, 65, 81, 82, 103, 104, 109, 111, 121, 122, 123, 124, 126, 127, 128, 129, 133, 134, 161, 170H, 181, 182, 183, 184, 186, 187, 189, 223, 234 (42 U.S.C. 2014, 2071, 2073, 2074, 2077, 2092, 2093, 2094, 2095, 2111, 2112, 2133, 2134, 2139, 2141, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2160c, 2160d, 2201, 2210h, 2231, 2232, 2233, 2234, 2236, 2237, 2239, 2273, 2282); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); Administrative Procedure Act (5 U.S.C. 552, 553); 42 U.S.C. 2139a, 2155a; 44 U.S.C. 3504 note.

§ 110.7 [Amended]

■ 80. In § 110.7(b), add “110.10,” in numerical order.

■ 81. In § 110.50 revise paragraph (c)(2) to read as follows:

§ 110.50 Terms.

* * * * *

(c) * * *

(2) The NRC’s office responsible for receiving advance notifications for all export and import shipments is the NRC Headquarters Operations Center. Notifications to the NRC Headquarters Operations Center are to be submitted by email (preferred method) or faxed using the contact information specified in appendix A to 10 CFR part 73 of this chapter. In the subject line of the email or on the fax cover page include “10 CFR 110.50(c) Notification.” To contact the NRC Operations Center, use the

same email address or call the telephone number in appendix A to 10 CFR part 73. For questions or concerns on submitting these advance notifications to the NRC, please contact the Office of International Programs at 301-287-9056.

* * * * *

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

■ 82. The authority citation for part 140 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 161, 170, 223, 234 (42 U.S.C. 2201, 2210, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

§ 140.9a [Amended]

■ 83. In § 140.9a(b), add “140.8,” in numerical order.

Dated: September 21, 2020.

For the Nuclear Regulatory Commission.

Cindy K. Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020-21148 Filed 10-15-20; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 34

[Docket No. OCC-2020-0014]

RIN 1557-AE86

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Docket No. R-1713]

RIN 7100-AF87

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 323

RIN 3064-AF48

Real Estate Appraisals

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

ACTION: Final rule.

SUMMARY: The OCC, Board, and FDIC (collectively, the agencies) are adopting

as final the interim final rule published by the agencies on April 17, 2020, making temporary amendments to the agencies' regulations requiring appraisals for certain real estate-related transactions. The final rule adopts the deferral of the requirement to obtain an appraisal or evaluation for up to 120 days following the closing of certain residential and commercial real estate transactions, excluding transactions for acquisition, development, and construction of real estate. Regulated institutions should make best efforts to obtain a credible estimate of the value of real property collateral before closing the loan and otherwise underwrite loans consistent with the principles in the agencies' Standards for Safety and Soundness and Real Estate Lending Standards. The agencies' final rule allows regulated institutions to expeditiously extend liquidity to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of the coronavirus disease 2019 (COVID event). The final rule adopts the interim final rule with one revision in response to comments received by the agencies on the interim final rule.

DATES: The final rule is effective October 16, 2020 through December 31, 2020.

FOR FURTHER INFORMATION CONTACT:

OCC: G. Kevin Lawton, Appraiser (Real Estate Specialist), (202) 649-6670; Mitchell Plave, Special Counsel, (202) 649-5490; or Joanne Phillips, Counsel, Chief Counsel's Office (202) 649-5500; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY users may contact (202) 649-5597.

Board: Anna Lee Hewko, Associate Director, (202) 530-6260; Teresa A. Scott, Manager, Policy Development Section, (202) 973-6114; Carmen Holly, Lead Financial Institution Policy Analyst, (202) 973-6122; Devyn Jeffereis, Senior Financial Institution Policy Analyst, (202) 365-2467, Division of Supervision and Regulation; Laurie Schaffer, Deputy General Counsel, (202) 452-2272; Derald Seid, Senior Counsel, (202) 452-2246; Trevor Feigleson, Counsel, (202) 452-3274; David Imhoff, Attorney, (202) 452-2249, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD) users may contact (202) 263-4869.

FDIC: Beverlea S. Gardner, Senior Examination Specialist, Division of Risk

Management and Supervision, (202) 898-3640, BGardner@FDIC.gov; Mark Mellon, Counsel, Legal Division, (202) 898-3884; or, Lauren Whitaker, Senior Attorney, Legal Division, (202) 898-3872, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, TDD users may contact (202) 925-4618.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Background
- III. Overview of the Interim Final Rule and Comments
 - A. Overview of the Interim Final Rule
 - B. Public Comments
- IV. Summary of the Final Rule
- V. Administrative Law Matters
 - A. Administrative Procedure Act
 - B. Congressional Review Act
 - C. Paperwork Reduction Act
 - D. Regulatory Flexibility Act
 - E. Riegle Community Development and Regulatory Improvement Act of 1994
 - F. Use of Plain Language
 - G. OCC Unfunded Mandates Reform Act of 1995 Determination

I. Introduction

Impact of the COVID event on appraisals and evaluations. Due to the impact of the COVID event¹ and the need for businesses and individuals to quickly access additional liquidity, the agencies published an interim final rule in the **Federal Register** on April 17, 2020 (interim final rule),² that deferred the requirement to obtain an appraisal or evaluation for up to 120 days following the closing of a transaction for certain residential and commercial real estate transactions, excluding transactions for acquisition, development, and construction of real estate. The interim final rule allows businesses and individuals to quickly access liquidity from real estate equity during the COVID event.

The agencies are adopting the interim final rule as final, with one revision in response to comments. The amendments to the agencies' appraisal regulations allow for the deferral of appraisals and evaluations for qualifying transactions through December 31, 2020, as detailed further below.

II. Background

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Title XI)³ directs each Federal

¹ The coronavirus disease 2019 outbreak was declared a national emergency under Proclamation No. 9994, 85 FR 15337 (Mar. 18, 2020).

² 85 FR 21312.

³ 12 U.S.C. 3331 *et seq.*; Public Law 101-73, 103 Stat. 183 (1989).

financial institutions regulatory agency to publish appraisal regulations for federally related transactions within its jurisdiction.⁴ The purpose of Title XI is to protect federal financial and public policy interests⁵ in real estate-related transactions by requiring that real estate appraisals used in connection with federally related transactions (Title XI appraisals) are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.⁶

Title XI directs the agencies to prescribe appropriate standards for Title XI appraisals under the agencies' respective jurisdictions.⁷ At a minimum, Title XI provides that a Title XI appraisal must be: (1) Performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP); (2) a written appraisal, as defined by Title XI; and (3) subject to appropriate review for compliance with USPAP.⁸ While appraisals ordinarily are completed before a lender and borrower close a real estate transaction, there is no specific requirement in USPAP that appraisals be completed at a specific time relative to the closing of a transaction.

All federally related transactions must have Title XI appraisals. Title XI defines a federally related transaction as a real estate-related financial transaction⁹ that the agencies or a financial institution regulated by the agencies engages in or contracts for, that requires the services of an appraiser.¹⁰ The agencies have authority to determine those real estate-related financial transactions that do not

require the services of an appraiser and thus are not required to have Title XI appraisals.¹¹ The agencies have exercised this authority by exempting certain categories of real estate-related financial transactions from the agencies' appraisal requirements.¹²

The agencies have used their safety and soundness authority to require evaluations for a subset of transactions for which an appraisal is not required.¹³ Under the appraisal regulations, for these transactions, financial institutions that are subject to the agencies' appraisal regulations (regulated institutions) must obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.¹⁴

Authority to defer appraisals and evaluations. In general, the agencies require that Title XI appraisals for federally related transactions occur prior to the closing of a federally related transaction.¹⁵ The Interagency Guidelines on Appraisals and Evaluations provide similar guidance about evaluations.¹⁶ Under the interim final rule, deferrals of appraisals and evaluations allow for expeditious access to credit. The agencies authorized the deferrals, which are temporary, in response to the COVID event. Regulated institutions that defer receipt of an appraisal or evaluation are still expected to conduct their lending activity consistent with the underwriting principles in the agencies' Standards for

Safety and Soundness¹⁷ and Real Estate Lending Standards¹⁸ that focus on the ability of a borrower to repay a loan and other relevant laws and regulations. These deferrals are not an exercise of the agencies' waiver authority, because appraisals and evaluations are being deferred, not waived. The deferrals also are not a waiver of USPAP requirements, given that (1) USPAP does not address the completion of an appraisal assignment with the timing of a lending decision; and (2) the deferred appraisal must be conducted in compliance with USPAP.

The deferral of evaluations reflects the same considerations relating to the impact of the COVID event as the deferral of appraisals. The agencies require evaluations for certain exempt transactions as a matter of safety and soundness. Evaluations do not need to comply with USPAP but must be sufficiently robust to support a valuation conclusion. An evaluation can be less complex than an appraisal and usually takes less time to complete than an appraisal, and commonly involves a physical property inspection. For these reasons, the agencies also are using their safety and soundness authority¹⁹ to allow for deferral of evaluations.

By the end of the 120-day appraisal and evaluation deferral period provided by the final rule, regulated institutions must obtain appraisals or evaluations that are consistent with safe and sound banking practices, as required by the agencies' appraisal regulations.

III. Overview of the Interim Final Rule and Comments

A. Overview of the Interim Final Rule

The interim final rule allows a temporary deferral of the requirements for appraisals and evaluations under the agencies' appraisal regulations. The deferrals apply to both residential and commercial real estate-related financial transactions, excluding transactions for acquisition, development, and construction of real estate. The agencies are excluding these transactions because these loans present heightened risks not associated with the financing of existing real estate.

¹⁷ OCC: 12 CFR part 30, appendix A; Board: 12 CFR part 208, appendix D–1; and FDIC: 12 CFR part 364, appendix A.

¹⁸ OCC: 12 CFR part 34, subpart D, appendix A; Board: 12 CFR part 208, subpart E, appendix C; and FDIC: 12 CFR part 365, subpart A, appendix A. Financial institutions should have a program for establishing the market value of real property to comply with these real estate lending standards, which require financial institutions to determine the value used in loan-to-value calculations based in part on a value set forth in an appraisal or an evaluation.

¹⁹ See 12 U.S.C. 1831p-1.

⁴ The term "Federal financial institutions regulatory agencies" means the Board, the FDIC, the OCC, the National Credit Union Administration, and, formerly, the Office of Thrift Supervision. 12 U.S.C. 3350(6).

⁵ These federal financial and public policy interests include those stemming from the federal government's roles as regulator and deposit insurer of financial institutions that engage in real estate lending and investment, guarantor or lender on mortgage loans, and as a direct party in real estate-related financial transactions. These interests have been described in predecessor legislation and accompanying Congressional reports. See Real Estate Appraisal Reform Act of 1988, H.R. Rep. No. 100–1001, pt. 1, at 19 (1988); 133 Cong. Rec. 33047–33048 (1987).

⁶ 12 U.S.C. 3331.

⁷ 12 U.S.C. 3339.

⁸ *Id.*

⁹ 12 U.S.C. 3350(5). A real estate-related financial transaction is defined as any transaction that involves: (i) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or financing thereof; (ii) the refinancing of real property or interests in real property; and (iii) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

¹⁰ 12 U.S.C. 3350(4).

¹¹ Real estate-related financial transactions that the agencies have exempted from the appraisal requirement are not federally related transactions under the agencies' appraisal regulations.

¹² See OCC: 12 CFR 34.43(a); Board: 12 CFR 225.63(a); FDIC: 12 CFR 323.3(a). The agencies have determined that these categories of transactions do not require appraisals by state certified or state licensed appraisers in order to protect federal financial and public policy interests or to satisfy principles of safe and sound banking.

¹³ See OCC: 12 CFR 34.43(b); Board: 12 CFR 225.63(b); and FDIC: 12 CFR 323.3(b). Evaluations are required for exempt residential and commercial loans below the dollar value thresholds for requiring an appraisal; exempt business loans; exempt subsequent transactions; and transactions subject to the rural residential exemption.

¹⁴ The agencies have provided guidance on appraisals and evaluations through the Interagency Guidelines on Appraisals and Evaluations. See 75 FR 77450 (Dec. 10, 2010), available at <https://occ.gov/news-issuances/federal-register/2010/75fr77450.pdf>.

¹⁵ See OCC: 12 CFR 34.42(a), 34.44(b)&(e); Board: 12 CFR 225.62(a), 225.64(b)&(e); and FDIC: 12 CFR 323.2(a), 323.4(b)&(e) (requiring an appraisal to (1) contain sufficient information and analysis to support the institution's decision to engage in the transaction, and (2) be based on the definition of market value in the regulation, which takes into account a specified closing date for the transaction).

¹⁶ See 75 FR 77450 (Dec. 10, 2010), available at <https://occ.gov/news-issuances/federal-register/2010/75fr77450.pdf>.

Under the interim final rule, regulated institutions may close a real estate loan without a contemporaneous appraisal or evaluation, subject to a requirement that the institution obtain the appraisal or evaluation, as would have been required under the appraisal regulations without the deferral, within a period of 120 days after the closing of the transaction. While appraisals and evaluations can be deferred, the agencies expect regulated institutions to use best efforts and available information to develop a well-informed estimate of the collateral value of the subject property. For purposes of the risk-weighting of residential mortgage exposures, an institution's prudent underwriting estimation of the collateral value of the subject property will be considered to meet the agencies' appraisal and evaluation requirements during the deferral period.²⁰ In addition, the agencies continue to expect regulated institutions to adhere to internal underwriting standards for assessing borrowers' creditworthiness and repayment capacity, and to develop procedures for estimating the collateral's value for the purposes of extending or refinancing credit. Transactions for acquisition, development, and construction of real estate are excluded because repayment of those transactions is generally dependent on the completion or sale of the property being held as collateral as opposed to repayment generated by existing collateral or the borrower. The agencies also expect regulated institutions to develop an appropriate risk mitigation strategy if the appraisal or evaluation ultimately reveals a market value significantly lower than the expected market value. A regulated institution's risk mitigation strategy should consider all risks that affect the institution's safety and soundness, balanced with mitigation of financial harm to COVID event affected borrowers. The temporary provision permitting regulated institutions to defer an appraisal or evaluation for eligible transactions will expire on December 31, 2020 (a transaction closed on or before December 31, 2020, is eligible for a deferral), unless extended by the agencies. The agencies believe that the limited timeframe for the deferral strikes the right balance between safety and soundness and the need for immediate relief due to the COVID event.

B. Public Comments

The agencies collectively received eleven comments from trade

associations representing banks, appraisers, and from individuals in response to the interim final rule. The majority of commenters supported the agencies' action and stated that appraisal and evaluation deferrals would be helpful to businesses and consumers during the COVID event. Commenters also requested clarification of certain aspects of the interim final rule. Two commenters requested that the agencies add a definition of acquisition, development, and construction transactions for purposes of this rule and that the agencies clarify risk management practices after the deferral period. Two commenters asked the agencies to reconsider the interim final rule, mainly over concern that delayed appraisals and evaluations might not support the related credit extensions and the loans would give rise to excessive leverage. One commenter asked the agencies to describe how appraisers should date deferred appraisals. One commenter asked the agencies to make the deferral permanent as a way to address the ongoing problem of appraiser shortages in rural areas.

Commenters in support of the interim final rule stated that it would provide households and businesses with needed relief during the COVID event. Several commenters stated the interim final rule would provide consumers with quick access to liquidity from real estate equity. Another commenter stated that flexibilities shown by the agencies in response to the COVID event, including the temporary amendment implemented by the interim final rule, would help community banks serve their clients and would not compromise safety and soundness or credit quality. Another commenter indicated the interim final rule would alleviate a bottleneck or freeze of appraisal and evaluation services in certain geographical areas. Another commenter stated that the interim final rule would allow banks to complete real estate transactions within the normal timeframes. A commenter stated that banks would use the deferral prudently, for creditworthy borrowers. Commenters also expressed support for the agencies making the interim final rule effective immediately.

Commenters who opposed the interim final rule expressed concern that the deferred appraisals and evaluations might not support the loan amount and that after the 120-day deferral period, loans would give rise to excessive leverage. Another expressed concern about sudden defaults and potential miscalculation of collateral values. Commenters also were concerned about professionalism in valuations, stating that insured professionals should be

involved from the outset of real estate lending. Commenters also stated that a well-informed estimate of collateral value, as required by the interim final rule, may be difficult to develop for complex commercial real estate transactions.

Definition of Acquisition, Development, and Construction

Two commenters requested the agencies provide clarity about the scope of "acquisition, development, and construction" transactions that are excluded from the interim final rule. One commenter stated there is confusion in the industry about the meaning of the term. Another commenter asked the agencies to confirm that the definition found in the instructions to the Federal Financial Institutions Examination Council (FFIEC) Schedule RC-C, Part I, "Loan and Leases,"²¹ of the Consolidated Reports of Condition and Income (Call Report), for the three versions of the Call Report (FFIEC 031, FFIEC 041, and FFIEC 051), is the definition that should apply to real estate appraisals for purposes of "acquisition, development, and construction" in the interim final rule.

After consideration of these comments, the agencies are clarifying that transactions for the "acquisition, development, and construction" of real estate excluded from the 120-day deferral period mean, for purposes of this rule, those loans described in the Instructions for Schedule RC-C, "Loans and Lease Financing Receivables," Part I, "Loans and Leases," item 1.a, "Construction, land development, and other land loans," of the Call Report. The instructions for Schedule RC-C describe such loans as loans secured by real estate made to finance (a) land development (*i.e.*, the process of improving land—laying sewers, water pipes, etc.) preparatory to erecting new structures, (b) the on-site construction of industrial, commercial, residential, or farm buildings (including not only construction of new structures, but also additions or alterations to existing structures and the demolition of existing structures to make way for new structures), (c) loans secured by vacant land, except land known to be used or useable for agricultural purposes, such as crop and livestock production, (d) loans secured by real estate the proceeds of which are to be used to acquire and improve developed and undeveloped

²⁰ See OCC: 12 CFR 3.32(g); Board: 12 CFR 217.32(g); and FDIC: 12 CFR 324.32(g).

²¹ See https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_202006_i.pdf. See also https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC051_202006_i.pdf.

property, and (e) loans made under Title I or Title X of the National Housing Act that conform to the definition of construction stated above and that are secured by real estate. This is consistent with the agencies' intent in excluding certain "acquisition, development, and construction" transactions from the 120-day deferral period, and reflects institutions' routine reporting of such assets for purposes of the Call Report.

Managing Loans Using COVID Event Flexibilities

One commenter requested that the agencies clarify post-crisis expectations for managing loans for which regulatory flexibilities have been used. Generally, the agencies expect that, after the COVID event, banks should continue to adhere to practices consistent with the established safety and soundness standards and should refer to risk management guidance for managing loans that have been issued during the COVID event. Existing flexibilities in appraisal standards and the interagency appraisal regulations are described in the Interagency Statement on Appraisals and Evaluations for Real Estate Related Financial Transactions Affected by the Coronavirus.²² Institutions should also consider the Joint Statement on Additional Loan Accommodations Related to COVID-19²³ (Joint Statement), issued by the FFIEC member agencies.²⁴ The Joint Statement provides guidance on managing loans as they approach the end of COVID event-related accommodation periods. The Joint Statement also provides guidance on offering additional accommodations.

Commenters also requested that the agencies provide a remedy for loans with deferred appraisals when the appraised value is lower than expected. The agencies did not prescribe methods or documentation standards for valuations estimated during the deferral period, but prudent institutions should retain information that was used to support a best estimate. Institutions should continue to develop a loan-to-value estimate in accordance with real

estate lending standards and overall standards for safety and soundness. Some examples of information that may help to develop an informed estimate are existing appraisals, tax assessed values, comparable sales, and lender estimates. As stated in the interim final rule, the agencies expect each institution to develop an appropriate risk mitigation strategy if the appraisal or evaluation ultimately determines a market value for a property that is significantly lower than expected when the loan was made. Appropriate risk mitigation strategies may vary based on circumstances and borrower. The Joint Statement clarifies that a reasonable accommodation may not necessarily result in an adverse risk rating solely because of a decline in the value of underlying collateral, provided that the borrower has the ability to perform according to the terms of the loan. However, institutions should recognize a heightened degree of risk if the subsequently obtained appraisal or evaluation ultimately reveals a market value significantly lower than the expected market value and take appropriate action to mitigate the risk.

Other Expectations for Deferred Appraisals

A commenter requested guidance on what effective date appraisers should use for appraisals that are deferred for 120 days. The agencies continue to leave the effective dates for these transactions to the discretion of the bank as established by the scope of work of the appraisal engagement. Another commenter suggested the agencies tailor the interim final rule to different types of real estate or based on the price of the property. Another commenter requested the agencies make the changes in the interim final rule and the *Interagency Statement on Appraisals and Evaluations for Real Estate Related Transactions Affected by the Coronavirus*²⁵ permanent. The agencies have no plans to extend or change the interim final rule at this time but will continue to consider flexibilities as needed while supporting safe and sound collateral valuation practices during and after the COVID event.

IV. Summary of the Final Rule

For the reasons discussed above, the agencies are adopting as final the interim final rule with one revision, which is the clarification of the meaning of "acquisition, development, and

construction loans." Accordingly, under the final rule, regulated institutions may defer required appraisals and evaluations for up to 120 days for all residential and commercial real estate-secured transactions, excluding transactions for acquisition, development, and construction of real estate, which mean, for purposes of this rule, loans secured by real estate made to finance (a) land development (*i.e.*, the process of improving land—laying sewers, water pipes, etc.) preparatory to erecting new structures, (b) the on-site construction of industrial, commercial, residential, or farm buildings (including not only construction of new structures, but also additions or alterations to existing structures and the demolition of existing structures to make way for new structures), (c) loans secured by vacant land, except land known to be used or useable for agricultural purposes, such as crop and livestock production, (d) loans secured by real estate the proceeds of which are to be used to acquire and improve developed and undeveloped property, and (e) loans made under Title I or Title X of the National Housing Act that conform to the definition of construction stated above and that are secured by real estate.

The temporary provision allowing regulated institutions to defer appraisals or evaluations for covered transactions will expire on December 31, 2020, unless extended by the agencies. As with the interim final rule, this final rule does not revise any of the existing appraisal exceptions or any other requirements with respect to the performance of evaluations. The agencies expect all appraisals, including deferred appraisals, to comply with USPAP, as issued by the Appraisal Standards Board of the Appraisal Foundation.

V. Administrative Law Matters

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires that a final rule be published in the **Federal Register** no less than 30 days before its effective date except for (1) substantive rules, which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.²⁶ Because the final rule relieves a restriction, the final rule is exempt from the APA's delayed effective date requirement.²⁷ Additionally, the agencies find good cause to publish the final rule with an

²² See *Interagency Statement on Appraisals and Evaluations for Real Estate Related Transactions Affected by the Coronavirus* (Apr. 14, 2020), available at <https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-54.html>.

²³ *Joint Statement on Additional Loan Accommodations Related to COVID-19*, OCC Bulletin 2020-72; Board SR Letter 20-18; FDIC Financial Institution Letter FIL-74-2020.

²⁴ The FFIEC is composed of the following: a member of the Board, appointed by the Chairman of the Board; the Chairman of the FDIC; the Chairman of the National Credit Union Administration; the Comptroller of the OCC; the Director of the Bureau of Consumer Financial Protection; and, the Chairman of the State Liaison Committee.

²⁵ Press Release: *Interagency Statement on Appraisals and Evaluations for Real Estate Related Transactions Affected by the Coronavirus* (Apr. 14, 2020).

²⁶ 5 U.S.C. 553(d).

²⁷ 5 U.S.C. 553(d)(1).

immediate effective date. The agencies believe that the public interest is best served by implementing the final rule as soon as possible. As discussed above, recent events have suddenly and significantly affected global economic activity, increasing businesses' and households' need to have timely access to liquidity from real estate equity. In addition, the spread of COVID-19 has greatly increased the difficulty of performing real estate appraisals and evaluations in a timely manner. The relief provided by the final rule will continue to allow regulated institutions to better focus on supporting lending to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of COVID-19, while reaffirming the safety and soundness principle that valuation of collateral is an essential part of the lending decision. Finally, the agencies believe that implementing the final rule as soon as possible, with its clarifying language, is consistent with the agencies' intent to continue to grant expedited relief to the regulated entities. Therefore, the final rule will become effective October 16, 2020 through December 31, 2020.

B. 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.²⁸ 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.²⁹

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.³⁰

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.

C. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995³¹ (PRA), the agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The agencies have reviewed this final rule and determined that it would not introduce any new or revise any collection of information pursuant to the PRA. Therefore, no submissions will be made to OMB for review.

D. 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 applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). Since the agencies were not required to issue a general notice of proposed rulemaking associated with the interim final rule or this final rule, no RFA is required. Accordingly, the agencies have concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCRDIA),³² 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 depository institutions, including small depository institutions, and customers of depository institutions, 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, disclosure, 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.³³ Each Federal banking agency has determined that the final rule would not impose any additional

reporting, disclosure, or other new requirements on IDIs, and thus the requirements of the RCDRIA do not apply.

F. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act³⁴ 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.

G. OCC Unfunded Mandates Reform Act of 1995 Determination

Under the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531 *et seq.*, the OCC prepares 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.³⁵ Therefore, because the OCC found good cause to dispense with notice and comment for the interim final rule, the OCC has not prepared an economic analysis of the final rule under the UMRA.

List of Subjects

12 CFR Part 34

Appraisal, Appraiser, Banks, banking, Consumer protection, Credit, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Capital planning, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

12 CFR Part 323

Banks, banking, Mortgages, Reporting and recordkeeping requirements, Savings associations.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the joint preamble, the OCC amends part 34 of

²⁸ 5 U.S.C. 801 *et seq.*

²⁹ 5 U.S.C. 801(a)(3).

³⁰ 5 U.S.C. 804(2).

³¹ 44 U.S.C. 3501–3521.

³² 12 U.S.C. 4802(a).

³³ 12 U.S.C. 4802.

³⁴ 12 U.S.C. 4809.

³⁵ See 2 U.S.C. 1532(a).

chapter I of title 12 of the Code of Federal Regulations as follows:

PART 34—REAL ESTATE LENDING AND APPRAISALS

■ 1. The authority citation for part 34 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 25b, 29, 93a, 371, 1462a, 1463, 1464, 1465, 1701j-3, 1828(o), 3331 *et seq.*, 5101 *et seq.*, and 5412(b)(2)(B) and 15 U.S.C. 1639h.

■ 2. Section 34.43 is amended by revising paragraph (f) to read as follows:

§ 34.43 Appraisals required; transactions requiring a State certified or licensed appraiser.

* * * * *

(f) *Deferrals of appraisals and evaluations for certain residential and commercial transactions*—(1) *120-day grace period.* The completion of appraisals and evaluations required under paragraphs (a) and (b) of this section may be deferred up to 120 days from the date of closing.

(2) *Covered transactions.* The deferrals authorized under paragraph (f)(1) of this section apply to all residential and commercial real estate-secured transactions, excluding transactions for the acquisition, development, and construction of real estate which, for purposes of this rule, mean those loans described in paragraphs (f)(2)(i) through (iv) of this section. The term “construction” as used in this paragraph (f)(2) includes not only construction of new structures, but also additions or alterations to existing structures and the demolition of existing structures to make way for new structures. The following loan transactions are excluded from the deferrals authorized under paragraph (f)(1) of this section:

(i) Loans secured by real estate made to finance:

(A) Land development (such as the process of improving land—laying sewers, water pipes, etc.) preparatory to erecting new structures; or

(B) The on-site construction of industrial, commercial, residential, or farm buildings;

(ii) Loans secured by vacant land (except land known to be used or usable for agricultural purposes);

(iii) Loans secured by real estate to acquire and improve developed or undeveloped property; and

(iv) Loans made under Title I or Title X of the National Housing Act that:

(A) Conform to the definition of “construction” as defined in paragraph (f)(2) of this section; and

(B) Are secured by real estate.

(3) *Sunset.* The appraisal and evaluation deferrals authorized by

paragraph (f) of this section will expire for transactions closing after December 31, 2020.

Federal Reserve Board

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board amends part 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 3. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

■ 4. Section 225.63 is amended by revising paragraph (f) to read as follows:

§ 225.63 Appraisals required; transactions requiring a State certified or licensed appraiser.

* * * * *

(f) *Deferrals of appraisals and evaluations for certain residential and commercial transactions*—(1) *120-day grace period.* The completion of appraisals and evaluations required under paragraphs (a) and (b) of this section may be deferred up to 120 days from the date of closing.

(2) *Covered transactions.* The deferrals authorized under paragraph (f)(1) of this section apply to all residential and commercial real estate-secured transactions, excluding transactions for the acquisition, development, and construction of real estate which, for purposes of this rule, mean those loans described in paragraphs (f)(2)(i) through (iv) of this section. The term “construction” as used in this paragraph (f)(2) includes not only construction of new structures, but also additions or alterations to existing structures and the demolition of existing structures to make way for new structures. The following loan transactions are excluded from the deferrals authorized under paragraph (f)(1) of this section:

(i) Loans secured by real estate made to finance:

(A) Land development (such as the process of improving land—laying sewers, water pipes, etc.) preparatory to erecting new structures; or

(B) The on-site construction of industrial, commercial, residential, or farm buildings;

(ii) Loans secured by vacant land (except land known to be used or usable for agricultural purposes);

(iii) Loans secured by real estate to acquire and improve developed or undeveloped property; and

(iv) Loans made under Title I or Title X of the National Housing Act that:

(A) Conform to the definition of “construction” as defined in paragraph (f)(2) of this section; and

(B) Are secured by real estate.

(3) *Sunset.* The appraisal and evaluation deferrals authorized by paragraph (f) of this section will expire for transactions closing after December 31, 2020.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the joint preamble, the FDIC amends part 323 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 323—APPRAISALS

■ 5. The authority citation for part 323 continues to read as follows:

Authority: 12 U.S.C. 1818, 1819(a) (“Seventh” and “Tenth”), 1831p–1 and 3331 *et seq.*

■ 6. Section 323.3 is amended by revising paragraph (g) to read as follows:

§ 323.3 Appraisals required; transactions requiring a State certified or licensed appraiser.

* * * * *

(g) *Deferrals of appraisals and evaluations for certain residential and commercial transactions*—(1) *120-day grace period.* The completion of appraisals and evaluations required under paragraphs (a) and (b) of this section may be deferred up to 120 days from the date of closing.

(2) *Covered transactions.* The deferrals authorized under paragraph (g)(1) of this section apply to all residential and commercial real estate-secured transactions, excluding transactions for the acquisition, development, and construction of real estate which, for purposes of this rule, mean those loans described in paragraphs (g)(2)(i) through (iv) of this section. The term “construction” as used in this paragraph (g)(2) includes not only construction of new structures, but also additions or alterations to existing structures and the demolition of existing structures to make way for new structures. The following loan transactions are excluded from the deferrals authorized under paragraph (g)(1) of this section:

(i) Loans secured by real estate made to finance:

(A) Land development (such as the process of improving land—laying sewers, water pipes, etc.) preparatory to erecting new structures; or

(B) The on-site construction of industrial, commercial, residential, or farm buildings;

(ii) Loans secured by vacant land (except land known to be used or usable for agricultural purposes);

(iii) Loans secured by real estate to acquire and improve developed or undeveloped property; and

(iv) Loans made under Title I or Title X of the National Housing Act that:

(A) Conform to the definition of “construction” as defined in paragraph (g)(2) of this section; and

(B) Are secured by real estate.

(3) *Sunset*. The appraisal and evaluation deferrals authorized by this paragraph (g) will expire for transactions closing after December 31, 2020.

Brian P. Brooks

Acting Comptroller of the Currency Office of the Comptroller of the Currency 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 September 15, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–21563 Filed 10–15–20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0676; Product Identifier 2020–NM–085–AD; Amendment 39–21287; AD 2020–21–14]

RIN 2120–AA64

Airworthiness Directives; ATR—GIE Avions de Transport Régional Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all ATR—GIE Avions de Transport Régional Model ATR72 airplanes. This AD was prompted by reports of main landing gear (MLG) hinge pins found

cracked or thermally abused. This AD requires replacing certain MLG hinge pins with serviceable parts, or replacing an MLG equipped with any affected MLG hinge pin with an MLG equipped with serviceable MLG hinge pins, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 20, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 20, 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–2020–0676.

Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–0676; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email Shahram.Daneshmandi@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD

2020–0101, dated May 5, 2020 (“EASA AD 2020–0101”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all ATR—GIE Avions de Transport Régional Model ATR72 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all ATR—GIE Avions de Transport Régional Model ATR72 airplanes. The NPRM published in the **Federal Register** on July 31, 2020 (85 FR 46010). The NPRM was prompted by MLG hinge pins found cracked or thermally abused. The NPRM proposed to require replacing certain MLG hinge pins with serviceable parts, or replacing an MLG equipped with any affected MLG hinge pin with an MLG equipped with serviceable MLG hinge pins, as specified in EASA AD 2020–0101.

The FAA is issuing this AD to address MLG hinge pins subjected to a non-detected thermal abuse during production, which could lead to structural failure and consequent collapse of the MLG, resulting in damage to the airplane and injury to the occupants. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

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

Costs of Compliance

The FAA estimates that this AD affects 23 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
4 work-hours × \$85 per hour = \$340	\$ *	\$340	\$7,820

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

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 the cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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):

2020–21–14 ATR—GIE Avions de Transport Régional: Amendment 39–21287; Docket No. FAA–2020–0676; Product Identifier 2020–NM–085–AD.

(a) Effective Date

This AD is effective November 20, 2020.

(b) Affected ADs

None.

(c) Applicability

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

(d) Subject

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

(e) Reason

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

(f) Compliance

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

(g) Requirements

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

(h) Exceptions to EASA AD 2020–0101

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

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

(i) No Reporting or Returning Parts Requirement

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

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k) 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 responsible Flight Standards Office.

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

(k) Related Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200

South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email Shahram.Daneshmandi@faa.gov.

(I) 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 2020–0101, dated May 5, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0101, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; Internet www.easa.europa.eu. You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>.

(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–2020–0676.

(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 October 6, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–22792 Filed 10–15–20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0581; Product Identifier 2020–NM–057–AD; Amendment 39–21284; AD 2020–21–11]

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) 2015–22–08, which applied to all Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; and Model A320–211, –212, –214, –231,

–232, and –233 airplanes. The FAA is also superseding AD 2018–17–19, which applied to certain Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, –233, –251N, and –271N airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –253N, and –271N airplanes. The FAA is also superseding AD 2019–19–15, which applied to certain Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, –233, –251N, and –271N airplanes; and Model A321 series airplanes. AD 2019–19–15 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 20, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 20, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of November 14, 2019 (84 FR 54480, October 10, 2019).

ADDRESSES: For EASA 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>. For the Airbus material identified in this AD that continues to be IBR, contact Airbus SAS, Airworthiness Office—ELAS, Rond-Point Emile Dewoitine No. 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; internet <https://www.airbus.com>. 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–2020–0581.

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–2020–0581; 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:

Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email sanjay.ralhan@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0080, dated April 1, 2020 (“EASA AD 2020–0080”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, and –153N airplanes; Model A320–211, –212, –214, –215, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –252N, –253N, –271N, –272N, –251NX, –252NX, –253NX, –271NX, and –272NX airplanes. Model A320–215 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2015–22–08, Amendment 39–18313 (80 FR 68434, November 5, 2015) (“AD 2015–22–08”). AD 2015–22–08 applied to all Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes;

Model A320-211, -212, -214, -231, -232, and -233 airplanes.

The FAA also proposed to supersede AD 2018-17-19, Amendment 39-19373 (83 FR 44460, August 31, 2018) ("AD 2018-17-19"). AD 2018-17-19 applied to certain Airbus SAS Model A318 series airplanes; Model A319-111, -112, -113, -114, -115, -131, -132, and -133 airplanes; Model A320-211, -212, -214, -216, -231, -232, -233, -251N, and -271N airplanes; and Model A321-111, -112, -131, -211, -212, -213, -231, -232, -251N, -253N, and -271N airplanes.

The FAA also proposed to supersede AD 2019-19-15, Amendment 39-19751 (84 FR 54480, October 10, 2019) ("AD 2019-19-15"). AD 2019-19-15 applied to certain Airbus SAS Model A318 series airplanes; Model A319-111, -112, -113, -114, -115, -131, -132, and -133 airplanes; Model A320-211, -212, -214, -216, -231, -232, -233, -251N, and -271N airplanes; and Model A321 series airplanes.

The NPRM published in the **Federal Register** on July 17, 2020 (85 FR 43499). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in an EASA AD.

The FAA is issuing this AD to address the failure of certain life-limited parts, which could result in reduced structural integrity 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 FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data 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 2020-0080 describes new or more restrictive airworthiness

limitations for airplane structures and safe life limits.

This AD also requires Airbus A318/A319/A320/A321 Airworthiness Limitations Section (ALS) Part 1 Safe Life Airworthiness Limitations (SL-ALI), Revision 06, Issue 02, dated November 30, 2018, which the Director of the Federal Register approved for incorporation by reference as of November 14, 2019 (84 FR 54480, October 10, 2019).

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 1,553 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2019-03-17 to be \$7,650 (90 work-hours × \$85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be \$7,650 (90 work-hours × \$85 per work-hour).

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:
 - a. Removing Airworthiness Directive (AD) 2015-22-08, Amendment 39-18313 (80 FR 68434, November 5, 2015); AD 2018-17-19, Amendment 39-19373 (83 FR 44460, August 31, 2018); and AD 2019-19-15, Amendment 39-19751 (84 FR 54480, October 10, 2019); and
 - b. Adding the following new AD:

2020-21-11 Airbus SAS: Amendment 39-21284; Docket No. FAA-2020-0581; Product Identifier 2020-NM-057-AD.

(a) Effective Date

This AD is effective November 20, 2020.

(b) Affected ADs

This AD replaces AD 2015-22-08, Amendment 39-18313 (80 FR 68434, November 5, 2015) ("AD 2015-22-08"); AD 2018-17-19, Amendment 39-19373 (83 FR 44460, August 31, 2018) ("AD 2018-17-19"); and AD 2019-19-15, Amendment 39-19751 (84 FR 54480, October 10, 2019) ("AD 2019-19-15").

(c) Applicability

This AD applies to the Airbus SAS airplanes specified in paragraphs (c)(1) through (4) of this AD, certificated in any

category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 13, 2019.

(1) Model A318-111, -112, -121, and -122 airplanes.

(2) Model A319-111, -112, -113, -114, -115, -131, -132, -133, -151N, and -153N airplanes.

(3) Model A320-211, -212, -214, -216, -231, -232, -233, -251N, -252N, -253N, -271N, -272N, and -273N airplanes.

(4) Model A321-111, -112, -131, -211, -212, -213, -231, -232, -251N, -252N, -253N, -271N, -272N, -251NX, -252NX, -253NX, -271NX, and -272NX airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the failure of certain life-limited parts, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Maintenance or Inspection Program Revision, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2019-19-15, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 30, 2018: Within 90 days after November 14, 2019 (the effective date of AD 2019-19-15), revise the existing maintenance or inspection program, as applicable, to incorporate Airbus SAS A318/A319/A320/A321 Airworthiness Limitations Section (ALS) Part 1 Safe Life Airworthiness Limitations (SL-ALI), Revision 06, Issue 02, dated November 30, 2018. The initial compliance time for doing the revised actions is at the applicable time specified in Airbus SAS A318/A319/A320/A321 ALS Part 1 Safe Life Airworthiness Limitations (SL-ALI), Revision 06, Issue 02, dated November 30, 2018, or within 90 days after November 14, 2019, whichever occurs later. Accomplishing the maintenance or inspection program revision required by paragraph (i) of this AD terminates the requirements of this paragraph.

(h) Retained Restrictions on Alternative Actions and Intervals With a New Exception

This paragraph restates the requirements of paragraph (h) of AD 2019-19-15, with a new exception. Except as required by paragraph (i) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative life limits may be used unless approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (l)(1) of this AD.

(i) New Maintenance or Inspection Program Revision

Except as specified in paragraph (j) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020-0080, dated April 1, 2020 ("EASA AD 2020-0080"). Accomplishing the maintenance or inspection program revision required by this paragraph terminates the requirements of paragraph (g) of this AD.

(j) Exceptions to EASA AD 2020-0080

(1) The requirements specified in paragraph (1), (3), and (4) of EASA AD 2020-0080 do not apply to this AD.

(2) Paragraph (2) of EASA AD 2020-0080 specifies revising "the AMP" within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the "limitations" specified in paragraph (3) of EASA AD 2020-0080 within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (2) of EASA AD 2020-0080 is at the applicable compliance times specified in paragraph (2) of EASA AD 2020-0080, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The "Remarks" section of EASA AD 2020-0080 does not apply to this AD.

(k) New Provisions for Alternative Actions and Intervals

After the maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (e.g., inspections) or intervals are allowed except as specified in the provisions of the "Ref. Publications" section of EASA AD 2020-0080.

(l) 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 (m) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov.

(i) 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.

(ii) AMOCs approved previously for AD 2019-19-15 are approved as AMOCs for the corresponding provisions of EASA AD 2020-0080 that are required by paragraph (g) of this AD.

(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 2020-0080 that contains RC procedures and tests: Except as required by paragraph (l)(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.

(m) Related Information

For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3223; email sanjay.ralhan@faa.gov.

(n) 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 20, 2020.

(i) European Union Aviation Safety Agency (EASA) AD 2020-0080, dated April 1, 2020.

(ii) [Reserved]

(4) The following service information was approved for IBR on November 14, 2019 (84 FR 54480, October 10, 2019).

(i) Airbus A318/A319/A320/A321 Airworthiness Limitations Section (ALS) Part 1 Safe Life Airworthiness Limitations (SL-ALI), Revision 06, Issue 02, dated November 30, 2018.

(ii) [Reserved]

(5) For EASA AD 2020-0080, 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>.

(6) For Airbus material, contact Airbus SAS, Airworthiness Office-EIAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; internet <https://www.airbus.com>.

(7) 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–2020–0581.

(8) 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 October 5, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–22793 Filed 10–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0552; Airspace
Docket No. 18–ANM–11]

RIN 2120–AA66

Amendment and Establishment of Class E Airspace; Coeur D’Alene, ID

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class E surface area airspace and establishes Class E airspace extending upward from 700 feet above the surface at Coeur D’Alene-Pappy Boyington Field, Coeur D’Alene, ID, to support the Instrument Flight Rules (IFR) operations under standard instrument approach and departure procedures at the airport, for the safety and management of aircraft within the National Airspace System. Additionally, an editorial change is being made to the legal description replacing “Airport/Facility Directory” with the term “Chart Supplement” and updating the name of the airport to match the FAA aeronautical database.

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

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at https://www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800

Independence Avenue SW, Washington, DC, 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

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

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code (U.S.C.). Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E surface airspace and establishes Class E airspace extending upward from 700 feet AGL at Coeur D’Alene-Pappy Boyington Field, Coeur D’Alene, ID, to support the Instrument Flight Rules (IFR) operations under standard instrument approach and departure procedures at the airport, for the safety and management of aircraft within the National Airspace System. Additionally, an editorial change is being made to the legal description replacing “Airport/Facility Directory” with the term “Chart Supplement” and updating the name of the airport to match the FAA aeronautical database.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 47718; August 6, 2020) for Docket No. FAA–2020–0552 to amend the Class E surface airspace, and establish the Class E airspace extending upward from 700 feet above the earth at Coeur D’Alene-Pappy Boyington Field, Coeur D’Alene, ID in support of IFR operations. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

The FAA is amending 14 CFR part 71 by amending the description of the Class E surface area and establishing Class E airspace extending upward from 700 feet above the surface at Coeur D’Alene-Pappy Boyington Field, Coeur D’Alene, ID.

The Class E surface airspace 3.5 miles each side of the VOR/DME 251° radial west of the airport is being removed. The lateral boundary for the area south of the airport is reduced from 1.8 miles each side of the 183° bearing to 1.3 miles and extend 6 miles from the airport instead of 8 miles. The additional airspace, in these two areas, is no longer required to support instrument operations. An area 1.8 miles each side of the 023° bearing is being added and extends 5 miles from the airport. This enables instrument departures to reach 700 feet AGL before exiting the surface area.

Class E airspace extending upward from 700 feet above the surface is being established to within 4.4 miles of the airport with three areas extending beyond the 4.4-mile radius. One area, 4.4 miles each side of the 250° bearing, extends from the airport 14.4 miles west. This section accommodates the ILS and RNAV approaches. Another area is being established, 1.3 miles each side of the 183° bearing and extending from the airport 10 miles south, to support the VOR approach. The third area extends 1.8 miles each side of the 023° bearing 8 miles northeast from the airport. This section protects aircraft using the Obstacle Departure Procedure. This airspace is necessary to support IFR approach and departure procedures at the airport.

Additionally, an editorial change is being made to the legal description replacing “Airport/Facility Directory” with the term “Chart Supplement” and updating the name of the airport to match the FAA’s aeronautical database.

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

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

ANM ID E2 Coeur D’Alene, ID [Amended]

Coeur D’Alene—Pappy Boyington Field
(Lat. 47°46’28” N, long 116°49’11” W)

That airspace within a 4.4-mile radius of the Coeur D’Alene—Pappy Boyington Field, and within 1.3 miles each side of the 183° bearing extending from the 4.4-mile radius to 6 miles south of the airport, and that airspace 1.8 miles each side of the 023° bearing extending from the 4.4-mile radius to 5 miles northeast of the airport. This Class E airspace is effective during the specific dates and times established in advance by a notice to airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

ANM WA E5 Coeur D’Alene, ID [New]

Coeur d’Alene—Pappy Boyington Field
(Lat. 47°46’28” N, long 116°49’11” W)

That airspace within a 4.4-mile radius of the Coeur d’Alene—Pappy Boyington Field, and within 1.3 miles each side of the 183° bearing from the airport extending from the 4.4-mile radius to 10 miles south of the airport, and that airspace 4.4 miles each side of the 250° bearing from the Coeur d’Alene—Pappy Boyington Field extending from the 4.4-mile radius to 14.4 miles west of the airport and that airspace 1.8 miles each side of the 023° bearing from the Coeur d’Alene—Pappy Boyington Field extending from the 4.4-mile radius to 8 miles northeast from the airport.

Issued in Seattle, Washington, on October 9, 2020.

Byron Chew,

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

[FR Doc. 2020–22906 Filed 10–15–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2014–0225; Amdt. No. 91–331F]

RIN 2120–AL58

Amendment of the Prohibition Against Certain Flights in Specified Areas of the Simferopol and Dnipropetrovsk Flight Information Regions (FIRs) (UKFV and UKDV)

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

ACTION: Final rule.

SUMMARY: This action amends and extends the Special Federal Aviation Regulation (SFAR) prohibiting certain flights in the specified areas of the Dnipropetrovsk Flight Information Region (FIR) (UKDV) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. The FAA finds this action necessary to address hazards to persons and aircraft engaged in such flight operations. However, due to changed conditions in Ukraine and the associated risks to U.S. civil aviation, this action does not extend the prohibition against certain flights in the specified areas of the Simferopol FIR (UKFV), which will expire on October 27, 2020. This action extends the expiration date of the prohibition against certain flights in the specified areas of the Dnipropetrovsk FIR (UKDV) from October 27, 2020, to October 27, 2021. Additionally, the FAA republishes the approval process and exemption information for this SFAR, consistent with other recently published flight prohibition SFARs, and makes minor administrative revisions.

DATES: This final rule is effective on October 27, 2020.

FOR FURTHER INFORMATION CONTACT: Stephen Moates, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–8166; email Stephen.moates@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This action amends and extends the prohibition against certain flight

operations in the specified areas of the Dnipropetrovsk FIR (UKDV) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. Specifically, this amendment continues to prohibit all persons described in paragraph (a) of SFAR No. 113, 14 CFR 91.1607, from conducting civil flight operations in the specified areas of the Dnipropetrovsk FIR (UKDV) until October 27, 2021, due to the hazards to civil aviation associated with the ongoing violence, including potential for misidentification.

However, this amendment does not extend the prohibition against certain flight operations in the specified areas of the Simferopol FIR (UKFV), which will expire on October 27, 2020, due to changed conditions in that airspace and the associated decrease in risk to U.S. civil aviation. The FAA also republishes the approval process and exemption information for this SFAR, consistent with other recently published flight prohibition SFARs, and makes minor administrative revisions.

II. Legal Authority and Good Cause

A. Legal Authority

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. Sections 106(f) and (g) of title 49, U.S. Code (U.S.C.), subtitle I, establish the FAA Administrator's authority to issue rules on aviation safety. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise this authority consistently with the obligations of the U.S. Government under international agreements.

The FAA is promulgating this rulemaking under the authority described in 49 U.S.C. 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures the Administrator finds

necessary for safety in air commerce and national security. This regulation is within the scope of the FAA's authority because it continues to prohibit the persons described in paragraph (a) of SFAR No. 113, § 91.1607, from conducting flight operations in the specified areas of the Dnipropetrovsk FIR (UKDV) due to the continuing hazards to the safety of U.S. civil flight operations, as described in the preamble to this final rule.

B. Good Cause for Immediate Adoption

Section 553(b)(3)(B) of title 5, U.S. Code, 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." Section 553(d) also authorizes agencies to forgo the delay in the effective date of the final rule for good cause found and published with the rule. In this instance, the FAA finds good cause exists to forgo notice and comment because notice and comment would be impracticable and contrary to the public interest. In addition, it is contrary to the public interest to allow any lapse of effectivity of the prohibition of U.S. civil flights in the specified areas of the Dnipropetrovsk FIR (UKDV).

The risk environment for U.S. civil aviation in airspace managed by other countries with respect to safety of flight is fluid because of the risks posed by weapons capable of targeting, or otherwise negatively affecting, U.S. civil aviation, as well as other hazards to U.S. civil aviation associated with fighting, extremist and militant activity, or heightened tensions. This fluidity and the need for the FAA to rely upon classified information in assessing these risks make issuing notice and seeking comments impracticable and contrary to the public interest. With respect to the impracticability of notice and comment procedures, the potential for rapid changes in the risks to U.S. civil aviation significantly limits how far in advance of a new or amended flight prohibition the FAA can usefully assess the risk environment. Furthermore, to the extent these rules and any amendments to them are based upon classified information, the FAA is not legally permitted to share such information with the general public, who cannot meaningfully comment on information to which they are not legally allowed access.

Under these conditions, public interest considerations favor not providing notice and seeking comment for this rule. While there is a public interest in having an opportunity for the

public to comment on agency action, there is a greater public interest in having the FAA's flight prohibitions, and any amendments thereto, reflect the agency's current understanding of the risk environment for U.S. civil aviation. This allows the FAA to protect the safety of U.S. operators' aircraft and the lives of their passengers and crews without over-restricting U.S. operators' routing options.

The FAA has determined extending the flight prohibition for U.S. civil aviation operations in the specified areas of the Dnipropetrovsk FIR (UKDV) is necessary due to continuing safety-of-flight hazards associated with the ongoing violence, including a risk of misidentification of civil aircraft. These hazards continue to present an unacceptable level of risk to U.S. civil aviation operations in the Dnipropetrovsk FIR (UKDV), as described in the preamble to this rule.

Accordingly, the FAA finds good cause exists to forgo notice and comment and any delay in the effective date for this rule that might allow the existing prohibition that applies to U.S. civil flights in the specified areas of the Dnipropetrovsk FIR (UKDV) to lapse.

III. Background

On April 25, 2014, the FAA published SFAR No. 113, § 91.1607, which prohibited certain flight operations in a portion of the Simferopol FIR (UKFV) after the Russian Federation unlawfully seized Crimea from Ukraine.¹ At that time, the FAA was concerned about the potential for civil aircraft to receive confusing and conflicting air traffic control instructions from both Ukrainian and Russian air traffic services providers while operating in the portion of the Simferopol FIR (UKFV) covered by SFAR No. 113, § 91.1607. In addition, political and military tensions between Ukraine and the Russian Federation remained high, and the FAA was concerned compliance with air traffic control instructions issued by the authorities of one country could result in a civil aircraft being misidentified and intercepted, or

¹ Prohibition Against Certain Flights in the Simferopol (UKFV) Flight Information Region (FIR) final rule, 79 FR 22862, April 25, 2014. As described in the 2014 final rule, the Russian Federation had also issued a NOTAM purporting to establish unilaterally a new FIR, effective April 3, 2014, in a significant portion of the Simferopol FIR (UKFV). The affected airspace included sovereign Ukrainian airspace over the Crimean Peninsula and the associated Ukrainian territorial sea, as well as international airspace managed by Ukraine over the Black Sea and the Sea of Azov under a regional air navigation agreement approved by the Council of the International Civil Aviation Organization (ICAO).

otherwise engaged, by air defense forces of the other country.

In the months that followed, the violence and the associated risks to civil aviation expanded to encompass the entirety of the Simferopol and Dnipropetrovsk FIRs (UKFV and UKDV, respectively). In addition to a series of attacks on fixed-wing and rotary-wing military aircraft flying at lower altitudes, two aircraft operating at higher altitudes were shot down over eastern Ukraine. The first, which occurred on July 14, 2014, involved a Ukrainian Antonov An-26 flying at 21,000 feet southeast of Luhansk, Ukraine. The second involved Malaysia Airlines Flight 17 (MH 17), which was flying over Ukraine at 33,000 feet just west of the Russian border on July 17, 2014. All of the 298 passengers and crew on board MH 17 perished. The FAA determined the use of weapons capable of targeting and shooting down aircraft flying on civil air routes at cruising altitudes posed a significantly dangerous threat to civil aircraft flying in the Simferopol and Dnipropetrovsk FIRs (UKFV and UKDV, respectively). On July 18, 2014, Universal Coordinated Time (UTC), the FAA issued NOTAM FDC 4/2182, which prohibited U.S. civil aviation operations in the entire Simferopol and Dnipropetrovsk FIRs (UKFV and UKDV, respectively). The FAA subsequently incorporated the expanded flight prohibition into SFAR No. 113, § 91.1607, on December 29, 2014.²

In 2018, the FAA determined security and safety conditions had sufficiently stabilized in certain regions of Ukraine for U.S. civil aviation operations to resume safely.³ However, the FAA also determined continuing hazards to U.S. civil aviation existed in the specified areas of the Simferopol FIR (UKFV) and the Dnipropetrovsk FIR (UKDV).⁴

A. Simferopol FIR (UKFV)

In the 2018 amendment, the FAA determined the government of Ukraine had addressed the FAA's previous flight safety concerns regarding conflicting air navigation service provider (ANSP) guidance for civil aircraft operating on certain air routes over the Black Sea in the Simferopol FIR (UKFV). In 2016, the government of Ukraine established, via

its aeronautical information publication (AIP), a prohibited area over the Crimean Peninsula and the adjacent territorial sea. In addition, the government of Ukraine issued flight advisories, prohibitions and other instructions for the safe navigation of civil aircraft, which it published via NOTAMs; reclassified Ukrainian airspace in 2014;⁵ and had improved safety incident reporting procedures to mitigate the risks associated with conflicting ANSP guidance from the Russian Federation.

In the October 2018 final rule, the FAA also determined the government of Ukraine had not mitigated the risks to civil aviation safety in the remainder of the Simferopol FIR (UKFV), necessitating a continuing, albeit more limited, flight prohibition for U.S. civil aviation. An overwhelming military presence of Russian forces and weapon capabilities remained on the Crimean Peninsula, creating a continuing risk for misidentification of aircraft flying over the Peninsula and in the airspace near the Peninsula. Additionally, the Russian Federation continued to claim that it had established unilaterally a new FIR that includes sovereign Ukrainian airspace over the Crimean Peninsula and the associated Ukrainian territorial sea. The claimed new FIR also includes international airspace over the Black Sea and the Sea of Azov in which Ukraine is responsible for providing air navigation services under regional air navigation agreements approved by the Council of the International Civil Aviation Organization (ICAO) and the European Region Aviation System Planning Group (EASPG) of the ICAO European and North Atlantic (EUR/NAT) Regions. For those reasons and their attendant risk to U.S. civil aviation operations, the FAA continued to prohibit U.S. civil aviation operations in the Simferopol FIR (UKFV) from the surface to unlimited, north and northeast of a line drawn direct from SOBLO (431503N 362298E) to DOLOT (434214N 332819E), direct to SOROK (440628N 324260E), then direct to OTPOL (452738N 313064E). The use of

⁵ The FAA notes that the State Aviation Administration of Ukraine conducted and completed an airspace restructuring that went into effect in the late 2014 timeframe. The new configuration altered both the Simferopol FIR (UKFV) and Dnipropetrovsk FIR (UKDV) altitude structures. To address the Ukraine airspace restructuring and provide additional clarity, on July 22, 2016, the FAA published a technical amendment to clarify the altitude and lateral boundaries of the airspace in which SFAR No. 113, § 91.1607, prohibited U.S. civil aviation operations. Extension of the Prohibition Against Certain Flights in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) Flight Information Regions final rule, technical amendment, 81 FR 47699, July 22, 2016.

airway M747, which partially overlapped with the new SFAR boundary, also remained prohibited.

B. Dnipropetrovsk FIR (UKDV)

In the October 2018 final rule, the FAA also determined an inadvertent risk to civil aviation associated with the ongoing violence continued to exist in the eastern portion of the Dnipropetrovsk FIR (UKDV). This violence involved localized skirmishes and the potential for larger scale fighting. The FAA was concerned this situation could lead to certain air defense forces misidentifying or engaging civil aviation.

In the October 2018 final rule, the FAA determined these threats were concentrated in the eastern portion of the Dnipropetrovsk FIR (UKDV) within the Russian-controlled area and in close proximity to the line of contact that bordered that area. While the potential for fluctuating levels of military engagement continued along the line of contact in eastern portions of the Dnipropetrovsk FIR (UKDV), the military situation had begun to stabilize, which reduced the risk of a larger-scale conflict that might extend into the western portion of the Dnipropetrovsk FIR (UKDV). The FAA determined these circumstances indicated the level of risk to civil aviation in the western portion of the Dnipropetrovsk FIR (UKDV) had diminished from the level of risk that had existed when the FAA initially prohibited U.S. civil aviation operations in the entire Dnipropetrovsk FIR (UKDV) in NOTAM FDC 4/2182. As a result, the FAA amended its flight prohibition for the Dnipropetrovsk FIR (UKDV) to allow U.S. civil aviation to resume flight operations in the western portion of the Dnipropetrovsk FIR (UKDV) from the surface to unlimited, west of a line drawn direct from ABDAR (471802N 351732E) along airway M853 to NIKAD (485946N 355519E), then along airway N604 to GOBUN (501806N 373824E). The October 2018 final rule also provided an exception to permit takeoffs and landings at Kharkiv International Airport (UKHH), Dnipropetrovsk International Airport (UKDD), and Zaporizhzhia International Airport (UKDE).

IV. Discussion of the Final Rule

A. Simferopol FIR (UKFV)

The FAA has determined U.S. civil aviation operations may resume safely in the specified areas of the Simferopol FIR (UKFV) when the flight prohibition for that FIR contained in SFAR No. 113, § 91.1607, expires on October 27, 2020. Although the FAA expects the Russian

² Prohibition Against Certain Flights in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) Flight Information Regions (FIRs) final rule, 79 FR 77857, December 29, 2014.

³ Amendment of the Prohibition Against Certain Flights in Specified Areas of the Simferopol and Dnipropetrovsk Flight Information Regions (FIRs) (UKFV and UKDV) final rule, 83 FR 52954, October 19, 2018.

⁴ Id.

Federation will continue to assert illegitimate territorial claims and maintain a competing ANSP for the foreseeable future, Ukraine has demonstrated a sustained commitment to taking appropriate measures to minimize the residual risks to flight safety in the Simferopol FIR (UKFV) from these circumstances. Since the spring of 2016, Ukraine's ANSP consistently has provided the FAA, as well as other countries, with credible post-implementation monitoring reports on Ukraine's implementation of the risk management measures outlined in its safety case⁶ for international air routes over the Black Sea, including incidents and mitigation measures. These post-implementation monitoring reports indicate the number of incidents within well-defined categories of identified hazards, with appropriate mitigation measures for the few incidents that continue to occur. As a result of Ukraine's diligent efforts, the number of reported safety-related incidents involving civil air traffic associated with Russian aggression in Ukraine has decreased to near zero over three and a half years of flight operations on Black Sea air routes in the Simferopol FIR (UKFV).

Ukraine has also demonstrated a sustained commitment to taking appropriate steps to protect civil aviation from the risk of misidentification associated with the continuing substantial Russian military presence and weapons capabilities on and in the vicinity of the Crimean Peninsula. For example, Ukrainian authorities issue NOTAMs to inform pilots of the locations of Russian military operational areas, work to de-conflict military and civil air traffic in the Simferopol FIR (UKFV), and have established a prohibited area over the Crimean Peninsula and adjacent Ukrainian territorial waters.

Additionally, despite the Russian Federation's purported annexation and its occupation of the Crimean Peninsula and continued deployment of substantial military capabilities, the security situation in the Simferopol FIR (UKFV) has stabilized. No reported clashes or incidents demonstrating an inadvertent risk to U.S. civil aviation

from misidentification or miscalculation have occurred since the November 2018 Kerch Strait maritime incident.

Therefore, as a result of the significantly reduced risk to U.S. civil aviation safety in the Simferopol FIR (UKFV), this rule does not extend the prohibition on U.S. civil aviation operations in the specified areas of the Simferopol FIR (UKFV), which will expire in accordance with the existing SFAR on October 27, 2020.

B. Dnipropetrovsk FIR (UKDV)

The FAA has determined the situation in the specified areas of the Dnipropetrovsk FIR (UKDV) continues to present an unacceptable level of risk to U.S. civil aviation. An inadvertent risk to U.S. civil aviation associated with the ongoing violence exists, involving localized skirmishes and the potential for larger scale fighting in the eastern portion of the Dnipropetrovsk FIR (UKDV), particularly near the line of contact that borders the Russian-controlled area. The FAA remains concerned these skirmishes and the risk for potential larger-scale fighting could lead to the misidentification or engagement of civil aviation by certain air defense forces. The various military and militia elements in the region continue to have access to a variety of anti-aircraft weapons systems, including man-portable air defense systems, and possibly more advanced surface-to-air missile (SAM) systems with the capability to engage aircraft at higher altitudes.

Despite the most recent ceasefire arrangement between Ukraine and the Russian Federation, which went into effect in December 2019, recent conflict-related air defense activity in eastern Ukraine highlights the continuing inadvertent risk to U.S. civil aviation operations in the eastern portion of the Dnipropetrovsk FIR (UKDV). On April 5, 2020, Ukrainian forces shot down a Russian military unmanned aircraft flying over the Donetsk region in the eastern portion of the Dnipropetrovsk FIR (UKDV). On April 10, 2020, the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission (SMM) to Ukraine lost an unmanned aircraft to small arms fire. Russia-led forces in eastern Ukraine regularly use SAMs, small-arms ground fire, and Global Positioning System (GPS) jamming to target OSCE SMM unmanned aircraft, including in the eastern portion of the Dnipropetrovsk FIR (UKDV). In October 2019, a Ukrainian military official indicated in public statements that Ukraine had lost numerous unmanned aircraft to Russian GPS interference throughout the

conflict, though the true number of unmanned aircraft lost remains unconfirmed.

Although the situation has remained mostly stable since 2018, skirmishes and attacks within the Dnipropetrovsk FIR (UKDV) and sub-adjacent Ukrainian territory continue to occur with little or no warning. For example, on April 18 and 19, 2020, Russia-led forces conducted multiple mortar attacks in the Donbas region, which is located in the eastern portion of the Dnipropetrovsk FIR (UKDV), injuring several Ukrainian soldiers.

Therefore, as a result of the significant, continuing unacceptable risk to the safety of U.S. civil aviation operations in the specified areas of the Dnipropetrovsk FIR (UKDV), which remain unchanged, the FAA extends the expiration date of SFAR No. 113, § 91.1607, from October 27, 2020, to October 27, 2021. The extension is limited to one year, given the particularized limitations applicable in the different portions of the Dnipropetrovsk FIR (UKDV) covered by the SFAR.

Further amendments to SFAR No. 113, § 91.1607, might be appropriate if the risk to civil aviation safety and security changes. In this regard, the FAA will continue to monitor the situation and evaluate the extent to which persons described in paragraph (a) of this rule might be able to operate safely in the specified areas of the Dnipropetrovsk FIR (UKDV).

The FAA also republishes the details concerning the approval and exemption processes in Sections V and VI of this preamble, consistent with other recently published flight prohibition SFARs, to enable interested persons to refer to this final rule for comprehensive information about requesting relief from the FAA from the provisions of SFAR No. 113, § 91.1607.

Lastly, the FAA makes minor administrative revisions to the regulatory text. These revisions include an update to the applicability paragraph of the regulatory text to make it consistent with other recently published flight prohibition SFARs and a minor non-substantive clarification of the SFAR boundary description for the specified areas of the Dnipropetrovsk FIR (UKDV).

⁶ As defined by ICAO, a safety case is "a document which provides substantial evidence that the system to which it pertains meets its safety objectives." See, e.g., International Civil Aviation Organization Asia and Pacific Office, Guidance on Building a Safety Case for Delivery of an ADS-B Separation Service, version 1.0 (Sept. 2011), available at <https://www.icao.int/APAC/Documents/edocs/cns/APX.%20J%20-%20Guidance%20Material%20on%20Building%20Safety%20Case%20for%20ADS-B%20separation.pdf>.

V. Approval Process Based on a Request From a Department, Agency, or Instrumentality of the United States Government

A. Approval Process Based on an Authorization Request From a Department, Agency, or Instrumentality of the United States Government

In some instances, U.S. Government departments, agencies, or instrumentalities may need to engage U.S. civil aviation to support their activities in the specified areas of the Dnipropetrovsk FIR (UKDV) described in this rule. If a department, agency, or instrumentality of the U.S. Government determines that it has a critical need to engage any person described in paragraph (a) of SFAR No. 113, § 91.1607, including a U.S. air carrier or commercial operator, to transport civilian or military passengers or cargo or conduct other operations in the specified areas of the Dnipropetrovsk FIR (UKDV), that department, agency, or instrumentality may request the FAA to approve persons described in paragraph (a) of SFAR No. 113, § 91.1607, to conduct such operations.

The requesting department, agency, or instrumentality of the U.S. Government must submit the request for approval to the FAA's Associate Administrator for Aviation Safety in a letter signed by an appropriate senior official of the requesting department, agency, or instrumentality.⁷ The FAA will not accept or consider requests for approval from anyone other than the requesting department, agency, or instrumentality. In addition, the senior official signing the letter requesting FAA approval on behalf of the requesting department, agency, or instrumentality must be sufficiently positioned within the organization to demonstrate that the senior leadership of the requesting department, agency, or instrumentality supports the request for approval and is committed to taking all necessary steps to minimize operational risks to the proposed flights. The senior official must also be in a position to: (1) Attest to the accuracy of all representations made to the FAA in the request for approval, and (2) ensure that any support from the requesting U.S. Government department, agency, or instrumentality described in the request

for approval is in fact brought to bear and is maintained over time. Unless justified by exigent circumstances, requests for approval must be submitted to the FAA no less than 30 calendar days before the date on which the requesting department, agency, or instrumentality wishes the proposed operation(s) to commence.

The requestor must send the request to the Associate Administrator for Aviation Safety, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591. Electronic submissions are acceptable, and the requesting entity may request that the FAA notify it electronically as to whether the FAA grants the request for approval. If a requestor wishes to make an electronic submission to the FAA, the requestor should contact the Air Transportation Division, Flight Standards Service, at (202) 267-8166, to obtain the appropriate email address. A single letter may request approval from the FAA for multiple persons described in SFAR No. 113, § 91.1607, or for multiple flight operations. To the extent known, the letter must identify the person(s) expected to be covered under the SFAR on whose behalf the U.S. Government department, agency, or instrumentality seeks FAA approval, and it must describe—

- The proposed operation(s), including the nature of the mission being supported;
- The service that the person(s) covered by the SFAR will provide;
- To the extent known, the specific locations in the specified areas of the Dnipropetrovsk FIR (UKDV) where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Dnipropetrovsk FIR (UKDV) and the airports, airfields, or landing zones at which the aircraft will take off and land; and
- The method by which the U.S. Government department, agency, or instrumentality will provide, or how the operator will otherwise obtain, current threat information and an explanation of how the operator will integrate this information into all phases of the proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases).

The request for approval must also include a list of operators with whom the U.S. Government department, agency, or instrumentality requesting FAA approval has a current contract(s), grant(s), or cooperative agreement(s) (or its prime contractor has a subcontract(s)) for specific flight operations in the specified areas of the

Dnipropetrovsk FIR (UKDV). The requestor may identify additional operators to the FAA at any time after the FAA issues its approval. Neither the operators listed in the original request, nor any operators the requestor subsequently seeks to add to the approval, may commence operations under the approval until the FAA issues them an Operations Specification (OpSpec) or Letter of Authorization (LOA), as appropriate, for operations in the specified areas of the Dnipropetrovsk FIR (UKDV). The approval conditions discussed below apply to all operators, whether included in the original list or subsequently added to the approval. Requestors should send updated lists to the email address obtained from the Air Transportation Division by calling (202) 267-8166.

If an approval request includes classified information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

FAA approval of an operation under SFAR No. 113, § 91.1607, does not relieve persons subject to this SFAR of the responsibility to comply with all other applicable FAA rules and regulations. Operators of civil aircraft must comply with the conditions of their certificates, OpSpecs, and LOAs, as applicable. Operators must also comply with all rules and regulations of other U.S. Government departments or agencies that may apply to the proposed operation(s), including, but not limited to, regulations issued by the Transportation Security Administration.

B. Approval Conditions

If the FAA approves the request, the FAA's Aviation Safety organization will send an approval letter to the requesting U.S. Government department, agency, or instrumentality informing it that the FAA's approval is subject to all of the following conditions:

(1) The approval will stipulate those procedures and conditions that limit, to the greatest degree possible, the risk to the operator, while still allowing the operator to achieve its operational objectives.

(2) Before any approval takes effect, the operator must submit to the FAA:

(a) A written release of the U.S. Government from all damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in

⁷ This approval procedure applies to U.S. Government departments, agencies, or instrumentalities; it does not apply to the public. The FAA describes this procedure in the interest of providing transparency with respect to the FAA's process for interacting with U.S. Government departments, agencies, or instrumentalities that seek to engage U.S. civil aviation to operate in the area in which this SFAR prohibits their operations.

the specified areas of the Dnipropetrovsk FIR (UKDV); and

(b) The operator's written agreement to indemnify the U.S. Government with respect to any and all third-party damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising from or related to the approved operations in the specified areas of the Dnipropetrovsk FIR (UKDV).

(3) Other conditions the FAA may specify, including those the FAA might impose in OpSpecs or LOAs, as applicable.

The release and agreement to indemnify do not preclude an operator from raising a claim under an applicable non-premium war risk insurance policy the FAA issues under chapter 443 of title 49, U.S. Code.

If the FAA approves the proposed operation(s), the FAA will issue an OpSpec or LOA, as applicable, to the operator(s) identified in the original request authorizing them to conduct the approved operation(s). In addition, the FAA will notify the U.S. Government department, agency, or instrumentality that requested the FAA's approval of any additional conditions beyond those contained in the approval letter.

VI. Information Regarding Petitions for Exemption

Any operations not conducted under an approval the FAA issues through the approval process set forth previously may only occur in accordance with an exemption from SFAR No. 113, § 91.1607. A petition for exemption must comply with 14 CFR part 11. The FAA will consider whether exceptional circumstances exist beyond those the approval process described in the previous section contemplates. To determine whether a petition for exemption from the prohibition this SFAR establishes fulfills the standard of 14 CFR 11.81, the FAA consistently finds necessary the following information:

- The proposed operation(s), including the nature of the operation;
- The service the person(s) covered by the SFAR will provide;
- The specific locations in the specified areas of the Dnipropetrovsk FIR (UKDV) where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Dnipropetrovsk FIR (UKDV) and the airports, airfields, or landing zones at which the aircraft will take off and land;
- The method by which the operator will obtain current threat information and an explanation of how the operator

will integrate this information into all phases of its proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases); and

- The plans and procedures the operator will use to minimize the risks, identified in this preamble, to the proposed operations, to establish that granting the exemption would not adversely affect safety or would provide a level of safety at least equal to that provided by this SFAR. The FAA has found comprehensive, organized plans and procedures of this nature to be helpful in facilitating the agency's safety evaluation of petitions for exemption from flight prohibition SFARs.

The FAA includes, as a condition of each such exemption it issues, a release and agreement to indemnify, as described previously.

The FAA recognizes that, with the support of the U.S. Government, the governments of other countries could plan operations that SFAR No. 113, § 91.1607, affects. While the FAA will not permit these operations through the approval process, the FAA will consider exemption requests for such operations on an expedited basis and in accordance with the order of preference set forth in paragraph (c) of SFAR No. 113, § 91.1607.

If a petition for exemption includes security-sensitive or proprietary information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information appears in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

VII. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. In addition, DOT rulemaking procedures in subpart B of 49 CFR part 5 instruct DOT agencies to issue a regulation upon a reasoned determination that benefits exceed costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), as codified in 5 U.S.C. 603 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96-39), as codified in 19 U.S.C. Chapter 13, prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and,

where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as codified in 2 U.S.C. Chapter 25, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, the FAA has determined this final rule has benefits that justify its costs. This rule is a significant regulatory action, as defined in section 3(f) of Executive Order 12866 and DOT rulemaking procedures, as it raises novel policy issues. This rule also complies with the requirements of the Department of Transportation's administrative rule on rulemaking at 49 CFR part 5. As 5 U.S.C. 553 does not require notice and comment for this final rule, 5 U.S.C. 603 and 604 do not require regulatory flexibility analyses regarding impacts on small entities. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

This action does not extend the prohibition against certain U.S. civil flight operations in the specified areas of the Simferopol FIR (UKFV), which will expire on October 27, 2020. As a result of this expiration, U.S. civil operators will have additional routing options available to them, which may reduce flight times and operational costs for some flights, as SFAR No. 113, § 91.1607, will no longer require them to avoid the specified areas of the Simferopol FIR (UKFV) after that date.

This action also extends, without any changes to its boundaries, the prohibition against certain U.S. civil flight operations in the specified areas of the Dnipropetrovsk FIR (UKDV) for one additional year due to the significant, continuing hazards to U.S. civil aviation in that airspace, as described in the preamble to this final rule. Because this rule does not apply to the western portion of the Dnipropetrovsk FIR (UKDV), U.S. civil operators and airmen may continue to operate in that area. This action also continues to permit U.S. civil flight

operations to the extent necessary to conduct takeoffs and landings at three Ukrainian international airports near the western boundary of SFAR No. 113, § 91.1607, in the Dnipropetrovsk FIR (UKDV).

The FAA acknowledges the continuation of the flight prohibition in the specified areas of the Dnipropetrovsk FIR (UKDV) might result in additional costs to some U.S. operators, such as increased fuel costs and other operational-related costs. However, the FAA expects the benefits of this action exceed the costs because it will result in the avoidance of risks of fatalities, injuries, and property damage that could occur if a U.S. operator's aircraft were shot down (or otherwise damaged) while operating in the specified areas of the Dnipropetrovsk FIR (UKDV). The FAA will continue to monitor and evaluate the safety risks to U.S. civil operators and airmen as a result of the security conditions in the specified areas of the Dnipropetrovsk FIR (UKDV).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), in 5 U.S.C. 603, requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever 5 U.S.C. 553 or any other law requires an agency to publish a general notice of proposed rulemaking for any proposed rule. Similarly, 5 U.S.C. 604 requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553, after that section or any other law requires publication of a general notice of proposed rulemaking. The FAA concludes good cause exists to forgo notice and comment and to not delay the effective date for this rule. As 5 U.S.C. 553 does not require notice and comment in this situation, 5 U.S.C. 603 and 604 similarly do not require regulatory flexibility analyses.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of

international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from risks to their operations in the specified areas of the Dnipropetrovsk FIR (UKDV), a location outside the U.S. Therefore, the rule complies with the Trade Agreements Act of 1979.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) 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 an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$155 million in lieu of \$100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the FAA consider the impact of paperwork and other information collection burdens it imposes on the public. The FAA has determined no new requirement for information collection is associated with this final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, the FAA's policy is to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined no ICAO Standards and Recommended Practices correspond to this regulation. The FAA also finds this action is fully consistent with the obligations under 49 U.S.C. 40105(b)(1)(A) to ensure the FAA exercises its duties consistently with the obligations of the United States under international agreements.

While the FAA's flight prohibition does not apply to foreign air carriers, DOT codeshare authorizations prohibit foreign air carriers from carrying a U.S. codeshare partner's code on a flight segment that operates in airspace for which the FAA has issued a flight prohibition for U.S. civil aviation. In addition, foreign air carriers and other

foreign operators may choose to avoid, or be advised or directed by their civil aviation authorities to avoid, airspace for which the FAA has issued a flight prohibition for U.S. civil aviation.

G. Environmental Analysis

The FAA has analyzed this action under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, and DOT Order 5610.1C, Paragraph 16. Executive Order 12114 requires the FAA to be informed of environmental considerations and take those considerations into account when making decisions on major Federal actions that could have environmental impacts anywhere beyond the borders of the United States. The FAA has determined this action is exempt pursuant to Section 2–5(a)(i) of Executive Order 12114 because it does not have the potential for a significant effect on the environment outside the United States.

In accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 8–6(c), the FAA has prepared a memorandum for the record stating the reason(s) for this determination and has placed it in the docket for this rulemaking.

VIII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule will not have federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy, Supply, Distribution, or Use. The agency has determined it is not a “significant energy action” under the executive order and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges

involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This rule is not subject to the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, because the FAA is issuing with respect to a national security function of the United States.

IX. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of a rulemaking document may be obtained from the internet by—

- Searching the docket for this rulemaking at <https://www.regulations.gov>;
- Visiting the FAA's Regulations and Policies web page at https://www.faa.gov/regulations_policies; or
- Accessing the Government Publishing Office's website at <https://www.govinfo.gov>.

Copies may also be obtained by sending a request (identified by amendment or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677.

Except for classified material, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the docket for this rulemaking.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104-121) (set forth as a note to 5 U.S.C. 601) requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the persons listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out

more about SBREFA on the internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Ukraine.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

- 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506-46507, 47122, 47508, 47528-47531, 47534, Pub. L. 114-190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

- 2. Revise § 91.1607 to read as follows:

§ 91.1607 Special Federal Aviation Regulation No. 113—Prohibition Against Certain Flights in Specified Areas of the Dnipropetrovsk Flight Information Region (FIR) (UKDV).

(a) *Applicability.* This Special Federal Aviation Regulation (SFAR) applies to the following persons:

- (1) All U.S. air carriers and U.S. commercial operators;
- (2) All persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and
- (3) All operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier.

(b) *Flight prohibition.* Except as provided in paragraphs (c) and (d) of this section, no person described in paragraph (a) of this section may conduct flight operations in the Dnipropetrovsk FIR (UKDV) from the surface to unlimited, east of a line drawn direct from ABDAR (471802N 351732E) along airway M853 to NIKAD (485946N 355519E), then along airway N604 to GOBUN (501806N 373824E). This prohibition applies to airways M853 and N604.

(c) *Permitted operations.* This section does not prohibit persons described in paragraph (a) of this section from conducting flight operations in the specified areas described in paragraph (b) of this section, under the following circumstances:

(1) Operations are permitted to the extent necessary to take off from and land at the following three airports, subject to the approval of, and in accordance with the conditions established by, the appropriate authorities of Ukraine:

(i) Kharkiv International Airport (UKHH);

(ii) Dnipropetrovsk International Airport (UKDD); and

(iii) Zaporizhzhia International Airport (UKDE).

(2) Operations are permitted provided that they are conducted under a contract, grant, or cooperative agreement with a department, agency, or instrumentality of the U.S. Government (or under a subcontract between the prime contractor of the department, agency, or instrumentality of the U.S. Government and the person described in paragraph (a) of this section) with the approval of the FAA, or under an exemption issued by the FAA. The FAA will consider requests for approval or exemption in a timely manner, with the order of preference being: First, for those operations in support of U.S. Government-sponsored activities; second, for those operations in support of government-sponsored activities of a foreign country with the support of a U.S. Government department, agency, or instrumentality; and third, for all other operations.

(d) *Emergency situations.* In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from this section to the extent required by that emergency. Except for U.S. air carriers and commercial operators that are subject to the requirements of 14 CFR part 119, 121, 125, or 135, each person who deviates from this section must, within 10 days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the responsible Flight Standards office a complete report of the operations of the aircraft involved in the deviation, including a description of the deviation and the reasons for it.

(e) *Expiration.* This SFAR will remain in effect until October 27, 2021. The FAA may amend, rescind, or extend this SFAR as necessary.

(f) *Definition.* For purposes of this section, the Dnipropetrovsk FIR (UKDV) is defined as that airspace from the surface to unlimited within the lateral limits in figure 1 to this paragraph (f):

BILLING CODE 4910-13-P

Figure 1 to paragraph (f)

511400N 0342700E-504942N 0341300E-
 502043N 0335720E-501246N 0335307E-
 491848N 0333700E-485700N 0332200E-
 484118N 0324431E-483620N 0324010E-
 483128N 0323605E-482300N 0323900E-
 480730N 0325324E-474600N 0325000E-
 474400N 0330300E-472700N 0344800E-
 470630N 0355500E-465800N 0360000E-
 463500N 0364200E-463424N 0372206E-
 463930N 0372518E-464700N 0373000E-
 465900N 0382000E-470642N 0381324E-
 then along state boundary to 511400N 0342700.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5), on September 24, 2020.

Steve Dickson,
Administrator.

[FR Doc. 2020-22041 Filed 10-15-20; 8:45 am]

BILLING CODE 4910-13-C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA-2018-0927; Amdt. No. 91-353A]

RIN 2120-AL56

Prohibition Against Certain Flights in the Baghdad Flight Information Region (FIR) (ORBB)

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

ACTION: Final rule.

SUMMARY: This action amends and extends, with modifications to reflect conditions in Iraq and the risks to U.S.

civil aviation, the Special Federal Aviation Regulation (SFAR) prohibiting certain flight operations in the Baghdad Flight Information Region (FIR) (ORBB) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. The FAA finds this action necessary to address the risks to the safety of persons and aircraft engaged in such flight operations. Specifically, this action amends the SFAR to prohibit U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes below Flight Level (FL) 320. This rule amends the SFAR prohibition from altitudes below FL260 to altitudes below FL320, based on an assessment of the current aviation safety risks. This action also extends the expiration date of the SFAR from October 26, 2020, to October 26, 2022. Additionally, the FAA republishes the approval process and exemption information for this SFAR, consistent with other recently published

flight prohibition SFARs, and makes minor administrative revisions.

DATES: This final rule is effective on October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Stephen Moates, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202-267-4147; email stephen.moates@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This action amends, with modifications to reflect conditions in Iraq and the risks to U.S. civil aviation, the prohibition against certain U.S. civil flight operations in the Baghdad FIR (ORBB) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. Specifically, this amendment prohibits all persons described in paragraph (a) of

SFAR No. 77, § 91.1605 of title 14, Code of Federal Regulations (CFR), from conducting civil flight operations in the Baghdad FIR (ORBB) at altitudes below FL320. NOTAM KICZ A0036/20, which prohibits U.S. civil aviation operations in the entire Baghdad FIR (ORBB) at all altitudes, will remain in effect following publication of this final rule. This approach maintains flexibility for the FAA to revisit the all-altitude flight prohibition as necessary to determine whether U.S. civil aviation operations can occur safely in the Baghdad FIR (ORBB) at altitudes at or above FL320.

This action also makes several other amendments to the SFAR. This action extends the expiration date of this SFAR from October 26, 2020, to October 26, 2022; republishes the approval process and exemption information for this SFAR, consistent with other recently published flight prohibition SFARs; and makes minor administrative revisions.

II. Legal Authority and Good Cause

A. Legal Authority

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. Sections 106(f) and (g) of title 49, U.S. Code (U.S.C.), subtitle I, establish the FAA Administrator's authority to issue rules on aviation safety. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the Agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise this authority consistently with the obligations of the U.S. Government under international agreements.

The FAA is promulgating this rulemaking under the authority described in 49 U.S.C. 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures that the Administrator finds necessary for safety in air commerce and national security.

This regulation is within the scope of the FAA's authority because it prohibits the persons described in paragraph (a) of SFAR No. 77, § 91.1605, from conducting flight operations in the Baghdad FIR (ORBB) at altitudes below FL320 due to the hazards to the safety

of U.S. civil flight operations, as described in the preamble to this final rule.

B. Good Cause for Immediate Adoption

Section 553(b)(3)(B) of title 5, U.S. Code, 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." Section 553(d) also authorizes agencies to forgo the delay in the effective date of the final rule for good cause found and published with the rule. In this instance, the FAA finds good cause exists to forgo notice and comment because notice and comment would be impracticable and contrary to the public interest. In addition, it is contrary to the public interest to delay the effective date of this SFAR.

The risk environment for U.S. civil aviation in airspace other countries manage with respect to safety of flight is fluid because of the risks posed by weapons capable of targeting, or otherwise negatively affecting, U.S. civil aviation, as well as other hazards to U.S. civil aviation associated with fighting, extremist or militant activity, or heightened tensions. This fluidity and the need for the FAA to rely upon classified information in assessing these risks make issuing notice and seeking comments impracticable and contrary to the public interest. With respect to the impracticability of notice and comment procedures, the potential for rapid changes in the risks to U.S. civil aviation significantly limits how far in advance of a new or amended flight prohibition the FAA can usefully assess the risk environment. Furthermore, to the extent that these rules and any amendments to them are based upon classified information, the FAA is not legally permitted to share such information with the general public, who cannot comment meaningfully on information to which they are not legally allowed access.

Under these conditions, public interest considerations favor not providing notice and seeking comment for this rule. While there is a public interest in having an opportunity for the public to comment on agency action, there is a greater public interest in having the FAA's flight prohibitions, and any amendments thereto, reflect the Agency's current understanding of the risk environment for U.S. civil aviation. This allows the FAA to protect the safety of U.S. operators' aircraft and the lives of their passengers and crews without overrestricting U.S. operators' routing options.

Based on concerns for safety of the operations of persons described in paragraph (a) of SFAR No. 77, § 91.1605, in the Baghdad FIR (ORBB) at altitudes below FL320, this rule is necessary and its effective date should not be subject to delay. Good cause exists for not delaying the effective date, based on the current risk assessment of the environment in which this SFAR prohibits U.S. civil aviation operations. As such, public interest favors not subjecting this rule to public comment and not delaying the effective date. The FAA maintains NOTAM KICZ A0036/20's all-altitude prohibition on U.S. civil aviation operations in the Baghdad FIR (ORBB), but does not incorporate the portion of that prohibition that applies to U.S. civil aviation operations at altitudes at or above FL320 into the CFR. This course of action is consistent with the FAA's approach of making decisions based on risk and will provide flexibility.

Based on the foregoing, the FAA finds good cause exists to forgo notice and comment and any delay in the effective date for this rule.

III. Background

On October 26, 2018, the FAA reissued SFAR No. 77, § 91.1605. As reissued, SFAR No. 77, § 91.1605, prohibited U.S. civil flight operations in the Baghdad FIR (ORBB) at altitudes below FL260, subject to certain limited exceptions described in the 2018 final rule.¹ The reissued SFAR No. 77, § 91.1605, permitted the persons described in paragraph (a) of the rule to operate at altitudes below FL260 in the Baghdad FIR (ORBB) to the extent necessary to climb out of, or descend into, the Kuwait FIR (OKAC), subject to the approval of, and in accordance with the conditions established by, the appropriate authorities of Iraq. The 2018 final rule also included an expiration date of October 26, 2020.

In issuing the 2018 final rule, the FAA stated it had determined the situation in the Baghdad FIR (ORBB) remained hazardous for U.S. civil aviation at altitudes below FL260, subject to limited exceptions.² A continuing risk to U.S. civil aviation existed from the potential for fighting in certain areas of northern and western Iraq between the Islamic State of Iraq and ash-Sham (ISIS), other extremist or militant elements, Iraqi security forces, and other elements. ISIS and other extremist or militant elements possessed a variety of

¹ Prohibition Against Certain Flights in the Baghdad Flight Information Region (FIR) (ORBB) final rule, 83 FR 53985, October 26, 2018.

² Id.

anti-aircraft-capable weapons, including man-portable air defense systems (MANPADS), and had fired on military aircraft during combat operations in Iraq. This presented a continued risk of anti-aircraft fire against civil aircraft, particularly in areas where fighting might occur. A risk of potential hostile activity by ISIS elements or other anti-U.S. militants or extremists elsewhere in Iraq also existed.

Following the 2018 final rule, the FAA continued to monitor the risks to U.S. civil aviation in the Baghdad FIR (ORBB). After the United States withdrew from the Joint Comprehensive Plan for Action (the “Iran Nuclear Agreement”) in May 2018 and designated Iran’s Islamic Revolutionary Guard Corps (IRGC) as a Foreign Terrorist Organization in April 2019, Iran took a series of steps that heightened regional tensions. Specifically, Iran began posturing military capabilities on its southern coast to project strength and influence in the Persian Gulf and Gulf of Oman region. Additionally, the United States assessed Iran to have been responsible for sabotage attacks on multiple merchant vessels in the region in May 2019. On June 19, 2019, Universal Coordinated Time (UTC), IRGC elements shot down a U.S. military Global Hawk unmanned aircraft operating in airspace over the Gulf of Oman with a surface-to-air missile (SAM) system. The successful intercept of the unmanned aircraft followed a June 13, 2019, UTC, failed intercept attempt of a U.S. unmanned aircraft conducting observation of damaged oil tankers in the Gulf of Oman. In mid-September 2019, the United States assessed Iranian forces to have been responsible for conducting a complex attack using unmanned aircraft systems (UAS) and missiles to target Saudi Aramco’s energy infrastructure. In late-December 2019, IRGC-aligned militia groups conducted a rocket attack targeting U.S. forces located at a coalition base near Kirkuk, Iraq, resulting in casualties and precipitating U.S. retaliatory airstrikes on IRGC-aligned militia-associated facilities in Iraq and Syria.

On January 2, 2020, UTC, U.S. forces conducted an airstrike near Baghdad International Airport (ORBI) in Iraq, which killed IRGC Quds Force Commander Qassem Soleimani. In a televised address, Iranian Supreme Leader Ali Khamenei stated Iran would engage in “harsh retaliation” for Soleimani’s death.

On January 7, 2020, UTC, Iran conducted retaliatory ballistic missile strikes targeting U.S. air bases in Iraq.

To address immediate safety-of-flight hazards following this event, the FAA issued NOTAMs KICZ A0001/20, A0002/20, and A0003/20, which prohibited U.S. civil flight operations in the Baghdad FIR (ORBB), the Tehran FIR (OIIX), and the overwater airspace above the Persian Gulf and the Gulf of Oman, respectively.³

By February 2020, regional military activity had de-escalated, and regional political tensions, although still elevated, had diminished. As a result, the FAA assessed U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes at or above FL320 and determined such operations could resume safely. However, the FAA determined there remained an unacceptable level of risk to U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes below FL320, due to heightened IRGC-aligned militia activities and continued elevated tensions in the region. As a result, on February 27, 2020, UTC, the FAA issued NOTAM KICZ A0032/20, which replaced NOTAM KICZ A0001/20 and allowed U.S. civil aviation operations in the Baghdad FIR (ORBB) to resume at altitudes at or above FL320. NOTAM KICZ A0032/20 continued to prohibit U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes below FL320, including descents into and departures from the Kuwait FIR (OKAC).

Following the issuance of NOTAM KICZ A0032/20, the FAA continued to monitor the situation closely, given the fluid and tense security environment in Iraq. On March 11, 2020, UTC, likely IRGC-aligned militia elements conducted a rocket attack against Taji Military Complex, resulting in the death of two U.S. soldiers and one British soldier. Following this event, on March 12, 2020, UTC, the FAA issued NOTAM KICZ A0036/20, prohibiting U.S. civil aviation operations in the Baghdad FIR (ORBB) at all altitudes once again due to heightened militia activities and increased tensions in Iraq, which presented an inadvertent risk to U.S. civil aviation operations due to the potential for miscalculation or misidentification.

IV. Discussion of the Final Rule

The FAA has determined the situation in the Baghdad FIR (ORBB) continues to present an unacceptable level of risk for U.S. civil aviation, especially for operations that occur below FL320. Shortly after the FAA issued NOTAM KICZ A0036/20, on March 14, 2020,

³ To be clear, the scope of the rulemaking action taken here is limited to the Baghdad FIR (ORBB).

UTC, a second rocket attack against Taji Military Complex occurred, resulting in at least five injuries. Additionally, on April 6, 2020, UTC, an indirect fire attack occurred in close proximity to a U.S. energy company facility in southern Iraq. Even though no reported damage or casualties occurred as a result of the April 6, 2020, UTC, attack, this event demonstrates the risk to U.S. interests in Iraq. Although the perpetrators of the recent attacks against the Taji Military Complex and the attack near the U.S. energy company facility in southern Iraq remain unidentified, Iranian-backed militia groups targeting U.S. interests in Iraq likely committed the attacks. In late May 2020, an IRGC-aligned militia group claimed to have fired MANPADS targeting a U.S. military helicopter operating south of Baghdad on April 17, 2020. IRGC-aligned militia groups continued to conduct harassing indirect fire attacks targeting U.S. forces and interests in Iraq, including multiple incidents directed at U.S. interests collocated at Baghdad International Airport (ORBI). The latest such incident took place on September 10, 2020, when three rockets impacted near Baghdad International Airport (ORBI), with one round hitting the airport parking garage.

During 2019 and 2020, the security environment in Iraq evolved such that the primary sources of risk to U.S. civil aviation operations below FL320 in the Baghdad FIR (ORBB) include not just the ISIS threat but also IRGC-aligned militia attacks on, and threats against, U.S. interests in Iraq. In addition to the previously described attacks on Taji Military Complex and the U.S. energy company facility in southern Iraq, IRGC-aligned militia groups continue to call for the expulsion of U.S. and other coalition armed forces from Iraq. IRGC-aligned militia groups are also likely responsible for multiple indirect fire attacks targeting U.S. and other coalition armed forces, as well as ongoing, intermittent rocket attacks targeting the U.S. Embassy and Baghdad International Airport (ORBI). Such attacks pose a risk to airports and airbases, aircraft on the ground, and aircraft operating at low altitudes, including during the arrival and departure phases of flight.

In addition, the FAA is concerned about risks to aviation safety that anti-U.S. IRGC-aligned militia groups might present. Such groups, armed with various anti-aircraft capabilities, including light anti-aircraft artillery and MANPADS, have publicly threatened to defend their locations, following a string of third party airstrikes in 2019. These groups might respond similarly in the

event that U.S. or other coalition forces conduct retaliatory airstrikes.

The FAA considered several other factors in assessing risk to U.S. civil aviation safety in the Baghdad FIR (ORBB). For example, Iran has a history of proliferating advanced weapons capabilities, including advanced anti-aircraft weapons, to its proxy groups, and the FAA remains concerned Iran may provide IRGC-aligned militia groups with advanced anti-aircraft weapons capable of engaging aircraft at altitudes below FL320. Moreover, both Iran and Turkey recently conducted small-scale attacks along and across the northern and eastern borders of Iraq with little or no warning. Finally, fielded GPS jammers pose a continuing potential inadvertent risk to U.S. civil aviation operations in the Baghdad FIR (ORBB). Taken as a whole, the complex security environment in Iraq makes it challenging to de-conflict military activities from civil air traffic, increasing the risk of an accidental shoot down of a civil aircraft due to miscalculation or misidentification.

The FAA's concerns for the safety of U.S. civil aviation operations in the Baghdad FIR (ORBB) include operations to descend into, or depart from, the Kuwait FIR (OKAC), given the evolution in the sources of risk to U.S. civil aviation to include IRGC-aligned militia attacks on, and threats against, U.S. interests. The FAA has determined potential IRGC-aligned militia activity in southern Iraq presents an unacceptable risk to U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes below FL320, including flights departing from, or descending into, the Kuwait FIR (OKAC).

The FAA is cognizant of the fact that, in May 2020, Iraq formed a new government, led by Prime Minister Mustafa al-Kadhimi. The newly formed Government of Iraq has worked with the U.S. Government to reduce risks to civil aviation operations in the Baghdad FIR (ORBB). The newly formed Government of Iraq has publicly declared its intent to rein in non-state actors and has already initiated steps toward eliminating the influence of IRGC-aligned militia groups at Baghdad International Airport (ORBI). If successful in curbing harassing attacks on U.S. interests in Iraq, these efforts may reduce the risk of further escalation, thereby reducing the inadvertent risk to U.S. civil aviation overflights from anti-aircraft weapons activity.

The FAA appreciates the Government of Iraq's expressed intent to improve the safety of civil aviation in the Baghdad FIR (ORBB), as well as the continuing

diplomatic and technical engagements between the Government of the United States and the Government of Iraq on this matter. While the FAA welcomes the Government of Iraq's efforts to reduce aviation safety risks, the Government of Iraq currently has not sufficiently abated risks to the safety in the Baghdad FIR (ORBB) at altitudes below FL320 for U.S. civil flights to resume at those altitudes, given the complex security environment in Iraq. Amending SFAR No. 77, § 91.1605, to prohibit U.S. civil aviation operations in the Baghdad FIR (ORBB) at altitudes below FL320 is necessary to protect U.S. civil aviation. Therefore, based on the foregoing discussion, the final rule prohibits U.S. civil flight operations in the Baghdad FIR (ORBB) at altitudes below FL320. Additionally, given that the security environment in Iraq currently remains fluid and tense, the FAA remains concerned about the safety of U.S. civil aviation operations in the Baghdad FIR (ORBB). As a result, NOTAM KICZ A0036/20 will remain in effect following publication of this SFAR. This approach maintains flexibility for the FAA to revisit the all-altitude flight prohibition as necessary to determine whether U.S. civil aviation operations can occur safely in the Baghdad FIR (ORBB) at altitudes at or above FL320.

Further, the FAA extends the expiration date of SFAR No. 77, § 91.1605, from October 26, 2020, until October 26, 2022. The FAA also republishes the details concerning the approval and exemption processes in Sections V and VI of this preamble, consistent with other recently published flight prohibition SFARs, to enable interested persons to refer to this final rule for comprehensive information about requesting relief from the FAA from the provisions of SFAR No. 77, § 91.1605.

Amendments to SFAR No. 77, § 91.1605 might be appropriate if the risk to aviation safety and security changes. In this regard, the FAA will continue to monitor the situation and evaluate the extent to which persons described in paragraph (a) of this rule might be able to operate safely in the Baghdad FIR (ORBB).

Lastly, the FAA makes minor administrative revisions to SFAR No. 77, § 91.1605, including updating the applicability paragraph of the regulatory text to make it consistent with other recently published flight prohibition SFARs.

V. Approval Process Based on a Request From a Department, Agency, or Instrumentality of the United States Government

A. Approval Process Based on an Authorization Request From a Department, Agency, or Instrumentality of the United States Government⁴

In some instances, U.S. Government departments, agencies, or instrumentalities may need to engage U.S. civil aviation to support their activities in the Baghdad FIR (ORBB) at altitudes below FL320. If a department, agency, or instrumentality of the U.S. Government determines that it has a critical need to engage any person described in SFAR No. 77, § 91.1605, including a U.S. air carrier or commercial operator, to transport civilian or military passengers or cargo or conduct other operations in the Baghdad FIR (ORBB), that department, agency, or instrumentality may request the FAA to approve persons described in paragraph (a) of SFAR No. 77, § 91.1605, to conduct such operations.

The requesting department, agency, or instrumentality of the U.S. Government must submit the request for approval to the FAA's Associate Administrator for Aviation Safety in a letter signed by an appropriate senior official of the requesting department, agency, or instrumentality.⁵ The FAA will not accept or consider requests for approval from anyone other than the requesting department, agency, or instrumentality. In addition, the senior official signing the letter requesting FAA approval on behalf of the requesting department, agency, or instrumentality must be sufficiently positioned within the organization to demonstrate that the

⁴ U.S. civil aviation overflights of the Baghdad FIR (ORBB) at or above FL320 only require relief from NOTAM KICZ A0036/2020. The FAA generally would need the same categories of information, addressing the altitudes at which the proposed operation would take place, to consider a request for relief from the NOTAM as it would a request for relief from the SFAR. If the proposed operations would involve U.S. civil flights in the Baghdad FIR (ORBB) at altitudes below FL320, then the operator would require relief from both the NOTAM and the SFAR. In the interests of efficiency, the U.S. Government department, agency, or instrumentality may make a single request for approval to the FAA, which the FAA will construe as a request for both forms of relief, if both forms of relief would be necessary to conduct the proposed operations.

⁵ This approval procedure applies to U.S. Government departments, agencies, or instrumentalities; it does not apply to the public. The FAA describes this procedure in the interest of providing transparency with respect to the FAA's process for interacting with U.S. Government departments, agencies, or instrumentalities that seek to engage U.S. civil aviation to operate within the area in which this SFAR prohibits their operations.

senior leadership of the requesting department, agency, or instrumentality supports the request for approval and is committed to taking all necessary steps to minimize operational risks to the proposed flights. The senior official must also be in a position to: (1) Attest to the accuracy of all representations made to the FAA in the request for approval, and (2) ensure that any support from the requesting U.S. Government department, agency, or instrumentality described in the request for approval is in fact brought to bear and is maintained over time. Unless justified by exigent circumstances, requests for approval must be submitted to the FAA no less than 30 calendar days before the date on which the requesting department, agency, or instrumentality wishes the proposed operation(s) to commence.

The requestor must send the request to the Associate Administrator for Aviation Safety, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591. Electronic submissions are acceptable and the requesting entity may request that the FAA notify it electronically as to whether the FAA grants the approval request. If a requestor wishes to make an electronic submission to the FAA, the requestor should contact the Air Transportation Division, Flight Standards Service, at (202) 267-8166, to obtain the appropriate email address. A single letter may request approval from the FAA for multiple persons described in SFAR No. 77, § 91.1605, or for multiple flight operations. To the extent known, the letter must identify the person(s) expected to be covered under the SFAR on whose behalf the U.S. Government department, agency, or instrumentality seeks FAA approval, and it must describe—

- The proposed operation(s), including the nature of the mission being supported;
- The service that the person(s) covered by the SFAR will provide;
- To the extent known, the specific locations in the Baghdad FIR (ORBB) at altitudes below FL320 where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the Baghdad FIR (ORBB) at altitudes below FL320, and the airports, airfields, or landing zones at which the aircraft will take off and land; and
- The method by which the department, agency, or instrumentality will provide, or how the operator will otherwise obtain, current threat information and an explanation of how the operator will integrate this

information into all phases of the proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases).

The request for approval must also include a list of operators with whom the U.S. Government department, agency, or instrumentality requesting FAA approval has a current contract(s), grant(s), or cooperative agreement(s) (or its prime contractor has a subcontract(s)) for specific flight operations in the Baghdad FIR (ORBB) at altitudes below FL320. The requestor may identify additional operators to the FAA at any time after the FAA issues its approval. Neither the operators listed in the original request, nor any operators the requestor subsequently seeks to add, may commence operations under the approval until the FAA issues them an Operations Specification (OpSpec) or Letter of Authorization (LOA), as appropriate, for operations in the Baghdad FIR (ORBB) at altitudes below FL320.⁶ The approval conditions discussed below apply to all operators, whether included in the original list or subsequently added to the approval. Requestors should send updated lists to the email address to be obtained from the Air Transportation Division by calling (202) 267-8166.

If an approval request includes classified information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

FAA approval of an operation under SFAR No. 77, § 91.1605, does not relieve persons subject to this SFAR of the responsibility to comply with all other applicable FAA rules, regulations, and orders, including flight prohibition NOTAMs. Operators of civil aircraft must comply with the conditions of their certificates, OpSpecs, and LOAs, as applicable. Operators must also comply with all rules and regulations of other U.S. Government departments or agencies that may apply to the proposed operation(s), including, but not limited to, regulations issued by the Transportation Security Administration.

B. Approval Conditions

If the FAA approves the request, the FAA's Aviation Safety Organization will send an approval letter to the requesting department, agency, or instrumentality informing it that the FAA's approval is

⁶ If the FAA also approves operations under NOTAM KICZ A0036/20, then the OpSpec or LOA, as appropriate, will apply to operations in the Baghdad FIR (ORBB) at all altitudes.

subject to all of the following conditions:

(1) The approval will stipulate those procedures and conditions that limit, to the greatest degree possible, the risk to the operator, while still allowing the operator to achieve its operational objectives.

(2) Before any approval takes effect, the operator must submit to the FAA:

(a) A written release of the U.S. Government from all damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the Baghdad FIR (ORBB) at altitudes below FL320; and

(b) The operator's written agreement to indemnify the U.S. Government with respect to any and all third-party damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising from or related to the approved operations in the Baghdad FIR (ORBB) at altitudes below FL320.⁷

(3) Other conditions the FAA may specify, including those the FAA might impose in OpSpecs or LOAs, as applicable.

The release and agreement to indemnify do not preclude an operator from raising a claim under an applicable non-premium war risk insurance policy the FAA issues under chapter 443 of title 49, U.S. Code.

If the FAA approves the proposed operation(s), the FAA will issue an OpSpec or LOA, as applicable, to the operator(s) identified in the original request, authorizing them to conduct the approved operation(s). In addition, the FAA will notify the department, agency, or instrumentality that requested the FAA's approval of any additional conditions beyond those contained in the approval letter.

VI. Information Regarding Petitions for Exemption

Any operations not conducted under an approval the FAA issues through the approval process set forth previously may occur only in accordance with an exemption from SFAR No. 77, § 91.1605.⁸ A petition for exemption

⁷ If the FAA approves operations under NOTAM KICZ A0036/20, alone or in addition to the SFAR, then the release and agreement to indemnify must cover all altitudes.

⁸ U.S. civil aviation overflights of the Baghdad FIR (ORBB) at altitudes at or above FL320 only require relief from NOTAM KICZ A0036/20. The FAA generally would need the same categories of information, addressing the altitudes at which the proposed operation will be conducted, to consider a request for relief from the NOTAM as it would a petition for exemption from the SFAR. If the proposed operations would involve U.S. civil

must comply with 14 CFR part 11. The FAA will consider whether exceptional circumstances exist beyond those that the approval process described in the previous section contemplates. To determine whether a petition for exemption from the prohibition this SFAR establishes fulfills the standard of 14 CFR 11.81, the FAA consistently finds necessary the following information:

- The proposed operation(s), including the nature of the operation;
- The service the person(s) covered by the SFAR will provide;
- The specific locations in the Baghdad FIR (ORBB) at altitudes below FL320 where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the Baghdad FIR (ORBB) at altitudes below FL320 and the airports, airfields, or landing zones at which the aircraft will take off and land;
- The method by which the operator will obtain current threat information and an explanation of how the operator will integrate this information into all phases of its proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases); and
- The plans and procedures the operator will use to minimize the risks, identified in this preamble, to the proposed operations, to establish that granting the exemption would not adversely affect safety or would provide a level of safety at least equal to that provided by this SFAR. The FAA has found comprehensive, organized plans and procedures of this nature to be helpful in facilitating the Agency's safety evaluation of petitions for exemption from flight prohibition SFARs.

The FAA includes, as a condition of each such exemption it issues, a release and agreement to indemnify, as described previously.⁹

The FAA recognizes that, with the support of the U.S. Government, the governments of other countries could plan operations that SFAR No. 77, § 91.1605, affects. While the FAA will not permit these operations through the approval process, the FAA will consider

exemption requests for such operations on an expedited basis and in accordance with the order of preference set forth in paragraph (c) of SFAR No. 77, § 91.1605.

If a petition for exemption includes security-sensitive or proprietary information, requestors may contact Aviation Safety Inspector Stephen Moates for instructions on submitting it to the FAA. His contact information appears in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

VII. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. In addition, DOT rulemaking procedures in subpart B of 49 CFR part 5 instruct DOT agencies to issue a regulation upon a reasoned determination that benefits exceed costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), as codified in 5 U.S.C. 603 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96–39), as codified in 19 U.S.C. Chapter 13, prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as codified in 2 U.S.C. Chapter 25, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, the FAA has determined this final rule has benefits that justify its costs. This rule is a significant regulatory action, as defined in section 3(f) of Executive Order 12866 and DOT rulemaking procedures, as it raises novel policy issues. This rule also complies with the requirements of the Department of Transportation's administrative rule on rulemaking at 49 CFR part 5. As 5 U.S.C. 553 does not require notice and comment for this final rule, 5 U.S.C. 603

and 604 do not require regulatory flexibility analyses regarding impacts on small entities. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

This rule prohibits U.S. civil flights in the Baghdad FIR (ORBB) at altitudes below FL320, due to the significant, continuing hazards to U.S. civil aviation detailed in the preamble of this final rule.¹⁰ This action also extends the expiration date of this rule for an additional two years. U.S. Government departments, agencies and instrumentalities may take advantage of the approval process on behalf of U.S. operators and airmen with whom they have a contract, grant, or cooperative agreement, or with whom their prime contractor has a subcontract. U.S. operators and airmen who seek to conduct operations in the Baghdad FIR (ORBB) at altitudes below FL320 without any of the foregoing types of arrangements with the U.S. Government may petition for exemption from this rule.

The FAA acknowledges this flight prohibition might result in additional costs to some U.S. operators, such as increased fuel costs and other operational-related costs. However, the FAA expects the benefits of this action exceed the costs because it will result in the avoidance of risks of fatalities, injuries, and property damage that could occur if a U.S. operator's aircraft were shot down (or otherwise damaged) while operating in the Baghdad FIR (ORBB) at altitudes below FL320. The FAA will continue to monitor and evaluate the risks to U.S. civil operators and airmen as a result of security conditions in the Baghdad FIR (ORBB).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), in 5 U.S.C. 603, requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever 5 U.S.C. 553 or any other law requires an agency to publish a general notice of proposed rulemaking for any proposed rule. Similarly, 5 U.S.C. 604 requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule

flights in the Baghdad FIR (ORBB) at altitudes below FL320, then the operator would require relief from both the NOTAM and the SFAR. In the interests of efficiency, the operator may make a single request to the FAA for both forms of relief, which the FAA will construe as a request for relief from the NOTAM and a petition for exemption from the SFAR, if both forms of relief would be necessary to conduct the proposed operations.

⁹ If the FAA grants a petition for exemption for an operation under NOTAM KICZ A0036/20, alone or in addition to the SFAR, then the release and agreement to indemnify will cover all altitudes.

¹⁰ As described previously, the FAA also maintains the all-altitude flight prohibition contained in NOTAM KICZ A0036/20 due to continued safety hazards that extend well above FL320.

under 5 U.S.C. 553, after that section or any other law requires publication of a general notice of proposed rulemaking. The FAA concludes good cause exists to forgo notice and comment and to not delay the effective date for this rule. As 5 U.S.C. 553 does not require notice and comment in this situation, 5 U.S.C. 603 and 604 similarly do not require regulatory flexibility analyses.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from risks to their operations in the Baghdad FIR (ORBB), a location outside the U.S. Therefore, the rule is in compliance with the Trade Agreements Act of 1979.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) 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 an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$155 million in lieu of \$100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the FAA to consider the impact of paperwork and other information collection burdens it imposes on the public. The FAA has determined no new requirement for information collection is associated with this final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, the FAA’s policy is to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined no ICAO Standards and Recommended Practices correspond to this regulation. The FAA also finds this action is fully consistent with the obligations under 49 U.S.C. 40105(b)(1)(A) to ensure the FAA exercises its duties consistently with the obligations of the United States under international agreements.

While the FAA’s flight prohibition does not apply to foreign air carriers, DOT codeshare authorizations prohibit foreign air carriers from carrying a U.S. codeshare partner’s code on a flight segment that operates in airspace for which the FAA has issued a flight prohibition for U.S. civil aviation. In addition, foreign air carriers and other foreign operators may choose to avoid, or be advised or directed by their civil aviation authorities to avoid, airspace for which the FAA has issued a flight prohibition for U.S. civil aviation.

G. Environmental Analysis

The FAA has analyzed this action under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, and DOT Order 5610.1C, Paragraph 16. Executive Order 12114 requires the FAA to be informed of environmental considerations and take those considerations into account when making decisions on major Federal actions that could have environmental impacts anywhere beyond the borders of the United States. The FAA has determined this action is exempt pursuant to Section 2–5(a)(i) of Executive Order 12114 because it does not have the potential for a significant effect on the environment outside the United States.

In accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 8–6(c), the FAA has prepared a memorandum for the record stating the reason(s) for this determination and has placed it in the docket for this rulemaking.

VIII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. The Agency has determined this action will not have a substantial direct effect on the States,

or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule will not have federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined it is not a “significant energy action” under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This rule is not subject to the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, because the FAA is issuing it with respect to a national security function of the United States.

IX. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of a rulemaking document may be obtained from the internet by—

- Searching the docket for this rulemaking at <https://www.regulations.gov>;
- Visiting the FAA’s Regulations and Policies web page at https://www.faa.gov/regulations_policies; or
- Accessing the Government Publishing Office’s website at <https://www.govinfo.gov>.

Copies may also be obtained by sending a request (identified by amendment or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking,

ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677.

Except for classified material, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the docket for this rulemaking.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104-121) (set forth as a note to 5 U.S.C. 601) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the persons listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Iraq.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

- 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506-46507, 47122, 47508, 47528-47531, 47534, Pub. L. 114-190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

- 2. Revise § 91.1605 to read as follows:

§ 91.1605 Special Federal Aviation Regulation No. 77—Prohibition Against Certain Flights in the Baghdad Flight Information Region (FIR) (ORBB).

(a) *Applicability.* This section applies to the following persons:

(1) All U.S. air carriers and U.S. commercial operators;

(2) All persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and

(3) All operators of civil aircraft registered in the United States, except when the operator of such aircraft is a foreign air carrier.

(b) *Flight prohibition.* Except as provided in paragraphs (c) and (d) of this section, no person described in paragraph (a) of this section may conduct flight operations in the Baghdad Flight Information Region (FIR) (ORBB) at altitudes below Flight Level (FL) 320.

(c) *Permitted operations.* This section does not prohibit persons described in paragraph (a) of this section from conducting flight operations in the Baghdad FIR (ORBB) at altitudes below FL320, provided that such flight operations occur under a contract, grant, or cooperative agreement with a department, agency, or instrumentality of the U.S. Government (or under a subcontract between the prime contractor of the department, agency, or instrumentality, and the person described in paragraph (a) of this section) with the approval of the FAA, or under an exemption issued by the FAA. The FAA will consider requests for approval or exemption in a timely manner, with the order of preference being: first, for those operations in support of U.S. Government-sponsored activities; second, for those operations in support of government-sponsored activities of a foreign country with the support of a U.S. Government department, agency, or instrumentality; and third, for all other operations.

(d) *Emergency situations.* In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from this section to the extent required by that emergency. Except for U.S. air carriers and commercial operators that are subject to the requirements of part 119, 121, 125, or 135 of this chapter, each person who deviates from this section must, within 10 days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the responsible Flight Standards office a complete report of the operations of the aircraft involved in the deviation, including a description of the deviation and the reasons for it.

(e) *Expiration.* This SFAR will remain in effect until October 26, 2022. The FAA may amend, rescind, or extend this SFAR, as necessary.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g).

40101(d)(1), 40105(b)(1)(A), and 44701(a)(5), on October 8, 2020.

Steve Dickson,
Administrator.

[FR Doc. 2020-23047 Filed 10-14-20; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 645

Welfare-to-Work Grants

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule; technical amendment.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (the Department) is removing the regulations which implement and govern the Welfare-to-Work (WtW) programs conducted at the state and local area levels and provide program requirements applicable to all WtW formula and competitive funds under the Social Security Act (SSA). Congressional authorization for this program has expired, and all remaining grant funding was rescinded by the Department in 2004. Accordingly, these regulations are no longer necessary. This technical amendment is a ministerial action to remove obsolete regulations from the Code of Federal Regulations.

DATES: This final rule is effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT:

Heidi M. Casta, Acting Deputy Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210; telephone (202) 693-3700 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Department is removing the regulations at 20 CFR part 645, which implement and govern the WtW programs authorized under Title IV, part A of the SSA, 42 U.S.C. 601 *et seq.*

On August 5, 1997, the President signed the Balanced Budget Act of 1997 (Pub. L. 105-33). This legislation amended certain provisions of the SSA concerning the Temporary Assistance

for Needy Families (TANF) program. The legislation authorized the Secretary of Labor to provide WtW grants to states and local communities to assist hard-to-employ TANF welfare recipients in moving into unsubsidized jobs and economic self-sufficiency. The funds distributed through the WtW grant program were designed to assist states and Private Industry Councils in meeting their welfare reform objectives by providing additional resources targeted to hard-to-employ welfare recipients residing in high poverty areas within the state.

In November 1997, pursuant to 42 U.S.C. 603(a)(5)(C)(ix), the Department issued an interim final rule providing a framework for the administration of the WtW program in coordination with the TANF program administered by the Department of Health and Human Services.¹ Public comments were received in response to the interim final rule, which were taken into consideration in drafting the final rule. The final rule was published in 2001, alongside a second interim final rule that contained additional changes in response to the 1999 amendments to the statute.² The Department solicited and received comments on the second interim final rule.³ These rules were codified at 20 CFR part 645.

In 2004, Congressional authorization for the WtW program expired and all formula grant funds appropriated under the WtW provisions of the SSA that were unexpended by the states were rescinded.⁴ Any remaining active participants in the WtW program were transitioned into similarly-targeted programs under the Workforce Investment Act, which was later replaced by the Workforce Innovation and Opportunity Act.⁵ The Department is therefore undertaking this ministerial action to remove the regulations governing the former WtW program from the Code of Federal Regulations as they are obsolete. This technical amendment to the CFR affects no rights or obligations and poses no costs.

Procedural and Other Matters

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that when an agency for good cause finds that notice and public procedures are impracticable,

unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The purpose of this action is to remove regulations implementing the WtW grant provisions of Title IV, Part A of the SSA, which are no longer necessary as all WtW grant funds have been expended or rescinded, all grants have been closed out, and the program is no longer in operation. Accordingly, for good cause, the Department has determined that public notice-and-comment procedures are unnecessary. For the same reasons, the Department finds good cause to forgo delay of the effective date under section 553(d)(3) of the Administrative Procedure Act and to make this final rule effective immediately upon publication.

The Office of Information and Regulatory Affairs at the Office of Management and Budget has determined that this final rule is not a significant regulatory action under Executive Order 12866, and is therefore not subject to Executive Order 13771, entitled Reducing Regulations and Controlling Regulatory Costs. Additionally, no analysis is required under the Regulatory Flexibility Act⁶ or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999,⁷ because, for the reasons discussed above, the Department is not required to engage in notice and comment under the Administrative Procedure Act. This final rule does not have significant Federalism implications under Executive Order 13132. The final rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*), because it does not contain a collection of information as defined in 44 U.S.C. 3502(3).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, including a copy of the action, to each House of the Congress and to the Comptroller General of the United States. This final action is administrative and only removes obsolete regulations from the CFR. Accordingly, the Department has determined that good cause exists, and that this technical amendment is not subject to the timing requirements of the Congressional Review Act.

⁶ See 5 U.S.C. 601(2) (limiting “rules” under the Regulatory Flexibility Act, to rules for which a general notice of proposed rulemaking is published).

⁷ Public Law 104–4.

List of Subjects in 20 CFR Part 645

Administrative practice and procedure, Employment, Grant programs-labor.

■ For the reasons stated in the preamble, under the authority of 42 U.S.C. 603(a)(5)(C)(ix), the Department amends 20 CFR chapter V by removing part 645.

John Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2020–21308 Filed 10–15–20; 8:45 am]

BILLING CODE 4510–FN–P

OFFICE OF NATIONAL DRUG CONTROL POLICY

21 CFR Part 1401

RIN 3201–AA01

Freedom of Information Act

AGENCY: Office of National Drug Control Policy, Executive Office of the President.

ACTION: Final rule.

SUMMARY: The Office of National Drug Control Policy (ONDCP) is updating its Freedom of Information Act (FOIA) implementing regulation to comport with the FOIA Improvement Act of 2016 and best practices. The final rule describes how to make a FOIA request with ONDCP and how the Office of General Counsel, which includes the ONDCP officials authorized to evaluate FOIA requests, processes requests for records. The final rule also states ONDCP’s Privacy Act Policies and Procedures. The final rule describes how individuals can learn if an ONDCP system of records contains information about them and, if so, how to access or amend a record.

DATES: The final rule is effective on October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be directed to Michael J. Passante, Acting General Counsel, Office of General Counsel, Office of National Drug Control Policy, Executive Office of the President, at (202) 395–6622 or OGC@ondcp.eop.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Regulatory History

A. Background

ONDCP has undertaken a review of agency practices related to the collection, use, protection and disclosure of ONDCP records and information in light of the FOIA Improvement Act of 2016 and the

¹ See 62 FR 61588 (Nov. 18, 1997).

² See 66 FR 2690 (Jan. 11, 2001).

³ See 66 FR 9763 (Feb. 12, 2001).

⁴ See Department of Labor Appropriations Act, 2004, Public Law 108–199, 105, 118 Stat. 226, 235 (2004); Training and Employment Guidance Letter No. 19–03 (Feb. 27, 2004).

⁵ See *id.*; Public Law 113–128, 128 Stat. 1425 (2014).

Privacy Act. As a result of that review, ONDCP is updating its regulation on FOIA and the Privacy Act. The FOIA, 5 U.S.C. 552 *et seq.*, provides a right of access to certain records and information Federal agencies maintain and control. The FOIA requires each Federal agency to publish regulations describing how to submit a FOIA request and how people responsible for FOIA will process these requests.

B. Regulatory History

ONDCP's current FOIA regulation, codified at 21 CFR part 1401, was last revised in 1999. *See* 64 FR 69901 (Dec. 15, 1999). Due to the passage of time and amendments to the FOIA, we proposed updating the regulation by issuing a notice of proposed rulemaking (NPRM) on May 22, 2020. *See* 85 FR 31087 (May 22, 2020). ONDCP's final regulation on FOIA and the Privacy Act incorporates the practical experience of the agency's staff who handle FOIA and privacy issues and guidance from the Office of Management and Budget and the U.S. Department of Justice, Office of Information Policy. The final FOIA and Privacy Act regulation also substantially benefitted from public comments we received in response to our May 22, 2020 NPRM. The final regulation strives for consistency with FOIA and Privacy Act regulations among other agencies, particularly within the Executive Office of the President.

II. Section-by-Section Analysis

Subpart A—Freedom of Information Act Policies and Procedures

Section 1401.1—Purpose: This section describes the purpose of the regulation, which is to implement the FOIA.

Section 1401.2—ONDCP: Organization and functions: This section describes the mission and leadership structure of the agency. It specifies where media inquiries may be submitted and notes that oral requests for information under FOIA will be rejected.

Section 1401.3—Definitions: Final 1401.3 defines the key terms used in the regulation. It includes revisions and additions to the definitions. As suggested by commenters, the definitions of the terms duplicate, educational institution, noncommercial scientific institution, and representative of the media are revised for clarity. Fee waiver, FOIA public liaison, and requester category were added to the definitions. With respect to fees ONDCP charges for processing FOIA requests, a commenter stated that 116% for direct costs was not the correct percentage, but ONDCP does not agree. This percentage

is accurate because the fee is 100% of the salary plus another 16% of the salary for benefits, which equals 116%.

Section 1401.4—Access to information: This section describes the types of information that ONDCP will make available under FOIA. Section 1401.4 also describes information about ONDCP that the public can access without filing a FOIA request. Pursuant to the FOIA Improvement Act of 2016, ONDCP will make records available that have been requested three or more times in an electronic format.

Section 1401.5 (pertaining to Proactive Disclosures) from the NPRM is removed from the final regulation because some of its contents are duplicative of requirements specified in section 1401.4.

Section 1401.5—Records requiring consultation. Final section 1401.5, which was section 1401.6 in the NPRM, has been revised to include the definitions for consultation, referral, and coordination as suggested by a commenter. This section describes how ONDCP will process records that originated with another agency but are in the custody of ONDCP. The standard referral procedure outlined in this subsection may not be appropriate for requests that implicate personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if ONDCP locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms.

Section 1401.6—How to request records—Form and content: Final section 1401.6, which was section 1401.7 in the NPRM, is revised to include ONDCP's mailing address. The requirement to include "FOIA REQUEST" or "REQUEST FOR RECORDS," is changed from must to should. The reference to section 1401.10 is corrected to reference section 1401.8. This section explains what an individual must do to submit a valid FOIA request to ONDCP and where a request should be sent. It also describes the information requesters must provide

so ONDCP can identify the records sought and process their requests.

Section 1401.8 in the NPRM pertaining to initial determination is removed because its contents were duplicative of those specified in section 1401.11 of the NPRM, which are now sections 1409.8(c) and 1401.10 in the final rule.

Section 1401.7—Response—form and content: Final section 1401.7, which was section 1401.9 in the NPRM, is updated to reflect the correct reference. Subsection (b)(2) is revised to include the different types of denials. One commenter noted that we should include several provisions from the DOJ FOIA template. Those provisions that were not already in the regulations were added. Section 1401.7 also describes the period of time within which ONDCP will determine whether it is appropriate to grant or deny a FOIA request, *i.e.*, ordinarily within 20 working days after the date the request is received. If ONDCP determines that a request is denied or that additional time is required to process the request, it will provide written notification to the requestor with an explanation of the reasons for denial or delay. ONDCP will provide information about the right of appeal and the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration. The response will include any fees associated with the FOIA request.

Section 1401.08—Expedited Process: Final section 1401.08, which was section 1401.10 in the NPRM, is revised with respect to section (a)(1) where we added "circumstances in which" to the beginning for clearer phrasing. In addition, in subsection 1401.08(a)(2), "primary profession" in reference to a media requester has been removed. This section describes the circumstances under which expedited processing of a FOIA request may be granted.

Section 1401.11 referencing prompt response from the NPRM has been removed as it was duplicative of information contained in sections 1409.8(c) and 1401.10.

Section 1401.09—Extension of Time: Final section 1401.09, which was section 1401.12 in the NPRM, describes and defines the "unusual circumstances" under which ONDCP may extend the time limit for making a determination on a FOIA request.

Section 1401.10—Appeal procedures: Final section 1401.10, which was section 1401.13 in the NPRM, among other more minor changes, strikes the word "legal" in the requirements for an appeal; strikes the term "writing" because it is duplicative; and adds FOIA

exemptions to the denial notice to requester. Further, the “names of individuals who participated in the determination” is changed to “the name and title of the person responsible for the denial.” This section describes when and how a requester may appeal a determination on a FOIA request and how and within what period of time ONDCP will make a determination on an appeal.

Section 1401.11—Fees to be charged—general: Final section 1401.11, which was section 1401.14 in the NPRM, is revised to consolidate subsections (a) and (b) relating to manual and computerized search. One commenter suggested that ONDCP restructure the fees section, but ONDCP believes that the structure is clear and covers all the information required under 5 U.S.C. 522. Using the commenter’s suggested template would result in duplicative sections. This section describes the general FOIA processing activities performed by ONDCP personnel and the rates charged by ONDCP to recoup the employee costs associated with responding to FOIA requests.

Section 1401.12—Fees to be charged—miscellaneous provisions: Final section 1401.12, which was section 1401.15 in the NPRM, is revised to include the payment methods a requester can use to submit payment for fees. The number of requester types is changed from four to three to be consistent with 5 U.S.C. 522. Subsection (e) is updated to reference section 1401.16 aggregation of request. This section contains miscellaneous FOIA fee provisions such as where payment should be sent, when advance payment is required, and rates of interest charged on late payments, etc.

Section 1401.13—Fees to be charged—Categories of Requester: Final section 1401.13, which was section 1401.16 in the NPRM, changes the terminology from “commercial use requester” to “commercial use request” for consistency with applicable law. This section describes the different categories of requesters and the types and amounts of fees ONDCP may assess to process and respond to a FOIA request.

Section 1401.14—Restrictions on charging fees: Final section 1401.14, which was section 1401.17 in the NPRM, describes the circumstances under which ONDCP is restricted in charging fees normally associated with processing FOIA request such as when ONDCP does not meet time limits mandated by the FOIA.

Section 1401.15—Waiver or Reduction of Fees: Final section

1401.15, which was section 1401.18 in the NPRM, is updated to reflect the correct references to sections 1401.17(1) and (2) to 1401.16(a). This section describes the factors that ONDCP may consider when deciding whether to waive or reduce the fees associated with processing FOIA requests.

Section 1401.16—Aggregation of requests: Final section 1401.16, which was section 1401.19 in the NPRM, describes the circumstances under which ONDCP may aggregate a series or group of requests for purposes of fee assessment.

Section 1401.17—Markings on released documents: Final section 1401.17, which was section 1401.20 in the NPRM, changes the heading from “Deletion of exempted information” to “Markings on released documents.” This section provides that ONDCP will redact exempt information from its FOIA disclosures to the extent that exempt information can be segregated from other information subject to disclosure.

Section 1401.18—Confidential commercial information: Final section 1401.18, which was section 1401.21 in the NPRM, explains when and how a person or entity that submits information to ONDCP must identify confidential commercial information. It also describes how ONDCP staff will handle such information.

Subpart B—Privacy Act Policies and Procedures

Section 1401.19—Definitions: Final section 1401.19, which was section 1401.22 in the NPRM, defines the key terms used in this Subpart.

Section 1401.20—Purpose and scope: Final section 1401.20, which was section 1401.23 in the NPRM, describes the purpose of the regulation, which is to implement the Privacy Act, and explains general policies and procedures for individuals requesting access to records, requesting amendments or corrections to records, and requesting an accounting of disclosures of records.

Section 1401.21—How do I make a Privacy Act request?: Final section 1401.21, which was section 1401.24 in the NPRM, explains what an individual must do to submit a request to ONDCP for access to records, to amend or correct records, or for an accounting of disclosures of records. It also describes the information an individual must provide so ONDCP can identify the records sought and determine whether the request can be granted.

Section 1401.22—How will ONDCP respond to a Privacy Act request?: Final section 1401.22, which was section

1401.25 in the NPRM, describes the period of time within which ONDCP will respond to requests. It also explains that ONDCP will grant or deny requests in writing, provide reasons if a request is denied in whole or in part, and explain the right of appeal.

Section 1401.23—What can I do if I am dissatisfied with ONDCP’s response to my Privacy Act request?: Final section 1401.23, which was section 1401.26 in the NPRM, describes when and how an individual may appeal a determination on a Privacy Act request and how and within what time period ONDCP will make a determination on an appeal.

Section 1401.24—What does it cost to get records under the Privacy Act?: Final section 1401.24, which was section 1401.27 in the NPRM, explains the fees that requesters are required to pay for the duplication of requested records.

III. Regulatory Flexibility Act

ONDCP has considered the impact of the rule and determined that the final rule is not likely to have a significant economic impact on a substantial number of small business entities because it only applies to ONDCP’s internal operations and legal obligations. *See* 5 U.S.C. 601 *et seq.*

IV. Paperwork Reduction Act

The rule does not contain any information collection requirement that requires approval from the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in CFR 21 Part 1401

Freedom of information, Privacy.

■ For the reasons stated in the preamble, the Office of National Drug Control Policy revises part 1401 of title 21 of the Code of Federal Regulations to read as follows:

PART 1401—PUBLIC AVAILABILITY OF INFORMATION

Subpart A — Freedom of Information Act Policies and Procedures

Sec.

1401.1 Purpose.

1401.2 The Office of National Drug Control Policy—organization and functions.

1401.3 Definitions.

1401.4 Access to information.

1401.5 Records requiring consultation.

1401.6 How to request records—form and content.

1401.7 Responses—form and content.

1401.8 Expedited process.

1401.9 Extension of time.

1401.10 Appeal procedures.

1401.11 Fees to be charged—general.

1401.12 Fees to be charged—miscellaneous provisions.

- 1401.13 Fees to be charged—categories of requesters.
- 1401.14 Restrictions on charging fees.
- 1401.15 Waiver or reduction of fees.
- 1401.16 Aggregation of requests.
- 1401.17 Markings on released documents.
- 1401.18 Confidential commercial information.

Subpart B—Privacy Act Policies and Procedures

- 1401.19 Definitions.
- 1401.20 Purpose and scope.
- 1401.21 How do I make a Privacy Act request?
- 1401.22 How will ONDCP respond to my Privacy Act request?
- 1401.23 What can I do if I am dissatisfied with ONDCP's response to my Privacy Act request?
- 1401.24 What does it cost to get records under the Privacy Act?

Authority: 5 U.S.C. 552

Subpart A—Freedom of Information Act Policies and Procedures

§ 1401.1 Purpose.

The purpose of this part is to prescribe rules, guidelines and procedures to implement the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552.

§ 1401.2 The Office of National Drug Control Policy—organization and functions.

(a) The Office of National Drug Control Policy (ONDCP or Agency) was created by the Anti-Drug Abuse Act of 1988, 21 U.S.C. 1501 *et seq.*, and reauthorized under the SUPPORT for Patients and Communities Act, 21 U.S.C. 1701 *et seq.* and several appropriations acts. The mission of ONDCP is to coordinate the anti-drug efforts of the various agencies and departments of the Federal Government, to consult with States and localities and assist their anti-drug efforts, and to annually promulgate the National Drug Control Strategy. ONDCP is headed by the Director of National Drug Control Policy.

(b) ONDCP's Office of External and Legislative Affairs is responsible for providing information to the press and to the general public. If members of the public have general questions about ONDCP, they may email the Office of External and Legislative Affairs at mediainquiry@ondcp.eop.gov. This email address should not be used to make FOIA requests. All oral requests for information under FOIA will be rejected.

§ 1401.3 Definitions.

For the purpose of this part, all the terms defined in the Freedom of Information Act apply.

Commercial use request is a request that asks for information for a use or a

purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

Agencies will notify requesters of their placement in this category.

Direct costs means the expense actually expended to search, review, or duplicate in response to a FOIA request. For example, direct costs include 116% of the salary of the employee performing work (*i.e.*, the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the actual costs incurred while operating equipment.

Duplicate means the process of making a copy of a document. Such copies may take the form of paper, microform, audio-visual materials, or machine-readable documentation.

Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agency may seek verification from the requester that the request furthers scholarly research, and agency will advise requesters of their placement in this category.

Fee waiver means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied, including that the information is in the public interest and is not requested for a commercial interest.

FOIA public liaison means a supervisory agency FOIA official who assists in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes between the requester and ONDCP.

Noncommercial scientific institution is an institution that is not operated on a "commercial" basis and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. Agency will advise requesters of their placement in this category.

OGIS means the Office of Government Information Services of the National Archives and Records Administration. OGIS offers FOIA dispute resolution services, which is a voluntary process. If ONDCP agrees to participate in the

dispute resolution services provided by OGIS, ONDCP will actively engage as a partner to the process in an attempt to resolve the dispute.

Records and any other terms used in this part in reference to information includes any information that would be an agency record subject to the requirements of this part when maintained in any format, including electronic format.

Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience. The term "news" means information that is about current events or information that would be of interest to the public. Examples of news media entities include television or radio stations that broadcast "news" to the public at large and publishers of periodicals that disseminate "news" and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. "Freelance" journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Agency can also consider a requester's past publication record in making this determination. The Agency will advise requesters of their placement in this category.

Request means a letter or other written communication seeking records or information under FOIA.

Requester category means one of the three categories that ONDCP will place requesters in for the purpose of determining whether a requester will be charged fees for search, review, and duplication. The categories are: commercial use requests; non-commercial scientific or educational institutions or news media requesters; and all other requesters.

Review means the process of examining documents that are located during a search to determine if any portion should lawfully be withheld. It is the processing of determining disclosability. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate

exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1401.18, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means to review, manually or by automated means, agency records for the purpose of locating those records responsive to a request.

§ 1401.4 Access to information.

The Office of National Drug Control Policy makes available information pertaining to matters issued, adopted, or promulgated by ONDCP, that are within the scope of 5 U.S.C. 552(a)(2). Such information is located at <https://www.whitehouse.gov/ondcp>. Included in that information are ONDCP's proactive disclosures. Proactive disclosures are records that have been requested three or more times, or that have been released to a requester and that ONDCP determines have become, or are likely to become, the subject of subsequent requests for substantially the same records.

§ 1401.5 Records requiring consultation.

Requests for records that are in ONDCP's custody but in which other agencies have equities shall be reviewed by ONDCP and then ONDCP will either consult with or refer the records to the other agency or agencies for further processing.

(a) *Consultation*. When records originated with ONDCP, but contain within them information of interest to another agency or other Federal government office, ONDCP will consult with that other entity prior to making a release determination.

(b) *Referral*—(1) *Determination*. When ONDCP believes that a different agency or component is best able to determine whether to disclose the record, ONDCP will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the agency processing the request and the originating agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(2) *Documentation*. Whenever ONDCP refers any part of the responsibility for responding to a request to another agency, it must document the referral,

maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination*. The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In order to avoid harm to an interest protected by an applicable exemption, the agency that received the request should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the agency that originally received the request.

(c) *Classified information*. On receipt of any request involving classified information, ONDCP must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the receiving agency must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the agency must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(d) *Timing of responses to consultations and referrals*. All consultations and referrals received by ONDCP will be handled according to the date that the first agency received the perfected FOIA request.

(e) *Agreements regarding consultations and referrals*. ONDCP may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 1401.6 How to request records—form and content.

(a) You must describe the records you seek in sufficient detail and in writing to enable ONDCP personnel to locate

them with a reasonable amount of effort. To satisfy this requirement, you should be as detailed as possible when describing the records you seek. To the extent possible, each request must reasonably describe the record(s) sought including the type of document, specific event or action, title or name, author, recipient, subject matter of the record, date or time period, location, and all other pertinent data. Before or after submitting their requests, requesters may contact ONDCP's FOIA Public Liaison to discuss the records they seek and for assistance in describing the records. A list of Agency FOIA Public Liaisons is available at <https://www.foia.gov/#agency-search>.

(b)(1) If you are making a request for records about yourself, you must comply with the verification of identity provision set forth in § 1401.21(f) of this part.

(2) If a request for records pertains to a third party, you may receive greater access by submitting either a notarized authorization signed by that individual or an unsworn declaration under 26 U.S.C. 1746 by that individual authorizing disclosure of the records to you. If the other individual is deceased, you should submit proof of death such as a copy of the death certificate or an obituary. As an exercise of administrative discretion, ONDCP may require you to provide additional information if necessary in order to verify that a particular individual has consented to disclosure.

(c) Requesters may specify the preferred form or format (including electronic formats) for the records they seek. ONDCP will try to accommodate formatting requests if the record is readily reproducible in that form or format.

(d) Whenever it is appropriate to do so, ONDCP automatically processes a Privacy Act request for access to records under both the Privacy Act and the FOIA, following the rules contained in this part. ONDCP processes a request under both the FOIA and Privacy Act so you will receive the maximum amount of information available to you by law.

(e) Requests must be received by ONDCP through methods specified on the FOIA page of ONDCP's website: <https://www.whitehouse.gov/ondcp/about/foia-and-legal/>. Requests may be emailed at any time to FOIA@ondcp.eop.gov or mailed to SSDMD/RDS; ONDCP Office of General Counsel; Joint Base Anacostia-Bolling (JBAB) Bldg. 410/Door 123; 250 Murray Lane SW, Washington, DC 20509. Email requests are strongly preferred.

(f) The words "FOIA REQUEST" or "REQUEST FOR RECORDS" should be

clearly marked on all FOIA request communications. The time limitations imposed by § 1401.7(a) will not begin until ONDCP identifies a communication as a FOIA request.

(g) You must provide contact information, such as your phone number, email address and mailing address, so we will be able to communicate with you about your request and provide released records. If we cannot contact you, or you do not respond within 20 calendar days to our request for clarification, we will close your request.

(h) To protect our computer systems, ONDCP reserves the right to not open attachments to emailed request. Please include your request within the body of your email.

§ 1401.7 Responses—form and content.

(a) *Determinations.* The General Counsel, or designee, will determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of a FOIA request whether it is appropriate to grant the request and will provide written notification to the person making the request. The notification shall also advise the person making the request of any fees assessed under § 1401.11 through 13. ONDCP will inform the requester of the availability of its FOIA Public Liaison.

(b) *Tracking number.* ONDCP will assign it an individualized tracking number if it will take longer than 10 working days to process and may assign such a tracking number for less than 10 working days at our discretion.

(c) *Adverse determinations.* If ONDCP makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(d) *Content of denial.* The denial must be signed by the head of the agency or designee and must include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA

exemption applied by the agency in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed to the Director or his/her designee within 90 days of the date of the response. The requirements for making an appeal are specified in § 1401.10.

(5) A statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS.

§ 1401.8 Expedited process.

(a) A request for expedited processing may be made at any time. ONDCP must process requests and appeals on an expedited basis whenever it is determined that they involve:

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) An urgency to inform the public about an actual or alleged Federal Government activity, beyond the public's right to know about government activity generally, and the request is made by a person primarily engaged in disseminating information.

(b) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for requesting expedited processing. For example, under paragraph (a)(2) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person who is primarily engaged in information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. The formality of certification may be waived as a matter of administrative discretion.

(c) Within 10 days of receipt of a request for expedited processing,

ONDCP will decide whether to grant it and will notify the requester of the decision. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

§ 1401.9 Extension of time.

(a) In unusual circumstances, ONDCP may extend the time limit prescribed in § 1401.7(a), (b) or § 1401.8 by written notice to the FOIA requester. The notice will state the reasons for the extension.

(b) The phrase "unusual circumstances" means:

(1) The requested records are located in establishments that are separated from the office processing the request;

(2) A voluminous amount of separate and distinct records are demanded in a single request; or

(3) Another agency or two or more components in the same agency have substantial interest in the determination of the request.

(c) Whenever ONDCP cannot meet the statutory time limit for processing a request because of "unusual circumstances," as defined by 5 U.S.C. 552(a)(b)(B), and ONDCP extends the time limit on that basis, the agency must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which ONDCP estimates processing of the request will be completed. Where the extension exceeds 10 working days, ONDCP must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Agency must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The Agency must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) To satisfy unusual circumstances under the FOIA, ONDCP may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. ONDCP cannot aggregate multiple requests that involve unrelated matters.

§ 1401.10 Appeal procedures.

(a) An appeal to the ONDCP must explain the reasoning and factual basis

for the appeal. It must be received by email at FOIA@ondcp.eop.gov or another method specified on the FOIA page of ONDCP's website within 90 days of the date of the response. The appeal must be in writing, addressed to SSDMD/RDS; ONDCP Office of General Counsel; Joint Base Anacostia-Bolling (JBAB) Bldg. 410/Door 123; 250 Murray Lane SW, Washington, DC 20509. The communication should clearly be labeled as a "Freedom of Information Act Appeal."

(b) The Director or designee will decide the appeal within 20 days (excepting Saturdays, Sundays, and legal public holidays). If the Director or designee deny an appeal in whole or in part, the written determination will contain the reason for the denial, the name and title of the person responsible for the denial, any FOIA exemptions applied, and the provisions for judicial review of the denial and ruling on appeal provided in 5 U.S.C. 552(a)(4). The denial will also inform the requester of the dispute resolution services offered by OGIS as a non-exclusive alternate to litigation. If ONDCP agrees to participate in voluntary dispute resolution services provided by OGIS, it will actively engage in an attempt to resolve the dispute.

§ 1401.11 Fees to be charged—general.

ONDCP will assess a fee to process FOIA requests in accordance with the provisions of this section and Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget ("OMB Guidelines"). ONDCP shall ensure that searches, review and duplication are conducted in the most efficient and the least expensive manner. ONDCP will ordinarily collect all applicable fees before sending copies of records to a requester. ONDCP will charge the following fees unless a waiver or reduction of fees is granted under § 1401.15, or the total fee to be charged is less than \$25.00. ONDCP will notify you if we estimate that charges will exceed \$25.00 including a breakdown of the fees for search, review or duplication and whether applicable entitlements to duplication and search at no charge have been provided. ONDCP will not process your request until you either commit in writing to pay the actual or estimated total fee, or designate some amount of fees you are willing to pay.

(a) *Search for records.* ONDCP will charge \$77.00 per hour, which is a blended hourly rate for all personnel that respond to FOIA requests plus 16 percent of that rate to cover benefits.

(b) *Review of records.* ONDCP will charge \$77.00 per hour, which is a blended hourly rate for all personnel that responded to FOIA requests plus 16 percent of that rate to cover benefits. Records or portions of records withheld under an exemption subsequently determined not to apply may be reviewed to determine the applicability of exemptions not considered. The cost for a subsequent review is assessable.

(c) *Duplication of records.* We will charge duplication fees to all requesters. We will honor your preference for receiving a record in a particular format if we can readily reproduce it in the form or format requested. If we provide photocopies, we will make one copy per request at the cost of \$.10 per page. For copies of records produced on tapes, disks or other media, we will charge the direct costs of producing the copy, including operator time. Where we must scan paper documents in order to comply with your preference to receive the records in an electronic format, we will charge you the direct costs associated with scanning those materials. For other forms of duplication, we will charge the direct costs. We will provide the first 100 pages of duplication (or the cost equivalent for other media) without charge except for requesters seeking records for a commercial use.

(d) *Other charges.* ONDCP will recover the costs of providing other services such as certifying records or sending records by special methods.

§ 1401.12 Fees to be charged—miscellaneous provisions.

(a) Payment for FOIA services may be made by check or money order made payable to the Treasury of the United States.

(b) ONDCP may require advance payment where the estimated fee exceeds \$250, or a requester previously failed to pay within 30 days of the billing date.

(c) ONDCP may assess interest charges beginning the 31st day of billing. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(d) ONDCP may assess search charges where records are not located or where records are exempt from disclosure.

(e) ONDCP may aggregate individual requests for fee purposes in accordance with 1401.16.

§ 1401.13 Fees to be charged—categories of requesters.

(a) There are three categories of FOIA requesters: Commercial use requests; educational, non-commercial scientific

institutions or representatives of the news media; and all other requesters.

(b) The specific levels of fees for each of these categories are:

(1) *Commercial use request.* ONDCP will recover the full direct cost of providing search, review and duplication services. Commercial use requests will not receive free search-time or free reproduction of documents.

(2) *Educational and non-commercial scientific institution request.* ONDCP will charge the cost of reproduction, excluding charges for the first 100 pages. Requesters must demonstrate the request is authorized by and under the auspices of a qualifying institution and that the records are sought for scholarly or scientific research not a commercial use.

(3) *Request from representative of the news media.* ONDCP will charge the cost of reproduction, excluding charges for the first 100 pages. Requesters must meet the criteria in § 1401.3, and the request must not be made for a commercial use. A request that supports the news dissemination function of the requester shall not be considered a commercial use.

(4) *All other requesters.* ONDCP will recover the full direct cost of the search and the reproduction of records, excluding the first 100 pages of reproduction and the first two hours of search time.

§ 1401.14 Restrictions on charging fees.

(a) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(b) If ONDCP fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in § 1401.13(b)(2), may not charge duplication fees, except as described in paragraphs (c), (d), and (e) of this section.

(c) If ONDCP determines that unusual circumstances as defined by the FOIA apply and the agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(d) If ONDCP determines that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees, or, in the case of requesters described in § 1401.13(b)(2) of this section, may charge duplication fees if the following steps are taken. ONDCP must have

provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the agency must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, ONDCP may charge all applicable fees incurred in the processing of the request.

(e) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(f) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(g) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is \$25.00 or less for any request, no fee will be charged.

§ 1401.15 Waiver or reduction of fees.

Requirements for waiver or reduction of fees:

(a) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) ONDCP must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In deciding whether this standard is satisfied the agency must consider the factors described in paragraphs (b)(1) through (3) of this section:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or

activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. ONDCP will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, ONDCP will consider the following criteria:

(i) ONDCP must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, the component must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of § 1401.15(a) are satisfied and any commercial interest is not the primary interest furthered by the request. ONDCP ordinarily will presume that when a news media requester has satisfied the requirements of § 1401.15(a), the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(d) Requests for a waiver or reduction of fees should be made when the request is first submitted to ONDCP and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or

on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

§ 1401.16 Aggregation of requests.

When ONDCP reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, ONDCP will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

§ 1401.17 Markings on released documents.

When requested records contain matters that are exempted under 5 U.S.C. 552(b), but such exempted matters can be reasonably segregated from the remainder of the records, the records shall be disclosed by ONDCP with the necessary redactions. If records are disclosed in part, ONDCP will mark them to show the amount and location of information redacted and the exemption(s) under which the redactions were made unless doing so would harm an interest protected by an applicable exemption.

§ 1401.18 Confidential commercial information.

(a) *Definitions.* As used in this section:

Confidential commercial information means commercial or financial information obtained by ONDCP from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be

protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) ONDCP must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if ONDCP determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) ONDCP has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, ONDCP may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) ONDCP determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, ONDCP must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) ONDCP must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide ONDCP a detailed written statement that specifies all grounds for withholding the

particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. ONDCP is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* ONDCP must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever ONDCP decides to disclose information over the objection of a submitter, ONDCP must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as ONDCP intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, ONDCP must promptly notify the submitter.

(i) *Requester notification.* ONDCP must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

(j) *No right or benefit.* The requirements of this section such as notification do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any person.

Subpart B—Privacy Act Policies and Procedures

§ 1401.19 Definitions.

For purposes of this subpart:

Access means making a record available to a subject individual.

Amendment means any correction, addition to or deletion of information in a record.

Individual means a natural person who either is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

Maintain includes the term “maintain”, collect, use, or disseminate.

Privacy Act Office means the ONDCP officials who are authorized to respond to requests and to process requests for amendment of records ONDCP maintains under the Privacy Act.

Record means any item, collection or grouping of information about an individual that ONDCP maintains within a system of records and contains the individual's name or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or photograph.

System of records means a group of records ONDCP maintains or controls from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual.

§ 1401.20 Purpose and scope.

This subpart implements the Privacy Act, 5 U.S.C. 552a, a Federal law that requires Federal agencies to protect private information about individuals that the agencies collect or maintain. It establishes ONDCP's rules for access to records in systems of records we maintain that are retrieved by an individual's name or another personal identifier. It describes the procedures by which individuals may request access to records, request amendment or correction of those records, and request an accounting of disclosures of those records by ONDCP. Whenever it is appropriate to do so, ONDCP automatically processes a Privacy Act request for access to records under both the Privacy Act and the FOIA, following the rules contained in this part. ONDCP processes a request under both the Privacy Act and the FOIA so you will receive the maximum amount of information available to you by law.

§ 1401.21 How do I make a Privacy Act request?

(a) *In general.* You can make a Privacy Act request for records about yourself. You also can make a request on behalf of another individual as the parent or legal guardian of a minor, or as the legal guardian of someone determined by a court to be incompetent.

(b) *How do I make a request? (1) Where do I send my written request?* To make a request for access to a record, you should write directly to our Office of General Counsel. Heightened security

delays mail delivery. To avoid mail delivery delays, we strongly suggest that you email your request to foia@ondcp.eop.gov. Our mailing address is: SSDMD/RDS; ONDCP Office of General Counsel; Joint Base Anacostia-Bolling (JBAB); Bldg. 410/Door 123; 250 Murray Lane SW, Washington, DC 20509. To make sure that the Office of General Counsel receives your request without delay, you should include the notation "Privacy Act Request" in the subject line of your email or on the front of your envelope and also at the beginning of your request.

(2) *Security concerns.* To protect our computer systems, we reserve the right not to open attachments to emailed requests. We request that you include your request within the body of the email.

(c) *What should my request include?* You must describe the record that you seek in enough detail to enable ONDCP to locate the system of records containing the record with a reasonable amount of effort. Include specific information about each record sought, such as the time period in which you believe it was compiled, the name or identifying number of each system of records in which you believe it is kept, and the date, title or name, author, recipient, or subject matter of the record. As a general rule, the more specific you are about the record that you seek, the more likely we will be able to locate it in response to your request.

(d) *How do I request amendment of a record?* If you are requesting an amendment of an ONDCP record, you must identify each particular record in question and the system of records in which the record is located, describe the amendment that you seek, and state why you believe that the record is not accurate, relevant, timely or complete. You may submit any documentation that you think would be helpful, including an annotated copy of the record.

(e) *How do I request an accounting of record disclosures?* If you are requesting an accounting of disclosures made by ONDCP to another person, organization or Federal agency, you must identify each system of records in question. An accounting generally includes the date, nature and purpose of each disclosure, as well as the name and address of the person, organization, or Federal agency to which the disclosure was made.

(f) *Verification of identity.* When making a Privacy Act request, you must verify your identity in accordance with these procedures to protect your privacy or the privacy of the individual on whose behalf you are acting. If you

make a Privacy Act request and you do not follow these identity verification procedures, ONDCP cannot process your request.

(1) *How do I verify my own identity?* You must include in your request your full name, citizenship status, current address, and date and place of birth. We may request additional information to verify your identity. To verify your own identity, you must provide an unsworn declaration under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury. To fulfill this requirement, you must include the following statement just before the signature on your request:

I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].

(2) *How do I verify parentage or guardianship?* If you make a request as the parent or legal guardian of a minor, or as the legal guardian of someone determined by a court to be incompetent, for access to records or information about that individual, you must establish:

(i) The identity of the individual who is the subject of the record, by stating the individual's name, citizenship status, current address, and date and place of birth;

(ii) Your own identity, as required in paragraph (f)(1) of this section;

(iii) That you are the parent or legal guardian of the individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or a court order establishing your guardianship; and

(iv) That you are acting on behalf of the individual in making the request.

§ 1401.22 How will ONDCP respond to my Privacy Act request?

(a) *When will we respond to your request?* We will search to determine if the requested records exist in a system of records ONDCP owns or controls. The Office of General Counsel will respond to you in writing within 20 days after we receive your request and/or within ten working days after we receive your request for an amendment, if it meets the requirements of this subpart. We may extend the response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record that is in storage.

(b) *What will our response include?* (1) Our written response will include our determination whether to grant or deny your request in whole or in part, a brief explanation of the reasons for the determination, and the amount of the fee charged, if any, under § 1401.24. If

you requested access to records, we will make the records, if any, available to you. If you requested amendment of a record, the response will describe any amendments made and advise you of your right to obtain a copy of the amended record.

(2) We will also notify the individual who is subject to the record in writing, if, based on your request, any system of records contains a record pertaining to him or her.

(3) If ONDCP makes an adverse determination with respect to your request, our written response will identify the name and address of the person responsible for the adverse determination, that the adverse determination is not a final agency action, and describe the procedures by which you may appeal the adverse determination under § 1401.23.

(4) An adverse determination is a response to a Privacy Act request that:

(i) Withholds any requested record in whole or in part;

(ii) Denies a request to amend a record in whole or in part;

(iii) Declines to provide an accounting of disclosures;

(iv) Advises that a requested record does not exist or cannot be located;

(v) Finds that what you requested is not a record subject to the Privacy Act; or

(vi) Advises on any disputed fee matter.

§ 1401.23 What can I do if I am dissatisfied with ONDCP's response to my Privacy Act request?

(a) *What can I appeal?* You can appeal any adverse determination in writing to our Director or designee within 90 calendar days after the date of our response. We provide a list of adverse determinations in § 1401.22(b)(3).

(b) *How do I make an appeal?* (1) *What should I include?* You may appeal by submitting a written statement giving the reasons why you believe the Director or designee should overturn the adverse determination. Your written appeal may include as much or as little related information as you wish to provide, as long as it clearly identifies the determination (including the request number, if known) that you are appealing.

(2) *Where do I send my appeal?* You should mark both your letter and the envelope, or the subject of your email, "Privacy Act Appeal." To avoid mail delivery delays caused by heightened security, we strongly suggest that you email any appeal to foia@ondcp.eop.gov. Our mailing address is: SSDMD/RDS; ONDCP Office of General Counsel; Joint Base Anacostia-Bolling

(JBAB); Bldg. 410/Door 123; 250 Murray Lane SW, Washington, DC 20509.

(c) *Who will decide your appeal?* (1) The Director or designee will act on all appeals under this section.

(2) We ordinarily will not adjudicate an appeal if the request becomes a matter of litigation.

(3) On receipt of any appeal involving classified information, the Director or designee must take appropriate action to ensure compliance with applicable classification rules.

(d) *When will we respond to your appeal?* The Director or designee will notify you of its appeal decision in writing within 30 days from the date it receives an appeal that meets the requirements of paragraph (b) of this section. We may extend the response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record shipped offsite for storage.

(e) *What will our response include?* The written response will include the Director or designee's determination whether to grant or deny your appeal in whole or in part, a brief explanation of the reasons for the determination, and information about the Privacy Act provisions for court review of the determination.

(1) *Appeals concerning access to records.* If your appeal concerns a request for access to records and the appeal is granted in whole or in part, we will make the records, if any, available to you.

(2) *Appeals concerning amendments.* If your appeal concerns amendment of a record, the response will describe any amendment made and advise you of your right to obtain a copy of the amended record. We will notify all persons, organizations or Federal agencies to which we previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended. Whenever the record is subsequently disclosed, the record will be disclosed as amended. If our response denies your request for an amendment to a record, we will advise you of your right to file a statement of disagreement under paragraph (f) of this section.

(f) *Statements of disagreement—(1) What is a statement of disagreement?* A statement of disagreement is a concise written statement in which you clearly identify each part of any record that you dispute and explain your reason(s) for disagreeing with our denial in whole or in part of your appeal requesting amendment.

(2) *How do I file a statement of disagreement?* You should mark both your letter and the envelope, or the

subject of your email, "Privacy Act Statement of Disagreement." To avoid mail delivery delays caused by heightened security, we strongly suggest that you email a statement of disagreement to foia@ondcp.eop.gov. Our mailing address is: SSDMD/RDS; ONDCP Office of General Counsel; Joint Base Anacostia-Bolling (JBAB); Bldg. 410/Door 123; 250 Murray Lane SW, Washington, DC 20509.

(3) *What will we do with your statement of disagreement?* We shall clearly note any portion of the record that is disputed and provide copies of the statement and, if we deem appropriate, copies of our statement that denied your request for an appeal for amendment, to persons or other agencies to whom the disputed record has been disclosed.

(g) *When appeal is required.* Under this section, you generally first must submit a timely administrative appeal, before seeking review of an adverse determination or denial request by a court.

§ 1401.24 What does it cost to get records under the Privacy Act?

(a) *Agreement to pay fees.* Your request is an agreement to pay fees. We consider your Privacy Act request as your agreement to pay all applicable fees unless you specify a limit on the amount of fees you agree to pay. We will not exceed the specified limit without your written agreement.

(b) *How do we calculate fees?* We will charge a fee for duplication of a record under the Privacy Act in the same way we charge for duplication of records under the FOIA in § 1401.11(c). There are no fees to search for or review records requested under the Privacy Act.

Michael J. Passante,
Acting General Counsel.

[FR Doc. 2020-20270 Filed 10-15-20; 8:45 am]

BILLING CODE 3280-F5-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 63

[201A2100DD/AAKC001030/
A0A501010.999900 253G]

RIN 1076-AF53

Indian Child Protection and Family Violence Prevention; Minimum Standards of Character

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule; confirmation.

SUMMARY: The Bureau of Indian Affairs (BIA) is confirming the interim final rule published on June 23, 2020, updating the minimum standards of character to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes or acted in a manner that placed others at risk, in accordance with the Indian Child Protection and Family Violence Prevention Act, as amended.

DATES: This final rule is effective on October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, (202) 273-4680; elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION:

I. Summary of Rule

The Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3201 *et seq.*, requires the Secretary of the Interior to prescribe minimum standards of character for positions that involve duties and responsibilities involving regular contact with, or control over, Indian children. The Department of the Interior (Interior) prescribed the minimum standards of character in its regulations at 25 CFR 63.12 and 63.19. As a result, no applicant, volunteer, or employee of Interior may be placed in a position with regular contract with or control over Indian children if that person has been found guilty of, or entered a plea of nolo contendere or guilty to, certain offenses. Before 2000, the offenses listed in the regulation matched the offenses listed in the Act: Any offense under Federal, State, or Tribal law involving crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons.

In 2000, Congress updated the Act to clarify which types of offenses are disqualifying. *See* Public Law 106-568, revising 25 U.S.C. 3207(b). Specifically, the 2000 Act updated "any offense" with "any felonious offense, or any of two or more misdemeanor offenses," and added "offenses committed against children." This interim final rule would update Interior's regulations, at sections 63.12 and 63.19, to reflect the updated language of the Act and add a definition to define the phrase "offenses committed against children." The definition is the same as the Indian Health Service (IHS) definition of "offenses committed against children" in the regulations establishing minimum standards of character under the Indian Child Protection and Family Violence

Prevention Act for those working in the IHS. See 42 CFR 136.403. Using the same definition provides consistency in these standards across Federal agencies.

This rule also includes an explanation of whether a conviction, or plea of nolo contendere or guilty, should be considered if there has been a pardon, expungement, set aside, or other court order of the conviction or plea. As the IHS regulation provides, this rule provides that all convictions or pleas of nolo contendere or guilty should be considered in making a determination unless a pardon, expungement, set aside or other court order reaches the plea of guilty, plea of nolo contendere, or the finding of guilt. See 42 CFR 136.407. Including this contingency also provides consistency in the standards across Federal agencies.

With this regulatory update, the list of offenses includes any felonious offense or any two or more misdemeanor offenses under Federal, State, or Tribal law involving crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons, or any offenses committed against children. Practically, what this rule means is that an individual with a single misdemeanor offense involving certain crimes is no longer prohibited from holding positions for which that individual is otherwise qualified. This rule remedies an overly broad prohibition, as determined by Congress in the 2000 amendments. This rule also means that an individual with offenses against children would be prohibited from holding positions involving regular contact with, or control over, Indian children, regardless of that individual's qualifications.

II. Interim Final Rule and Comments

BIA published an interim final rule on June 23, 2020. 85 FR 37562. BIA received one written comment submission on the interim final rule. That comment was from a Tribe and expressed strong support for the rule and stated that it will have a significant beneficial impact. BIA will also consider the Tribe's recommendation for additional future revisions or guidance to provide Tribes with greater discretion in hiring decisions and enhance Tribal sovereignty.

III. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules.

The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order also directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. BIA developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more;
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive

Order 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. This rule was evaluated under the Interior's consultation policy pursuant to the criteria in Executive Order 13175. The Interior has determined this regulation does not require consultation because it is merely updating discrete provisions of the regulation to match controlling statutory law.

I. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required. BIA may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. This rule is excluded from the requirement to prepare a detailed statement because it is a regulation of an administrative nature (for further information, see 43 CFR 46.210(i)). BIA

has also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 63

Child welfare, Domestic violence, Employment, Grant programs-Indians, Grant programs-social programs, Indians.

■ The interim final rule amending 25 CFR part 63 which was published at 85 FR 37562 on June 23, 2020, is adopted as final without change.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–21535 Filed 10–15–20; 8:45 am]

BILLING CODE 4337–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2019–0686; FRL–10014–39–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Reasonably Available Control Technology Determinations for Case-by-Case Sources Under the 1997 and 2008 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving multiple state implementation plan (SIP) revisions submitted by the Commonwealth of Pennsylvania. These revisions were submitted by the Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for individual major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_x) pursuant to the Commonwealth of Pennsylvania's conditionally approved RACT regulations. In this action, EPA is only approving source-specific (also referred to as "case-by-case") RACT determinations for 19 major sources. These RACT evaluations were submitted to meet RACT requirements

for the 1997 and 2008 8-hour ozone national ambient air quality standards (NAAQS). EPA is approving these revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA) and EPA's implementing regulations.

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

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2019–0686. 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: Ms. Emily Bertram, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–5273. Ms. Bertram can also be reached via electronic mail at bertram.emily@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On March 20, 2020, EPA published a notice of proposed rulemaking (NPRM). 85 FR 16021. In the NPRM, EPA proposed approval of case-by-case RACT determinations for 19 sources in Pennsylvania for the 1997 and 2008 8-hour ozone NAAQS. The case-by-case RACT determinations for these 19 sources were included in SIP revisions submitted by PADEP on August 14, 2017, November 21, 2017, April 26, 2018, June 26, 2018, and October 29, 2018.

Under certain circumstances, states are required to submit SIP revisions to address RACT requirements for major sources of NO_x and VOC or any source category for which EPA has promulgated control technique guidelines (CTG) for each ozone NAAQS. Which NO_x and VOC sources in Pennsylvania are considered "major," and therefore to be addressed for RACT revisions, is dependent on the location of each source within the Commonwealth. Sources located in

nonattainment areas would be subject to the "major source" definitions established under the CAA based on their classification. In the case of Pennsylvania, sources located in any areas outside of moderate or above nonattainment areas, as part of the Ozone Transport Region (OTR), are subject to source thresholds of 50 tons per year (tpy). CAA section 184(b).

On May 16, 2016, PADEP submitted a SIP revision addressing RACT under both the 1997 and 2008 8-hour ozone NAAQS in Pennsylvania. PADEP's May 16, 2016 SIP revision intended to address certain outstanding non-CTG VOC RACT, VOC CTG RACT, and major NO_x RACT requirements for both standards. The SIP revision requested approval of Pennsylvania's 25 Pa. Code 129.96–100, Additional RACT Requirements for Major Sources of NO_x and VOCs (the "presumptive" RACT II rule). Prior to the adoption of the RACT II rule, Pennsylvania relied on the NO_x and VOC control measures in 25 Pa. Code 129.92–95, Stationary Sources of NO_x and VOCs, (the RACT I rule) to meet RACT for non-CTG major VOC sources and major NO_x sources. The requirements of the RACT I rule remain approved into Pennsylvania's SIP and sources are obligated to follow them.¹ On September 26, 2017, PADEP submitted a supplemental SIP, dated September 22, 2017, which committed to address various deficiencies identified by EPA in their May 16, 2016 "presumptive" RACT II rule SIP revision.

On May 9, 2019, EPA conditionally approved the RACT II rule based on the commitments PADEP made in its September 22, 2017 supplemental SIP. 84 FR 20274. In EPA's final conditional approval, EPA noted that PADEP would be required to submit, for EPA's approval, SIP revisions to address any facility-wide or system-wide averaging plan approved under 25 Pa. Code 129.98 and any case-by-case RACT determinations under 25 Pa. Code 129.99. PADEP committed to submitting these additional SIP revisions within 12 months of EPA's final conditional approval, specifically May 9, 2020. The SIP revisions addressed in this rule are part of PADEP's efforts to meet the conditions of its supplemental SIP and EPA's conditional approval of the RACT II Rule.

¹ The RACT I Rule was approved by EPA into the Pennsylvania SIP on March 23, 1998. 63 FR 13789.

II. Summary of SIP Revisions and EPA Analysis

A. Summary of SIP Revisions

To satisfy a requirement from EPA's May 9, 2019 conditional approval, PADEP has submitted to EPA SIP revisions addressing case-by-case RACT requirements for major sources in Pennsylvania subject to 25 Pa. Code 129.99. In the Pennsylvania RACT SIP revisions, PADEP included a case-by-case RACT determination for the

existing emissions units at each of the major sources of NO_x and/or VOC that required a source-specific RACT determination. In PADEP's RACT determinations, an evaluation was completed to determine if previously SIP-approved, case-by-case RACT emission limits or operational controls (herein referred to as RACT I and contained in RACT I permits) were more stringent than the new RACT II presumptive or case-by-case

requirements. If more stringent, the RACT I requirements will continue to apply to the applicable source. If the new case-by-case RACT II requirements are more stringent than the RACT I requirements, then the RACT II requirements will supersede the prior RACT I requirements.² Here, EPA is taking action on SIP revisions pertaining to case-by-case RACT requirements for 19 major sources of NO_x and/or VOC in Pennsylvania as summarized in Table 1.

TABLE 1—NINETEEN MAJOR NO_x AND/OR VOC SOURCES IN PENNSYLVANIA SUBJECT TO CASE-BY-CASE RACT II DETERMINATIONS UNDER THE 1997 AND 2008 8-HOUR OZONE NAAQS

Major source (county)	1-Hour ozone RACT source? (RACT I)	Major source pollutant (NO _x and/or VOC)	RACT II permit (effective date)
Exelon Generation—Fairless Hills (Bucks)	Yes	NO _x	09–00066 (01/27/17)
The Boeing Co. (Delaware)	Yes	NO _x and VOC	23–00009 (01/03/17)
Cherokee Pharmaceuticals, LLC (Northumberland)	Yes	VOC	49–00007 (04/24/17)
First Quality Tissue, LLC (Clinton)	No	VOC	18–00030 (09/18/17)
JW Aluminum Company (Lycoming)	No	VOC	41–00013 (03/01/17)
Ward Manufacturing, LLC (Tioga)	No	VOC	59–00004 (01/10/17)
Wood-Mode Inc. (Snyder)	Yes	VOC	55–00005 (07/12/17)
Foam Fabricators Inc. (Columbia)	No	VOC	19–00002 (12/20/17)
Resilite Sports Products Inc. (Northumberland)	Yes	VOC	49–00004 (08/25/17)
NRG Energy Center Paxton, LLC (Dauphin)	Yes	NO _x	22–05005 (03/16/18)
Containment Solutions/Mt. Union Plant (Huntingdon)	Yes	VOC	31–05005 (07/10/18)
Armstrong World Ind./Marietta Ceiling Plant (Lancaster)	Yes	VOC	36–05001 (06/28/18)
Jeraco Enterprises Inc. (Northumberland)	Yes	VOC	49–00014 (01/26/18)
Blommer Chocolate Company (Montgomery)	No	VOC	46–00198 (01/26/17)
Texas Eastern—Bernville (Berks)	Yes	NO _x	06–05033 (03/16/18)
Texas Eastern—Shermans Dale (Perry)	Yes	NO _x	50–05001 (03/26/18)
Texas Eastern—Perulack (Juniata)	Yes	NO _x and VOC	34–05002 (03/27/18)
Texas Eastern—Grantville (Dauphin)	Yes	NO _x	22–05010 (03/16/18)
Texas Eastern—Bechtelsville (Berks)	Yes	NO _x	06–05034 (04/19/18)

The case-by-case RACT determinations submitted by PADEP consist of an evaluation of all reasonably available controls at the time of evaluation for each affected emissions unit, resulting in a PADEP determination of what specific emission limit or control measures, if any, satisfy RACT for that particular unit. The adoption of new, additional, or revised emission limits or control measures to existing SIP-approved RACT I requirements were specified as requirements in new or revised Federally enforceable permits (hereafter RACT II permits) issued by PADEP to the source. The RACT II permits, which revise or adopt additional source-specific limits and/or controls, have been submitted as part of the Pennsylvania RACT SIP revisions for EPA's approval in the Pennsylvania SIP under 40 CFR 52.2020(d)(1). The RACT II permits submitted by PADEP are

listed in the last column of Table 1 of this preamble, along with the permit effective date, and are part of the docket for this rule, which is available online at <https://www.regulations.gov>, Docket No. EPA–R03–OAR–2019–0686.³ EPA is incorporating by reference in the Pennsylvania SIP, via the RACT II permits, source-specific RACT emission limits and control measures under the 1997 and 2008 8-hour ozone NAAQS for certain major sources of NO_x and VOC emissions.

B. EPA's Proposed Action

PADEP's SIP revisions incorporate its determinations of source-specific RACT II controls for individual emission units at major sources of NO_x and/or VOC in Pennsylvania, where those units are not covered by or cannot meet Pennsylvania's presumptive RACT regulation. After thorough review and evaluation of the information provided

by PADEP in its five SIP revision submittals for 19 major sources of NO_x and/or VOC in Pennsylvania, EPA proposed to find that PADEP's case-by-case RACT determinations and conclusions establish limits and/or controls on individual sources that are reasonable and appropriately considered technically and economically feasible controls.

PADEP, in its RACT II determinations, considered the prior source-specific RACT I requirements and, where more stringent, retained those RACT I requirements as part of its new RACT determinations. In the NPRM, EPA proposed to find that all the proposed revisions to previously SIP approved RACT I requirements would result in equivalent or additional reductions of NO_x and/or VOC emissions. The proposed revisions should not interfere with any applicable requirement concerning attainment or

² While the prior SIP-approved RACT I permit will remain part of the SIP, this RACT II rulemaking will incorporate by reference the RACT II requirements through the RACT II permit and

clarify the ongoing applicability of specific conditions in the RACT I permit.

³ The RACT II permits are redacted versions of a facility's Federally enforceable permits and reflect

the specific RACT requirements being approved into the Pennsylvania SIP.

reasonable further progress with the NAAQS or section 110(l) of the CAA.

Other specific requirements of Pennsylvania's 1997 and 2008 8-hour ozone NAAQS case-by-case RACT determinations and the rationale for EPA's proposed action were explained in the NPRM, and its associated technical support document (TSD), and will not be restated here.

III. Public Comments and EPA Responses

EPA received comments from 27 commenters on the March 20, 2020 NPRM. 85 FR 16021. A summary of the comments and EPA's responses are discussed in this section of the preamble. A copy of the comments can be found in the docket for this action.

Comment 1: EPA received two nearly identical comments that stated, "EPA should extend the comment period for this and all rulemakings until the global pandemic of SARS-COV-2 is over." The commenters further stated that "EPAs [sic] decision to continue the regulatory process during the COVID-19 pandemic is unlawful because EPA is forcing the public to choose between their own health and safety or participate in this public process." The commenters noted that environmental advocacy groups have asked EPA to put rulemakings on hold because they "violate the APA and don't allow the public to fully review EPA's decision while a global pandemic is in full force." The commenters request EPA extend the public comment period for an additional 30 days after the "President's National Emergency Order or Pennsylvania's Emergency Order are pulled back." Lastly, one commenter stated that "EPA has released numerous orders waiving environmental requirements such as monitoring required by Part 75 and waiving enforcement of environmental rules due to COVID-19, recognizing that industry may not be able to comply with these rules due to the global pandemic but EPA still expects the public to review and comment on rulemakings such as this."

Response 1: EPA disagrees with the commenters' assertion that it should extend all public comment periods until the end of the "global pandemic of SARS-COV-2." EPA also disagrees that "EPAs decision to continue the regulatory process during the COVID-19 pandemic is unlawful because EPA is forcing the public to choose between their own health and safety or participate in this public process." Prior to the COVID-19 pandemic, EPA was providing the public with online access to rulemaking actions and supporting

documentation. During the pandemic, EPA has continued to make those materials available to the public; this proposed rulemaking was no exception. EPA also disagrees that its action, proposing approval of RACT for 19 facilities in Pennsylvania, violates the Administrative Procedures Act (APA). EPA followed necessary APA procedures for this proposed rulemaking, which included providing the public with a 30-day comment period and access to all supporting documentation related to the proposed rulemaking.

Finally, EPA understands the commenters' concerns with respect to the challenges the public is facing with respect to COVID-19 and the global pandemic, but that alone is not a reason for EPA to extend its public comment period for this proposed rulemaking. The commenters failed to provide new information or a compelling reason as to why EPA should extend the public comment period for this specific rulemaking action. The public was given adequate time and access to information necessary to formulate comments on this rule. Therefore, EPA continues to believe that the 30-day comment period was appropriate and did not feel compelled to extend the public comment period, as requested by the commenters. In this action, EPA is finalizing its rulemaking action in accordance with APA requirements.

Comment 2: One commenter questioned why EPA is reproposing this action, since it already proposed action on these RACT permits in July 2019 under Docket EPA-R03-OAR-2017-0290. The commenter then goes on to assert that "EPA is attempting to circumvent the comments submitted under this prior proposal and trying to avoid responding to these comments!" The commenter further asserts that EPA should be "forced to publish the comments and properly respond to them" noting that the "previous proposal received 66 comments, and then for some reason most of the documents associated with that proposal have disappeared from the docket." The commenter makes statements that "what EPA is doing is illegal" and responding to those comments is "required by the APA" and that EPA should "respond to each of them as required." Lastly, the commenter attempts to "incorporate by reference all those comments into this comment and request EPA to respond to those comments as if they were copied here verbatim."

Response 2: EPA acknowledges that it previously proposed to approve certain source-specific RACT determinations

for 21 facilities in its July 31, 2019 NPRM. See 84 FR 37167. In its current proposed rulemaking, EPA explained that on August 30, 2019, the last day of the comment period for the July 31, 2019 NPRM, EPA became aware through a comment submitted to *Regulations.gov* that one of the files contained in the SIP submission—which EPA made public in the docket for that rulemaking proposing to approve the submission (Docket No. EPA-R03-OAR-2017-0290-0064)—contained potential CBI. EPA restricted public access in *Regulations.gov* to that file containing potential CBI the same day, prior to the end of the comment period. On September 30, 2019, EPA became aware through additional comments submitted to *Regulations.gov* during the comment period that additional potential CBI was contained in other files EPA had posted to Docket No. EPA-R03-OAR-2017-0290-0064. EPA restricted public access in *Regulations.gov* to the entire docket that same day. In accordance with EPA's CBI regulations at 40 CFR part 2, subpart B, EPA has contacted each business affected by the inclusion of potential CBI in the docket files to inform them that potential CBI was made publicly available on *Regulations.gov*, and afforded each business an opportunity to assert a claim of business confidentiality for any of their information posted by EPA to Docket No. EPA-R03-OAR-2017-0290-0064. See 85 FR 16021, 16022 (March 20, 2020).

EPA subsequently proposed to approve 19 of the 21 Pennsylvania case-by-case RACT determinations in this new rulemaking. EPA has established a docket for this new rulemaking that does not include any materials claimed as CBI (Docket ID No. EPA-R03-OAR-2019-0686). In EPA's NPRM, commenters were instructed to submit any comments they have on EPA's proposed approval of these 19 case-by-case RACT determinations to this new docket number. Because this is a new rulemaking, EPA will not consider any comments on its prior proposal made at Docket ID No. EPA-R03-OAR-2017-0290-0064. The proposal that is being finalized here specifically stated that "[a]ny prior comments will need to be resubmitted to Docket ID No. EPA-R03-OAR-2019-0686 during the comment period for this proposed rulemaking for EPA to consider them." Id. Also, the NPRM contains standard language explaining that the written comment is considered the official comment and should include all the points the commenter wants to make. Comments or comment content outside the primary

submission are generally not considered.

For the reasons stated here, and in its March 20, 2020 NPRM, EPA disagrees with the commenter's assertion that it is trying to "circumvent the comments" or that it is doing something "illegal." To the contrary, EPA made its intentions clear to the public that this was a new rulemaking and provided the public with the legally required 30-day public comment period. In its March 20, 2020 NPRM, EPA articulated that the previous comments would not be responded to and the public would be required to resubmit any comments based on the documentation provided in the docket for the March 20, 2020 rulemaking. Similarly, the commenter is not able to "incorporate by reference all those comments into this comment and request EPA to respond to those comments as if they were copied here verbatim." As instructed, if the commenter wanted EPA to address comments made on the previous July 31, 2019 NPRM, the commenter needed to resubmit those specific comments during this public comment period and EPA would respond to them, as required by the APA.

Comment 3: The commenter asserts that for the sources at Blommer Chocolate Company (Blommer), EPA is proposing to approve 12-month rolling ty VOC limits as case-by-case RACT despite EPA policy guidance documents that require daily VOC RACT limits and in no case should those limits exceed 30-day averages because ozone is a short-term standard. The commenter cites several prior comments that EPA made to PADEP that suggested that these 12-month rolling ty limits proposed as case-by-case VOC RACT for the sources at Blommer Chocolate are inadequate based on existing policy guidance. The commenter demands that EPA disapprove PADEP's case-by-case RACT determination for Blommer Chocolate and requests re-evaluation so that appropriate VOC emission limits with averages no greater than 30-days can be imposed on the sources at this facility.

Response 3: While the commenter does not specify the particular EPA policy guidance documents being referenced, EPA agrees that existing guidance does highlight the need for emission controls that are reasonably consistent with protecting a short-term NAAQS such as ozone. In those cases where an emission limit for a RACT control can be quantified, EPA guidance states that averaging periods for such

limits should be as short as practicable and in no case longer than 30 days.⁴

Since the 1970's, EPA has consistently defined RACT as the lowest emission limit that a particular source is capable of meeting by the application of the control technology that is reasonably available considering technological and economic feasibility. The establishment of case-by-case RACT requirements to reduce VOC and/or NO_x emissions considers not only numeric emission limits, but also design and equipment specifications, operational and throughput constraints and work practice standards. Each of these requirements can take different forms depending on the types of processes and emissions at a facility. For example, emission controls can include material content limits (pound (lb) per gallon (gal) material used) or emission limits (lb per hour (hr) limits, lb per day limits, and lb per month limits). These forms of controls are all considered suitable RACT requirements. Each source is different and not every form of an emission control is possible for every source. For example, in some cases, one or more of the various forms of short-term emission limits may be infeasible based on an evaluation of the RACT-subject facility. The commenter is also correct that EPA provided comments to PADEP when reviewing a draft permit that questioned the adequacy and enforceability of some of the proposed limits at Blommer, including the ty limit, based on EPA guidance.

As determined by PADEP, the technically feasible control strategies for the nine sources subject to case-by-case RACT at Blommer were not economically feasible, except for the good operating practices option. Having concluded through the RACT evaluation process that the type of control options available for the Blommer sources (upon which short-term limits could be imposed) were not technically or economically feasible, PADEP imposed good operating practices along with the requirement to install, maintain, and operate each source in accordance with manufacturer's specifications as the RACT requirements for these sources.⁵ Additionally, PADEP included source-specific recordkeeping and reporting requirements. Monthly recordkeeping requirements are required for

calculating both VOC emissions and the amount of cocoa nibs processed.⁶

In addition to these RACT requirements, PADEP also included in its SIP submittal a request to incorporate existing permitted annual VOC emission limits for the sources into the Pennsylvania SIP. Those annual limits were previously established for each source through a Best Available Technology (BAT) evaluation at the time each source was permitted, and ensure the SIP requires the conditions under which the PADEP analyzed RACT feasibility.⁷ In response to PADEP's request, EPA is approving those annual limits into the SIP in addition to the RACT requirements PADEP determined to be technically and economically feasible for Blommer. Because Pennsylvania analyzed what should be RACT under operating conditions that included annual limits from the Blommer permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual emission limits into the SIP not as RACT control limits but for the purpose of SIP strengthening. For these reasons, we consider the annual limits to be separate from RACT and believe the commenter's assertion is misplaced.⁸

Comment 4: The commenter states that EPA is proposing case-by-case VOC RACT for the sources at Jeraco Enterprises, Inc. (Jeraco) to be in compliance with 40 CFR part 63 subparts WWWW and PPPP (National Emission Standards for Hazardous Air

⁶ For example, see Blommer redacted Permit No. 46-00198, Section D, Source ID 105, Condition IV, #004, which is part of the record for this docket and will be incorporated by reference into the SIP.

⁷ See Alternative RACT Compliance Proposal, Blommer Chocolate Company, October 2016, which is part of the record for this docket. BAT is defined by Pennsylvania as "[e]quipment, devices, methods, or techniques as determined by the Department which will prevent, reduce, or control emissions of air contaminants to the maximum degree possible and which are available or may be made available." 25 Pa. Code 121.1.

⁸ EPA notes that PADEP, in its RACT SIP revisions for the following facilities (The Boeing Co.; JW Aluminum Company; Ward Manufacturing, LLC; Wood-Mode Inc.; Texas Eastern Transmission, L.P.—Bernville; Texas Eastern Transmission, L.P.—Shermans Dale; Texas Eastern Transmission, L.P.—Perulack; Texas Eastern Transmission, L.P.—Grantville; Texas Eastern Transmission, L.P.—Bechtelsville; NRG Energy Center Paxton, LLC; Containment Solutions, Inc.; Jeraco Enterprises, Inc.; and Foam Fabricators, Inc.) included some form of annual limits in the RACT II permits for those facilities. Even though a public comment was not submitted concerning the annual limits for these other facilities, EPA wishes to clarify that it is not approving any such annual limits as RACT control limits. Rather, because PADEP conducted its RACT analysis under operating conditions that included annual limits from the existing facility permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual limits into the SIP not as RACT control limits but for the purpose of SIP strengthening.

⁴ See the January 20, 1984 EPA guidance memorandum titled "Averaging Times for Compliance with VOC Emission Limits—SIP Revision Policy."

⁵ See PADEP Technical Review Memo, dated February 1, 2017, which is part of the record for this docket.

Pollutants (NESHAP) for Surface Coating of Plastic Parts and Products; NESHAP for Reinforced Plastic Composites Production). The commenter states that EPA does not quantify how much VOC emission reductions this might achieve. According to the commenter, VOC emissions cannot be controlled under this strategy because while some hazardous air pollutants (HAPs) are VOCs, not all VOCs are HAPs. Thus, the commenter asserts that EPA must evaluate what percentage of VOC reductions are being achieved through the control of HAPs at the sources at Jeraco, and from there, determine what additional controls are necessary to address non-HAP VOC emissions.

Response 4: EPA disagrees with the commenter's claim that case-by-case VOC RACT for the five sources at Jeraco is in compliance with 40 CFR part 63 subparts WWWW and PPPP. While the commenter is correct in stating that the facility is indeed subject to NESHAPs WWWW and PPPP, PADEP did not determine that the five sources could meet RACT requirements only by meeting the NESHAP requirements. EPA also disagrees with the commenter on the alleged inadequacy of PADEP's evaluation of VOC emissions at the facility. PADEP followed the RACT provisions of 25 Pa. Code 129.99 and evaluated the technical and economic feasibility of potential VOC control options for the five case-by-case sources at Jeraco. Through that evaluation, PADEP considered the control of all VOCs, not just VOCs that were HAPs. As PADEP evaluated potential control options for all VOCs, there was no need to evaluate what percentage of VOC control is achieved through the applicable NESHAP as suggested by the commenter because compliance with the NESHAP, which was an existing baseline condition at the facility, was not one of the control requirements considered for purposes of fulfilling RACT requirements.

The redacted version of the facility's permit (No. 49-00014), which is being incorporated by reference into the SIP and is available in the docket for this action, documents the RACT requirements to be incorporated into the SIP for this facility. These requirements are summarized in the TSD (under the heading "PADEP Conclusions"). The requirements for the Jeraco sources include, in most instances, specific VOC emission limitations, VOC content restrictions, material usage requirements, and detailed work

practice requirements to minimize VOC emissions.⁹

Comment 5: The commenter asserts that for the boardmill line at Armstrong World Industries, Inc. (Armstrong), there is a discrepancy between what is reported as the source's exhaust temperature and the moisture content of that exhaust in the evaluation of activated carbon adsorption as a VOC control versus that which is reported for these measures during the evaluation of the catalytic oxidizer. The commenter demands that EPA disapprove PADEP's case-by-case RACT determination for Armstrong and requests re-evaluation of these technologies with the actual exhaust temperature and moisture content.

Response 5: EPA disagrees that there is a discrepancy in what is being reported as the boardmill line source's exhaust temperature and moisture content when evaluating the technical feasibility of the two VOC control strategies (activated carbon adsorption/zeolite adsorption and a catalytic oxidizer) as RACT. Actual exhaust temperatures and moisture content (*i.e.*, saturation) for the two different exhaust streams (at the venturi scrubber inlet and outlet) have been provided by Armstrong. Stack test results for the boardmill line, pre and post-scrubber, with data on both exhaust temperature and moisture content are provided in Armstrong's RACT II proposal.¹⁰ Table 2-1 (scrubber inlet) of that report shows exhaust temperatures averaging 344 degrees Fahrenheit (°F) and 341 °F for the North and South locations respectively. Moisture content averages 36.6 percent (%) and 36.1%, respectively. Table 2-2 (scrubber outlet) of that report shows exhaust temperatures averaging 170 °F for both locations and moisture content averaging 37.9% and 37.8%, respectively, for both locations.

These temperature and moisture content values were used consistently in Armstrong's RACT analysis. In the evaluation of the adsorption control technology, the company cites vendor information that states that adsorbents will not function in a saturated gas stream or function for a process gas with temperatures greater than 104 °F.¹¹ The same letter also explains that catalytic

oxidation is not feasible at the scrubber exhausts because the temperature is too low and would have to be significantly increased to about 650 °F.

Comment 6: The commenter states that EPA is proposing case-by-case VOC RACT for the sources at Containment Solutions—Mt. Union Plant (Containment Solutions) to be in compliance with 40 CFR part 63 subpart WWWW (NESHAP for Reinforced Plastic Composites Production). The commenter states that EPA does not quantify how much VOC emission reductions this might achieve. The commenter asserts that EPA must evaluate what percentage of VOC reductions are being achieved through the control of HAPs at the layup source at Containment Solutions.

Response 6: The commenter is partially correct in that for the single source at Containment Solutions that is subject to a case-by-case VOC RACT determination (the layup area), PADEP has determined RACT to include, among other requirements, compliance with NESHAP WWWW. However, PADEP's RACT determination did not rely solely on compliance with NESHAP WWWW. EPA disagrees with the commenter on the alleged inadequacy of PADEP's evaluation of VOC emissions at the facility. PADEP followed the RACT provisions of 25 Pa. Code 129.99 to evaluate the technical and economic feasibility of potential VOC control options for the case-by-case source at Containment Solutions. Through that evaluation, PADEP considered the control of all VOCs, not just VOCs that were HAPs. As PADEP evaluated potential control options for all VOCs, there was no need to evaluate what percentage of VOC control is achieved through the applicable NESHAP as suggested by the commenter because compliance with the NESHAP was an existing baseline condition at the facility.

Other RACT requirements imposed by PADEP for this source also include a restriction on total resin use (shall not exceed 12,910,000 lbs per 12-month consecutive period) and specific work practice requirements (such as the use of a "tank fabrication" resin pouring layup method and a ban on the use of solvent-based resin cleanup solutions). PADEP also included specific recordkeeping and reporting requirements.¹²

Comment 7: The commenter asserts that EPA does not specify the

⁹ For example, see Jeraco redacted Permit No. 49-00014, Section D, Source 102A, Conditions I, #003 and #004, IV, #006-#008, VI, #014-#019, and VII, #021.

¹⁰ See TRC Environmental Corporation's Report for Armstrong World Industries, Marietta Boardmill Dryer, Marietta, Pennsylvania, which is part of the record for this docket.

¹¹ See letter dated October 31, 2017 from Liberty Environmental, Inc. to PADEP, which is part of the record in this docket.

¹² See Containment Solutions redacted Permit No. 31-05005, Section E, Group 06, RACT II Requirements for Source ID 101, Condition VII, which is being incorporated by reference into the SIP and is part of the record for this docket.

monitoring and recordkeeping being required as RACT for Containment Solutions.

Response 7: EPA disagrees with this comment. Specific monitoring and recordkeeping requirements associated with the RACT requirements for the layup area (Source ID 101) at Containment Solutions can be found in the redacted version of the facility's permit. Daily records, which inherently require monitoring, are required on resin identification, resin usage, VOC emissions and hours of operation.¹³

Comment 8: The commenter asserts that the PADEP economic benchmark for case-by-case RACT determinations is too low and not appropriate for all case-by-case evaluations, such as those for Texas Eastern Bechtelsville. The commenter states that an absolute cost threshold should not be used. The commenter goes on to discuss New Jersey's RACT program in comparison to Pennsylvania's, stating that New Jersey's program does not consider an absolute cost threshold, and the range of dollar per ton of NO_x removed in the New Jersey evaluations allows for more control options to be considered economically feasible.

Response 8: EPA is aware that Pennsylvania considered cost-effectiveness levels (\$/ton removed) that are lower than other states, such as New Jersey as the commenter notes, when developing the RACT II rule. However, EPA has not set a single cost, emission reduction, or cost-effectiveness figure to fully define cost-effectiveness in meeting the NO_x or VOC RACT requirement. Therefore, states have the discretion to determine what costs are considered reasonable when establishing RACT for their sources. Each state must make and defend its own determination on how to weigh these values in establishing RACT.

As PADEP explained in its RACT II rulemaking, it did not establish a bright-line cost effectiveness threshold in determining what is economically reasonable for purposes of defining RACT.¹⁴ Instead, it developed as guidance a cost-effectiveness threshold of \$2,800 per ton of NO_x controlled and \$5,500 per ton of VOC controlled for RACT. Pennsylvania also determined that even evaluating control technology options with an additional 25% margin, an upper bound cost-effectiveness threshold of \$3,500 per ton NO_x controlled and \$7,000 per ton VOC controlled, would not affect the add-on control technology decisions required

by RACT.¹⁵ Pennsylvania determined that these higher cost-effectiveness thresholds did not impact the determination of what add on control technology was feasible. Pennsylvania also reviewed examples of benchmarks used by other states: Wisconsin, \$2,500 per ton NO_x; Illinois, \$2,500—\$3,000 per ton NO_x; Maryland, \$3,500—\$5,000 per ton NO_x; Ohio, \$5,000 per ton NO_x; and New York, \$5,000—\$5,500 per ton NO_x.¹⁶

In its conditional approval of Pennsylvania's overall RACT II program, EPA found that PADEP's cost effectiveness thresholds are reasonable and reflect control levels achieved by the application and consideration of available control technologies, after considering both the economic and technological circumstances of Pennsylvania's own sources. See 84 FR 20274, 20286 (May 9, 2019).

Comment 9: The commenter requests that EPA and PADEP re-evaluate Texas Eastern Bechtelsville's RACT analysis, taking into account the NO_x emission reductions achieved in practice by other existing sources in New Jersey and other states. The commenter cites a similar natural gas compressor station operated by Texas Eastern in New Jersey that has two identical turbines (two Dresser Clark DC-990 turbines) as those found at Texas Eastern Bechtelsville. The commenter states that under the New Jersey RACT program, in order to comply with the presumptive NO_x RACT limit of 42 parts per million by volume, dry (ppm_{vd}) at 15% oxygen (O₂), the facility proposed replacement of the turbines with two new turbines that utilize low NO_x emissions technology and will reduce NO_x emissions from 172.5 ppm_{vd} to 9 ppm_{vd} at 15% O₂ (or 25 tpy).

Response 9: The commenter is correct that the Texas Eastern Bechtelsville facility does appear to have one source (Source ID 101, Dresser Clark DC 990 turbine) which is similar if not identical to the two sources the commenter discusses that are allegedly found at the natural gas compressor station in New Jersey. However, under the Pennsylvania RACT program, Source ID 101 at Texas Eastern Bechtelsville will meet Pennsylvania's presumptive RACT requirements per 25 Pa. Code 129.97(g)(2)(iii) and 129(g)(2)(iv). It is not part of the facility's case-by-case RACT proposal and EPA is not taking any action on Source ID 101 in this

rulemaking. The presumptive RACT determination for Source ID 101 is not part of this rulemaking action, thus the comment is outside the scope of this action.

Comment 10: The commenter asks EPA to re-evaluate the RACT determination for the two boilers at NRG Energy Center Paxton, LLC (NRG), specifically for the boilers when operating on No. 6 fuel oil. The commenter states that the proposed NO_x short-term emission limit of 0.44 pound per million British thermal units (lb/MMBtu) is "entirely too high for a boiler of this size." The commenter suggests that switching to No. 2 fuel oil and/or a permanent restriction on the use of No. 6 residential fuel oil to only emergency situations when natural gas is unavailable should be evaluated as RACT.

Response 10: EPA continues to find that Pennsylvania's RACT determination for Boiler Nos. 13 and 14 (Source IDs 032 and 033) at NRG is reasonable given the technological and economic feasibility analysis required by 25 Pa. Code Sections 129.92 and 129.99. Through the RACT analysis, PADEP reviewed the available control options with a reasonable potential for application at the source and determined that the short-term NO_x emission limit of 0.44 lb/MMBtu for Boilers 13 and 14 when operating on No. 6 fuel oil is the appropriate RACT requirement.

Through the RACT II process, PADEP also added new requirements for Boilers 13 and 14. Under the new RACT II permit, each of the two boilers will now be subject to an annual NO_x emission limit of 46 tpy, a limit that is in addition to the short-term RACT limit and strengthens the SIP. Furthermore, each boiler will now be subject to operating restrictions on fuel usage—No. 6 fuel oil limited to 1,533,300 gallons per year (gal/yr) and natural gas limited to 584,000,000 cubic feet/year.¹⁷ PADEP had added these requirements to reflect the fact that these are not full time operating units and impose the conditions upon which the feasibility analysis was conducted. Because Pennsylvania analyzed what should be RACT under operating conditions that included annual limits from the NRG permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual emission limits into the SIP not as

¹³ Id.

¹⁶ PADEP Responses to Frequently Asked Questions, Final Rulemaking RACT Requirements for Major Sources of NO_x and VOCs. October 20, 2016.

¹³ Id.

¹⁴ 46 Pa. Bulletin 2036 (April 23, 2016).

¹⁷ See NRG redacted permit No. 22-05005, Section E, Group 003, RACT II Requirements for Source IDs 032 and 033, which is being incorporated by reference into the SIP and is part of the record for this docket.

RACT control limits but for the purpose of SIP strengthening.¹⁸

Comment 11: The commenter suggests that EPA should disapprove the short-term NO_x emission limit of 116 parts per million (ppm) at Texas Eastern Grantville because the limit is too high. The commenter cites stack test results in which the applicable sources were able to maintain a NO_x emission rate of 84.3 ppm with the highest run being 86.8 ppm. The commenter demands that EPA send the RACT determination back to the state for a re-evaluation showing the lowest achievable emission limit for the sources.

Response 11: EPA disagrees with the commenter on the stack test results referenced in the comment. The values included in the comment refer to stack test results for the facility's Dresser Clark DC 990 turbine (Source ID 032), which is subject to presumptive RACT requirements at 25 Pa. Code 129.97(g)(2)(iii) and (iv).¹⁹ The test results do not refer to the Westinghouse W52 turbines (Source IDs 033 and 034), which are subject to this case-by-case RACT rulemaking.

The two Westinghouse W52 turbines (Source IDs 033 and 034) have a short-term NO_x limit of 116 ppm. Assuming the commenter was objecting to the 116 ppm short-term NO_x limit for the Westinghouse turbines, EPA continues to find that Pennsylvania's RACT determinations for those turbines are reasonable given the analysis of technological and economic feasibility, which is part of the record for this docket, and that the short-term NO_x emission limit of 116 ppm for these turbines is appropriate. As part of the case-by-case NO_x RACT analysis, the facility evaluated the technical and, where appropriate, economic feasibility of available control strategies for the two Westinghouse turbines and determined that there were no reasonably available control technologies that were technically or economically feasible for the conditions at this facility. Technological and economic feasibility are how EPA analyzes what is RACT for purposes of implementation of the ozone NAAQS—the standard is not lowest achievable emission rates, as suggested by the commenter.²⁰

PADEP imposed, as a RACT II requirement, a continuation of the current RACT I short-term NO_x limit of 116 ppm_{vd} at 15% O₂ at all times. This limit is based on a statistical analysis of historical stack test results (for Texas Eastern's entire fleet of Westinghouse W52 turbines in Pennsylvania). The analysis showed that lowering the short-term emission rate without the availability of any additional feasible controls would present a significant compliance risk.²¹ Ultimately, Pennsylvania agreed with the facility's evaluation of feasible controls and that case-by-case NO_x RACT short-term emission limits cannot be based on individual stack test results alone in this instance.

Comment 12: The commenter suggests that EPA should disapprove the short-term NO_x emission limit of 120 ppm at Texas Eastern Perlack because the limit is too high. The commenter cites stack test results in which the applicable source was able to maintain a NO_x emission rate of 66.5 ppm with the highest run being 67.5 ppm. The commenter demands that EPA send the RACT determination back to the state for a re-evaluation showing the lowest achievable emission limit for the source.

Response 12: EPA continues to find that Pennsylvania's RACT determination for the General Electric Frame 5 turbine at Texas Eastern Perlack (Source ID 037) is reasonable given the analysis of technological and economic feasibility, which is part of the record for this docket, and that the short-term NO_x emission limit of 120 ppm for these turbines is appropriate. As part of the case-by-case NO_x RACT analysis, the facility evaluated the technical and, where appropriate, economic feasibility of available control strategies for the General Electric Frame 5 turbine and determined that there were no reasonably available control technologies that were technically or economically feasible for the conditions at this facility. Technological and economic feasibility are how EPA analyzes what is RACT for purposes of implementation of the ozone NAAQS—the standard is not lowest achievable

emission rates, as suggested by the commenter.²²

PADEP imposed, as a RACT II requirement, a continuation of the current RACT I short-term NO_x limit of 120 ppm_{vd} at 15% O₂ at all times. This limit is based on a statistical analysis of historical stack test results (for Texas Eastern's entire fleet of General Electric Frame 5 turbines in Pennsylvania). The analysis showed that lowering the short-term emission rate without the availability of any additional feasible controls would present a significant compliance risk.²³ Ultimately, Pennsylvania agreed with the facility's evaluation of feasible controls and that case-by-case NO_x RACT short-term emission limits cannot be based on individual stack test results alone in this instance.

Comment 13: The commenter suggests that EPA should disapprove the short-term NO_x emission limit of 120 ppm at Texas Eastern Shermans Dale because the limit is too high. The commenter cites stack test results in which the applicable sources were able to maintain a NO_x emission rate of no greater than 94.8 ppm and 107.7 ppm, respectively. The commenter demands that EPA disapprove the RACT determination and send it back to the state for a re-evaluation showing the lowest achievable emission limit for the sources.

Response 13: EPA continues to find that Pennsylvania's RACT determination for the two General Electric Frame 5 turbines at Texas Eastern Shermans Dale (Source IDs 031 and 032) are reasonable given the analysis of technological and economic feasibility, which is part of the record for this docket, and that the short-term NO_x emission limit of 120 ppm for these turbines is appropriate. As part of the case-by-case NO_x RACT analysis, the facility evaluated the technical and, where appropriate, economic feasibility of available control strategies for the two General Electric turbines and determined that there were no reasonably available control technologies that were technically and economically feasible for the conditions at this facility. Technological and economic feasibility are how EPA analyzes what is RACT for purposes of implementation of the ozone NAAQS—the standard is not lowest achievable emission rates, as suggested by the commenter.²⁴

¹⁸ As a result of reviewing PADEP's RACT II determination for NRG in response to this comment, EPA has also updated its TSD for this facility to clarify its RACT I status. The updated TSD has been added to the docket of this rulemaking.

¹⁹ See letter from Spectra Energy Partners to PADEP, dated October 21, 2016 (Re: Request for Compliance Demonstration Waiver), which is part of the record for this docket.

²⁰ Since the 1970's, EPA has consistently defined "RACT" as the lowest emission limit that a

particular source is capable of meeting by the application of the control technology that is reasonably available considering technological and economic feasibility. See December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, "Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas," and 44 FR 53762 (September 17, 1979).

²¹ See letter dated October 24, 2017 from Enbridge to PADEP, which is part of the record for this docket.

²² See footnote 20 of this preamble.

²³ See letter dated October 24, 2017 from Enbridge to PADEP, which is part of the record for this docket.

²⁴ See footnote 20 of this preamble.

PADEP imposed, as a RACT II requirement, a continuation of the current RACT I short-term NO_x limit of 120 ppm_{v,d} at 15% O₂ at all times on each turbine. This limit is based on a statistical analysis of historical stack test results (for Texas Eastern's entire fleet of General Electric Frame 5 turbines in Pennsylvania). The analysis showed that lowering the short-term emission rate without the availability of any additional feasible controls would present a significant compliance risk.²⁵ Ultimately, Pennsylvania agreed with the facility's evaluation of feasible controls and that case-by-case NO_x RACT short-term emission limits cannot be based on individual stack test results alone in this instance.

Comment 14: The commenter asks EPA to clarify the potential to emit (PTE) supporting documentation for Texas Eastern Shermans Dale, citing footers for Tables A-1 and A-2 of Attachment 4 of the source's application, which cite a different Texas Eastern compressor station (Bernville). The commenter further states that the tables are identical to those included with the RACT determination for Texas Eastern Bernville. The commenter asks EPA to supplement the record with the correct PTE in order to properly determine cost effectiveness and RACT for the sources at Texas Eastern Shermans Dale.

Response 14: EPA acknowledges that Table A-1 in Attachment 4 of the facility's RACT II proposal (submitted by Trinity Consultants), which is included in the record for this docket, contains a footer that mistakenly references the Texas Eastern Bernville facility, not the Texas Eastern Shermans Dale facility. Table A-1 in the Shermans Dale supporting documentation provides the "Hourly and Annual Emission Estimates" for the gas-fired General Electric turbine, model M5241. As the commenter noted, Table A-1 in Attachment 4 in the RACT II Proposal for the Bernville station contains the same information as in Table A-1 for the Shermans Dale station. This is accurate and appropriate since both tables provide emission estimates for the same type of General Electric M5241 model turbine, which is used at each facility. Therefore, the mistaken reference in Table A-1 in the Shermans Dale proposal is just a typographical error and the PTE data is correct. There is no need to supplement the record. Finally, EPA disagrees with the commenter regarding Table A-2 in

Attachment 4. The footer associated with Table A-2 properly references the Texas Eastern Shermans Dale facility.

Comment 15: The commenter states that the presses, which vent within the building, and the autoclaves should be evaluated for RACT at Boeing. The commenter references statements in Boeing's RACT analysis that allegedly state that it is seeking a case-by-case RACT for the autoclaves and disagrees with Boeing's alleged claim that only the autoclaves are subject to case-by-case RACT because no odors from the presses have been detected by the workers.

Response 15: While the commenter's concern addresses the autoclaves and presses at the Boeing facility, it is important to note that in the present action, EPA is only approving the case-by-case RACT determination for Source ID 251, which is a Composite Manufacturing Area. It is the only emission unit for which Boeing has requested such a source-specific determination and the only case-by-case RACT determination for this facility made by PADEP. There is no request for a case-by-case RACT determination for the autoclaves or the presses. The autoclaves are subject to RACT pursuant to 25 Pa. Code 129.97(c)(3).

Comment 16: The commenter stated that an improper economic feasibility analysis was conducted for Exelon because a 10% interest rate rather than the recommended 3% to 7% interest rate was used.

Response 16: The current economic feasibility analysis produces cost per ton calculations over \$21,000/ton of pollutant removed. The interest rate is one factor in a complex, multi-factor cost analysis. A change in interest rate from 10% to 3%–7% would not reduce the cost per ton figure sufficiently to make add-on controls economically feasible for the Exelon boilers. The RACT requirement for the two boilers at Exelon when burning landfill gas (LFG) is 0.1 lbs NO_x/MMBtu, which is comparable to Pennsylvania's presumptive RACT requirements when burning natural gas, and the operation of a continuous emissions monitoring system (CEMS). Therefore, although EPA agrees with the commenter about the suitability of the interest rate used in the analysis, a lower interest rate does not change the final conclusions of the analysis and EPA is finalizing the proposed RACT requirements for Exelon.

Comment 17: The commenter stated that the generic recordkeeping provisions of 25 Pa. Code 129.100 are insufficient for Exelon. The commenter states that the records must include

sufficient data and calculations to demonstrate that the requirements of 25 Pa. Code 129.96–129.99, as applicable, are met. Specifically, the commenter referred to EPA's response to the final approval of the Pennsylvania rule, which stated that 129.99(d)(6) requires sources to include such methods for demonstrating compliance and that EPA would evaluate these when they are submitted for SIP approval.

Response 17: EPA reviewed and evaluated the specific compliance demonstration provisions imposed by PADEP for the Exelon case-by-case RACT determination under 129.99(d)(6). Specific monitoring and recordkeeping provisions are contained in both the Exelon RACT I and RACT II permits that are incorporated or will be incorporated into the SIP.²⁶ For example, both permits require a CEMS, which monitors and records the required emissions information on a continuous basis. More specific recordkeeping requirements on fuel usage are also contained and will be retained in the SIP via the incorporated RACT I permit.

Comment 18: The commenter stated that EPA and PADEP did not consider burner replacement as a control option for Exelon and claims that dual-fuel fired (vs. single-fuel fired) burners should have specifically been considered as a technically and economically feasible option.

Response 18: EPA continues to find that Pennsylvania's RACT determination for the boilers (Source IDs 044 and 045) at Exelon—Fairless Hills is reasonable given the technological and economic feasibility analysis required by 25 Pa. Code Sections 129.92 and 129.99. Through the RACT analysis, PADEP reviewed the available control options with a reasonable potential for application at the sources and determined that the short-term NO_x emission limit of 0.10 lb/MMBtu for these boilers when burning LFG is the appropriate RACT requirement. The case-by-case RACT determination for these boilers is only required when they are burning LFG. The sources must comply with Pennsylvania's presumptive RACT II requirements at 25 Pa. Code 129.97(g)(1), respectively, when burning natural gas or No. 4 residual oil. With the use of low NO_x burners (LNBs),

²⁶ Exelon's RACT I permit (formerly PECO Energy—USX Fairless Works Powerhouse), Permit No. OP-09-0066, issued December 31, 1998 and revised April 6, 1999, was approved by EPA into the SIP on December 15, 2000. 40 CFR 52.2020(c)(143)(i)(B)(15). Incorporation of Exelon's redacted RACT II permit is the subject of this rulemaking. The monitoring and recordkeeping requirements in the RACT I permit are being retained in the SIP.

²⁵ See letter dated October 24, 2017 from Enbridge to PADEP, which is part of the record for this docket.

Exelon achieves a RACT NO_x emission rate when burning LFG equivalent to the NO_x emission rate in Pennsylvania's presumptive RACT requirements applicable to burning natural gas.

Comment 19: The commenter claims that without knowing the exit flue gas temperature, it is not possible to discount selective non-catalytic reduction (SNCR) as an option for the boilers at Exelon and that SNCR should not have been discounted as a feasible option for the boilers.

Response 19: As described in the supporting documentation for Exelon's RACT determination, which is part of the record for this docket, SNCR was determined to be technically infeasible when burning LFG for several reasons, including the high exhaust temperatures required by SNCR. Burning LFG naturally reduces combustion temperatures, and this lower combustion temperature reduces NO_x conversions when using SNCR, making the control technology less effective for this use. Further, EPA has not identified any application of SNCR to boilers when burning LFG. When using natural gas or No. 4 residual oil, these Exelon boilers will be required to meet the presumptive RACT requirements at 25 Pa. Code 129.97(g)(1)(i) and (ii), respectively.

Comment 20: The commenter stated that EPA has numerous guidance policies requiring short-term limits for RACT and has informed PADEP of these policies. Therefore, the commenter claims that an annual emissions cap for First Quality Tissue as RACT is insufficient.

Response 20: See Response 3, of this preamble, for a discussion of EPA policy on RACT and short-term limits. As explained there, the establishment of case-by-case RACT requirements to reduce VOC and/or NO_x emissions considers not only numeric emission limits, but also design and equipment specifications, operational and throughput constraints and work practice standards. Each of these requirements can take different forms depending on the types of processes and emissions at a facility.

For the First Quality Tissue emission units subject to case-by-case RACT, PADEP's RACT determination includes numerous continuous limits on the VOC content and usage rate of materials used at the facility. For example, materials used in the Adhesive Operation (Source ID 108) are restricted in VOC Content and usage rate as follows: Laminating Glue—0.0005 lb/gal per 4,000 gallons per day (gpd); Transfer Glue—0.010 lb/gal per 300 gpd; and Core Glue—0.008

lb/gal per 700 gpd.²⁷ In addition to these continuous limits, PADEP also included in its RACT II permit annual VOC limits for various units. These annual limits are existing legal requirements at the facility. Because Pennsylvania analyzed what should be RACT under operating conditions that included annual limits from the First Quality Tissue permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual emission limits into the SIP not as RACT control limits but for the purpose of SIP strengthening. For these reasons, we consider the annual limits to be separate from RACT and believe the commenter's assertion is misplaced.

In preparing the response to this comment, EPA noticed that the First Quality Tissue RACT II permit was improperly redacted in that it did not contain all of the requirements imposed by PADEP's RACT determination. Additional RACT provisions located in the First Quality Tissue Permit No. 18099939, Section C, Conditions #007, 026, 027 and 028 were erroneously redacted. Through a May 27, 2020 email from Mr. Viren Trivedi, PADEP, to Ms. Cristina Fernandez, EPA, PADEP has now corrected the First Quality Tissue RACT II permit to include these provisions and this corrected version will be incorporated into the Pennsylvania SIP. The corrected RACT II permit has been added to the docket of this rulemaking.

Comment 21: Two commenters state that EPA should not allow for the consideration of plant shutdown as part of the economic feasibility analysis for JW Aluminum. They claim that eliminating such consideration would likely make a number of control technologies economically feasible at Mills 1 and/or 2. The commenters conclude that EPA should disapprove the permit and require JW Aluminum to recalculate the costs of installing pollution control devices without considering shutdown.

One of the commenters also states that the economic feasibility analysis for JW Aluminum improperly included state taxes, property taxes, duties, value added tax (VAT), plant shutdown, and inflated interest rates. The commenter concludes that EPA should disapprove the permit and require JW Aluminum to recalculate the costs of installing

pollution control devices without these improper factors.

One commenter states that the use of 12% interest rate in the JW Aluminum cost analysis does not reflect current Fed Funds interest rates, which are available from <https://www.federalreserve.gov/monetarypolicy/openmarket.htm>, and now vary between 0 and 0.25%. Furthermore, the commenter states that EPA's guidance indicates it is feasible to use 3–7% interest rates where firm-specific rates or prime rates are not available. However, the commenter further summarizes that the EPA guidance also states that the 3% to 7% interest is not appropriate when assessing private costs by firms making investments. Without making these changes, EPA should return the permit to PADEP and require a recalculation of costs for the JW Aluminum RACT analysis.

Response 21: EPA agrees with the commenter that the values used for certain factors such as interest rate, taxes, and plant shutdown in the cost analysis may not have been justified in this case. These values are among many other values used in a complex, multi-factor cost analysis. However, even with adjustments to address questionable interest rates, taxes, and plant shutdown, the lowest cost/ton numbers to reduce emissions from these sources are still more than \$7,600/ton, a level that does not change the conclusion about the economic feasibility of controls for the rolling mills. Therefore, although EPA agrees with the commenter that the values used for certain factors in the economic feasibility analysis may not have been appropriate, the adjustment of such factors does not change the conclusions of the analysis.

Comment 22: The commenter states that the generic recordkeeping provisions of 25 Pa. Code 129.100 are insufficient for Cherokee. The commenter states that the records must include sufficient data and calculations to demonstrate that the requirements of 25 Pa. Code 129.96–129.99 are met. Specifically, the commenter referred to EPA's response to the final approval of the Pennsylvania rule, which stated that 25 Pa. Code 129.99(d)(6) requires sources to include such methods for demonstrating compliance and that EPA would evaluate these when they are submitted for SIP approval.

Response 22: EPA reviewed and evaluated the specific compliance determination provisions imposed by PADEP for the Cherokee case-by-case RACT determination under 129.99(d)(6). There are specific recordkeeping

²⁷ See, for example, First Quality Tissue's redacted Permit No. 18–00030, Section D., Source ID P102, I. Condition #003; Source ID P103, I. Conditions #001 and #003; Source ID P106, I. Condition #001; Source ID P108, VI. Condition #004; and Source ID P110, VI. Condition #006, which will be incorporated by reference into the SIP and is part of the record for this docket.

provisions for Source ID 101 in Cherokee's. The records needed to support the calculations necessary to verify compliance with the VOC emission limitation may include emissions data and information on emission modeling method and emission factors.²⁸

Comment 23: The commenter states that EPA must require that the 95% reduction from NESHAP subpart GGG is RACT for Cherokee because the annual emission cap alone is not sufficient for RACT purposes. The commenter further states that an annual emissions cap is not sufficient as EPA guidance and instruction to Pennsylvania has previously stated that RACT should consist of short-term limits such as daily averages.

Response 23: See Response 3, of this preamble, for a discussion of EPA policy on RACT and short-term limits. As explained in that response, the establishment of case-by-case RACT requirements to reduce VOC and/or NO_x emissions under EPA policy considers not only numeric emission limits, but also design and equipment specifications, operational and throughput constraints, and work practice standards. Each of these requirements can take different forms depending on the types of processes and emissions at a facility.

Cherokee's Source 101 is a collection of covered and uncovered tanks in the wastewater treatment plant and is already required to comply with 40 CFR part 63 subpart GGG, including the 95% reduction requirement. The 95% reduction requirement applies to all components of Source 101 and has reduced the potential VOC emissions from this source from 146 tpy to 15 tpy. Compliance with the 95% reduction requirement of subpart GGG and the VOC emissions limit of 15 tpy are existing legal requirements for this source.²⁹

As part of the case-by-case RACT analysis required under 25 Pa. Code 129.99, the facility evaluated the technical and, where appropriate, economic feasibility of available controls on the various individual components of Source 101. Tank covers were found to be feasible for certain tanks and are now RACT requirements; however, covers were found to be

technically or economically infeasible for certain other tanks. PADEP's RACT determination for Source 101 also requires that biodegradation is maximized, which requires ambient exposure of volatiles, which in turn precludes the use of a tank cover in certain cases because the processes require tank access for mixing and aeration. Having concluded through the RACT evaluation process that the type of control options available for certain tanks (upon which short-term limits could be imposed) were not technically or economically feasible, PADEP imposed good operating practices along with the requirement to *e.g.*, to maximize biodegradation of volatiles. Overall, RACT for Source 101 includes tank covers, maximization of biodegradation, and good operating practices.³⁰

In addition to these RACT requirements, PADEP has also included the existing annual VOC emissions cap referenced by the commenter in its redacted RACT II permit. Because Pennsylvania analyzed what should be RACT under operating conditions that included annual limits from the Cherokee permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual emission limits into the SIP not as RACT control limits but for the purpose of SIP strengthening. For these reasons, we consider the annual limits to be separate from RACT and believe the commenter's assertion is misplaced.

Comment 24: The commenter states that EPA should disapprove the Texas Eastern Bernville case-by-case RACT determination because the NO_x emission limits proposed for RACT are not the lowest achievable emission rates for the subject sources and do not reflect their actual emissions. The commenter notes that the NO_x emission rates for Source 101 and 102 are identified in the documentation as 115.75 lbs/hr and 110.29 lbs/hr, respectively, while RACT limit being proposed is 120 lb/hr.

Response 24: Initially, EPA needs to clarify certain information referenced by the commenter. The NO_x emission rates found in the documentation referenced by the commenter were provided by the manufacturer. They are generic rates; not measured NO_x emission rates at the Texas Eastern Bernville sources. Also, RACT for Source IDs 101 and 102 is being proposed at 120 ppm at 15% O₂

and not 120 lbs NO_x/hr, as apparently assumed by the commenter.

EPA also continues to find that Pennsylvania's RACT determination for the two General Electric Frame 5 turbines at Texas Eastern Bernville (Source IDs 101 and 102) are reasonable given the analysis of technological and economic feasibility, which is part of the record for this docket, and that the short-term NO_x emission limit of 120 ppm for these turbines is appropriate. As part of the case-by-case NO_x RACT analysis, the facility evaluated the technical and, where appropriate, economic feasibility of available control strategies for the two General Electric turbines and determined that there were no reasonably available control technologies that were technically and economically feasible for the conditions at this facility. Technological and economic feasibility are how EPA analyzes what is RACT for purposes of implementation of the ozone NAAQS—the standard is not lowest achievable emission rates, as suggested by the commenter.³¹

PADEP imposed, as a RACT II requirement, a short-term NO_x limit of 120 ppm_{v,d} at 15% O₂ at all times on each turbine. This limit is based on a statistical analysis of historical stack test results (for Texas Eastern's entire fleet of General Electric Frame 5 turbines in Pennsylvania). The analysis showed that lowering the short-term emission rate without the availability of any additional feasible controls would present a significant compliance risk.³² Ultimately, Pennsylvania agreed with the facility's evaluation of feasible controls and that case-by-case NO_x RACT short-term emission limits cannot be based on individual stack test results alone in this instance.

Comment 25: The commenter states that the compliance date required under RACT is January 1, 2017 and claims that approval of the case-by-case RACT for Texas Eastern Bernville Sources 101 and 102 includes an impermissible compliance date extension until January 1, 2024.

Response 25: The two turbines at issue would generally be subject to the presumptive RACT requirements specified in 25 Pa. Code 129.97(g)(2), but the source has demonstrated that the presumptive RACT limits are not in fact economically and technologically achievable for these two turbines. Accordingly, the source submitted, PADEP approved, and EPA is now

²⁸ See Cherokee's redacted RACT Permit No. 49-00007, Section D, Source ID 101, IV. Condition #004, which will be incorporated into the SIP with this rulemaking and is part of the record in this docket.

²⁹ See Cherokee title V Permit No. 49-00007, Section D., Source ID 101, I. Condition #01 and VII. Condition #013, which is part of the record for this docket.

³⁰ See Cherokee redacted Permit No. 49-00007, Section D., Source ID 101, VI. Conditions #010 and #011 and VII. Condition #014, which is part of the record for this docket and will be incorporated by reference into the SIP. See also, footnote 28 of this preamble.

³¹ See footnote 20 of this preamble.

³² See letter dated October 24, 2017 from Enbridge to PADEP, which is part of the record for this docket.

agreeing that these two turbines will have a source-specific RACT determination, and accompanying limits, for purposes of implementation of the 1997 and 2008 ozone NAAQS.

Texas Eastern evaluated the turbines under the source-specific RACT provisions as authorized by 25 Pa. Code 129.97(a). Following the case-by-case requirements of 25 Pa. Code 129.99, Texas Eastern evaluated the technical and economic feasibility of installing controls on the Frame 5 turbines to reduce NO_x emissions as required by RACT. Texas Eastern determined that there were no technically and economically feasible controls to implement on the turbines. PADEP reviewed Texas Eastern's RACT II analysis on control measures and determined that the RACT II requirements were a continuation of the existing RACT I emission limits. PADEP also included in its RACT II permit, emission, fuel usage, and operating hour caps that were utilized in the economic feasibility analysis. As explained in our proposal document and TSD provided in the docket, we agree with PADEP's determination. Source IDs 101 and 102 at Texas Eastern's Bernville facility are subject to RACT II requirements established through the source-specific alternative provisions of 25 Pa. Code 129.99. Those requirements currently apply to the turbines through Texas Eastern Bernville's title V permit, which is part of the record for this docket and was effective on March 16, 2018.³³ The redacted version of that permit includes the RACT requirements and is being incorporated into the SIP through this action.

In the course of its RACT analysis, Texas Eastern determined that it would replace these turbines as part of a major modernization project on the Texas Eastern pipeline. Texas Eastern indicated that the turbines would be replaced with turbine(s) resulting in a reduction of the facility's PTE NO_x of at least 290 tpy more than the presumptive RACT limit. However, because the modernization project would be implemented statewide, Texas Eastern indicated that it would be a seven-year project with a completion date of January 1, 2024. As described by Texas Eastern, the turbine replacements are part of an extensive modernization project across multiple facilities in Pennsylvania that requires extensive engineering and scheduling considerations as the operation of the compressor stations are inherently

dependent on each other—for example, to maintain appropriate line pressures throughout the pipeline.³⁴ Accordingly, Texas Eastern said that the replacement of the turbines could not occur until January 1, 2024, a date that, as commenter notes, exceeds the implementation deadline for RACT for purposes of the 1997 and 2008 ozone NAAQS.

Because Texas Eastern considered the replacement of these turbines by January 1, 2024 in their RACT proposal to PADEP, and PADEP included that requirement in their SIP submittal to us, we are approving that requirement into the SIP solely for the purposes of SIP strengthening to ensure that the conditions utilized in the economic feasibility analysis are implemented and enforceable. Because the turbine replacement is not a RACT-level requirement for this source, commenter's allegation that EPA is improperly extending the RACT implementation deadline beyond statutory and regulatory requirements is misplaced.

Comment 26: The commenter states that Texas Eastern Bernville's RACT evaluation is improper and should be cost effective. The commenter argues that EPA should not grant this RACT permit for Texas Eastern Bernville until full and complete environmental studies have been conducted and completed on the proposed site as soon as possible.

Response 26: Texas Eastern Bernville is an existing, not a proposed, source. PADEP and EPA have evaluated the subject sources at the Bernville facility under the requirements of the RACT regulations, which includes an analysis of potential controls for technical and economic feasibility.³⁵ The RACT analysis does not require an environmental study of the site.

Comment 27: The commenter states that EPA should reevaluate the cost analysis for Wood-Mode's lumber drying sources as the analysis of the thermal oxidizer inappropriately used a 10% interest rate and considered state and property taxes. The commenter suggests that these factors may change the feasibility of the thermal oxidizer and concludes that EPA should return the permit to PADEP and disapprove the current submittal.

Response 27: Wood-Mode's lumber drying sources (Source ID 154) are not

being evaluated under the case-by-case RACT provisions and are exempt pursuant to 25 Pa. Code 129.97(c)(2). Therefore, they are not relevant to the current rulemaking action. Only the hand-wipe staining operations (Source IDs 143 and 146) at Wood-Mode are being evaluated for case-by-case RACT determinations. The RACT analysis for the hand-wipe staining operations included an assessment of a thermal oxidizer. EPA agrees with the commenter that the values used for certain factors such as interest rate and taxes in the cost analysis for these sources may not have been justified in this case. However, the economic feasibility of the thermal oxidizer for Source IDs 143 and 146, which utilize materials with low VOC concentrations, is estimated at over \$20,000/ton and over \$30,000/ton, respectively. Even with adjustments to address questionable interest rates and taxes, the cost/ton numbers to reduce emissions from these sources remain elevated and do not change the conclusion about the economic feasibility of controls for the hand-wiped stain sources.

Comment 28: The commenter states that the newspaper proof of publication for Ward is unreadable because of a redaction on the page. Because of this, the commenter concludes that proof of publication for Ward Manufacturing was not provided and such proof of publication must be resubmitted.

Response 28: The commenter's concerns about an adequate proof of publication relate to a redacted version of the proof of publication on the first page in the supporting materials for Ward Manufacturing (Ward), which is contained in the docket. That page includes a partially obscured copy of the newspaper's proof of publication of PADEP's notice of its RACT determination for Ward. However, the second page of the supporting materials for Ward contains a second view of the proof of publication along with the full version of the actual newspaper notice. For these reasons, EPA reasonably determined that PADEP had met its obligation to provide proof of publication of its public notice for Ward.

Comment 29: The commenter states that Source 149A at Ward Manufacturing did not go through a RACT analysis as required and, instead, is inappropriately permitted to comply with 129.97. The commenter argues that Source 149A has a PTE of 5 tpy and is ineligible for the presumptive RACT requirements of 25 Pa. Code 129.97(c)(2).

Response 29: Source 149A, which is a grouping of individual emission units

³³ See Texas Eastern Bernville's title V permit No. 06-05033, Section E., Group No. SG05, Sources 101 and 102, VII.

³⁴ See RACT II Proposal, Texas Eastern Transmission, L.P., Bernville, PA, prepared by Trinity Consultants, October 2016, which is part of the record for this docket.

³⁵ See RACT II Proposal, Texas Eastern Transmission, L.P., Bernville, PA, prepared by Trinity Consultants, October 2016, which is part of the record for this docket.

(coring machines), is subject to the presumptive RACT requirements at 25 Pa. Code 129.97(c)(2) due to enforceable permit conditions that limit the potential VOC emissions for each coring machine source in this overall grouping.³⁶ The Pennsylvania regulations at 25 Pa. Code 121.1 define potential emissions as “[t]he maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and limitations on hours of operation or on the type or amount of material combusted, stored or processed shall be treated as part of the design if the limitation or the effect it would have on emissions is Federally enforceable or legally and practicably enforceable by an operating permit condition. The term does not include secondary emission from an offsite facility.” Therefore, with an enforceable emissions limitation on each individual emission unit within the grouping under Source 149A, no case-by-case RACT analysis is required for this source. Source 149A meets the presumptive RACT applicability at 25 Pa. Code 129.97(c)(2) based on using lower VOC content coatings that allow these emission units to meet their potential to emit emission caps.

Comment 30: The commenter questions EPA’s approval of annual RACT limits for Resilite. The commenter asserts that EPA’s guidance requires shorter term RACT limits with no greater than 30-day rolling averages.

Response 30: As explained in response to Comment 3, of this preamble, the establishment of case-by-case RACT requirements to reduce VOC and/or NO_x emissions considers not only numeric emission limits, but also design and equipment specifications, operational and throughput constraints and work practice standards. Each of these requirements can take different forms depending on the types of processes and emissions at a facility. For example, emission controls can include material content limits or emission limits. Short-term emission limits are typically expressed as lb/hr or lb/day limits. VOC material content limits, on the other hand, are typically expressed as lb/gal material used and are considered continuous controls in that they ensure that there is continuous VOC reduction by limiting the types of materials that can be used. Similarly, operational or throughput constraints

are continuous controls on VOC/NO_x emissions. Therefore, these forms of controls are all considered suitable RACT requirements. Each source is different and not every form of an emission control is economically or technically feasible for every source. In some cases, one or more of the various forms of short-term emission limits may be infeasible based on an evaluation of the RACT-subject facility.

Source IDs 106, 201, and 202 at Resilite are subject to the case-by-case RACT analysis prescribed by 25 Pa. Code 129.99. As part of the case-by-case NO_x RACT analysis, the facility evaluated the technical and, where appropriate, economic feasibility of available controls. A material change of solvent blends was determined to be technically and economically feasible as RACT with new, lower lb/gal material limits. Through the current RACT analysis, the RACT I VOC limit of 6.83 lbs/gal (minus water) for mat coating material was reduced to 4.97 lbs/gal.³⁷ It should also be noted that the adhesives or sealants applied at Source 106 are now limited to 2.1 lb/gal per 25 Pa. Code 129.77, not the RACT I limit of 5.98 lbs/gal.³⁸ In addition, PADEP is also retaining as RACT requirements work practices such as limiting what equipment can be cleaned with VOC-containing materials and restrictions on how spray guns are cleaned that were established as part of RACT I.³⁹

PADEP also established annual emission limits for each source that are derived from the VOC-content of the materials used at that source. In doing so, PADEP eliminated a former annual emissions cap for the facility. Because Pennsylvania developed annual limits for the Resilite permit, and PADEP included those requirements in its SIP submittal to us, EPA is incorporating those annual emission limits into the SIP not as RACT control limits but for the purpose of SIP strengthening. For these reasons, we consider the annual limits to be separate from RACT and believe the commenter’s assertion is misplaced.

³⁷ See Resilite redacted Permit No. 49–00004, Section D, Source ID 106, I. Condition #001, which is part of the record for this docket and will be incorporated by reference into the SIP with this rule.

³⁸ See Resilite title V Permit No. 49–00004, Section D, Source ID 106, VII. Condition #008, which is part of the record for this docket, and 80 FR 36482 (June 25, 2015).

³⁹ See Resilite redacted Permit No. 49–00004, Section D, Source ID 106, VI. Condition #005, and Section D, Source ID 202, VI. Condition #004, which is part of the record for this docket and will be incorporated by reference into the SIP with this rule.

Comment 31: The commenter questions the assumed capture efficiency for the molding process in Foam Fabricator’s cost effectiveness analysis. The commenter asserts that the cost effectiveness of controls on the molding operations should be reevaluated with updated capture efficiency to find controls effective.

Response 31: PADEP and EPA evaluated the sources at Foam Fabricators subject to the RACT case-by-case requirements set forth in 25 Pa. Code 129.99. The RACT analysis determined that the three technically feasible control scenarios for the molding operations were economically infeasible, with the cost to remove VOCs ranging from \$15,702/ton to \$23,699/ton.⁴⁰ Capture efficiency is one factor in a complex, multi-factor cost analysis. EPA has examined PADEP’s cost effectiveness analysis and finds that an updated evaluation with an increased capture efficiency would not impact the cost analysis enough to change the RACT determination.

IV. Final Action

EPA is approving case-by-case RACT determinations for 19 sources in Pennsylvania, as required to meet obligations pursuant to the 1997 and 2008 8-hour ozone NAAQS, as revisions to the Pennsylvania SIP.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of source-specific RACT determinations under the 1997 and 2008 8-hour ozone NAAQS for certain major sources of VOC and NO_x in Pennsylvania. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the For Further Information Contact section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be

⁴⁰ See RACT 2 Applicability and Compliance Evaluation for Foam Fabricators, Inc., Bloomsburg, Pennsylvania, January 2017, which is part of the record for this docket.

³⁶ See Ward’s title V permit No. 59–00004, Section D, Source ID 149A, I. Condition #003, which is part of the record for this docket.

incorporated by reference in the next update to the SIP compilation.⁴¹

VI. Statutory and Executive Order Reviews

A. General Requirements

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

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

methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 15, 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 approving Pennsylvania's NO_x and VOC RACT requirements for 19 case-by-case facilities for the 1997 and 2008 8-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 21, 2020.

Cosmo Servidio,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart NN—Pennsylvania

- 2. In § 52.2020, the table in paragraph (d)(1) is amended by:

- a. In the heading of the last column by removing the text “§ 52.2063 citation” and adding in its place the text “§§ 52.2063 and 52.2064 citations” and adding a footnote 1 to the table;
- b. In the last column, under the new heading “Additional explanation/ §§ 52.2063 and 52.2064 citations” by removing the text “52.2020” wherever it appears;
- c. Revising the entries “Texas Eastern Transmission Corp.—Bernville”; “Texas Eastern Transmission Corp.—Bechtelsville”; “Boeing Defense & Space Group—Helicopters Div”; “PECO Energy Co.—USX Fairless Works Powerhouse”; “Containment Solutions, Inc. (formerly called Fluid Containment—Mt. Union)”; “Resilite Sport Products, Inc.”; “Jeraco Enterprises, Inc.”; “Texas Eastern Transmission Corporation” (Permit No. 22–2010); “Armstrong World Industries, Inc” (Permit No. 36–2001); “Statoil Energy Power Paxton, LP”; “Harrisburg Steamworks”; “Texas Eastern Transmission Corp.”; “Texas Eastern Transmission Corporation” (Permit No. OP–34–2002); “Merck and Co., Inc.”; and
- d. Adding the entries at the end of the table “First Quality Tissue, LLC”; “JW Aluminum Company”; “Ward Manufacturing, LLC”; “Foam Fabricators Inc.”; “Blommer Chocolate Company”; “Wood-Mode Inc.”; “Exelon Generation—Fairless Hills (formerly referenced as PECO Energy Co.—USX Fairless Works Powerhouse)”; “The Boeing Co. (formerly referenced as Boeing Defense & Space Group—Helicopters Div)”; “Cherokee Pharmaceuticals, LLC (formerly referenced as Merck and Co., Inc.)”; “Resilite Sports Products Inc.”; “NRG Energy Center Paxton, LLC (formerly referenced as Harrisburg Steamworks and Statoil Energy Power Paxton, LP)”; “Containment Solutions, Inc./Mt. Union Plant (formerly referenced as Containment Solutions, Inc. and Fluid Containment—Mt. Union)”; “Armstrong

⁴¹ 62 FR 27968 (May 22, 1997).

World Industries, Inc.—Marietta Ceiling Plant (formerly referenced as Armstrong World Industries, Inc.)”; “Jeraco Enterprises Inc.”; “Texas Eastern Transmission, L.P.—Bernville (formerly referenced as Texas Eastern Transmission Corp.—Bernville)”; “Texas Eastern Transmission, L.P.—Shermans Dale (formerly referenced as

Texas Eastern Transmission Corp)”; “Texas Eastern Transmission, L.P.—Perulack (formerly referenced as Texas Eastern Transmission Corporation)”; “Texas Eastern Transmission, L.P.—Grantville (formerly referenced as Texas Eastern Transmission Corporation)”; and “Texas Eastern Transmission, L.P.—Bechtelsville (formerly referenced

as Texas Eastern Transmission Corp.—Bechtelsville)”.
The revisions and additions read as follows:

§ 52.2020 Identification of plan.

* * * * *
(d) * * *
(1) * * *

Name of source	Permit No.	County	State effective date	EPA approval date	Additional explanations/ §§ 52.2063 and 52.2064 citations ¹
* Texas Eastern Transmission Corp.—Bernville.	* OP-06-1033	* Berks	* 1/31/97	* 4/18/97, 62 FR 19049.	* See also 52.2064(a)(15).
* Texas Eastern Transmission Corp.— Bechtelsville.	* OP-06-1034	* Berks	* 1/31/97	* 4/18/97, 62 FR 19049.	* See also 52.2064(a)(19).
* Boeing Defense & Space Group— Helicopters Div.	* CP-23-0009	* Delaware	* 9/3/97	* 12/15/00, 65 FR 78418.	* See also 52.2064(a)(8).
* PECO Energy Co.— USX Fairless Works Power- house.	* OP-09-0066	* Bucks	* 12/31/98, 4/6/99	* 12/15/00, 65 FR 78418.	* See also 52.2064(a)(7).
* Containment Solu- tions, Inc. (for- merly called Fluid Containment—Mt. Union).	* OP-31-02005	* Huntingdon	* 4/9/99	* 8/6/01, 66 FR 40891.	* See also 52.2064(a)(12).
* Resilite Sport Prod- ucts, Inc.	* OP-49-0003	* Northumberland	* 12/3/96	* 10/17/03, 68 FR 59741.	* See also 52.2064(a)(10).
* Jeraco Enterprises, Inc.	* OP-49-0014	* Northumberland	* 4/6/97	* 3/29/05, 70 FR 15774.	* See also 52.2064(a)(14).
* Texas Eastern Transmission Cor- poration.	* 22-2010	* Dauphin	* 1/31/97	* 3/31/05, 70 FR 16423.	* See also 52.2064(a)(18).
* Armstrong World In- dustries, Inc.	* 36-2001	* Lancaster	* 7/3/99	* 11/2/05, 70 FR 66261.	* See also 52.2064(a)(13).
* Statoil Energy Power Paxton, L.P.	* OP-22-02015	* Dauphin	* 6/30/99	* 3/8/06, 71 FR 11514.	* See also 52.2064(a)(11).
* Harrisburg Steamworks.	* OP-22-02005	* Dauphin	* 3/23/99	* 3/8/06, 71 FR 11514.	* See also 52.2064(a)(11).
* Texas Eastern Transmission Corp.	* OP-50-02001	* Perry	* 4/12/99	* 4/28/06, 71 FR 25070.	* See also 52.2064(a)(16).
* Texas Eastern Transmission Cor- poration.	* OP-34-2002	* Juniata	* 1/31/97	* 7/11/06, 71 FR 38995.	* See also 52.2064(a)(17).

Name of source	Permit No.	County	State effective date	EPA approval date	Additional explanations/ §§ 52.2063 and 52.2064 citations ¹
Merck and Co., Inc. ..	OP-49-0007B	Northumberland	5/16/01	3/4/08, 73 FR 11553.	See also 52.2064(a)(9).
First Quality Tissue, LLC.	18-00030	Clinton	9/18/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(1).
JW Aluminum Company.	41-00013	Lycoming	3/01/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(2).
Ward Manufacturing, LLC.	59-00004	Tioga	1/10/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(3).
Foam Fabricators Inc..	19-00002	Columbia	12/20/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(4).
Blommer Chocolate Company.	46-00198	Montgomery	1/26/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(5).
Wood-Mode Inc.	55-00005	Snyder	7/12/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(6).
Exelon Generation—Fairless Hills (formerly referenced as PECO Energy Co.—USX Fairless Works Powerhouse).	09-00066	Bucks	1/27/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(7).
The Boeing Co. (formerly referenced as Boeing Defense & Space Group—Helicopters Div).	23-00009	Delaware	1/03/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(8).
Cherokee Pharmaceuticals, LLC (formerly referenced as Merck and Co., Inc).	49-00007	Northumberland	4/24/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(9).
Resilite Sports Products Inc..	49-00004	Northumberland	8/25/17	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(10).
NRG Energy Center Paxton, LLC (formerly referenced as Harrisburg Steamworks and Statoil Energy Power Paxton, LP).	22-05005	Dauphin	3/16/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(11).
Containment Solutions, Inc./Mt. Union Plant (formerly referenced as Containment Solutions, Inc. and Fluid Containment—Mt. Union).	31-05005	Huntingdon	7/10/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(12).
Armstrong World Industries, Inc.—Marietta Ceiling Plant (formerly referenced as Armstrong World Industries, Inc.).	36-05001	Lancaster	6/28/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(13).
Jeraco Enterprises Inc..	49-00014	Northumberland	1/26/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(14).

Name of source	Permit No.	County	State effective date	EPA approval date	Additional explanations/ §§ 52.2063 and 52.2064 citations ¹
Texas Eastern Transmission, L.P.—Bernville (formerly referenced as Texas Eastern Transmission Corp.—Bernville).	06–05033	Berks	3/16/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(15).
Texas Eastern Transmission, L.P.—Shermans Dale (formerly referenced as Texas Eastern Transmission Corp.).	50–05001	Perry	3/26/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(16).
Texas Eastern Transmission, L.P.—Perulack (formerly referenced as Texas Eastern Transmission Corporation).	34–05002	Juniata	3/27/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(17).
Texas Eastern Transmission, L.P.—Grantville (formerly referenced as Texas Eastern Transmission Corporation).	22–05010	Dauphin	3/16/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(18).
Texas Eastern Transmission, L.P.—Bechtelsville (formerly referenced as Texas Eastern Transmission Corp.—Bechtelsville).	06–05034	Berks	4/19/18	10/16/20, [INSERT Federal Register CITATION].	52.2064(a)(19).

¹ The cross-references that are not § 52.2064 are to material that pre-date the notebook format. For more information, see § 52.2063.

* * * * *

■ 3. Section 52.2064 is added to subpart NN to read as follows:

§ 52.2064 EPA-approved Source-Specific Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) and Oxides of Nitrogen (NO_x).

This section explains the EPA-approved Source-Specific Reasonably Available Control Technology (RACT) Requirements for Volatile Organic Compounds (VOC) and Oxides of Nitrogen (NO_x) incorporated by reference as part of the Pennsylvania State Implementation Plan (SIP) identified in § 52.2020(d)(1).

(a) Approval of source-specific RACT requirements for 1997 and 2008 8-hour ozone national ambient air quality standards for the facilities listed below are incorporated as specified below. (Rulemaking Docket No. EPA–OAR–2019–0686).

(1) First Quality Tissue, LLC—Incorporating by reference Permit No.

18–00030, issued September 18, 2017, as redacted by Pennsylvania.

(2) JW Aluminum Company—Incorporating by reference Permit No. 41–00013, issued March 1, 2017, as redacted by Pennsylvania.

(3) Ward Manufacturing, LLC—Incorporating by reference Permit No. 59–00004, issued January 10, 2017, as redacted by Pennsylvania.

(4) Foam Fabricators Inc.—Incorporating by reference Permit No. 19–00002, issued December 20, 2017, as redacted by Pennsylvania.

(5) Blommer Chocolate Company—Incorporating by reference Permit No. 46–00198, issued January 26, 2017, as redacted by Pennsylvania.

(6) Wood-Mode Inc.—Incorporating by reference Permit No. 55–00005, issued July 12, 2017, as redacted by Pennsylvania.

(7) Exelon Generation—Fairless Hills—Incorporating by reference Permit No. 09–00066, issued January 27, 2017, as redacted by Pennsylvania, which

supersedes the prior RACT Permit No. OP–09–0066, issued December 31, 1998 and amended April 6, 1999, except for Conditions 10, 11.A, 11.C, 11.D, 12, 13, 14, and 15, which remain as RACT requirements for the two remaining Boilers No. 4, Serial 2818 (now Source ID 044) and No. 5, Serial 2819 (now Source ID 045). See also § 52.2063(c)(143)(i)(B)(15) for prior RACT approval.

(8) The Boeing Co.—Incorporating by reference Permit No. 23–00009, issued August, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. CP–23–0009, issued September 3, 1997, except for Conditions 5.A, 5.C.1–3, and 5.D.2 and 4 (applicable to Source ID 251, Composite Manufacturing Operations); Conditions 7.A, 7.B.1–4, 7.D.1 and 7.E (applicable to Source ID 216, Paint Gun Cleaning); Condition 11.A, 11.C–E and 11.G (applicable to all solvent wiping and cleaning facility-wide); Condition 12 (applicable to listed de minimis VOC

emission sources facility-wide); Condition 14.A (applicable to Source IDs 041, 050 and 051, Emergency Generators and Diesel Fire Pump); Conditions 15.B and 16.B (applicable to Source IDs 033 and 039, Cleaver Brooks Boilers 1 and 2); Condition 15.D (applicable to Source ID 042, 4 combustion turbines); Condition 16.C (applicable to Source IDs 041, 050, 050A, 051, 051A, and 051B, Emergency Generators); and Condition 16.D (applicable to Source ID 039, Cleaver Brooks Boiler 2), which remain as RACT requirements. See also § 52.2063(c)(143)(i)(B)(1) for prior RACT approval.

(9) Cherokee Pharmaceuticals, LLC—Incorporating by reference Permit No. 49-00007, issued April 24, 2017, as redacted by Pennsylvania. All permit conditions in the prior RACT Permit No. OP-49-0007B, issued May 16, 2001 remain as RACT requirements. See also § 52.2063(d)(1)(v) for prior RACT approval.

(10) Resilite Sports Products Inc—Incorporating by reference Permit No. 49-00004, issued August 25, 2017, as redacted by Pennsylvania. All permit conditions in the prior RACT Permit No. OP-49-0003 issued December 3, 1996, remain as RACT requirements except for Condition 5c, which is superseded by the new permit. See also § 52.2063(c)(207)(i)(B)(1) for prior RACT approval.

(11) NRG Energy Center Paxton, LLC—Incorporating by reference Permit No. 49-00004, issued March 16, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit Nos. OP-22-02005 and OP-22-02015, both issued March 23, 1999, for Source IDs 032 and 033, Boilers No. 13 and 14. However, RACT Permit No. OP-22-02005 remains in effect as to Source IDs 031 and 034, Boilers No. 12 and 15, except for Conditions 1(a), 7, 14, 16, 21; and RACT Permit No. OP-22-02015 remains in effect as to Source IDs 102 and 103, Engines 1 and 2, except for Conditions 1(a), 7, 8, 9, 10, 12(c), 13, 14. See also § 52.2063(d)(1)(l) for prior RACT approval.

(12) Containment Solutions, Inc./Mt. Union Plant—Incorporating by reference Permit No. 31-05005, issued July 10, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. OP-31-02005, issued April 9, 1999. See also § 52.2063(c)(149)(i)(B)(11) for prior RACT approval.

(13) Armstrong World Industries, Inc.—Marietta Ceiling Plant—Incorporating by reference Permit No. 36-05001, issued June 28, 2018, as redacted by Pennsylvania, which

supersedes the prior RACT Permit No. 36-2001, issued July 3, 1999. See also § 52.2063(d)(1)(b) for prior RACT approval.

(14) Jeraco Enterprises Inc.—Incorporating by reference Permit No. 49-00014, issued January 26, 2018, as redacted by Pennsylvania. All permit conditions in the prior RACT Permit No. OP-49-0014, issued April 6, 1997, remain as RACT requirements. See also § 52.2063(d)(1)(h) for prior RACT approval.

(15) Texas Eastern Transmission, L.P.—Bernville—Incorporating by reference Permit No. 06-05033, issued March 16, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. OP-06-1033, issued January 31, 1997, except for Conditions 6, 7, 9, 10, 11, 12 and 13 which remain as RACT requirements. See also § 52.2063(c)(120)(i)(B)(1) for prior RACT approval.

(16) Texas Eastern Transmission, L.P.—Shermans Dale—Incorporating by reference Permit No. 50-05001, issued March 26, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. OP-50-02001, issued April 12, 1999. See also § 52.2063(d)(1)(n) for prior RACT approval.

(17) Texas Eastern Transmission, L.P.—Perulack—Incorporating by reference Permit No. 34-05002, issued March 16, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. OP-34-2002, issued January 31, 1997, except for Conditions 5.c, 6.a and 15 which remain as RACT requirements. See also § 52.2063(d)(1)(r) for prior RACT approval.

(18) Texas Eastern Transmission, L.P.—Grantville—Incorporating by reference Permit No. 22-05010, issued March 27, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. 22-2010, issued January 31, 1997. See also § 52.2063(d)(1)(f) for prior RACT approval.

(19) Texas Eastern Transmission, L.P.—Bechtelsville—Incorporating by reference Permit No. 06-05034, issued April 19, 2018, as redacted by Pennsylvania, which supersedes the prior RACT Permit No. OP-06-1034, issued January 31, 1997. See also § 52.2063(c)(120)(i)(B)(2) for prior RACT approval.

(b) [Reserved]

[FR Doc. 2020-21139 Filed 10-15-20; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2018-0824; FRL-10014-79-Region 10]

Air Plan Approval; ID; 2015 Ozone NAAQS Interstate Transport Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (CAA or the Act) requires each State Implementation Plan (SIP) to contain adequate provisions prohibiting emissions that will have certain adverse air quality effects in other states. On September 26, 2018, the State of Idaho (Idaho or the State) made a submission to the Environmental Protection Agency (EPA) to address these requirements for the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS). The EPA is approving the submission as meeting the requirement that each SIP contain adequate provisions to prohibit emissions that will significantly contribute to nonattainment or interfere with maintenance of the 2015 8-hour ozone NAAQS in any other state.

DATES: This action is effective on November 16, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R10-OAR-2018-0824. 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., 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: Claudia Vaupel, (206) 553-6121, or vaupel.claudia@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

On January 23, 2020, the EPA proposed to approve Idaho's September 26, 2018 submission as meeting the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2015 8-hour ozone NAAQS (84 FR

7854). Please refer to the January 23, 2020 notice of proposed rulemaking (NPRM) for an explanation of the CAA requirements, a detailed analysis of the submissions, and the EPA's proposed rationale for approval. The public comment period for this NPRM ended on February 24, 2020.

II. Response to Comments

The EPA received two sets of comments during the public comment period. Both commenters disagreed with the EPA's interpretation of *Wisconsin v. EPA*, 938 F.3d 303 (DC Cir. 2019) (*Wisconsin v. EPA*) as limited to the attainment dates for Moderate or higher classifications under CAA section 181, as well as the EPA's use of 2023 as the analytic year to determine whether sources in Idaho will significantly contribute to downwind nonattainment or interfere with maintenance of the 2015 ozone NAAQS.¹ One commenter argued that the EPA must reevaluate Idaho's significant contribution or interference with maintenance in alignment with the Marginal area attainment date. The other commenter supported the EPA's proposed approval of Idaho's SIP submission but argued that the EPA's approach to the treatment of Marginal nonattainment areas is inconsistent with *Wisconsin v. EPA* and is arbitrary and capricious. The commentator also disputed as arbitrary and capricious guidance published by the EPA in August 2018 indicating that, based on the EPA's analysis of its most recent modeling data, the amount of upwind collective contribution captured using a 1 parts per billion (ppb) contribution threshold is generally comparable, overall, to the amount captured using a threshold equivalent to 1 percent of the 2015 ozone NAAQS.² The following section summarizes the comments and provides the EPA's responses to them. The full set of comments is available in the docket for this action.

Comment 1: Commenters asserted that the EPA's proposed action improperly focuses on the Moderate attainment date (analytic year 2023), which commenters

argued ignores the 2021 attainment year faced by Marginal 2015 8-hour ozone nonattainment areas.³ These commenters asserted that the EPA's decision to focus on the Moderate attainment date, rather than the Marginal attainment date, contravenes the statutory text, the U.S. District of Columbia Circuit (D.C. Circuit) Court's decision in *Wisconsin v. EPA*, and is arbitrary and capricious.

One commenter specifically avers that the distinction the EPA has drawn between Marginal and Moderate areas is "unlawful" and that the EPA relies on flawed assumptions in its interpretation of *Wisconsin v. EPA*. Specifically, the commenter asserted that although the EPA acknowledged the *Wisconsin v. EPA* decision in its proposal, the EPA inappropriately claims that the ruling does not apply to Marginal nonattainment areas because such areas do not have formal SIP planning obligations and are presumed to rely on in-place emission control measures to reach attainment. The commenter stated that the statute prohibits upwind states from significantly contributing to nonattainment, or interfering with maintenance, in any other state, "regardless of the severity of the downwind state's nonattainment classification." Moreover, the commenter stated that "it would be illogical for the statute to contemplate action to address significant contribution to maintenance while disregarding contribution to marginal areas, which have worse air quality."

In support of the commenter's assertion that the EPA must consider Marginal nonattainment areas in 2021, the commenter argued that the EPA's methodology for classifying nonattainment areas is inaccurate, and therefore, the EPA cannot assume that Marginal nonattainment areas will attain the 2015 ozone NAAQS within 3 years. The commenter argues that because the EPA's "percent-above-the-standard" classification approach was developed for the 1979 1-hour ozone standard, it "will skew toward a lower classification threshold (i.e., Marginal) at a much greater rate" and the ppb reductions needed to attain the NAAQS within 3 years of designation "is extremely unlikely to occur when relying solely on existing control programs." The commenter further asserts that there are many Marginal nonattainment areas not likely to attain the 2015 standard by the statutory

deadline. These areas will then be reclassified as Moderate nonattainment areas that will continue to struggle to meet their obligations because, according to the commentator, the EPA does not enforce the Good Neighbor provision.

Another commenter also disagreed with the EPA's interpretation that the different statutory requirements applying to Marginal and Moderate ozone nonattainment areas provide a basis for aligning upwind Good Neighbor obligations with the Moderate area attainment date. They supported this argument by referring to the EPA's 2013 guidance for infrastructure SIP submissions. The commenter asserted that "EPA incorrectly relies on data and analysis that was flatly rejected by the *Wisconsin v. EPA* court case." They further asserted that "EPA must reevaluate its decision for Idaho and must evaluate interstate transport to marginal areas by their marginal attainment date of 2021."

Response 1: The commenters are referring to a D.C. Circuit court decision addressing, in part, the issue of the relevant analytic year for the purposes of evaluating interstate ozone transport under the good neighbor provision, CAA section 110(a)(2)(D)(i)(I). On September 13, 2019, the D.C. Circuit issued a decision in *Wisconsin v. EPA*, remanding the Cross-State Air Pollution Rule (CSAPR) Update⁴ to the extent that Good Neighbor federal implementation plans in the CSAPR Update did not fully eliminate upwind states' "significant contribution" by the next applicable attainment date⁵ by which downwind states must attain the 2008 ozone NAAQS. See 938 F.3d 303, 313. As explained in the proposal of this action, the EPA had interpreted that holding as limited to the attainment dates for Moderate or higher classifications under CAA section 181 on the basis that Marginal nonattainment areas have reduced nonattainment SIP planning requirements and other considerations. See, e.g., 85 FR 3874, 3877–3878 (January 23, 2020).

On May 19, 2020, the D.C. Circuit in *Maryland v. EPA*, applying the *Wisconsin* decision, held that the EPA must assess the impacts of interstate transport on air quality at the next downwind attainment date, including Marginal area attainment dates, in evaluating the basis for the EPA's denial of a petition under CAA section 126(b). 958 F.3d at 1203–04. The EPA signed the NPRM proposing approval of

¹ The EPA used the 2023 as the analytic year because that year aligns with the expected attainment year for Moderate ozone nonattainment areas. The attainment date for nonattainment areas classified as Moderate for the 2015 ozone NAAQS is August 3, 2024. See CAA section 181(a); 40 CFR 51.1303; 83 FR 25776 (June 4, 2018).

² *Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards*, August 31, 2018, available in the docket for this action or at <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs>.

³ The attainment date for nonattainment areas classified as Marginal for the 2015 ozone NAAQS is August 3, 2021. See CAA section 181(a); 40 CFR 51.1303; 83 FR 25776 (June 4, 2018).

⁴ 81 FR 74504 (October 26, 2016).

⁵ See CAA section 181(a); 40 CFR 51.1303.

Idaho's good neighbor SIP prior to the D.C. Circuit's decision in *Maryland*. This decision also came after the close of the comment period on our proposed approval of Idaho's SIP submittal. However, this decision bears directly on our consideration of these comments. In accordance with the *Maryland* decision, the Agency now, in taking this final action approving the Idaho SIP, will consider 2021⁶ to be the relevant analytic year for the purposes of determining whether sources in Idaho will significantly contribute to downwind nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other states.⁷

The points raised by the commenters to dispute the EPA's proposal to use 2023 as the analytic year are now moot because after the decision in *Maryland v. EPA*, the EPA is using 2021 as the analytic year in this final action. The EPA need not address commentator's claim that the 2015 ozone NAAQS designations were done incorrectly. This issue is beyond the scope of this action. As acknowledged by the commentator, they have previously raised this issue in comments on a different action, and the EPA responded to those comments in that context.⁸ Regardless, the rulemaking to evaluate Idaho's September 26, 2018, good neighbor SIP submission is not the appropriate forum to contest the 2015 ozone NAAQS area designations.

Idaho's September 26, 2018 SIP submission includes an interstate ozone transport analysis for the Good Neighbor provision that relied on the modeling information provided in the EPA's March 2018 memorandum,⁹ which used

2023 as the analytic year (corresponding with the 2024 Moderate area attainment date).¹⁰ The State concluded that it has no emissions reduction obligations for purposes of CAA section 110(a)(2)(D)(i)(I) on the basis that its emissions are not linked to any nonattainment or maintenance receptors.

Relying in part on the same data that informed its analysis of the year 2023, the EPA finds it reasonable to conclude that the impacts from emissions from sources in Idaho will not exceed a contribution threshold of 1 percent of the 2015 ozone NAAQS to any downwind nonattainment and maintenance sites in 2021. This finding is a sufficient basis for the EPA to conclude that Idaho is not linked to any downwind receptors at step 2 of the four-step interstate transport framework.¹¹

Based on the contribution modeling included in the March 2018 memorandum, the EPA concludes that Idaho's largest impact on any downwind nonattainment or maintenance receptors in 2023 are 0.18 ppb and 0.19 ppb, respectively.¹² These values are both far less than 1 percent of the 2015 ozone NAAQS (0.70 ppb). In response to the *Maryland* decision, using the best available information (including the same data that informed the EPA's 2023 modeling) to analyze Idaho's air quality impacts in the year 2021, the EPA finds it reasonable to conclude that Idaho's impact on any potential downwind nonattainment and

maintenance receptor in 2021 would be similar to those projected in 2023, and likewise well below 1 percent of the 2015 ozone NAAQS, as detailed in the methodology described in the following paragraphs. Therefore, the EPA finds that Idaho's September 26, 2018 infrastructure SIP submission satisfies the State's Good Neighbor obligations for the 2015 ozone NAAQS.

The EPA's analysis of receptors and contributions in 2021 relies in part on the 2023 modeling used in the NPRM of this action, the results of which were included with the March 2018 memorandum. These data are the most recent published applicable modeling data available at the time of this final action. To estimate Idaho's maximum contribution to a nonattainment or maintenance receptor in 2021, the EPA developed an interpolation analysis that evaluates available modeling, monitoring, and emissions data to assess air quality in this year. In general, this analysis utilizes 2019 measured design values¹³ and 2023 modeled design values to estimate design values at each monitoring site in 2021. Specifically, 2021 average and maximum design values were calculated by straight-line linear interpolation between the 2019 measured data and the 2023 modeled data. The EPA believes that the linear interpolation methodology using measured data and 2023 model projections provides a technically sound basis for estimation of ozone design values in 2021 in part because of the relatively short two-year span between 2021 and 2023.

The EPA calculated ozone contributions in 2021 by applying the following two-step process. First, the contributions (in ppb) from each state to each monitoring site in 2023 were converted to a fractional portion of the 2023 average design value by dividing the contribution by the 2023 design value. In the second step, the resulting contribution fractions were multiplied by the estimated 2021 average design value to produce 2021 contributions from each state to each monitoring site.^{14 15}

The 2021 design values and contributions were examined to determine if Idaho contributes at or above 1 percent of the 2015 ozone

⁶ The attainment date for nonattainment areas classified as Marginal for the 2015 ozone NAAQS is August 3, 2021. See CAA section 181(a); 40 CFR 51.1303; 83 FR 25776 (June 4, 2018).

⁷ The EPA notes that the court in *Maryland* did not have occasion to evaluate circumstances in which the EPA may determine that an upwind linkage to a downwind air quality problem exists at steps 1 and 2 of the four-step Good Neighbor framework by a particular attainment date, but for reasons of impossibility or profound uncertainty the Agency is unable to mandate upwind pollution controls by that date. See 938 F.3d at 319–320. The D.C. Circuit noted in *Wisconsin* that upon a sufficient showing, these circumstances may warrant a certain degree of flexibility in effectuating the implementation of the Good Neighbor provision. *Id.* Such circumstances are not at issue in the present action.

⁸ See "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach," 83 FR 10376, 10379 (March 9, 2018).

⁹ Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I), March 27, 2018, available in the docket for this action or at <https://www.epa.gov/interstate-air-pollution-transport/memos-and-notice-regarding-interstate-air-pollution-transport>.

¹⁰ The year 2023 was used as the analytic year because that year aligns with the expected attainment year for Moderate ozone nonattainment areas. The attainment date for nonattainment areas classified as Moderate for the 2015 ozone NAAQS is August 3, 2024. See CAA section 181(a); 40 CFR 51.1303; 83 FR 25776 (June 4, 2018).

¹¹ Thus, it is not necessary for the EPA to proceed to evaluate whether the State's infrastructure SIP submission may also be approvable using an alternative contribution threshold of 1 ppb. *Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards*, August 31, 2018, available in the docket for this action or at <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs>.

¹² The EPA's analysis indicates that Idaho will have a 0.18 ppb impact at the nonattainment receptor in Douglas County, Colorado (Site ID 80350004), which has a 2023 projected average design value of 71.1 ppb, and a 2023 projected maximum design value of 73.2 ppb. The EPA's analysis further indicates that Idaho will have a 0.19 ppb impact at the maintenance receptor in Arapahoe County, Colorado (Site ID 80050002), which has a projected 2023 average design value below the 2015 ozone NAAQS (69.3 ppb), and a 2023 projected maximum design value above the NAAQS (71.3 ppb). See the March 2018 memorandum, attachment C.

¹³ The 2019 design values at each monitoring site nationwide are available at <https://www.epa.gov/air-trends/air-quality-design-values>.

¹⁴ Note that the method used here for calculating contributions in 2021 is similar to the method used by the EPA to calculate the 2023 contributions from 2023 air quality modeling.

¹⁵ Design values for 2019, 2021, and 2023 along with the contributions in 2021 and 2023 are provided in a file in the docket for this rule.

NAAQS threshold (0.70 ppb) to a downwind nonattainment or maintenance receptor. The data indicate that the highest contribution in 2021 from Idaho to a downwind receptor is 0.49 ppb to the nonattainment receptor site 490353006 in Salt Lake County, Utah. Based on this analysis, the EPA finds it reasonable to conclude that Idaho will contribute less than 1 percent of the 2015 ozone NAAQS to any potential nonattainment or maintenance receptors in 2021.

The EPA also analyzed ozone precursor emissions trends in Idaho to support the findings from the air quality analysis. In evaluating emissions trends, we focused on state-wide emissions of nitrogen oxides (NO_x) and volatile organic compounds (VOCs) in

Idaho.^{16 17} Emissions from mobile sources, electricity generating units (EGUs), industrial facilities, gasoline vapors, and chemical solvents are some of the major anthropogenic sources of ozone precursors. This evaluation looks at both past emissions trends, as well as projected trends.

As shown in Table 1 of this preamble, between 2011 and 2017, annual total NO_x and VOC emissions have declined, by 19 percent and 8 percent, respectively. The projected reductions are a result of “on the books” and “on the way” regulations that will continue to decrease NO_x and VOC emissions in Idaho, as indicated by our 2023 projected emissions. The large decrease in NO_x emissions between 2017 emissions and projected 2023 emissions

in Idaho are primarily driven by reductions in emissions from onroad and nonroad vehicles. The EPA projects that the downward trend in both VOC and NO_x emissions from 2011 through 2017 will continue at a steady rate to 2023 and further into the future due to the replacement of higher emissions vehicles with lower emitting vehicles as a result of several mobile source control programs.¹⁸ This downward trend in emissions in Idaho adds support to the air quality analysis presented previously, which indicates that the impact of emissions from sources in Idaho to ozone in downwind states will continue to decline and remain below 1 percent of the NAAQS.

TABLE 1—ANNUAL EMISSIONS OF NO_x AND VOC FROM ANTHROPOGENIC EMISSION SOURCES IN IDAHO
[Tons]

	2011	2012	2013	2014	2015	2016	2017	Projected 2023
NO _x	90	87	84	82	78	76	73	49
VOC	90	89	88	87	86	84	82	63

Additionally, the EPA proposed in the NPRM to find that emissions from Idaho will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS at the Fort Hall Reservation in southeast Idaho in 2023.¹⁹ The EPA has reassessed air quality impacts of emissions sources in Idaho on the Fort Hall Reservation for 2021 and continues to believe Idaho will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS at the Fort Hall Reservation. As discussed in the proposal of this action, the EPA’s modeling in the March 2018 memorandum did not identify receptors in Idaho in 2023. Additionally, the ozone monitoring sites in Idaho are projected to remain below the current standard in 2023. The Idaho Falls area monitoring site (Site ID 160230101), which is nearest to the Fort Hall Reservation, had a 2014–2016 design value of 60 ppb and the EPA’s modeling projects a 2023 maximum design value of 60.2 ppb and a 2023 average design

value of 59.6 ppb, both below the 70 ppb standard.²⁰ The Boise area monitoring site with the highest 2023 projected ozone concentrations (Site ID 160010017) had a 2014–2016 design value of 67 ppb and the EPA’s modeling projects a 2023 maximum design value of 59.8 ppb and a 2023 average design value of 59.4 ppb. Because each of these monitoring sites were both attaining in 2016 and are projected to attain in 2023, and given the downward annual NO_x and VOC emissions trends identified in the Table 1 of this preamble, the EPA therefore finds it reasonable to conclude that emissions from Idaho will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS at the Fort Hall Reservation in 2021.

Thus, the EPA concludes that the air quality and emission analyses indicate that emissions from Idaho will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state, including the Fort

Hall Reservation, in 2021. Therefore, the EPA concludes that Idaho’s infrastructure SIP submission satisfies the State’s Good Neighbor obligations for the 2015 ozone NAAQS.

Comment 2: One commenter disagreed with the EPA’s 1 ppb alternate contribution threshold for determining significant contributions. The commenter’s reasoning was that “a 1 ppb threshold would be a departure from the EPA’s precedent of using 1 percent of the ozone NAAQS as the screening threshold” and that this reversal of the EPA’s “longstanding practice without adequate explanation is arbitrary, capricious and unreasonable.” The commenter asserts that “reducing the amount of total upwind contribution that is required to be addressed in an upwind state’s state or federal implementation plan will necessarily increase the amount of ozone that a downwind state will be required to address on its own,” shifting responsibility for reductions from upwind states to downwind states and

¹⁶ This is because ground-level ozone is not emitted directly into the air but is a secondary air pollutant created by chemical reactions between ozone precursors, chiefly NO_x and non-methane VOCs, in the presence of sunlight.

¹⁷ 81 FR 74504, 74513–14. (October 26, 2016).

¹⁸ Tier 3 Standards (March 2014), the Light-Duty Greenhouse Gas Rule (March 2013), Heavy (and Medium)-Duty Greenhouse Gas Rule (August 2011), the Renewable Fuel Standard (February 2010), the Light Duty Greenhouse Gas Rule (April 2010), the Corporate-Average Fuel Economy standards for

2008–2011 (April 2010), the 2007 Onroad Heavy-Duty Rule (February 2009), and the Final Mobile Source Air Toxics Rule (MSAT2) (February 2007).

¹⁹ On January 19, 2017, the EPA determined that the Shoshone-Bannock Tribes of the Fort Hall Reservation were eligible for treatment in the same manner as a state for CAA sections 110(a)(2)(D) and 126. The EPA’s determination is available in the docket for this action. See also <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>.

²⁰ The EPA previously provided the 2023 projected ozone design values at individual monitoring sites nationwide. *Supplemental Information on the Interstate Transport State Implementation Plan Submissions for the 2008 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)*, October 27, 2017, available in the docket for this action or at <https://www.epa.gov/interstate-air-pollution-transport/memos-and-notice-regarding-interstate-air-pollution-transport>. For data for the Idaho monitors, see page A–10 of attachment A.

further impeding the ability of downwind states to attain the NAAQS.

Response 2: It is unnecessary for the EPA to determine whether it may be appropriate to approve a state's use of an alternative 1 ppb threshold for the purposes of this action. The EPA's proposal, and this final action, are based on a finding that Idaho will not contribute above one percent of the 2015 ozone NAAQS (0.70 ppb) at any projected nonattainment or maintenance receptor in 2021. Therefore, there is no need to evaluate any potential higher contribution threshold, as discussed in the August 2018 memorandum, in the present final action.

III. Final Action

The EPA is approving Idaho's September 26, 2018 submission as meeting CAA section 110(a)(2)(D)(i)(I) interstate transport requirements for the 2015 ozone NAAQS.

IV. Statutory and Executive Orders Review

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735; October 4, 1993) and 13563 (76 FR 3821; January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339; February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255; August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885; April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355; May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629; February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and it 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. The 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 15, 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 CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: September 22, 2020.

Christopher Hladick,
Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart N—Idaho

- 2. In § 52.670, the table in paragraph (e) is amended by adding an entry at the end of the table for "Interstate Transport Requirements for the 2015 Ozone NAAQS" to read as follows:

§ 52.670 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED IDAHO NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
* Interstate Transport Requirements for the 2015 Ozone NAAQS.	* State-wide	* 9/26/2018	* 10/16/20, [Insert Federal Register citation].	* This action addresses CAA 110(a)(2)(D)(i)(I).

[FR Doc. 2020–21329 Filed 10–15–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA–R03–OAR–2020–0268; FRL–10015–02–Region 3]

Air Plan Approval; Pennsylvania; 1997 8-Hour Ozone National Ambient Air Quality Standards Second Maintenance Plan for the Franklin County Area**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This revision pertains to the Commonwealth's plan, submitted by the Pennsylvania Department of Environmental Protection (DEP), for maintaining the 1997 8-hour ozone national ambient air quality standard (NAAQS) (referred to as the "1997 ozone NAAQS") in the Franklin County, Pennsylvania area (Franklin County Area). EPA is approving these revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA).

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

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2020–0268. 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:

David Talley, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2117. Mr. Talley can also be reached via electronic mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

On August 3, 2020 (85 FR 46576), EPA published a notice of proposed rulemaking (NPRM) for the Commonwealth of Pennsylvania. In the NPRM, EPA proposed approval of Pennsylvania's plan for maintaining the 1997 ozone NAAQS in the Franklin County Area through July 25, 2027, in accordance with CAA section 175A. The formal SIP revision was submitted by DEP on March 10, 2020.

II. Summary of SIP Revision and EPA Analysis

On July 25, 2007 (72 FR 40746 effective July 25, 2007), EPA approved a redesignation request (and maintenance plan) from DEP for the Franklin County Area. In accordance with section 175A(b), at the end of the eighth year after the effective date of the redesignation, the state must also submit a second maintenance plan to ensure ongoing maintenance of the standard for an additional 10 years. CAA section 175A sets forth the criteria for adequate maintenance plans. In addition, EPA has published longstanding guidance that provides further insight on the content of an approvable maintenance plan, explaining that a maintenance plan should address five elements: (1) An attainment emissions inventory; (2) a maintenance demonstration; (3) a commitment for continued air quality monitoring; (4) a process for verification of continued attainment; and (5) a

contingency plan.¹ DEP's March 10, 2020 submittal fulfills Pennsylvania's obligation to submit a second maintenance plan and addresses each of the five necessary elements.

As discussed in the August 3, 2020 NPRM, EPA allows the submittal of a less rigorous, limited maintenance plan (LMP) to meet the CAA section 175A requirements by demonstrating that the area's design value² is well below the NAAQS and that the historical stability of the area's air quality levels shows that the area is unlikely to violate the NAAQS in the future. EPA evaluated DEP's March 10, 2020 submittal for consistency with all applicable EPA guidance and CAA requirements. EPA found that the submittal met CAA section 175A and all CAA requirements, and proposed approval of the LMP for the Franklin County Area as a revision to the Pennsylvania SIP. The effect of this action makes certain commitments related to the maintenance of the 1997 ozone NAAQS Federally enforceable as part of the Pennsylvania SIP.

Other specific requirements of DEP's March 10, 2020 submittal and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here. No public comments were received on the NPRM.

III. Final Action

EPA is approving the 1997 8-hour ozone NAAQS limited maintenance plan for the Franklin County as a revision to the Pennsylvania SIP.

IV. Statutory and Executive Order Reviews**A. General Requirements**

Under the CAA, the Administrator is required to approve a SIP submission

¹ "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni Memo).

² The ozone design value for a monitoring site is the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations. The design value for an ozone nonattainment area is the highest design value of any monitoring site in the area.

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because a SIP approval is not a significant regulatory action under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National

Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate

circuit by December 15, 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 pertaining to Pennsylvania's limited maintenance plan for the Franklin County Area may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: September 21, 2020.

Cosmo Servidio,

Regional Administrator, Region III.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart NN—Pennsylvania

- 2. In § 52.2020, the table in paragraph (e)(1) is amended by adding the entry "Second Maintenance Plan for the Franklin (Franklin County) 1997 8-Hour Ozone Nonattainment Area" at the end of the table to read as follows:

§ 52.2020 Identification of plan.

*	*	*	*	*
(e)	*	*	*	*
(1)	*	*	*	*

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * *	* * *	* * *	* * *	* * *
Second Maintenance Plan for the Franklin (Franklin County) 1997 8-Hour Ozone Nonattainment Area.	Franklin County	3/10/20	10/16/20, [insert Federal Register citation].	

* * * * *

[FR Doc. 2020-21228 Filed 10-15-20; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 180****[EPA-HQ-OPP-2017-0447; FRL-10014-31]****Methyl Bromide; Pesticide Tolerance for Emergency Exemptions****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of the fumigant methyl bromide, including its metabolites and degradates in or on imported/domestic agricultural commodities in fruit, citrus, group 10-10. This action is in response to EPA's granting a quarantine exemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on commodities within fruit, citrus, group 10-10. This regulation establishes a maximum permissible level for residues of methyl bromide in or on these commodities. The time-limited tolerance expires on December 31, 2023.

DATES: This regulation is effective October 16, 2020. Objections and requests for hearings must be received on or before December 15, 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-2017-0447, 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, 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 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 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-2017-0447 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 15, 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-2017-0447, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

II. Background 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 a time-limited tolerance for residues of methyl bromide in or on agricultural commodities in fruit, citrus, group 10-10 at 2 parts per million (ppm). By establishing a tolerance for specific commodities in this citrus fruit crop group, methyl bromide fumigation will be supported for the following crops: Australian desert lime, Australian finger lime, Australian round lime, Brown River finger lime, Calamondin, Citron, Citrus hybrids, Grapefruit, Japanese summer grapefruit, Kumquat, Lemon, Lime, Mediterranean Mandarin, Mount White Lime, New Guinea wild lime, Orange, sour, Orange, sweet, Pummelo, Russell River lime, Satsuma mandarin, Sweet lime, Tachibana orange, Tahiti Lime, Tangelo, Tangerine (Mandarin), Tangor, Trifoliate orange, and cultivars and/or hybrids of Unique fruit and varieties. The time-limited tolerance expires 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 its 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 Methyl Bromide on Commodities in Fruit, Citrus, Group 10–10 and FFDCA Tolerance

The U.S. Department of Agricultural/Animal and Plant Health Inspection Service/Plant Protection and Quarantine (USDA/APHIS/PPQ) Division has requested an amendment to 40 CFR 180.124 to allow methyl bromide fumigation of citrus hybrids from Chile. EPA has previously authorized quarantine exemptions under FIFRA section 18 for the use of methyl bromide on various agricultural commodities for post-harvest control of imported, invasive, non-indigenous, quarantine plant pests in the United States. Methyl bromide fumigation is currently registered for certain individual citrus

crops, but not citrus hybrids in citrus fruit group 10–10.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of methyl bromide in or on fruit, citrus, group 10–10 commodities. 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 quarantine exemption in order to address an urgent non-routine situation and to ensure that commodities bearing safe levels of residues may be lawfully distributed in commerce, EPA is issuing this tolerance without notice and opportunity for public comment as provided in FFDCA section 408(l)(6). Although the time-limited tolerance of 2 ppm for fruit, citrus, group 10–10 expires 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 citrus hybrid agricultural commodities in citrus, fruit group 10–10 after that date will not be unlawful, provided the pesticide was applied in a manner that is lawful under FIFRA, and the residues do not exceed a level that was authorized by the time-limited tolerance in fruit, citrus, group 10–10 at the time of that application. EPA will take action to revoke the time-limited tolerance of 2 ppm in fruit, citrus, group 10–10 earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because the time-limited tolerance in fruit, citrus, group 10–10 is being approved under emergency conditions, EPA has not made any decisions about whether methyl bromide meets FIFRA’s registration requirements for use on the specified agricultural citrus commodities or whether a permanent tolerance 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 methyl bromide by a State for special local needs under FIFRA section 24(c). Nor does this time-limited tolerance by itself serve as the authority for any person to make emergency use of this pesticide; emergency use on the applicable crops is permitted only as specified in the quarantine exemption issued to the Plant Protection and Quarantine Division of the United States Department of Agriculture and, Animal and Plant Health Inspection Service. For

additional information regarding the emergency exemption for methyl bromide, contact the Agency’s Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. 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 the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of, and to make a determination on, aggregate exposure expected as a result of this emergency exemption request and the time-limited tolerance for residues of methyl bromide in or on fruit, citrus, group 10–10 at 2 ppm. EPA’s assessment of exposures and risks associated with establishing this time-limited tolerance follows.

In the **Federal Register** on March 1, 2018 (83 FR 8758) (FRL–9971–19), EPA published a final rule establishing tolerances for residues of methyl bromide in or on various imported/domestic agricultural commodities based on the Agency’s determination that aggregate exposure to methyl bromide resulting from the residues subject to those tolerances is safe for the U.S. general population, including infants and children. Because the toxicity profile for methyl bromide has not changed since that last rule was published, EPA is incorporating the discussion of that profile (Unit III.A.) and the identified toxicological endpoints (Unit III.B.) as part of this rulemaking.

EPA's most recent comprehensive risk assessment dated December 17, 2018 remains an up-to-date assessment of the toxicity of, and dietary and aggregate exposures to, methyl bromide resulting from agricultural soil fumigation uses and a variety of non-agricultural uses such as commodity fumigations. Methyl bromide is not registered for any specific residential use patterns. In that December 2018 risk assessment, EPA did not aggregate short-, intermediate-term, or chronic dietary or inhalation exposures to methyl bromide because endpoints for dietary and inhalation exposures for these durations are not based on common toxicological effects. Similarly, no quantitative cancer assessment was conducted or is required for methyl bromide based on the Agency's having classified methyl bromide as of "not likely to be carcinogenic to humans." Further information about EPA's risk assessments and determination of safety supporting the tolerances established in the March 1, 2018 **Federal Register** action, as well as the new methyl bromide time-limited tolerance can be found at <http://www.regulations.gov> in the documents entitled "Methyl Bromide. Human Health Risk Assessment for the Section 18 Emergency Exemption Use on USDA APHIS PPQ Commodities," dated September 13, 2013, "Methyl Bromide. Section 18 Emergency Quarantine Exemption Use on Commodities Requested by the U.S. Department of Agriculture/Animal and Plant Health Inspection Service/Plant Protection and Quarantine (USDA/APHIS/PPQ) Division," dated May 2, 2017, and "Methyl Bromide. Amended Section 18 Emergency Quarantine Exemption for Use on Citrus Fruit Group 10–10 as Requested by the U.S. Department of Agriculture/Animal and Plant Health Inspection Service/Plant Protection and Quarantine (USDA/APHIS/PPQ) Division," dated May 7, 2018, respectively. All these documents can be found in docket ID EPA–HQ–OPP–2017–0447.

The acute and chronic dietary risk estimates for methyl bromide are partially refined since they incorporate anticipated residues, assume no methyl bromide residues are present in cooked commodities or in processed commodities subjected to heat, but include no adjustments for percent crop treated (PCT) (*i.e.*, 100 PCT is assumed). The acute and chronic dietary estimates for methyl bromide were found not to be of concern for the U.S. general population and all population subgroups. Acute dietary risks for

methyl bromide are below the Agency's LOC: 3.3% of the aPAD for children 1 to 2 years old, the population group with the highest exposure; and chronic risks are below the Agency's LOC: 38% of the cPAD for children 1 to 2 years old, the group with the highest exposure level.

There are no residential uses of methyl bromide. Non-occupational and ambient exposures are not typically aggregated with dietary exposures because the former is isolated and sporadic in nature, and the likelihood of having a significant food exposure occurring concurrently with a significant non-occupational exposure is negligible.

Therefore, the aggregate exposure assessments are equivalent to the dietary risk assessments.

Therefore, based on the risk assessments and information described above, EPA concludes 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 methyl bromide residues. More detailed information on the subject action to establish a tolerance in or on fruit, citrus, group 10–10 can be found at <http://www.regulations.gov> in the document entitled, "Methyl Bromide. Amended Section 18 Emergency Quarantine Exemption for Use on Citrus Fruit Group 10–10 as Requested by the U.S. Department of Agriculture/Animal and Plant Health Inspection Service/Plant Protection and Quarantine (USDA/APHIS/PPQ) Division." This document can be found in docket ID number EPA–HQ–OPP–2017–0447.

V. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology (King headspace method, J. Agricultural Food Chemistry, Vol 29, No. 5, pp 1003–1005) is available to enforce the tolerance expression. This method is a gas chromatography/electron capture (GC/EC) method that was validated in 1987 in the EPA Environmental Chemistry Laboratory (D168869, L. Cheng, 27–OCT–1992). The headspace procedure for determining methyl bromide has been forwarded to FDA for inclusion in PAM Vol. II. This method is adequate for data collection and for tolerance enforcement on plant and processed food commodities.

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.

Methyl bromide Codex MRLs have been established for several commodities; however, there are no Codex MRLs for any of the commodities that are the subject of this quarantine action.

VI. Conclusion

Therefore, a time-limited tolerance is established for residues of the fumigant methyl bromide, including its metabolites and degradates for the citrus fruit crop group, 10–10. Compliance with the tolerance level is to be determined by measuring only methyl bromide residues, in or on commodities in fruit, citrus, group 10–10. This tolerance expires on December 31, 2023.

VII. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA sections 408(e) and 408(l)(6). 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: September 11, 2020.
Marietta Echeverria,
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 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 § 180.124 amend paragraph (b) by:

■ a. Revising the introductory text and redesignating the table as Table 2 to paragraph (b); and

■ b. Amending newly designated Table 2 to paragraph (b) by adding, in alphabetical order, the entry “Fruit, citrus, group 10–10”.

The revision and addition read as follows:

§ 180.124 Methyl Bromide; tolerance for residues.

* * * * *

(b) *Section 18 emergency exemptions.* A time-limited tolerance is established for residues of the fumigant methyl bromide, including its metabolites and degradates, in or on the specified agricultural commodity in the table below. Compliance with the tolerance level specified below is to be determined by measuring only methyl bromide, in or on the commodities, resulting from use of the pesticide pursuant to Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) section 18 emergency exemptions. The tolerance expires and is revoked on the date specified in the table.

TABLE 2 TO PARAGRAPH (b)

Commodity	Parts per million	Expiration date
* * *	*	*
Fruit, citrus, group 10–10 ..	2	12/31/2023
* * *	*	*
* * *	*	*

[FR Doc. 2020–21199 Filed 10–15–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 414

[CMS–5533–CN]

Medicare Program; Alternative Payment Model (APM) Incentive Payment Advisory for Clinicians—Request for Current Billing Information for Qualifying APM Participants; Correction

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

ACTION: Payment advisory; correction.

SUMMARY: This document corrects a typographical error in the payment advisory that appeared in the September 17, 2020 **Federal Register** titled “Medicare Program; Alternative Payment Model (APM) Incentive Payment Advisory for Clinicians—Request for Current Billing Information for Qualifying APM Participants”.

DATES: This correction is effective October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Tanya Dorm, (410) 786–2216.

SUPPLEMENTARY INFORMATION:

I. Background and Summary of Errors

In FR Doc. 2020–20488 of September 17, 2020 (85 FR 57980), there was a typographical error in the telephone number listed in the “FOR FURTHER INFORMATION CONTACT” section of the document. This document corrects that error.

II. Correction of Errors

In FR Doc. 2020–20488 of September 17, 2020 (85 FR 57980), make the following correction:

On page 57980, second column, second full paragraph, line 1, the telephone number “(410) 786–2206” is corrected to read “(410) 786–2216”.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Seema Verma, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: October 8, 2020.

Lynette Wilson,
Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2020–22889 Filed 10–14–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Administration for Children and Families****45 CFR Parts 1304 and 1305**

RIN 0970-AC77

Head Start Designation Renewal System

AGENCY: Office of Head Start (OHS), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule; delay of effective date.

SUMMARY: This document delays the effective date of the final rule entitled “Head Start Designation Renewal System,” published in the **Federal Register** on August 28, 2020. As published, the rule was to be effective October 27, 2020. ACF is postponing the effective date of the rule to November 9, 2020.

DATES: The effective date for the rule amending 45 CFR parts 1304 and 1305, published at 85 FR 53189 on August 28, 2020, is delayed until November 9, 2020.

FOR FURTHER INFORMATION CONTACT: Colleen Rathgeb, Office of Head Start, at HeadStart@eclkc.info or 1-866-763-6481. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8:00 a.m. and 7:00 p.m. Eastern Standard Time.

SUPPLEMENTARY INFORMATION: On August 28, 2020, ACF published a rule refining how the Office of Head Start uses deficiencies, Classroom Assessment Scoring System: Pre-K (CLASS®) scores, and audit findings for designation renewal. The rule also streamlines and updates the regulatory provisions on designation renewal to make them easier to understand. The effective date of the rule has been delayed from October 27, 2020, to November 9, 2020.

Dated: October 7, 2020.

Lynn A. Johnson,
Assistant Secretary for Children and Families.

Approved: October 8, 2020.

Alex M. Azar II,

Secretary.

[FR Doc. 2020-22960 Filed 10-15-20; 8:45 am]

BILLING CODE 4184-01-P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 204, 212, 217, and 252**

[Docket DARS-2020-0034]

RIN 0750-AK81

Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041); Correction

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

ACTION: Interim rule; correction.

SUMMARY: DoD is correcting interim regulations that published in the **Federal Register** on September 29, 2020. The document heading carried an incorrect Regulation Identifier Number (RIN). This document reflects the correct RIN.

DATES: *Effective date:* The correction is effective October 16, 2020.

Comment due date: Comments for the interim rule published September 29, 2020, at 85 FR 61505, continue to be accepted on or before November 30, 2020, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D041, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2019-D041”. Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2019-D041” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D041 in the subject line of the message.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6100.

SUPPLEMENTARY INFORMATION: On September 29, 2020, DoD published an interim rule in the **Federal Register** at 85 FR 61505 titled “Assessing

Contractor Implementation of Cybersecurity Requirements”. The document’s heading, on page 61505, in the first column, contained the incorrect RIN 0750-AJ81. The correct RIN is “RIN 0750-AK81” and is in the heading of this correction.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020-22753 Filed 10-15-20; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 252**

[Docket DARS-2019-0052]

RIN 0750-AK66

Defense Federal Acquisition Regulation Supplement: Treatment of Certain Items as Commercial Items (DFARS Case 2019-D029); Correction

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

ACTION: Correcting amendment.

SUMMARY: DoD is correcting final regulations that published in the **Federal Register** on September 29, 2020, to reflect that the clause date for the DFARS section on subcontracts for commercial items should be “(OCT 2020)”.

DATES: Effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6100.

SUPPLEMENTARY INFORMATION: On September 29, 2020, DoD published in the **Federal Register** at 85 FR 60918 a final rule titled “Treatment of Certain Items as Commercial Items”. The purpose of this correction is to reflect that the clause date for DFARS 252.244-7000, Subcontracts for Commercial Items, should be “(OCT 2020)” and not “(SEP 2020)” as published in the final rule.

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

252.244–7000 [Amended]

■ 2. Amend section 252.244–7000 by removing the clause date of “(SEP 2020)” and adding “(OCT 2020)” in its place.

[FR Doc. 2020–22752 Filed 10–15–20; 8:45 am]

BILLING CODE 5001–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412–AA86

Leave and Holidays for U.S. Personal Services Contractors, Including Family and Medical Leave

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The rule amends the AIDAR’s provisions that pertain to the General Provision contract clause 5 (hereafter “clause”), entitled “Leave and Holidays (APR 1997).”

DATES: *Effective Date:* November 16, 2020.

FOR FURTHER INFORMATION CONTACT: Richard E. Spencer, Procurement Analyst, by phone at 202–916–2629, or email at rspencer@usaid.gov, for clarification of content or information pertaining to status or publication schedules. All communications regarding this rule must cite AIDAR RIN No. 0412–AA86.

SUPPLEMENTARY INFORMATION:

A. Background

The U.S. Agency for International Development (USAID) published a proposed rule on June 21, 2019 (84 FR 29140), with a supplemental notice on August 16, 2019 (84 FR 41954), to amend Section 12 of Appendix D of the AIDAR by revising General Provision contract clause 5 and its related provisions. The public comment period closed on August 20, 2019, and USAID received 142 comments. The revisions to Appendix D of the AIDAR made by this final rule are as follows.

USAID is revising Section 4 of Appendix D of the AIDAR to make the prescription for Annual and Sick Leave in Paragraph (c)(2)(ix) consistent with

the General Provision contract clause 5 in Section 12 of Appendix D, entitled “Leave and Holidays.” The revisions to General Provision contract clause 5 in Section 12 are as follows:

(1) Annual Leave.

- The title of the clause changes from “Vacation Leave” to “Annual Leave,” to be consistent with Paragraph (c)(2)(ix) of Section 4 of this Appendix, as well as USAID’s time-keeping system, and the Family and Medical Leave Act of 1993, as amended (FMLA), which allows for the use of “Annual” leave.

- The rule clarifies the provision regarding the minimum 90-day period of continuous performance required for a USAID U.S. Personal Services Contractor (USPSC) to accrue Annual Leave.

- The terms “tour,” “tour of duty,” and “employee” change to “period of performance” and “contractor,” to be consistent with USAID’s current contractual terminology.

- The rule clarifies the accrual of Annual Leave to indicate USAID will prorate it for less-than-full-time work.

- Annual-leave accrual rates broaden to include former service as a USAID USPSC under any statutory authority, and former service as a U.S. Government civilian and/or honorable service as an active-duty member of the U.S. Uniformed Services, by using the definition from Section 2101 of Title 5 of the U.S. Code (U.S.C.). The clause also specifies the documents a USAID Contracting Officer (CO) may review as evidence of a USPSC’s prior service. This change is intended to expand the Agency’s market base for USPSCs and attract former U.S. Government employees with relevant skills to participate in the competitive process for hiring them.

- USAID caps the maximum amount of annual leave a USPSC may carry over from one calendar year to the next during the period of a contract at 240 hours, consistent with the same restriction the Agency imposes on its U.S. direct-hire (USDH) employees. This change will also eliminate the need for making manual entries in the Agency’s time-keeping system to reinstate forfeited leave automatically cancelled in the time-keeping system at the end of each calendar year.

- The rule clarifies the conditions that allow a USPSC to avoid forfeiting Annual Leave; endorsement by a Mission Director is no longer required for a CO to approve these conditions, and a Determinations and Findings (D&F) is now required before the authorization of a lump-sum payment.

- USPSCs who are performing at USAID’s headquarters in Washington, DC, require approval by the cognizant Assistant Administrator (AA) for advanced Annual Leave. Also, the maximum amount of advanced leave an AA may approve is limited to what a USPSC could earn in a 12-month period, or over the life of his or her contract, whichever is less.

(2) Sick Leave.

- The rule amends the paragraph to clarify that the USPSC may take Sick Leave based on the same standards that apply to USAID’s USDH employees.

- The rule clarifies the paragraph to indicate that USAID will prorate the accrual of Sick Leave for less-than-full-time work.

- The rule clarifies the paragraph regarding the carryover of Sick Leave to specify that it only applies to a subsequent “follow-on” contract for the same services.

(3) Home Leave.

Home leave is a benefit a USPSC can earn after performing services for USAID abroad, usually after two years. It provides time off that the USPSC must use in the U.S., subject to his or her commitment to continued service. Home leave is meant to ensure that persons who are living and working abroad undergo reorientation and re-exposure in the U.S., and USAID provides it to USPSCs as a benefit comparable to that the Agency offers to its USDH employees. Detailed changes to the text regarding home leave are as follows:

- USAID only provides Home Leave currently to USPSCs who agree to return to the same Mission abroad after completing the Home Leave. In July 1998, USAID issued a policy deviation from Appendix D of the AIDAR to authorize a maximum of 20 workdays of Home Leave based on a USPSC’s commitment to relocate to a different USAID Mission as a USPSC immediately following the Home Leave for a specific period of time, subject to prior approval by the Mission Director (*i.e.*, the Mission from which the USPSC is departing.)

- The revised clause includes the required verification documents a USPSC must provide to support Home Leave based on a commitment to continue work under a new contract with a different USAID Mission.

- The rule makes a clarification to the travel requirements to specify that the days counted toward Home Leave do not include the travel time for Home Leave, with a cross-reference to the related contract clause titled, “Travel and Transportation Expenses.”

(4) Home Leave for Qualifying Missions.

USAID adds this category of leave based on a 2006 amendment to the Foreign Service Act of 1980 (Pub. L. [P.L.] 96–465), as amended, which authorized this additional Home Leave for USPSCs following their completion of a 12-month period of performance at Qualifying Missions, currently those in the Republics of Iraq and South Sudan and the Islamic Republics of Afghanistan and Pakistan. USAID provides Home Leave for USPSCs at the Qualifying Missions comparable to what it offers USDH employees, so as to attract USPSCs for these hard-to-fill positions.

(5) Holidays.

The rule revises the title and text of this paragraph to add “Administrative Leave” to apply all Agency closures to USPSCs on the same basis as to USDHs.

(6) Military Leave.

- The paragraph adds “U.S.” to “Armed Forces” to clarify that the clause only applies to the U.S. military services.

- The rule has clarified the contract-filing requirement to inform each USPSC that USAID will maintain such approval on file.

(7) Leave Without Pay (LWOP).

- The paragraph includes the abbreviation “LWOP” to conform to USAID’s time-keeping system.

- The paragraph includes a reference to the use of LWOP for Family and Medical Leave to conform to entitlements for this leave under the Family and Medical Leave Act (FMLA, Pub. L. 103–3).

(8) Compensatory Time.

The rule removes the term “leave” to characterize this benefit more accurately in line with USAID’s internal policies. Also, the paragraph contains a new sentence to clarify that both the earning and use of compensatory time off by USPSCs follow the same policies as apply to USAID’s USDH employees.

(9) Family and Medical Leave.

This clause adds a new section to cover Family and Medical Leave for all USAID’s USPSCs. As a matter of policy, USAID is extending the eligibility of Family and Medical Leave to USPSCs who are performing in the U.S. as well as outside the U.S. Congress passed the FMLA to allow employees to balance work and family life by protecting their employment and benefits status when taking reasonable leave for medical reasons, including the birth, adoption or care of a child; or care for a spouse, parent, or oneself in the event of a serious health condition.

Following inquiries from USPSCs, USAID examined the applicability of

the FMLA to USPSCs who are working in the U.S. and abroad. USAID found that Title II of the FMLA limits eligibility to USDH employees, and does not apply to contracts with individuals. However, USAID has determined that USPSCs who are working in the U.S. are entitled to Family and Medical Leave under Title I of the FMLA, as administered by the U.S. Department of Labor (DOL) through Part 825 of Title 29 of the Code of Federal Regulations (CFR). The DOL applies the broad definition of “employee” from the Fair Labor Standards Act of 1938 (Section 201 of Title 29 of the U.S. Code [U.S.C.]).

USAID determined that FMLA does not apply to USPSCs who are working outside the U.S. However, in November 2015, as a matter of Agency policy, the then-Acting Administrator authorized Family and Medical Leave for USPSCs who are working abroad to allow for a consistent leave policy for all of USAID’s USPSCs, irrespective of their place of performance. Based on this approval, in December 2015, USAID processed a two-year class deviation (under Title 48 of the CFR) from clause 5 of Section 12 of Appendix D of the AIDAR, “Leave and Holidays,” to authorize Family and Medical Leave for all of the Agency’s USPSCs. USAID implemented the deviation on an interim basis pending the finalization of this rule.

USAID has determined that Cooperating-Country National Personal Services Contractors (CCNPSCs) or Third-Country National PSCs (TCNPSCs) are not entitled to the Family and Medical Leave provided under this rule, even if a Mission Director approves other specific benefits based on an exception under Appendix J of the AIDAR (Title 48 of the CFR). Key provisions of the rule regarding Family and Medical Leave are as follows:

- The clause includes eligibility criteria in accordance with Part 825.110 of Title 29 of the CFR, with detailed requirements regarding establishing eligibility in USAID’s internal policy.

- The rule specifies the reasons for which a USPSC may take Family and Medical Leave in accordance with Part 825.112 of Title 29 of the CFR.

- The rule makes the provisions for the substitution of LWOP with paid leave, as allowed under Part 825.207 of Title 29 of the CFR, consistent with what USAID provides to USDH.

- The rule clarifies that COs may not authorize Family and Medical Leave for a USPSC beyond the completion date of the contract.

- The rule provides procedures a USPSC must follow to establish eligibility for Family and Medical Leave.

- The clause refers to a publication of the Wage and Hour Division of the U.S. Department of Labor for more information about Family and Medical Leave and procedures to report violations of the underlying law.

(10) Leave Records. The rule changes the use of “shall” to “must.”

B. Discussion and Analysis

USAID received 142 public comments regarding the proposed rule, which the Agency considered in the development of the final rule.

(1) Summary of Significant Changes From the Proposed Rule

There are no significant changes, and the Agency only made the following editorial clarifications to clause 5 under this final rule as a result of the public comments:

- In Paragraph (a)(3) on annual leave, the Agency corrected the sentence, “The contractor’s unused annual leave balance at the end of the last pay period of each calendar year will be forfeited, . . .” to indicate that a USPSC only forfeits annually those hours in excess of 240, as follows: “The contractor’s unused annual leave balance in excess of the 240 hour maximum at the end of the last pay period of each leave year will be forfeited, . . .”.

- In Paragraph (c)(2)(iii), the Agency revised the sentence, “The contractor agrees to return immediately after completing home leave to the same Mission to serve out the remaining time necessary to meet two (2) years of continued performance under this contract, plus an additional— . . .”, to clarify that the time required for the return service obligation starts after the USPSC has taken Home Leave, as follows, “The contractor agrees to immediately return to the same Mission to complete the time remaining to meet the twenty-four (24) month period of service required for home leave, which begins after the contractor returns from home leave, plus an additional— . . .”

(2) Analysis of Public Comments

Below are the Agency’s responses to comments on the changes proposed to clause 5 of Section 12 of Appendix D of the AIDAR. The Agency did not address comments unrelated to, or outside the scope of, the revisions of the proposed rule from the existing rule:

a. *Comment:* Many of the comments generally supported the rule. Numerous also included the statement, “USAID seeks consistency in its leave policies

for direct-hires and USPSCs,” or similar statements to the effect that USAID’s goal is to align all USPSC benefits with its USDH staff.

Response: The Agency is not seeking with this rule to replicate USDH benefits for USPSCs completely. For those benefits USAID does provide to USPSCs as a matter of policy, USAID may adopt a standard generally consistent with USDH employees.

b. *Comment:* Regarding the revisions to Paragraph (a)(3) on Annual Leave, numerous comments objected to the introduction of the maximum 240 hours of leave a USPSC can retain by the end of each leave year, often by citing the cap of 360 hours currently applicable to US DH Foreign Service Officers.

Response: Because the rule was previously silent about a yearly cap on the accrual of Annual Leave, the proposed rule revised Paragraph (a)(3) to address this issue. The 240-hour annual cap, regardless of a contractor’s place of performance, is consistent with the U.S. Department of State’s policies for its PSCs. Also, the previous uncapped amount had a negative financial impact on the Agency, because it undermined the imperative in Paragraph (a)(4), “The contractor must use all accrued annual leave during the period of performance.” Setting the cap will encourage USPSCs to take Annual leave as required. Additionally, as stated in the preamble to the rule, the cap will avoid the administrative burden on the Agency of individual entries to the time-keeping system, which automatically cancels Annual Leave that exceeds 240 hours at the end of each leave year. USAID therefore adopted this standard to resemble the default cap on the accumulation of Annual Leave applicable to its USDH employees in the Civil Service.

c. *Comment:* Regarding the revisions to Paragraph (a)(3) on Annual Leave and the annual cap on accrual, one comment stated, “The document is silent on the issue of carrying over annual leave that currently exceeds the new cap. This needs to be addressed. For those of us who currently exceed the proposed new cap we should be grandfathered in so as we do not lose this leave or be forced to take excessive leave before the end of the calendar year.”

Response: The 240-hour yearly cap on Annual Leave will take effect for all new solicitations and contract awards made after the effective date of this final rule. The yearly cap on Annual Leave will not apply to contracts awarded prior to the rule’s effective date that contained the prior version of the clause with no cap.

d. *Comment:* One comment regarding Paragraph (a)(3) on Annual Leave stated, “The draft states that the contract can carry over a maximum of 240 hours from one leave year to the next, but the states that the ‘contractor’s unused annual leave balance at the end of the last pay period of each calendar year will be forfeited, unless [restored].’ Do you mean ALL of the unused leave balance, or that PORTION of the unused leave balance that exceeds the authorized carry over amount? Do you mean the last pay period of each CALENDAR year, or the last pay period of the LEAVE year? The proposed rule, in the same provision, states that restoration of annual leave may be approved only by the USAID Administrator, cognizant AA or Head of an Independent Office reporting directly to the USAID Administrator, and cannot be delegated further. What is the rationale for having this approval remain at such a high level of the organization? Why not allow the Mission Director (or even the CO) to approve such restorations? The proposed rule, in the same provision, provides that restored annual leave must be used within two years. Why provide a longer period than is allowed for USDH?”

Response: As the Agency did not intend to indicate that USPSCs would forfeit all accrued, unused Annual Leave at the end of each leave year, we have revised this final rule to clarify that USPSCs will forfeit only leave in excess of 240 hours by the end of each leave year. Regarding the approval level the Agency chose for the restoration of annual leave, “for exceptional circumstances beyond the control of the contractor,” as stated in the rule, approval authority is with the head of the Agency or someone designated to act in that capacity consistent with the standard applicable to USDH employees under similar circumstances. Lastly the two-year maximum time limit for use of such restored leave is consistent with that USAID provides to USDH employees.

e. *Comment:* Related to Paragraphs (a)(3) on Annual Leave and (b) on Sick Leave, numerous comments spoke to the provisions in the rule for the carryover of such leave to a new contract. Many related comments requested a donation program for Annual and Sick Leave comparable to what is available to USDH employees.

Response: The carryover provisions for Annual and Sick Leave to new contracts from the existing regulatory text remained materially unchanged in the proposed rule. Both in the existing and proposed rule, USPSCs may carry

over sick leave to a “follow on” contract, but not carry over Annual or Sick Leave to a new contract for different services at a different place of performance.

Regarding leave “donations,” the Office of Personnel Management (OPM) administers the Voluntary Leave Transfer Program (VLTP), and statute prohibits PSCs from participating in OPM’s programs, in accordance with Section 636(a)(3) of the Foreign Assistance Act, as reiterated in Appendix D of the AIDAR. Furthermore, the Agency has determined that a similar program for contractors is not allowable, as there is no legal basis for leave donation among contractors in light of the constraints of the statutes, regulations, and general contract principles applicable to USAID when hiring and administering PSCs.

f. *Comment:* Regarding Paragraph (b) on Sick Leave, numerous comments indicated disagreement with the following text indicated by quotes as having been included in the rule: “sick leave can be carried over from one contract to another when the follow-on is for the same services as the original contract (i.e., the same scope of work in the same location).”

Response: Although the cited text is inaccurate, as it is not a verbatim quotation from the proposed rule, the Agency understands the point of the comments was to disagree with the regulatory text that states, “The contractor is not authorized to carry over sick leave to a new contract for a different position or at a different location.” The proposed rule does not substantively change the existing regulatory text regarding the carryover of Sick Leave. The Agency only made an editorial clarification for the proposed rule, as stated in the preamble, “A clarification is made to the carryover of sick leave to specify that it only applies to a subsequent ‘follow-on’ contract for the same services.”

g. *Comment:* Regarding Paragraph (c) on Home Leave, one comment stated, “What is the justification for providing Home Leave to contractors who voluntarily take work overseas, and whose contracts fund their return to the U.S. after only five years at most? Compared to Foreign Service Officers who agree to a career of service abroad at the direction of the Agency for decades, what is the Agency’s justification for incurring a cost that should be reserved to career officials? The same level of productivity and rest from service abroad could be achieved for contractors with regular [travel for rest and recuperation] instead of a costly 30 days of added vacation. Providing

Home Leave as proposed in this rule, which is in ways more generous than what a Foreign Service Officer gets, undermines the incentives our Government needed to grow a dedicated Foreign Service workforce so important to best representing U.S. interests overseas.”

Response: The existing rule already provided eligibility for Home Leave for USPSCs, with a return service agreement of two years, or only one year subject to a Mission Director’s approval when a USPSC cannot meet the two-year return service requirement after the fourth year of a five-year contract. This rule does not affect the provision of Home Leave generally to USPSCs, nor does it involve travel between rest and recuperation. Regarding whether provisions for USPSCs to receive Home Leave are more generous than what USAID provides to USDH employees, the Agency is not required to replicate USDH benefits completely, as explained above.

h. Comment: Regarding Paragraph (c)(2) on Home Leave, one comment stated, “The draft states that ‘the contractor agrees to return immediately after completing home leave to the same Mission to serve out the remaining time necessary to meet two (2) years of continued performance under this contract, plus . . .’ How do you define ‘remaining time’? If the contractor takes advance home leave after 18 months, then returns to post after one month of home leave, how much longer must he serve under the contract after his return? Six months (24 months minus 18) or five months (24 months minus 18 months minus one month of home leave)? Phrased a different way, does the home leave period count as PART of the 24 month-contract, or as an ADDITION to the 24-month contract? This same section provides for up to five days in work status for consultation at USAID/ Washington. Why is this different than for USDH employees (who normally get three days)?”

Response: The Agency has revised Paragraph (c)(2)(iii) on advanced Home Leave to clarify that the time spent on Home Leave, irrespective of when taken, is additional to the required 24-months of performance necessary for a USPSC to be eligible for home leave. Regarding Paragraph (4) that addresses “five (5) days in work status for consultation at USAID/Washington,” the text in the proposed rule remains unchanged from the existing regulatory text, and is therefore not germane to the revisions of the rule.

i. Comment: Regarding Paragraph (f) on military leave, one comment stated, “This draft provision authorizes

military leave of not more than 15 calendar days in any calendar year for military leave. USDH are authorized 15 WORK days in any FISCAL year. What is the reason for the inconsistency?”

Response: The Agency has not changed the provision for military leave materially from the existing regulatory text, and is therefore not part of the substantive revisions proposed for the rule. As stated in the preamble, USAID has made only the following clarifying editorial changes, “The paragraph adds ‘U.S.’ to ‘Armed Forces’ to clarify that the clause only applies to the U.S. military services. The rule has clarified the contract-filing requirement to inform each USPSC that USAID will maintain such approval on file.”

j. Comment: Regarding Paragraph (g) on compensatory time off, one comment stated, “This draft provision states that USAID may grant compensatory time off ‘under the same guidelines which apply to USAID direct-hire employees for its use.’ Which kind of USAID direct-hire do you mean? The guidelines are different for Civil Service and Foreign Service direct-hire employees. And they are different for commissioned Foreign Service and non-commissioned Foreign Service direct-hire employees. Commissioned Foreign Service employees are not authorized compensatory time at all (other than travel compensatory time, which falls under a different set of rules anyway), so this is an important distinction to make.”

Response: Compensatory time off applies equally to eligible USDH employees. The only employees who are not eligible are commissioned Foreign Service Officers, members of the Senior Foreign Service, and members of the Senior Executive Service.

C. Impact Assessment

(1) Regulatory Planning and Review. Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) has designated this final rule as being “significant” and therefore subject to review by the Office of Management and Budget (OMB). OMB/OIRA has determined that this final rule is not an “economically significant regulatory action” under Section 3(f)(1) of E.O. 12866. This final rule is not a major rule under title Section 804 of Title 5 of the U.S.C.

The costs and benefit of the revisions described above are as follows, by each type of leave affected:

- Annual Leave—Under the existing rule, USPSCs can only accrue Annual Leave per Pay Period at increasingly higher hourly rates based on prior PSC service under the authority of “Section

636(a)(3) of the FAA [Foreign Affairs Act of 1961, as amended].” The default accrual rate for a USPSC is four hours per Pay Period; however a contractor may accrue at a rate of six hours per pay period as a prior PSC under the FAA for more than three years, or eight hours per period for prior PSC services under the FAA for more than 15 years. The final rule broadens this to allow USPSCs to include prior service as a USAID PSC under other statutory authorities, as well as prior civilian or uniformed service. USAID estimated the cost of progressively adding four hours for three years and two hours for two years for 26 Pay Periods each year of a five-year contract to reach the maximum eight-hour accrual rate per Pay Period. USAID’s historical data indicate only approximately 50 percent of a given USPSC population will have prior experience to make them eligible for the maximum accrual rate. Based on an average annual salary for a General Schedule (GS) employees at the levels of GS–13, GS–14, and GS–15, step 10, of \$146,000 (base with locality pay for Washington, DC) equal to \$70 per hour, USAID estimates 270 U.S.-based USPSCs (*i.e.*, 50 percent of 540 total) would cost approximately \$1.575 million per year in higher accrual rates. The equivalent calculation for 275 USPSCs who are serving abroad (*i.e.*, 50 percent of 550 total) with an average salary of \$117,000 (base with no locality) equal to \$56/hour comes to \$1.283 million per year. Therefore the total estimated cost of additional compensation in Annual Leave based on the expanded prior service eligibility is \$2.859 million per year. The benefit of this provision is to provide this leave for USPSCs on a similar basis as USAID provides to USDH to attract a wider pool of offerors with greater opportunities for higher accrual rates.

- Home Leave—The final rule codifies USAID’s current policy in place by deviation from the existing AIDAR to add eligibility for Home Leave for USPSCs who relocate to a different Mission under a new USPSC contract immediately following Home Leave every two years. Assuming about half of USAID’s 550, or 275, USPSCs abroad fulfil their continued service commitments at a different Mission, the maximum additional cost at an average GS–13, GS–14, and GS–15, step 10, annual salary of \$117,000 (base with no locality) equal to \$450/day for 20 days is \$2.476 million every two years, or \$1.238 million for each year.

- Home Leave for Qualifying Missions—The final rule increases Home Leave by providing 10 days of leave for USPSCs after every 12 months

abroad when performing at certain “Qualifying” Missions, currently in Iraq, Afghanistan, Pakistan, and South Sudan. Together these Missions have approximately 70 USPSCs abroad, so using the average GS–13, GS–14, GS–15, step 10, annual salary of \$117,000 per year (base with no locality) equal to \$450/day for 10 days, the total additional annual cost of this leave is approximately \$315,000 each year. The cost of this additional leave is justified to increase USAID’s ability to hire USPSCs for hard-to-fill positions at dangerous and high-attrition Missions.

• **Holidays and Administrative Leave**—The final rule adds emergency dismissals and closures to acknowledge when USAID/Washington headquarters or Missions abroad are closed for inclement weather, civil unrest, or other logistical complications. This will not have a cost impact, because previously USPSCs were not able to work when USAID facilities were closed, and so received the same Administrative Leave as USDH as a practical matter. Additionally, telework-ready USPSCs will continue to perform as USDH do.

• **Family and Medical Leave**—The addition of Family and Medical Leave will only have a marginal cost impact, if any, because this entitlement does not provide additional leave. USPSCs must use Leave without Pay, Annual, or Sick Leave while under the status of Family and Medical Leave. The benefit that Family and Medical Leave provides is that it entitles an individual to use leave once he or she is determined eligible and not subject to the ordinary leave-approval process. Statute requires the provision of this benefit to USPSCs who are performing in the U.S.; therefore, the only expansion beyond what the law requires is the Agency’s discretion to apply it equally to USPSCs based abroad. USAID made this decision to provide this entitlement equally to all USPSCs and not disadvantage those who are performing abroad.

As a regulatory matter, the cost of the rule-making process to incorporate these revisions into the regulation is also justified. The AIDAR’s Appendices

include all the compensation and benefits available under PSCs. Therefore, the Agency needs these revisions to keep the regulation consistent, complete, and transparent to industry, other U.S. Government agencies, and the general public.

(2) **Regulatory Flexibility Act.** The Director of the Office of Acquisition and Assistance in USAID’s Bureau for Management, acting as the Head of the Agency for purposes of the Federal Acquisition Regulation, certifies that this rule will not affect a substantial number of small entities within the meaning of the Regulatory Flexibility Act, Section 601 of Title 5 of the U.S.C. 601, *et seq.* Therefore, USAID has not performed an Initial Regulatory Flexibility Analysis.

(3) **Paperwork Reduction Act.** The rule does not establish or modify a collection of information that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (Chapter 35 of Title 44 of the U.S.C.).

List of Subjects in Appendix D of Chapter 7 of Title 48 of the CFR Government procurement.

For the reasons discussed in the preamble, USAID amends Chapter 7 of Title 48 of the CFR under the authority of Section 621 of Public Law 87–195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and Title 3 of the CFR, 1979 Comp., p. 435, as follows:

CHAPTER 7—AGENCY FOR INTERNATIONAL DEVELOPMENT

- 1. Amend Appendix D to Chapter 7 by:
 - a. In section 4, revising the second sentence of paragraph (c)(2)(ix);
 - b. In section 12:
 - i. Revising the section heading;
 - ii. Revising clause 5;
 - iii. In clauses 6 and 16, removing the word “vacation” each time it appears and adding in its place the word “annual”.
 - c. By adding a parenthetical authority citation at the end of the appendix.

The revisions and addition read as follows:

Appendix D to Chapter 7—Direct USAID Contracts With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

* * * * *

4. Policy

* * * *

(c) * * *

(2) * * *

(ix) * * * However, PSCs with previous service are eligible to earn annual leave in accordance with the “Leave and Holidays” General Provision contract clause in section 12 of this appendix.

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12. General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

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5. Leave and Holidays

[Insert the following clause in all USPSC contracts.]

Leave and Holidays (DATE)

(a) **Annual Leave.** (1) The contractor may accrue annual leave at the rate specified in paragraph (a)(2) of this clause as follows:

(i) If the contract period of performance is ninety (90) calendar days or more, and the contractor’s performance is continuous for the contract period of performance, the contractor is entitled to accrue annual leave as of the start date of the contract.

(ii) If the contract period of performance is ninety (90) calendar days or more, and the contractor’s performance is not continuous during the contract period of performance, the contractor is entitled to accrue annual leave only for each instance of continuous performance of ninety (90) calendar days or more.

(iii) If the contract period of performance is less than ninety (90) calendar days, the contractor is not entitled to accrue annual leave.

(2) The rate at which the contractor will accrue annual leave is based on the contractor’s time in service according to the table of this paragraph (a)(2). The accrual rates are based on a full-time, 40-hour workweek, which will be prorated if the contract provides for a shorter workweek:

Time in service	Annual leave (AL) accrual rate
0 to 3 years	4 hours of leave for each 2-week period.
over 3, and up to 15 years	6 hours of AL for each 2-week period (including 10 hours AL for the final pay period of a calendar year).
over 15 years	8 hours of AL for each 2-week period.

(i) USAID will calculate the time in service based on all the previous service performed by the contractor as—:

(A) An individual personal services contractor with USAID for any duration

covered by Sec. 636(a)(3) of the FAA or other statutory authority applicable to USAID; and/or

(B) A former U.S. Government (USG) direct-hire civilian employee; and/or

(C) An honorable active duty member of the uniformed services based on the definition in 5 U.S.C. 2101(3).

(ii) In addition to the information certified by the contractor in their Offeror Information

form, the contracting officer may require the contractor to furnish copies of previously executed contracts, and/or other evidence of previous service (e.g., SF 50, DD Form 214 or 215) to conduct the due diligence necessary to verify creditable previous service.

(3) Annual Leave is provided under this contract primarily for the purposes of providing the contractor necessary rest and recreation during the period of performance. The contractor, in consultation with the Supervisor, must develop an annual leave schedule early in the period of performance, taking into consideration the requirements of the position, the contractor's preference, and other factors. The maximum amount of annual leave that the contractor can carry over from one leave year to the next is limited to 240 hours. The contractor's unused annual leave balance in excess of the 240 hour maximum at the end of the last pay period of each leave year will be forfeited, unless the requirements of the position precluded the contractor from taking such leave. The contractor may be authorized to restore annual leave for exceptional circumstances beyond the control of the contractor. The restoration of annual leave may be approved only by the USAID Administrator, cognizant Assistant Administrator or Head of an Independent Office reporting directly to the USAID Administrator, and cannot be delegated further. Annual leave restored must be scheduled and used no later than either the end of the leave year two years after either—

(i) The date fixed by the approving official as the termination date of the exigency of the public business or other reason beyond the contractor's control, which resulted in the forfeiture; or

(ii) The end of the contract, whichever is earlier.

(4) The contractor must use all accrued annual leave during the period of performance. At the end of the contract, the contractor will forfeit any unused annual leave except where the requirements of the position precluded the contractor from taking annual leave. In this case, the contracting officer may authorize the following:

(i) The contractor to take annual leave during the concluding weeks of the contract, not to exceed the period of performance; or

(ii) Payment of a lump-sum for annual leave not taken based on a signed, written determination and findings (D&F) from the contractor's supervisor. The D&F must set out the facts and circumstances that prevented the contractor from taking annual leave, and the contracting officer must find that the contractor did not cause, or have the ability to control, such facts and circumstances. This lump-sum payment must not exceed the number of days the contractor could have accrued during a twelve (12)-month period based on the contractor's accrual rate.

(5) The contractor may be granted advanced annual leave by the contracting officer when circumstances warrant. Advanced leave must be approved by the Mission Director, cognizant Assistant Administrator, or Head of an Independent Office reporting directly to the

Administrator, as appropriate. In no case may the contracting officer grant advanced annual leave in excess of the amount the contractor can accrue in a twelve (12)-month period or over the life of the contract, whichever is less. At the end of the period of performance or at termination, the contractor must reimburse USAID for any outstanding balance of advanced annual leave provided to the contractor under the contract.

(b) *Sick Leave.* The contractor may use sick leave on the same basis and for the same purposes as USAID direct-hire employees. The contractor will accrue sick leave at a rate not to exceed four (4) hours every two (2) weeks for a maximum of thirteen (13) workdays per year based on a full-time, 40-hour workweek, and the rate of accrual will be prorated if the contract provides for a shorter workweek. The contractor may carry over unused sick leave from year to year under the same contract, and to a new follow-on contract for the same work at the same place of performance. The contractor is not authorized to carry over sick leave to a new contract for a different position or at a different location. The contractor will not be compensated for unused sick leave at the completion of this contract.

(c) *Home Leave.* (1) The contractor may be granted home leave to be taken only in the U.S., its commonwealth, possessions, or territories, in one continuous period, under the following conditions:

(i) The contractor must complete twenty-four (24) continuous months of service abroad under this contract, and must not have taken more than thirty (30) workdays leave (annual, sick, or LWOP) in the U.S., its commonwealths, possessions, or territories. The required service abroad will include the actual days in orientation in the U.S. (excluding any language training), travel time by the most direct route, and actual days abroad beginning on the date of arrival in the cooperating country. Any annual and sick leave taken abroad, excluding leave without pay (LWOP), will count toward the period of service abroad. Any days of annual and sick leave taken in the U.S., its commonwealths, possessions, or territories will not be counted toward the required twenty-four (24) months of service abroad.

(ii) The contractor must agree to return immediately after completing home leave to continue performance for an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved in writing by the Mission Director before the contractor departs on home leave.

(iii) If the contractor agrees to meet the conditions in paragraph (c)(1)(ii) of this clause above by returning to the same USAID Mission under this contract or a new contract, the contractor may be granted thirty (30) workdays of home leave.

(iv) If the contractor agrees to meet the continued performance conditions of paragraph (c)(1)(ii) of this clause and will be relocating to a different USAID Mission under a new USAID personal services contract immediately following the completion of home leave, the contractor may be granted twenty (20) workdays of home leave. USAID will provide the contractor these twenty days of home leave

under this contract, not under the new contract.

(v) If home leave eligibility is based on paragraph (c)(1)(iv) of this clause, prior to departure on home leave, the contractor must submit to the contracting officer at the current Mission, a copy of the new contract with a special award condition in the contract Schedule indicating the contractor's obligation to fulfill the commitment for continued performance in accordance with paragraph (c)(1)(ii) of this clause.

(2) Notwithstanding the requirements in paragraph (c)(1) of this clause, the contractor may be granted advanced home leave subject to all of the following conditions:

(i) Granting of advanced home leave would serve in each case to advance the attainment of the objectives of this contract; and

(ii) The contractor has served at least eighteen (18) months abroad, as defined in paragraph (c)(4) of this clause, at the same USAID Mission under this contract, and has not taken more than 30 work days leave (annual, sick or LWOP) in the U.S.; and

(iii) The contractor agrees to return immediately to the same Mission to complete the time remaining to meet the twenty-four (24) month period of service required for home leave, which begins after the contractor returns from home leave, plus an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved by the Mission Director, under the current contract, or under a new contract for the same or similar services at the same Mission, before the contractor departs on home leave.

(3)(i) Home leave must be taken only in the U.S., its commonwealths, possessions, or territories. Any days spent in any other location will be charged to annual leave, or if the contractor does not have accrued annual leave to cover these days, the contractor will be placed on LWOP.

(ii) Travel time by the most direct route is authorized in addition to the home leave authorized under this "Leave and Holidays" clause. Salary during travel to and from the U.S. for home leave will be limited to the time required for travel by the most direct and expeditious route. Additional home leave travel requirements are included in the "Travel and Transportation Expenses" clause of this contract.

(iii) Except for reasons beyond the contractor's control as determined by the contracting officer, the contractor must return abroad immediately after home leave to fulfill the additional required continued performance of services for any home leave provided under this contract, or else the contractor must reimburse USAID for the salary and benefits costs of home leave, travel and transportation, and any other payments related to home leave.

(iv) Unused home leave is not reimbursable under this contract.

(4) The contracting officer may authorize the contractor to spend no more than five (5) days in work status for consultation at USAID/Washington while on home leave in the U.S., before returning abroad. Consultation in excess of five (5) days or at locations other than USAID/Washington must be approved in advance by the Mission Director or the contracting officer.

(d) *Home Leave for Qualifying Posts.* (1) If the contractor ordinarily qualifies for home leave and has completed a 12-month period at one of the USAID qualifying Missions, as announced by the Department of State or USAID, the contractor is entitled to ten (10) workdays of home leave in addition to the home leave the contractor is normally entitled to in accordance with paragraph (c) of this "Leave and Holidays" clause.

(2) There is no requirement that an eligible contractor take this additional home leave for qualifying Missions; it is for use at the contractor's option. If the contractor is eligible and elects to take such home leave, the contractor must take all ten (10) workdays at one time in the U.S. under the conditions described in paragraphs (c)(3) and (c)(4) of this clause. If the contractor is returning to the U.S. and not returning abroad to the same or different USAID Mission, the contractor is not eligible for home leave for qualifying Missions, and this paragraph (d) will not apply.

(e) *Holidays and Administrative Leave.* The contractor is entitled to all holidays and administrative leave granted by USAID to U.S. direct-hire employees as announced by the Agency or Mission.

(f) *Military Leave.* Military leave of not more than fifteen (15) calendar days in any calendar year may be granted to the contractor who is a reservist of the U.S. Armed Forces, provided that the military leave has been approved, in advance, by the contracting officer or the Mission Director. A copy of the contractor's official orders and the contracting officer or Mission Director approval will be part of the contract file.

(g) *Leave Without Pay (LWOP).* The contractor may be granted LWOP only with the written approval of the contracting officer or Mission Director, unless a such leave is requested for family and medical leave purposes under paragraph (i) of this clause.

(h) *Compensatory Time.* USAID may grant compensatory time off only with the written approval of the contracting officer or Mission Director in rare instances when it has been determined absolutely essential and under the policies that apply to USAID U.S. direct-hire employees. The contractor may use earned compensatory time off in accordance with policies that apply to USAID direct-hire employees.

(i) *Family and Medical Leave.* (1) USAID provides family and medical leave for eligible USPSCs working within the U.S., or any territories or possession of the U.S., in accordance with Title I of the Family and Medical Leave Act of 1993, as amended (FMLA), and as administered by the Department of Labor under 29 CFR 825. USAID also provides family and medical leave to eligible USPSCs working outside the U.S., or any territories or possession of the U.S., in accordance with this paragraph (i) outside the provisions of Title I of the FMLA as a matter of policy discretion.

(2) Family and medical leave only applies to USPSCs, not any other type of PSC.

(3) In accordance with 29 CFR 825.110, to be eligible for family and medical leave, the contractor must have performed services for

(ii) At least 1,250 hours with USAID during the previous 12-month period.

(4) In accordance with 29 CFR 825.200(a), and USAID's internal policies available in Automated Directive System Chapter 309 (ADS 309), an eligible contractor may take up to twelve (12) workweeks of leave under FMLA, Title I, in any 12-month period for the reasons specified in 29 CFR 825.112.

(5) In accordance with 29 CFR part 825.207, the contractor may take LWOP for family and medical leave purposes. However, the contractor may choose to substitute LWOP with accrued annual or sick leave earned under the terms of this contract. If the contractor does not choose to substitute accrued paid leave, the contracting officer, in consultation with the contractor's supervisor, may require the contractor to substitute accrued paid leave for LWOP. The CO must obtain the required certifications for approval of family medical leave in accordance with USAID policy. The contractor must notify the contractor's Supervisor of the intent to substitute paid leave for LWOP prior to the date such paid leave commences. After having invoked the entitlement to family and medical leave and taking LWOP for that purpose, the contractor cannot retroactively substitute paid leave for the LWOP already taken under family and medical leave.

(6) Family medical leave is not authorized for any period beyond the completion date of this contract.

(7) When requesting family medical leave, the contractor must submit the relevant leave request in writing, including certifications and other supporting documents required by 29 CFR 825 and USAID policy in ADS 309.

(8) The U.S. Department of Labor's (DOL's) Wage and Hour Division (WHD) Publication 1420 explains the FMLA's provisions and provides information concerning procedures for filing complaints for violations of the Act.

(j) *Leave Records.* The contractor must maintain their current leave records and make them available as requested by the Mission Director or the contracting officer.

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(Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and Title 3 of the CFR, 1979 Comp., p. 435.)

Mark A. Walther,

Chief Acquisition Officer.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 622 and 635

[Docket No. 200922-0254]

RIN 0648-BI61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Atlantic Highly Migratory Species; Coral and Coral Reefs of the Gulf of Mexico; Amendment 9

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

ACTION: Final rule.

SUMMARY: NMFS implements management measures described in Amendment 9 to the Fishery Management Plan (FMP) for the Coral and Coral Reefs of the Gulf of Mexico (Amendment 9) and an associated framework action to the FMP, as prepared by the Gulf of Mexico Fishery Management Council (Council). This final rule establishes new habitat areas of particular concern (HAPCs), some of which include a prohibition of the deployment of bottom-tending gear, and modifies fishing regulations for the other existing HAPCs in the Gulf of Mexico (Gulf). Additionally, this final rule implements complementary management measures for Atlantic highly migratory species (HMS) in the Gulf. The purpose of this final rule is to protect coral essential fish habitat (EFH) in the Gulf.

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

ADDRESSES: Electronic copies of Amendment 9 and the framework action may be obtained from

www.regulations.gov or the Southeast Regional Office website at <https://www.fisheries.noaa.gov/action/amendment-9-coral-habitat-areas-considered-management-gulf-mexico>.

Amendment 9 includes a final environmental impact statement (EIS), fishery impact statement, regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis.

FOR FURTHER INFORMATION CONTACT:

Kelli O'Donnell, NMFS Southeast Regional Office, telephone: 727-824-5305; email: kelli.odonnell@noaa.gov. Karyl Brewster-Geisz, NMFS Highly Migratory Species Division, telephone: 301-427-8503; email: karyl.brewster-geisz@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS and the Council manage coral and coral reef

(i) At least twelve (12) months with USAID; and

resources in the Gulf under the FMP. The FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS manages Atlantic HMS under the 2006 Consolidated Atlantic HMS FMP and its amendments, under the authority of the Magnuson-Stevens Act and the Atlantic Tunas Convention Act. The 2006 Consolidated Atlantic HMS FMP is implemented by regulations at 50 CFR part 635.

On December 18, 2017, NMFS published a notice of intent to prepare a draft EIS for Amendment 9 in the **Federal Register** and requested public comment (82 FR 60003, December 18, 2017). On September 26, 2019, NMFS published a notice of availability for Amendment 9 and an associated framework action to the FMP, and requested public comment (84 FR 50814, September 26, 2019). On December 20, 2019, the Secretary of Commerce approved Amendment 9 and the framework action under section 304(a)(3) of the Magnuson-Stevens Act. On November 15, 2019, NMFS published a proposed rule for Amendment 9 and the associated framework action, and requested public comment (84 FR 62491, November 15, 2019). The proposed rule and Amendment 9 outline the rationale for the actions contained in this final rule. A summary of the management measures described in Amendment 9 and the associated framework action, and implemented by this final rule is provided below.

Management Measure Contained in This Final Rule

This final rule establishes 13 new HAPCs in the Gulf in which the deployment of certain bottom-tending gear is prohibited. The rule also prohibits the deployment of dredge fishing gear in existing Gulf HAPCs that are managed with fishing regulations. Further, this rule modifies the restrictions in the existing HAPCs that prohibit fishing with specific gear types to prohibit the deployment of those gear. NMFS is establishing these areas and fishing regulations to further protect coral EFH in the Gulf.

HAPCs With Fishing Regulations

This final rule establishes 13 coral HAPCs in which the deployment of specified bottom-tending gear is prohibited. For purpose of the prohibition, fishing gear is “deployed” if any part of the gear is in contact with the water. The 13 HAPCs are called

West Florida Wall, Alabama Alps Reef, L & W Pinnacles and Scamp Reef (combined area), Mississippi Canyon 118, Roughtongue Reef, Viosca Knoll 826, Viosca Knoll 862/906, AT 047, AT 357, Green Canyon 852, Southern Bank, Harte Bank, and Pulley Ridge South Portion A. Pulley Ridge South Portion A is adjacent to the established Pulley Ridge South HAPC.

For these areas, excluding Pulley Ridge South Portion A, prohibitions on the following activities apply year-round: Deployment of bottom longline, bottom trawl, buoy gear as defined in 50 CFR 622.2, dredge, pot, or trap, and bottom anchoring by fishing vessels. The buoy gear defined in 50 CFR 622.2 is not the same as HMS buoy gear defined in 50 CFR 635.2. HMS buoy gear is not a bottom-tending gear.

Within the Viosca Knoll 862/906 area, the gear deployment prohibitions do not apply to a fishing vessel issued a Gulf royal red shrimp endorsement, as specified in 50 CFR 622.50(c), while fishing for royal red shrimp. The areas around this HAPC are used to fish for royal red shrimp. Fishing for royal red shrimp occurs in deep waters and requires several miles of continuous forward vessel movement to lift the nets up in the water column to the vessel. Therefore, requiring that these nets be out of the water would effectively prevent the use of an area much larger than the HAPC. The exemption allows royal red shrimp fishermen to continue the historic practice of lifting the nets off the bottom but keeping them in the water as they travel through this area while still protecting corals.

Within the Pulley Ridge South Portion A area, the following prohibitions apply year-round: Deployment of a bottom trawl, buoy gear as defined in 50 CFR 622.2, dredge, pot, or trap, and bottom anchoring by fishing vessels. Pulley Ridge South Portion A does not include a restriction on the deployment of bottom longline gear to allow fishing that has historically occurred in this area to continue. This final rule does not change any other boundaries or regulations within the existing Pulley Ridge HAPC.

The Council concluded that the exception for royal red shrimp fishing in the Viosca Knoll 862/906 area and for bottom longline fishing in the proposed Pulley Ridge South Portion A area is unlikely to adversely affect the habitat. Both types of fishing have occurred in the respective areas for over a decade without causing significant harm.

Dredge Fishing Prohibition

Previous to this final rule, only some HAPCs in the Gulf had fishing regulations that prohibited dredge fishing within the designated areas. This final rule prohibits the deployment of dredge fishing gear in all HAPCs in the Gulf with associated fishing regulations. Dredge fishing is most commonly used to harvest shellfish and is not known to occur in the Gulf. Therefore, this management measure will not restrict any known fishing activity in the Gulf, but increases the consistency of management measures across HAPCs with fishing regulations.

Fishing Restrictions in Established HAPCs

This rule modifies restrictions associated with bottom-tending fishing gear in the HAPCs established prior to this final rule. Previously, the regulations at 50 CFR 622.74 prohibited “fishing” in these HAPCs with bottom-tending gear with specific types of gear prohibitions varying by HAPC. As explained in the proposed rule, the Council determined that it was more appropriate to prohibit the “deployment” of bottom-tending gear. Therefore, this rule changes the prohibition for the HAPCs listed in 50 CFR 622.74, other than the Tortugas marine reserves HAPC, to prevent the deployment of the bottom-tending gear to be consistent with the prohibition in the HAPCs implemented by this final rule. The Tortugas marine reserves HAPC already has a broader prohibition on all fishing and anchoring by fishing vessels.

HMS Fisheries in the Gulf

This final rule modifies regulations at 50 CFR 635.21 for Atlantic HMS fisheries that operate in the Gulf to complement the fishing vessel anchoring and gear deployment prohibitions in 50 CFR 622.74.

Management Measure Contained in Amendment 9 But Not Codified Through This Final Rule

Amendment 9 also establishes eight HAPCs with no associated fishing regulations. The Council determined that specific fishing regulations in these eight HAPCs are unnecessary because there is no known fishing activity that occurs within them, partly because the areas are located in very deep water (greater than 984 ft or 300 m). The HAPCs without fishing regulations in Amendment 9 are South John Reed, Garden Banks 299, Garden Banks 535, Green Canyon 140 and 272 (combined), Green Canyon 234, Green Canyon 354, Mississippi Canyon 751, and

Mississippi Canyon 885. Although fishing impacts were not identified as a concern in these eight areas, establishing these HAPCs informs the public that the Council considers these areas to be of particular importance and could help guide NMFS' review of non-fishing impacts during EFH consultations.

Comments and Responses

NMFS received 12,055 comments on the notice of availability for Amendment 9 and proposed rule. Of those, 12,035 were in support of Amendment 9 with no further recommendations. Eight comments were in support of Amendment 9 and establishing HAPCs, but stated that Amendment 9 did not do enough to protect deep-sea coral or EFH. Five comments were in opposition to establishing some or all of the proposed HAPCs. Two comments were not relevant to Amendment 9 or the proposed rule. Comments specific to Amendment 9 and the proposed rule are grouped as appropriate and summarized below, followed by NMFS' responses.

Comment 1: Amendment 9 does not fully implement the NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems to conserve deep-sea coral and sponge habitat. The Council and NMFS should create a precautionary management area in the Gulf similar to those established by the Mid-Atlantic and New England Fishery Management Councils by using the discretionary authority of the Magnuson-Stevens Act to limit expansion of bottom-tending fishing gear in the Gulf to existing areas fished by those gear to better protect coral EFH.

Response: The Council did not prepare Amendment 9 to implement the NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems. Nevertheless, the purpose of Amendment 9 is to protect coral species and habitat under Federal management in the Gulf, and does accomplish some of the goals and objectives of the plan. While the NOAA Strategic Plan outlines several authorities available to the Council, it is not prescriptive in how the Council should protect deep-sea coral resources. Unlike the New England and Mid-Atlantic Fishery Management Councils, the Gulf Council manages corals in Federal waters of the Gulf directly through the Coral FMP and the Council defined coral EFH as all areas where managed corals exist. Because corals are already managed under the Coral FMP and protected through the existing EFH designation, the Council did not consider designating deep-sea coral areas under section 303(b)(2)(B) of the

Magnuson-Stevens Act because this would be duplicative. However, the Council is currently considering beginning work on a new amendment to the Coral FMP that would review additional areas for designation as coral HAPCs.

Comment 2: The Council should use its statutory authority to engage in the oversight, permitting, and evaluation of non-fishing activities in the Gulf, such as, to restrict shipping traffic within HAPCs, and develop policies related to non-fishing activities to reduce negative impacts to coral habitats in the Gulf.

Response: NMFS disagrees. While the Magnuson-Stevens Act does allow for the Council to comment on any Federal or state activity authorized, funded, or undertaken that may affect the habitat under the Council's authority, the Magnuson-Stevens Act does not authorize the Council to regulate non-fishing activities or engage in the permitting of non-fishing activities. HAPCs are a subset of EFH, and while the designation does not confer any additional specific protections to designated areas, it can be used to focus attention when NMFS conducts required consultations on non-fishing activities that may adversely affect this habitat.

Comment 3: Fishing with bottom-tending gear should be further restricted or prohibited in all HAPCs established in Amendment 9.

Response: NMFS disagrees that it is necessary or appropriate to further restrict fishing in the HAPCs established in Amendment 9. As part of the development of Amendment 9, the Council received input and recommendations from several advisory panels, including the Council's Special Coral Scientific and Statistical Committee (SSC), Coral Advisory Panel (AP), the Shrimp AP, Reef Fish AP, Spiny Lobster AP, and Law Enforcement Technical Committee, as well as royal red shrimp fishermen and bottom longline fishermen. The Council reviewed habitat information, current fishing activity location information, and feedback from interested members of the fishing industry, the oil and gas industries, non-profit and academic organizations, and the general public during public Council meetings. Based on all of this information, the Council identified several areas in which the Council determined that it was appropriate to prohibit the use bottom-tending gear. These areas have a known abundance of coral, extensive coral fields, or species richness or diversity indices that differed from areas in a similar geographic location. However, the Council also determined that in two

of these areas, Pulley Ridge South Portion A and Viosca Knoll 862/906, historic fishing practices that have not caused substantial harm to coral habitat should be allowed to continue.

Therefore, there is no prohibition on the use of bottom longline gear in Pulley Ridge South Portion A and the prohibition in Viosca Knoll 862/906 does not apply to fishing vessels issued a Gulf royal red shrimp endorsement, as specified in § 622.50(c), while the vessel is fishing for royal red shrimp.

The Council also identified eight deep-water areas for designation as HAPCs without associated fishing regulations. These eight areas have substantial coral communities or contain corals that are rare, but are in depths that are unlikely to have fishing with bottom-tending gear.

Additionally, although Amendment 9 included restrictions on "fishing" with bottom-tending gear, the Council subsequently determined that the because of the broad definition of "fishing" in the Magnuson-Stevens Act the restriction could be interpreted to prohibit activities that did not involve having the gear in the water. Therefore, the Council developed a framework action to modify the prohibition on "fishing with bottom-tending gear" to a prohibition on the "deployment of bottom-tending gear." This applies to the previously established HAPCs in 50 CFR 622.74, except the Tortugas marine reserves HAPC, and to those established through Amendment 9. Fishing gear is deployed if the gear is in contact with the water.

Comment 4: No additional HAPCs should be established in the Gulf. Bottom-tending gear is not used over coral areas, therefore designating additional HAPCs with or without fishing regulations is unnecessary.

Response: The Council has a responsibility to minimize, to the extent practicable, impacts to EFH from fishing gear. The Council determined, and NMFS agrees, that the areas established through Amendment 9 have corals in sufficient number or diversity to warrant designation as HAPCs, which are a subset of EFH. While the available data indicates that there is likely little use of bottom-tending gear in most of these areas, the HAPC designation ensures fishing with bottom-tending gear in these areas will not occur in the future.

Comment 5: The HAPCs in Amendment 9 will negatively impact fishing for tilefish and deep-water grouper, which occurs over sand and mud bottoms.

Response: NMFS disagrees. The HAPCs implemented in this final rule

are areas with confirmed coral reef features and there will not be any impacts to fishing for Gulf reef fish species over sand and mud bottoms.

Comment 6: No new regulations should be implemented that restrict areas where bottom longline gear has traditionally been used in the Gulf, including the Pulley Ridge area. Specifically, in the Pulley Ridge area, bottom longlines have been shown not to damage the coral bottom.

Response: The Council determined, and NMFS agrees, that it is appropriate to restrict the use of bottom-tending gear, including bottom longline, in several of the new HAPCs because scientific studies have documented impacts to deep sea corals from fishing gear. These HAPCs and restrictions were selected after several workshops with scientists and fishermen. As part of this process, the Council recognized both the coral and habitat present in Pulley Ridge, and historic use of that area by bottom longline fishermen. Therefore, the new Pulley Ridge South Portion A HAPC does not include a prohibition on the use of bottom longlines. Allowing this historic fishing activity to continue in this area balances resource use and protection, and avoids potential displacement of fishing activity to other coral areas.

Comment 7: There is insufficient information provided in Amendment 9 to show that the Gulf royal red shrimp stock will not be significantly harmed. In addition, Amendment 9 does not provide enough information about the current number of royal red shrimp endorsements.

Response: Amendment 9 addresses the habitat of those corals included in the Coral FMP. Amendment 9 contains some information about other species, including royal red shrimp, because Amendment 9 includes restrictions on bottom-tending gear used to harvest those species. Amendment 9 also includes an exception to the gear restrictions in one area for those vessels with a royal red shrimp endorsement that are fishing for royal red shrimp. However, Amendment 9 does not include any other management measures related to the harvest of royal red shrimp. NMFS does not expect the establishment of the HAPCs to negatively impact the royal red shrimp stock, but it may provide benefits by protecting habitat adjacent to some areas in which this species is harvested.

With respect to the number of vessels with royal red shrimp endorsements, Amendment 9 explained that any vessel issued a Federal commercial Gulf shrimp moratorium permit (Gulf shrimp permit) is eligible for a royal red shrimp

endorsement. The number of vessels issued a royal red endorsement can change over time and where Amendment 9 provides information about the number of endorsement holders, it includes the date that information was obtained.

Comment 8: The HAPC areas are too small to prevent the fishing community from destroying corals and coral habitat in the Gulf.

Response: NMFS disagrees. Amendment 9 and this final rule establish 13 new HAPCs in which the deployment of certain bottom-tending gear is prohibited. The HAPC designation acknowledges that corals are present in sufficient number or diversity to provide important ecological functions, are sensitive to human-induced degradation, or are rare. As stated in the response to *Comment 3*, the Council selected these areas based on input and recommendations from the Council's Coral SSC, which included coral scientists, various Council advisory panels, as well as shrimp and bottom longline fishermen. The Council determined, and NMFS agrees, that the sizes of the HAPCs established in Amendment 9 will sufficiently protect the corals in those areas from interactions with fishing gear without unnecessarily restricting fishing activity that requires the use of bottom-tending gears. The Council may consider additional areas to designate as HAPCs in a future amendment to the FMP.

Comment 9: In Amendment 9, NMFS failed to consider that the designation of HAPCs has significant potential to impact non-fishing industries and activities within the Gulf. NMFS has not adequately addressed compliance with Executive Order (E.O.) 12866, and Amendment 9 should account for potential economic impacts beyond the restrictions proposed on the fishing industry.

Response: As stated in Amendment 9, an HAPC designation itself does not confer any additional specific protections to designated areas or impose any restrictions on industries because the areas considered for HAPC designation are already identified as EFH. Although designating HAPCs can be used to focus attention on those areas when NMFS consults with other Federal agencies on proposed actions that may adversely affect EFH, these consultations do not impose any restrictions on non-fishing activities. A consultation may result in recommendations that can be taken by the other Federal agency to conserve this habitat. However, any future recommendations would depend on the proposed Federal action. The other

Federal agency, not NMFS, would decide whether to implement those recommendations. Therefore, neither the EIS nor the Regulatory Impact Review, which serves as the basis for determining whether the regulations are a significant regulatory action under the E.O. 12866, discuss the economic impacts related to non-fishing activities or conduct a cost-benefit analysis related to these activities.

Comment 10: Creating new restrictions on the use of bottom longline gear will cause great economic harm to small family grouper fishing businesses, local fish house producers, and the local fishing communities. Restricting the bottom longline fishery in the Gulf that targets grouper will also reduce the species' availability to the American consumer.

Response: NMFS recognizes the final rule may cause negative economic effects to small entities. However, available data indicates that only a minority of the total longline vessels in the Gulf will likely be affected by the implementation of the fishing restrictions in this final rule. The use of bottom longlines are not prohibited in the Pulley Ridge South Portion A HAPC, which is the HAPC where the highest number of bottom longline vessels (11) have operated. Because the fishing regulations in this rule apply to bottom longline vessels, except in Pulley Ridge South Portion A, analysis in Amendment 9 states the number of these vessels expected to be affected throughout the Gulf, excluding Pulley Ridge South Portion A, is approximately 13. Further, it is possible that some of these vessels fished in the areas of multiple HAPCs. As analyzed in Amendment 9, these 13 bottom longline vessels represented approximately 2 percent of the average number of federally permitted vessels that caught reef fish in the Gulf from 2010–2016.

NMFS does not agree that establishing bottom longline regulations in the new HAPCs will reduce the availability of grouper to the American consumer. Those impacted vessels will continue to be able to fish with bottom longline gear in adjacent or nearby areas, thereby reducing the economic effects of this final rule on harvesters, shoreside support businesses, and fishing communities.

Comment 11: Table 4.3.2.1 in Amendment 9 indicates a range of 23 to 179 different vessels will be impacted by establishing the HAPCs in Amendment 9, but it is not clear what percentage of the fishery this range represents.

Response: The referenced table in Amendment 9 lists the number of

unique vessels with Federal permits for commercial Gulf reef fish, HMS commercial sharks, and Gulf shrimp vessels, identified by the onboard vessel monitoring system and electronic logbook (ELB) in the new northeastern Gulf HAPCs for each of those alternatives and options analyzed. The number of unique vessels varied by preferred option selected by the Council and by tracking system attached to the vessel. A vessel with a commercial permit for Gulf reef fish or HMS sharks must have an operational VMS on board, and approximately one-third of vessels with a commercial permit for Gulf shrimp have an ELB, which fishermen must use to report. In Table 4.3.2.1, VMS data and unique vessels are for the years 2007–2015, and ELB data and unique vessels are for the years 2004–2013. The range of vessels potentially affected by the Council's preferred options varied by location and permit type from 12 and 83. Additionally, because the number of unique vessels in the table did not apply across different options considered by the Council, the same vessel may have been counted under multiple options. Finally, the range of unique vessels listed in Table 4.3.2.1 represent small percentages of the federally permitted vessels in the respective Gulf commercial fisheries.

Comment 12: The Small Business Administration (SBA) should approve this final rule.

Response: As discussed in the Classification section of this final rule, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the SBA during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. A statement providing the factual basis for this certification was also provided to the SBA. No comments were received from the SBA in response.

NMFS revised the factual basis for the certification in this final rule to include data that was inadvertently omitted from the proposed rule. This data pertains to commercial fishing vessels that use bandit gear, which would be affected by the prohibition on bottom anchoring implemented by this final rule. This additional data does not affect NMFS' determination that this rule would not have a significant economic impact on a substantial number of small entities, and the revised factual basis will be provided to the SBA.

Comment 13: The notice of availability for Amendment 9 referenced a paragraph in the CFR that does not exist.

Response: NMFS acknowledges that the notice of availability published in the **Federal Register** on September 26, 2019, cited an incorrect CFR reference on page 50815 in the left column (84 FR 50814). The notice of availability stated that HAPCs are a subset of EFH that meet specified criteria identified at 50 CFR 600.818(a)(8). The correct citation is 50 CFR 600.815(a)(8) and was stated correctly in the proposed rule for Amendment 9 that published in the **Federal Register** on November 15, 2019 (84 FR 62492).

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with Amendment 9, the FMP, the 2006 Consolidated FMP for Atlantic Highly Migratory Species, other provisions of the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This final rule is not an Executive Order 13771 regulatory action because this final rule is not significant under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule. However, NMFS inadvertently omitted data pertaining to commercial fishing vessels that use bandit gear, which would be affected by the prohibition on bottom anchoring implemented by this final rule. A revised factual basis for the determination of no significant economic impact on a substantial number of small entities that includes the missing bandit rig data is included below. Three public comments related to socio-economic implications and potential impacts on small businesses were received and are addressed in the responses to *Comment 9* through *Comment 12* in the Comments and Responses section of this final rule.

None of the public comments that were received in response to the proposed rule specifically addressed the certification and NMFS has not received any new information that would affect its determination that this rule would not have a significant economic impact on a substantial number of small entities. As a result, a final regulatory

flexibility analysis was not required and none was prepared.

A description of the final rule, why it is being implemented, and the objectives of, and legal basis for this final rule are contained in the preamble of this final rule at the beginning of the **SUPPLEMENTARY INFORMATION** section and in the **SUMMARY** section. The Magnuson-Stevens Act provides the statutory basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified.

This final rule designates several areas in the Gulf as HAPCs and establishes or modifies fishing regulations in the new and existing HAPCs. In some of the new HAPCs, the deployment of specific bottom-tending gear will be prohibited. This final rule will also change the prohibition in the existing HAPCs with fishing regulations to a prohibition on the deployment of the gear as opposed to fishing with the gear. As a result, this final rule will directly affect federally permitted commercial fishermen fishing for reef fish, shrimp, or sharks. Recreational anglers fishing in the designated HAPCs will also be directly affected by this final rule, but anglers are not considered business entities under the RFA. Recreational charter vessels and headboats will also be affected by this action but only in an indirect way. Thus, only the effects on federally permitted commercial fishing vessels harvesting reef fish, shrimp, and shark will be discussed. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide.

To determine whether a substantial number of small entities will be affected by the final rule, NMFS first describes the characteristics of the Federal commercial reef fish, shrimp, and shark fisheries that operate in the Gulf. NMFS then describes the data available to determine the number of small entities that operate in the new HAPCs and applies these data to each new HAPC or groups of HAPCs.

With respect to the Gulf reef fish fishery, as of July 14, 2018, there were 841 vessels with valid or renewable Federal Gulf reef fish commercial vessel permits. From 2010 through 2016, an average of 554 federally permitted

commercial reef fish vessels per year landed any reef fish species in the Gulf. These vessels, combined, averaged 6,608 trips per year in the Gulf on which reef fish were landed and 810 other trips. The average annual total dockside revenue (2016 dollars) for these vessels combined was approximately \$52.13 million from reef fish, approximately \$1.32 million from other species co-harvested with reef fish (on the same trips), and approximately \$1.54 million from other trips by these vessels in the Gulf on which no reef fish were harvested or where fishing occurred in other areas. Total average annual revenue from all species harvested by these vessels in the Gulf or other areas was approximately \$54.95 million, or approximately \$99,000 per vessel. These vessels generated approximately 95 percent of their total revenues from reef fish. Commercial reef fish vessels used a variety of gears in harvesting reef fish. For the period 2010–2016, an average of 68 vessels used longlines and generated revenues of approximately \$250,000 per vessel; 267 vessels used bandit gear generating approximately \$109,000 in revenue per vessel; 273 vessels used hook-and-line gear, generating approximately \$27,000 in revenue per vessel; 47 vessels used diving gear, generating approximately \$13,000 in revenue per vessel; and, 6 vessels used other gears, generating approximately \$40,000 in revenue per vessel. Therefore, all federally permitted commercial vessels fishing for reef fish are assumed to be small entities.

In the Gulf shrimp fishery, brown and white shrimp are the dominant shrimp species in terms of landings, ex-vessel revenues, and number of participating vessels. For the period 2010–2016, an annual average of 3,552 vessels landed approximately 61 million lb (27,669,134 kg) of brown shrimp with an ex-vessel value of about \$206 million; an annual average of 3,914 vessels landed approximately 61 million lb (27,669,134 kg) of white shrimp valued at about \$210 million; an annual average of 175 vessels landed pink shrimp valued at about \$18 million; and, an annual average of 8 vessels landed approximately 154,000 lb (69,853 kg) of royal red shrimp valued at about \$964,000. Not all vessels that landed Gulf shrimp are federally permitted, and not all federally permitted vessels landed shrimp. In 2014, for example, only 74 percent of federally permitted vessels landed shrimp. As of July 14, 2018, there were 1,422 valid or renewable Gulf shrimp commercial permits and 305 valid Gulf royal red shrimp endorsements. The latest data on

the economics and financial conditions of the Gulf shrimp fishery are for 2014. Data for later years are still being processed and compiled by NMFS. Between 2011 and 2014, the average gross revenue from fishing operations of federally permitted shrimp vessels was approximately \$343,000, but net revenue from operations was only about \$8,300. These estimates best approximate expected financial and economic conditions for these vessels in the foreseeable future. Therefore, all federally permitted commercial vessels fishing for shrimp are assumed to be small entities.

The HMS shark fishery is the fishery that most likely will be affected by the final rule. To commercially fish for sharks, fishermen need to possess a Federal shark directed or incidental permit, or smoothhound shark permit. Shark directed and incidental permits are currently limited access permits, while the smoothhound shark permit is an open access permit. As of September 12, 2018, there were 220 and 267 valid or renewable shark directed and incidental permits, respectively, and 164 valid or renewable smoothhound shark permits. Vessels can possess shark permits in addition to commercial reef fish or shrimp permits. In 2017, there were 18 vessels with limited access permits that were actively fishing for sharks in the Gulf. Of the 18 vessels, 11 possessed both a shark limited access permit and a commercial reef or shrimp permit, while 7 possessed only a shark limited access permit. These vessels, combined, generated \$4.7 million of revenue from HMS. When tracked back to 2013, these vessels generated an average revenue of \$4.8 million per year, indicating a close match between their 2017 revenue and 2013–2017 average revenue. The 2013–2017 average revenue per vessel was approximately \$267,000. Therefore, all federally permitted commercial vessels fishing for sharks are assumed to be small entities.

As stated earlier in the preamble, this final rule will establish 13 HAPCs in which the deployment of specific bottom-tending gear will be prohibited. Unless otherwise noted, the following prohibitions will apply to each of the 13 HAPCs: Deployment of bottom longline, bottom trawl, buoy gear as defined in 50 CFR 622.2, dredge, pot, or trap, and bottom anchoring by fishing vessels.

The available data allows NMFS to estimate the number of federally permitted reef fish, shrimp, and shark vessels potentially affected by the final rule. Information on fishing activities in the proposed HAPCs is based on the electronic logbook (ELB) program for

commercial shrimp vessels, the vessel monitoring system (VMS) for commercial reef fish vessels, and shark bottom longline observer program (SBLOP) for shark vessels. Available ELB data are for the years 2004–2013, VMS data are for the years 2007–2015, and SBLOP data are for the years 2008–2016.

ELB data are collected from approximately one-third of the federally permitted shrimp vessels, while VMS data collection is required of all federally permitted reef fish vessels. Vessels that were included in the SBLOP are also in the VMS data set because these vessels have both shark and commercial reef fish permits. The VMS and ELB data sets provide data points and number of fishing vessels by area, while the SBLOP data provides some information on the number of fishing sets by shark vessels. Although VMS data are collected from all reef fish vessels, the points refer to the number of times the electronic system detects the vessel in a specific area, but it does not distinguish between fishing and non-fishing activity. In contrast, ELB data points are collected from approximately one-third of permitted shrimp vessels but this occurs every 10 minutes, which allows NMFS to determine likely fishing activity from non-fishing activity based on vessel speed. Therefore, the ELB data points in this analysis are those that NMFS has determined to represent active shrimp fishing.

Because the VMS, ELB, and SBLOP data sources do not provide information on the number of trips or fishing intensity per vessel, it is not possible to estimate the revenue and profit effects of the final rule. Therefore, the extent of economic impacts is based on the number of vessels potentially affected by the final rule. In the following discussion, data points and vessels are expressed as annual averages for each of the 13 new HAPCs. In addition, only VMS information from reef fish vessels that use bottom longline or bandit gear is reported as only these vessels would likely be affected by the final rule.

In the Pulley Ridge South Portion A HAPC, ELB data indicate one data point corresponding to one shrimp vessel. VMS data indicate 639 data points corresponding to 11 bottom longline vessels and 276 data points corresponding to 7 bandit rig vessels. However, to allow fishing that has historically occurred to continue, the regulations implemented by this final rule will not prohibit the deployment of bottom longlines. Therefore, longline vessels will not be affected by the gear prohibitions in this area. SBLOP

recorded only two fishing sets by shark longline vessels, which are included in the VMS data set. Based on the above information, the gear prohibitions in this area will not affect a substantial number of small entities.

For the West Florida Wall HAPC, which is located in the southeastern Gulf, ELB did not record any data point or shrimp vessel fishing in the area. VMS recorded one data point corresponding to one bottom longline vessel and one data point corresponding to one bandit rig vessel. SBLOP data indicate very low shark fishing effort in the area. Therefore, the gear prohibitions in this area will not affect a substantial number of small entities.

Six new HAPCs will be established in the northeastern Gulf: Alabama Alps Reef, L & W Pinnacles and Scamp Reef, Mississippi Canyon 118, Roughtongue Reef, Viosca Knoll 826, and Viosca Knoll 862/906. For Alabama Alps Reef, ELB recorded 1 data point corresponding to 1 vessel and VMS recorded 7 data points corresponding to 1 bottom longline vessel, and 221 data points corresponding to 11 bandit rig vessels. For L & W Pinnacles and Scamp Reef, ELB recorded 2 data points and 1 vessel while VMS recorded 42 data points corresponding to 3 bottom longline vessels, and 1,209 data points corresponding to 24 bandit rig vessels. For Mississippi Canyon 118, ELB recorded four data points and one vessel while VMS recorded four data points corresponding to one bottom longline vessel and one data point corresponding to one bandit rig vessel. For Roughtongue Reef, ELB recorded 1 data point and 1 vessel while VMS recorded 40 data points corresponding to 3 bottom longline vessels and 1,208 data points corresponding to 24 bandit rig vessels. For Viosca Knoll 826, ELB recorded one data point and one vessel while VMS recorded one data point corresponding to one bottom longline vessel and three data points corresponding to one bandit rig vessel. For Viosca Knoll 862/906, ELB recorded 168 data points and 2 vessels while VMS recorded 8 data points corresponding to 2 bottom longline vessels and 13 data points corresponding to 2 bandit rig vessels. NMFS notes that shrimp vessels fishing in Viosca Knoll 862/906 are mainly those fishing for royal red shrimp. Vessels with a royal red shrimp endorsement fishing for this species in this area are exempt from the prohibition on bottom-tending gear and will not be affected by this final rule. SBLOP reported only two sets by two shark fishing vessels for L & W Pinnacles and Scamp Reef, and none for

the other areas. Because of the general location of this group of HAPCs, it is likely that certain vessels could be fishing in multiple HAPCs within this group in any given year. It is also possible that a vessel would fish in different HAPCs from year to year. Thus, the total number of vessels affected by the prohibitions applicable in this group of HAPCs would be less than the sum of vessels fishing in each HAPC as noted above. Therefore, the gear prohibitions in these six areas will not affect a substantial number of small entities.

This final rule will establish three new HAPCs in the northwestern Gulf: AT 047, AT 357, and Green Canyon 852. Both ELB and VMS recorded very few data points and vessels fishing in each of these three areas. ELB recorded at most one data point and one vessel for each of these three areas while VMS recorded at most one data point and one bottom longline vessel in each of the AT 047 and AT 357 HAPCs and none for Green Canyon 852. There were no bandit rig vessels recorded in these areas. In addition, no shark fishing sets were observed in these areas. Therefore, the gear prohibitions in these three areas will not affect a substantial number of small entities.

This final rule will establish two new HAPCs in the southwestern Gulf: Harte Bank and Southern Bank. For Harte Bank, ELB recorded at most one data point and one vessel while VMS recorded two data points corresponding to one bottom longline vessel and four data points corresponding to one bandit rig vessel. For Southern Bank, ELB recorded one data point and one vessel while VMS recorded no data points for bottom longline vessels and one point for one bandit rig vessel. In addition, no bottom longlining for sharks was observed in these two areas. Therefore, the gear prohibitions in these two areas will not affect a substantial number of small entities.

The action to change the prohibition in the existing HAPCs with fishing regulations to a prohibition on the “deployment” of bottom-tending gear, as opposed to a prohibition on “fishing” with the bottom-tending gear, will have no effects on the revenues of fishing vessels. These vessels do not currently derive any revenues from fishing with bottom-tending gear in any existing HAPCs with fishing regulations. This final rule will make fishing regulations in existing HAPCs consistent with the regulations in the new HAPCs, and therefore will lessen confusion on the part of fishermen as well as simplify enforcement.

Amendment 9 will also establish eight new deep-water HAPCs without fishing regulations, which will have no accompanying economic effects on small entities. The effects of prohibiting the deployment of dredge fishing gear in all HAPCs that have fishing regulations are included in the discussion of effects for each HAPC. This prohibition will not impact any small entities as there is no known dredge fishing in any existing or proposed HAPCs.

In summary, there are three Federal fisheries that operate in the HAPCs implemented by this final rule, and although all of the commercially permitted reef fish, shrimp, and shark vessels are small entities, based on available data, only a small number of vessels are estimated to have fished with bottom-tending gear in each of the HAPCs, and all HAPCs combined. Therefore, this final rule will not affect a substantial number of small entities.

The information provided above supports a determination that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule contains no information collection requirements subject to the Paperwork Reduction Act of 1995.

List of Subjects

50 CFR Part 622

Coral, Fisheries, Fishing, Gulf of Mexico.

50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: September 22, 2020.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 622 and 635 are amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

- 1. The authority citation for part 622 continues to read as follows:

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

- 2. Section 622.74 is revised to read as follows:

§ 622.74 Area closures to protect Gulf corals.

For the purposes of this section, fishing gear is deployed if any part of the gear is in contact with the water.

(a) *Florida Middle Grounds HAPC*. Deployment of a bottom longline, bottom trawl, dredge, pot, or trap is prohibited year-round in the area bounded by rhumb lines connecting the following points in order:

TABLE 1 TO PARAGRAPH (a)

Point	North lat.	West long.
A	28°42.500'	84°24.800'
B	28°42.500'	84°16.300'
C	28°11.000'	84°00.000'
D	28°11.000'	84°07.000'
E	28°26.600'	84°24.800'
A	28°42.500'	84°24.800'

(b) *Tortugas marine reserves HAPC*. Fishing for any species and bottom anchoring by fishing vessels are prohibited year-round in the areas of the HAPC.

(1) *EEZ portion of Tortugas North HAPC*. The area is bounded by rhumb lines connecting the following points in order: From point A at 24°40.000' N lat., 83°06.000' W long. to point B at 24°46.000' N lat., 83°06.000' W long. to point C at 24°46.000' N lat., 83°00.000' W long.; then along the line denoting the seaward limit of Florida state waters, as shown on the current edition of NOAA chart 11434, to point A at 24°40.000' N lat., 83°06.000' W long.

(2) *Tortugas South HAPC*. The area is bounded by rhumb lines connecting the following points in order:

TABLE 2 TO PARAGRAPH (b)(2)

Point	North lat.	West long.
A	24°33.000'	83°09.000'
B	24°33.000'	83°05.000'
C	24°18.000'	83°05.000'
D	24°18.000'	83°09.000'
A	24°33.000'	83°09.000'

(c) *Pulley Ridge South HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 3 TO PARAGRAPH (c)

Point	North lat.	West long.
A	24°58.300'	83°38.550'
B	24°58.300'	83°37.000'
C	24°41.183'	83°37.000'
D	24°40.000'	83°41.367'
E	24°43.917'	83°47.250'
A	24°58.300'	83°38.550'

(d) *Pulley Ridge South Portion A HAPC*. Deployment of a bottom trawl,

buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 4 TO PARAGRAPH (d)

Point	North lat.	West long.
A	24°40.000'	83°41.366'
B	24°39.666'	83°42.648'
C	24°47.555'	83°55.240'
D	24°57.065'	83°48.405'
E	24°52.859'	83°41.841'
F	24°43.917'	83°47.250'
A	24°40.000'	83°41.366'

(e) *West Florida Wall HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 5 TO PARAGRAPH (e)

Point	North lat.	West long.
A	26°28.835'	84°47.955'
B	26°28.816'	84°46.754'
C	26°10.471'	84°42.076'
D	26°10.528'	84°44.577'
E	26°25.028'	84°47.986'
F	26°25.100'	84°47.980'
A	26°28.835'	84°47.955'

(f) *Alabama Alps Reef HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 6 TO PARAGRAPH (f)

Point	North lat.	West long.
A	29°16.160'	88°20.525'
B	29°15.427'	88°18.990'
C	29°13.380'	88°19.051'
D	29°14.140'	88°20.533'
A	29°16.160'	88°20.525'

(g) *L & W Pinnacles and Scamp Reef HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 7 TO PARAGRAPH (g)

Point	North lat.	West long.
A	29°18.595'	87°48.757'
B	29°18.484'	87°50.688'
C	29°19.754'	87°52.484'
D	29°20.401'	87°51.449'
E	29°20.095'	87°50.933'
F	29°20.832'	87°46.631'
G	29°21.473'	87°46.326'
H	29°21.314'	87°45.535'
I	29°22.518'	87°43.465'
J	29°21.144'	87°42.632'
K	29°19.269'	87°45.525'
A	29°18.595'	87°48.757'

(h) *Mississippi Canyon 118 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 8 TO PARAGRAPH (h)

Point	North lat.	West long.
A	28°53.183'	88°30.789'
B	28°53.216'	88°27.819'
C	28°50.602'	88°27.782'
D	28°48.944'	88°27.759'
E	28°48.962'	88°30.727'
A	28°53.183'	88°30.789'

(i) *Roughtongue Reef HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 9 TO PARAGRAPH (i)

Point	North lat.	West long.
A	29°27.596'	87°37.527'
B	29°27.621'	87°31.552'
C	29°25.007'	87°31.539'
D	29°24.981'	87°37.510'
A	29°27.596'	87°37.527'

(j) *Viosca Knoll 826 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting the following points in order:

TABLE 10 TO PARAGRAPH (j)

Point	North lat.	West long.
A	29°10.920'	88°03.509'
B	29°10.877'	87°59.460'
C	29°07.974'	87°59.448'

TABLE 10 TO PARAGRAPH (j)—
Continued

Point	North lat.	West long.
D	29°08.017'	88°03.532'
A	29°10.920'	88°03.509'

(k) *Viosca Knoll 862/906 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC. This prohibition does not apply to a fishing vessel issued a Gulf royal red shrimp endorsement, as specified in § 622.50(c), while the vessel is fishing for royal red shrimp. The HAPC is bounded by rhumb lines connecting the following points in order:

TABLE 11 TO PARAGRAPH (k)

Point	North lat.	West long.
A	29°07.640'	88°23.608'
B	29°07.603'	88°20.590'
C	29°03.749'	88°20.554'
D	29°03.734'	88°22.016'
E	29°02.367'	88°21.998'
F	29°02.281'	88°24.972'
G	29°07.568'	88°25.044'
H	29°07.592'	88°25.044'
I	29°07.676'	88°25.045'
A	29°07.640'	88°23.608'

(l) *McGrail Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 12 TO PARAGRAPH (l)

Point	North lat.	West long.
A	27°59.100'	92°37.320'
B	27°59.100'	92°32.290'
C	27°55.925'	92°32.290'
D	27°55.925'	92°37.320'
A	27°59.100'	92°37.320'

(m) *AT 047 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 13 TO PARAGRAPH (m)

Point	North lat.	West long.
A	27°54.426'	89°49.404'
B	27°54.486'	89°46.464'

TABLE 13 TO PARAGRAPH (m)—
Continued

Point	North lat.	West long.
C	27°51.874'	89°46.397'
D	27°51.814'	89°49.336'
A	27°54.426'	89°49.404'

(n) *AT 357 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 14 TO PARAGRAPH (n)

Point	North lat.	West long.
A	27°36.259'	89°43.068'
B	27°36.315'	89°40.136'
C	27°33.703'	89°40.073'
D	27°33.646'	89°43.004'
A	27°36.259'	89°43.068'

(o) *Green Canyon 852 HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 15 TO PARAGRAPH (o)

Point	North lat.	West long.
A	27°08.354'	91°08.929'
B	27°05.740'	91°08.963'
C	27°05.762'	91°10.610'
D	27°08.376'	91°10.567'
A	27°08.354'	91°08.929'

(p) *West Flower Garden Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 16 TO PARAGRAPH (p)

Point	North lat.	West long.
A	27°55.380'	93°53.160'
B	27°55.380'	93°46.767'
C	27°49.050'	93°46.767'
D	27°49.050'	93°53.160'
A	27°55.380'	93°53.160'

(q) *East Flower Garden Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the

HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 17 TO PARAGRAPH (q)

Point	North lat.	West long.
A	27°59.240'	93°38.970'
B	27°59.240'	93°34.058'
C	27°52.608'	93°34.058'
D	27°52.608'	93°38.970'
A	27°59.240'	93°38.970'

(r) *Stetson Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 18 TO PARAGRAPH (r)

Point	North lat.	West long.
A	28°10.638'	94°18.608'
B	28°10.638'	94°17.105'
C	28°09.310'	94°17.105'
D	28°09.310'	94°18.608'
A	28°10.638'	94°18.608'

(s) *Harte Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 19 TO PARAGRAPH (s)

Point	North lat.	West long.
A	26°40.826'	96°36.590'
B	26°40.789'	96°32.220'
C	26°37.992'	96°32.308'
D	26°38.043'	96°36.636'
A	26°40.826'	96°36.590'

(t) *Southern Bank HAPC*. Deployment of a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap, and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting the following points in order:

TABLE 20 TO PARAGRAPH (t)

Point	North lat.	West long.
A	27°26.923'	96°31.902'
B	27°26.989'	96°30.881'
C	27°25.958'	96°31.134'
D	27°25.958'	96°31.892'
A	27°26.923'	96°31.902'

**PART 635—ATLANTIC HIGHLY
MIGRATORY SPECIES**

■ 3. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 4. In § 635.21, revise paragraph (a)(3)(i) and add paragraph (a)(3)(v) to read as follows:

**§ 635.21 Gear operation and deployment
restrictions.**

(a) * * *

(3) * * *

(i) No person may fish for, catch, possess, or retain any Atlantic HMS or anchor a fishing vessel that has been issued a permit or is required to be permitted under this part, in the areas and seasons designated at § 622.34(a)(3) of this chapter.

* * * * *

(v) Within the areas of the Gulf coral HAPCs designated at § 622.74 of this chapter, no person may bottom anchor a fishing vessel or deploy fishing gear that may not be deployed pursuant to § 622.74 of this chapter. For purposes of this provision, fishing gear is deployed if any part of the gear is in contact with the water.

* * * * *

[FR Doc. 2020-21298 Filed 10-15-20; 8:45 am]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 85, No. 201

Friday, October 16, 2020

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

DEPARTMENT OF STATE

22 CFR Part 22

[Public Notice 10522]

RIN 1400-AE12

Schedule of Fees for Consular Services—Documentary Services Fee

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State (the Department) proposes an adjustment to the Schedule of Fees for Consular Services (Schedule of Fees) for authentication of a document in the United States. The Department is incorporating the domestic authentications fee into the Schedule of Fees and increasing it from \$8 to \$20, in light of the findings of its Cost of Service Model (CoSM), to ensure that the fee for this consular service better aligns with the costs of providing this service. The proposed fee was calculated and set to recover the full cost of providing the document authentication service, in line with OMB Circular A-25. The collected fees are remitted to the Department of Treasury. The Department of State lacks statutory authority to retain this fee revenue.

DATES: Written comments must be received on or before December 15, 2020.

ADDRESSES: Interested parties may submit comments to the Department by any of the following methods:

- Visit the *Regulations.gov* website at: <http://www.regulations.gov> and search for the Regulatory Information Number (RIN) 1400-AE12 or docket number DOS-2018-0037.

- Mail (paper, disk, or CD-ROM): U.S. Department of State, Office of the Comptroller, Bureau of Consular Affairs (CA/C), SA-17 8th Floor, Washington, DC 20522-1707.

- Email: fees@state.gov. You must include the RIN (1400-AE12) in the subject line of your message.

All comments should include the commenter's name, the organization the commenter represents, if applicable, and the commenter's address. If the Department is unable to read your comment for any reason, and cannot contact you for clarification, the Department may not be able to consider your comment. After the conclusion of the comment period, the Department will publish a Final Rule (in which it will address relevant comments) as expeditiously as possible.

During the comment period, the public may request an appointment to review Cost of Service Model (CoSM) data on site if certain conditions are met. To request an appointment, please call 202-485-8915 and leave a message with your contact information.

FOR FURTHER INFORMATION CONTACT: Robert Schlicht, Management Analyst, Office of the Comptroller, Bureau of Consular Affairs, Department of State; phone: 202-485-8915, telefax: 202-485-6826; email: fees@state.gov.

Background

The proposed rule makes a change to the Schedule of Fees in 22 CFR 22.1. The Department generally sets and collects its fees based on the concept of full cost recovery. The Department completed a review of current consular fees and will implement a change to the Schedule of Fees based on the cost of services calculated by updates to the Cost of Service Model. This specific rule proposes to adjust the fee associated with document authentications in the United States.

What is the authority for this action?

Authority for the Department's authentications service is contained in 22 CFR part 131. The Department derives the general authority to set fees based on the cost of the consular services it provides and to charge those fees from the general user charges statute, 31 U.S.C. 9701. See, e.g., 31 U.S.C. 9701(b)(2)(A) ("The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency . . . based on . . . the costs to the government."). The funds collected for many consular fees must be deposited into the general fund of the Treasury pursuant to 31 U.S.C. 3302(b). Various statutes permit the Department of State to retain some of the fee revenue it

collects (e.g. passport security surcharge, immigrant visa security surcharge, affidavit of support, etc.), but the Department of State lacks statutory authority to retain the fees collected for document authentication. As a result, all fees associated with this service are remitted to the Department of Treasury.

What are document authentication services?

The Office of Authentications provides authentication services for public documents that will be used overseas. These services support individuals, commercial organizations, institutions, federal, and state government agencies seeking to use certain documents abroad. In order to be recognized overseas, U.S. public documents may require authentication. Authentication is the process whereby the signature and/or seal of a public official on a document is certified as authentic. There are two kinds of authentication depending upon the country where the document is to be used. The first is with an Apostille for countries that are parties to the Hague Apostille Convention. The Department only issues Apostilles for federal public documents; U.S. states issue Apostilles for their documents such as vital records and notaries. The second form of authentication is part of the chain legalization process. Under this process, the Department issues an authentication certificate for federal documents and for U.S. state authentication certificates certifying underlying state public documents. These are then further authenticated by the foreign Embassy of the country where the document is to be used.

When the office receives a request, it is given a unique service number (for tracking purposes). The documents are examined for originality, original signatures, seals, notaries' annotations, and chronological date order. If a document is approved for processing, a certificate of authentication under the Seal of the Department of State for and in the name of the Secretary of State is printed, signed, and eyeletted to the document. If the document is not approved to be processed, a correspondence letter is sent to the customer informing them of additional documentation that is needed to process their document. If it is determined after review that the document is being

requested for an unlawful or improper purpose, the office sends the customer a refusal letter.

The most common documents authenticated are:

- FBI- federal background check and police records
- Certificates of Birth, Marriage, Death, and Divorce
- Diplomas and Transcripts
- Police Records and Certified Court Records
- Name Change Decrees
- Power of Attorney
- HHS- Company Bylaws, Articles of Incorporation, and Authorization of Agent
- Declarations and Incumbency
- Dossier and Home Study
- Courier Letters, Extraditions, Warrants, and Secretarial Assignments
- Naturalization Certificates

For more information, including application instructions, please visit: <https://travel.state.gov/content/travel/en/records-and-authentications/authenticate-your-document/office-of-authentications.html>.

Why is the department adjusting the documentary services fee at this time?

With certain exceptions—such as the reciprocal nonimmigrant visa issuance fee—the Department of State generally sets consular fees at an amount calculated to achieve recovery of the costs to the U.S. Government of providing the consular service, in a manner consistent with general user charges principles. As set forth in Office of Management and Budget (OMB) Circular A–25, as a general policy, each recipient should pay a user charge for government services, resources, or goods from which he or she derives a special benefit, at an amount sufficient for the U.S. Government to recover the full costs of providing the service, resource, or good. See OMB Circular No. A–25, sec. 6(a)(2)(a). The OMB guidance covers all Federal Executive Branch activities that convey special benefits to recipients beyond those that accrue to the general public. See *id.*, sections 4(a), 6(a)(1).

The Department reviews consular fees periodically, including through an annual update to its Cost of Service Model, to determine each fee's appropriateness in light of the OMB guidance. The Department proposes the change set forth in the Schedule of Fees accordingly. The Cost of Service Model is an activity-based costing model that determines the current direct and indirect costs to the U.S. Government associated with each consular good and service the Department provides. The

model update identifies the cost of the various discrete consular goods and services, both direct and indirect, and the update's results formed the basis of the change proposed to the Schedule of Fees.

Activity-Based Costing

To set fees in accordance with the general user charges principles, the Department must determine the true cost of providing consular services. Following guidance provided in “Managerial Cost Accounting Concepts and Standards for the Federal Government,” OMB’s Statement #4 of Federal Accounting Standards (SFFAS #4), available at http://files.fasab.gov/pdf/files/handbook_sffas_4.pdf, the Department chose to develop and use an activity-based costing (ABC) model to determine the true cost of each of its consular services.

The Government Accountability Office (GAO) defines activity-based costing as a “set of accounting methods used to identify and describe costs and required resources for activities within processes.” Because an organization can use the same staff and resources (computer equipment, production facilities, etc.) to produce multiple products or services, ABC models seek to identify and assign costs to processes and activities and then to individual products and services through the identification of key cost drivers referred to as “resource drivers” and “activity drivers.”

ABC models also seek to identify the amount of time an organization’s personnel spend on each service and how much overhead cost (rent, utilities, facilities maintenance, etc.) is associated with delivering each service. ABC models require financial and accounting analysis and modeling skills combined with a detailed understanding of an organization’s business processes. ABC models require an organization to identify all activities required to produce a particular product or service (“activities”) and all resources consumed (costs) in the course of producing that product or service. An organization must also measure the quantity of resources consumed (“resource driver”); and the frequency and intensity of demand placed on activities to produce services (“activity driver”). SFFAS Statement #4 provides a detailed discussion of the use of cost accounting by the U.S. Government.

The Department’s Cost of Service Model

The Department conducted periodic Cost of Service Studies using ABC methods to determine the costs of its consular services through 2009. In 2010,

the Department moved to adopt an annually updated Cost of Service Model (CoSM) that measures all of its consular operations and costs, including all activities needed to provide consular services, whether fee-based or not. This provides a comprehensive and detailed look at all consular services as well as all services the Department performs for other agencies in connection with its consular operations. The CoSM now includes approximately 118 distinct activities and enables the Department to model its consular-related costs with a high degree of precision.

The Department uses three methods outlined in SFFAS Statement #4 (paragraph 149(2)) to assign resource costs to activities: (a) Direct tracing; (b) estimation based on surveys, interviews, or statistical sampling; and (c) allocations. The Department uses direct tracing to assign the cost of, for example, a physical passport book or the visa foil placed in a visa applicant’s passport. Assigning costs to activities such as adjudicating a passport or visa application requires estimation based on surveys, interviews, or statistical sampling to determine who performs an activity and how long it takes. Indirect costs (overhead) in the CoSM are allocated according to the level of effort needed for a particular activity. Where possible, the model uses overhead cost pools to assign indirect costs only to related activities. For instance, the cost of rent for domestic passport agencies is assigned only to passport costs, not to visas or other services the Department provides only overseas. The Department allocates indirect support costs to each consular service by the portion of each cost attributable to consular activities. For example, the model allocates a portion of the cost of the Department’s Bureau of Human Resources to consular services. The total amount of this allocation is based on the number of Bureau of Human Resources staff members who support Bureau of Consular Affairs personnel. In turn, this amount is proportionally allocated between the different consular services.

For consular activities that take place in the United States, the Department collects workload and level of effort data from periodic workload reports including Passport Agency Task Reports pulled from management databases that include Passport’s Management Information System. Financial information is gathered from reports provided by the Bureau of Consular Affairs Office of the Comptroller. The Department converts the cost and workload data it collects into resource drivers and activity drivers for each resource and activity.

Because roughly 70 percent of the workforce involved in providing consular services are full-time Federal employees, if demand for a service falls precipitously, the Department cannot shed employees as quickly as the private sector. Likewise, should demand rise precipitously, the Department cannot add employees quickly, because delivering the majority of consular services requires specially trained employees who cannot begin their training until they have completed the federal hiring process and obtained a security clearance. Additionally, given government procurement rules and security requirements, the Department must commit to many of its facilities and infrastructure costs years before a facility becomes available. Despite changes in demand, the Department is obligated to cover these costs. Given these and other constraints on altering the Department's cost structure in the short term, changes in service volumes can have dramatic effects on whether a fee is self-sustaining. Predictive workloads are based on projections by the Office of Visa Services, the Office of Passport Services, and other parts of the Bureau of Consular Affairs that are consistent with Department budget documents prepared for Congress.

The costs the Department enters into CoSM include every line item of costs, including items such as physical material for making passports and visas, salaries, rent, supplies, and IT hardware and software. The Department then determines a resource driver for each of these costs as discussed above and enters the resource drivers and assignments into the model. The Department then selects an activity driver, such as the volume data discussed above for each activity, in order to assign these costs to each service type. This process allows the model to calculate a total cost for each of the Schedule of Fees line items for visa services, passport services, and overseas citizens services as well as

services for other government agencies and “no fee” services. The model then divides the total weighted cost by the total weighted volume of the service or product in question in order to determine a final unit cost for the service or product. Projected costs for predictive years are used to take account of changes in the size of consular staff, workload, and similar factors. The resulting database constitutes the Cost of Service Model.

The Department continues to refine and update the Cost of Service Model in order to set fees commensurate with the cost of providing consular services. Because the Cost of Service Model is a complex series of iterative computer processes incorporating more than a million calculations, it is not reducible to a tangible form such as a document. Inputs are formatted in spreadsheets for entry into the ABC software package. The ABC software package itself is an industry standard commercial off-the-shelf product, SAP Business Objects. The software's output includes spreadsheets with raw unit costs, validation reports, and management reports.

Using the Cost of Service Model To Assess Costs Associated With Document Authentication Services

For analyzing document authentication services, the cost object is Basic Domestic Authentication Service. It has six activities, denoted in the model by the shorthand AUTH.#, and they are Provide Information, Data Intake, Payment and Cashiering, Perform Authentication Review, Personalize, and Issue. Further down, each activity is described in detail. The resource driver is based on a time and motion study that identified the percentage of time the Office of Authentications staff spend on each activity. The overhead pools are the Passport General Management Overhead Pool and the General Management Overhead Pool.

AUTH.1 Provide Information

Costs are allocated according to a time and motion study, with tasks measured in the time and motion study mapped to CoSM activities with the assistance of the Authentications staff. Tasks include Retrieve messages from appointment/status line, Return calls/answer live calls from appointment line, and Return status calls. The cost of this activity is directly assigned to the Basic Authentication cost object.

AUTH.2 Data Intake

Tasks mapped to AUTH.2 Data Intake include Collect mail-in documents, walk-in documents, Greet customers in lobby, and Answer customer questions in lobby area during case drop off/pick-up. The cost of this activity is directly assigned to the Basic Authentication cost object.

AUTH.3 Payment and Cashiering

Tasks mapped to AUTH.3 Payment and Cashiering include Conduct follow-up calls for cases received without payment. The cost of this activity is directly assigned to the Basic Authentication cost object.

AUTH.4 Perform Authentication Review

Tasks mapped to AUTH.4 Perform Authentication Review include Perform authentication review for appointment documents, Perform initial review of case, Perform authentication review for counter documents, and Perform authentication review for mail documents. The cost of this activity is directly assigned to the Basic Authentication cost object.

AUTH.5 Personalize

Tasks mapped to AUTH.5 Personalize include print, sign, and bind certificate to the documents. The cost of this activity is directly assigned to the Basic Authentication cost object.

AUTH.6 Issue

Tasks mapped to AUTH.6 Issue include Return document to appointment customer in lobby and by mail back. The cost of this activity is directly assigned to the Basic Authentication cost object.

Domestic Authentications Driver

The table below details the resources, driver used, and corresponding activities performed.

TABLE 1—DOMESTIC AUTHENTICATIONS RESOURCE DRIVER

Resources	Driver used	Activities
CA Consolidation—DA, CA Headquarters Rent—DA, 281201 PPT/S/TO/AUT Office of Authentications positions and costs.	Time and motion study	AUTH.1 Provide Information, AUTH.2 Data Intake, AUTH.3 Payment and Cashiering, AUTH.4 Perform Authentication Review, AUTH.5 Personalize, AUTH.6 Issue.

Costs are assigned according to a time and motion study, with tasks measured in the time and motion study mapped to CoSM activities with the assistance of the Authentications staff.

Domestic Authentications Fee

The Department is incorporating the domestic authentications fee into the Schedule of Fees and increasing it from

\$8 to \$20. The Office of Authentications, which provides signed authentication certificates for U.S. documents destined for use in foreign

countries, moved from the Bureau of Administration (A Bureau) to the Bureau of Consular Affairs (CA) in October 2012. Before the move, the

Office of Authentications charged \$8 per authentication. At that time, there were five direct-hire full-time employees (FTE), no contractors, and a large backlog of authentications. In 2014, the Office of Authentications moved to the new Washington Passport Agency to increase space for operations, and in 2016 hired four contractors to perform functions like mail opening, cashiering, and data entry, among other clerical tasks.

Following the move to CA, the Department began to measure the cost of Office of Authentications operations and services in the Cost of Service Model. Costs for this service have gone up the past several years to meet customer service expectations and workload requirements. The Office of Authentications aims to maintain a five business day turn-around time for all mail-in applications, and a three day turn-around time for all walk-in requests. In 2016/2017, the office added five additional contractors to meet demand of the existing workload and to manage the walk-ins to the facility and to provide information and manage the queue of customers needing authentication services. CA's Office of Authentications now has nine FTEs and nine contractors. Only FTEs have the authority to adjudicate authentications, and the additional contractor resources allowed FTEs to reduce administrative tasks to focus on adjudication. The scope of work for the Office of Authentications also widened. Once CA inherited this service from the A Bureau, all IT systems had to be updated and a tracking system was created to manage workload. CA also had to increase its capacity to manage calls to support customer service in addition to workflow management systems to manage customers as they come into the facility. A presence was added to the *travel.state.gov* site to provide the public with information on the existence of the office. Lastly, two additional printers, which are rented and bear an annual expense, were acquired to meet demands for current technology.

Based on the findings of the most recent update to the Cost of Service Model, the Department determined that a fee of \$20 would fully recover the cost of Office of Authentications operations and services. This includes the salaries for the staff of the Office of Authentications, rent for the physical location at 600 19th Street NW, Washington, DC, and overhead costs that include information technology, human resources, facilities maintenance, legal review, and security.

There are over 100 specific line item costs that flow into the Department's cost for the domestic authentications service. A summary level breakdown broken down into three general cost categories is provided in the below table:

Table 2: Line Item Total (Authentications)	\$4,431,980
Compensation	1,589,237
Non-Compensation	1,604,126
Partner Bureaus	1,238,617

The Office of Authentications currently consists of nine civil-service employees, which includes an increase of two full-time employees (FTE) over the past five years, and several contract support staff. As discussed below, the Department notes that authentication services have remained roughly constant in recent years at approximately 235,000 authentications annually and expects that trend to continue. The FTE time-per-service (cycle time) has remained relatively constant. As such, CA is not planning to increase either FTE or contract staff at this time as the current staff is meeting demand within the established cycle times. Compensation costs include FTE staff salaries and benefits and domestic overhead costs directly related to the domestic authentication service, and total \$1,589,237. The FTE average compensation cost (with benefits) is more than \$138,000 per position. Additional costs in the Compensation category, totaling approximately \$38,582 per FTE, include general management overhead costs, and domestic Passport staff costs included in Passport general management overhead. The Non-Compensation costs total \$1,604,126, and include operating costs like domestic awards, contractor support costs, personnel travel and transportation, utilities, supplies, equipment, and CA IT costs which increase as FTE numbers increase.

The support from other State Department Partner Bureaus (or Partner Bureaus) cost category includes compensation, overhead, and operating costs associated with CA's Partner Bureaus that support the domestic authentication service. Partner Bureau functions that support the domestic authentication service include human resources support, facilities maintenance, legal review, and security. This cost category also includes rent CA pays for Office of Authentications space. The directly applicable portion of the Partner Bureau's costs, in line with the support they provide to perform this service, totals \$1,238,617. These three cost categories comprise the total overall

costs of providing the domestic authentication service, which totals \$4,431,980. The Cost of Service Model indicates that the cost-per-service is \$18.83. The Department has determined that it is most efficient to round up to the nearest five dollars, which is why it has set the fee at \$20. The Department notes that because all fee revenue associated with document authentication must be remitted to the Treasury, the Department uses alternative sources of retained fee revenue with broad spending authorities to fund the costs the Department incurs to provide the documentary authentication services.

Regulatory Findings

Administrative Procedure Act

The Department is publishing this rule as a proposed rule, with a 60-day provision for public comments.

Regulatory Flexibility Act

The Department has reviewed this proposed rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. 601(6).

Unfunded Mandates Act of 1995

This proposed rule is not expected to 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 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501–1504.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804(2).

Executive Order 12866 and 13563

The Department has reviewed this proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders. This proposed rule has been submitted to OMB for review.

This proposed rule is necessary in light of the need to incorporate the authentications fee into the Schedule of Fees for Consular Services and the Department of State's Cost of Service Model finding that the cost of authenticating a document in the United States is higher than the current fee. The Department is setting the fee in accordance with 31 U.S.C. 9701. See, e.g., 31 U.S.C. 9701(b)(2)(A) ("The head of each agency . . . may prescribe regulations establishing the charge for a

service or thing of value provided by the agency . . . based on . . . the costs to the Government.”). This proposed rule sets the fee for domestic authentications

at the amount required to recover the costs associated with providing this service.

Details of the proposed fee change are as follows:

TABLE 3—FEE CHANGE IMPACT

Item No.	Proposed fee	Current fee	Change in fee	Percentage increase	Estimated annual number of services requested ¹	Estimated change in annual fees collected ²
Schedule of Fees for Consular Services						
*	*	*	*	*	*	*
Documentary Services						
46. Authentications (by the Office of Authentications domestically):						
(a) Each basic authentication service	\$20	\$8	\$12	150	234,197	\$2,810,364
Total	20	8	12	150	234,197	2,810,364
*	*	*	*	*	*	*

¹ Based on FY 2018 workload. Workload has remained consistent over five years, averaging approximately 235,000 authentications each year—we expect that trend to continue. Respondents may ask for more than one service on a form and a fee is assessed per document authenticated.

² The Department of State does not retain this fee. All fee revenue associated with this service is remitted to Treasury.

Based on the foregoing information, and the fact that the CoSM has demonstrated that the increase in fees will allow the U.S. government to recover the full cost of providing this service, the Department finds that the benefit to the public outweighs the cost of this rule as outlined above.

Executive Order 13771

This regulation is not an E.O. 13771 regulatory action because it is a transfer rule that changes only the fee for a service without imposing any new costs. The increase of this current collection accurately reflects the cost to the U.S. government of providing this service.

Executive Orders 12372 and 13132

This regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this

rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on federal programs and activities do not apply to this regulation.

Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking relates to an information collection request for the DS-4194, Request for Authentications Service, which is being processed separately.

List of Subjects in 22 CFR Part 22

Consular services, Fees.

Accordingly, for the reasons stated in the preamble, 22 CFR part 22 is proposed to be amended as follows:

PART 22—SCHEDULE OF FEES FOR CONSULAR SERVICES— DEPARTMENT OF STATE AND FOREIGN SERVICE

■ 1. The authority citation for part 22 continues to read as follows:

Authority: 8 U.S.C. 1101 note, 1153 note, 1157 note, 1183a note, 1184(c)(12), 1201(c), 1351, 1351 note, 1713, 1714, 1714 note; 10 U.S.C. 2602(c); 22 U.S.C. 214, 214 note, 1475e, 2504(h), 2651a, 4206, 4215, 4219, 6551; 31 U.S.C. 9701; Exec. Order 10,718, 22 FR 4632 (1957); Exec. Order 11,295, 31 FR 10603 (1966).

■ 2. In § 22.1, amend the table by adding entry 46 under the heading “Documentary Services” to read as follows:

§ 22.1 Schedule of fees.

* * * * *

SCHEDULE OF FEES FOR CONSULAR SERVICES

Item No.	Fee
*	*
Documentary Services	
*	*
46. Authentications (by the Office of Authentications domestically):	

SCHEDULE OF FEES FOR CONSULAR SERVICES—Continued

Item No.	Fee
(a) Each basic authentication service	\$20
(Items 47–50 vacant.)	

* * * * *

Carl C. Risch,

*Assistant Secretary for Consular Affairs,
Department of State.*

[FR Doc. 2020–19926 Filed 10–15–20; 8:45 am]

BILLING CODE 4710–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0096; FRL–10014–93–Region 9]

Partial Approval and Partial Disapproval of Air Quality State Implementation Plans; California; Infrastructure Requirements for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove the state implementation plan (SIP) revision submitted by the State of California pursuant to the requirements of the Clean Air Act (CAA or “Act”) for the implementation, maintenance, and enforcement of the 2015 national ambient air quality standards (NAAQS or “standards”) for ozone. As part of this action, we are proposing to reclassify certain regions of the State for emergency episode planning purposes with respect to ozone. We are also proposing to approve into the SIP an updated state provision addressing CAA conflict of interest requirements, and emergency episode planning rules for Amador County Air Pollution Control District (APCD), Calaveras County APCD, Mariposa County APCD, Northern Sierra Air Quality Management District (AQMD), and Tuolumne County APCD. Finally, we are proposing to approve an exemption from emergency episode planning requirements for ozone for Lake County AQMD. We are taking comments on this proposal and, after considering any comments submitted, plan to take final action.

DATES: Written comments must be received on or before November 16, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2020–0096 at <https://www.regulations.gov>. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, or if you need assistance in a language other than English, or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Panah Stauffer, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3247 or by email at stauffer.panah@epa.gov

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

Table of Contents

- I. The EPA’s Approach to the Review of Infrastructure SIP Submittals
- II. Background
 - A. Statutory Requirements
 - B. NAAQS Addressed by this Proposal
 - C. EPA Guidance Documents
- III. California’s Submittals
- IV. The EPA’s Evaluation and Proposed Action
 - A. Proposed Approvals and Partial Approvals
 - B. Proposed Partial Disapprovals

C. The EPA’s Evaluation of California’s Submittal

D. Proposed Approval of State and Local Provisions into the California SIP

E. Proposed Approval of Reclassification Requests for Emergency Episode Planning

F. The EPA’s Action

V. Incorporation by Reference

VI. Statutory and Executive Order Reviews

I. The EPA’s Approach to the Review of Infrastructure SIP Submittals

The EPA is acting upon two SIP submittals from California that address the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2015 ozone NAAQS. Whenever the EPA promulgates a new or revised NAAQS, CAA section 110(a)(1) requires states to make SIP submissions to provide for the implementation, maintenance, and enforcement of the NAAQS. This type of SIP submission is commonly referred to as an “infrastructure SIP.” These submissions must meet the various requirements of CAA section 110(a)(2), as applicable. Due to ambiguity in some of the language of CAA section 110(a)(2), the EPA believes that it is appropriate to interpret these provisions in the specific context of acting on infrastructure SIP submissions. The EPA has previously provided comprehensive guidance on the application of these provisions through a guidance document for infrastructure SIP submissions¹ and through regional actions on infrastructure submissions. Unless otherwise noted below, we are following that existing approach in acting on this submission. In addition, in the context of acting on such infrastructure submissions, the EPA evaluates the submitting state’s SIP for facial compliance with statutory and regulatory requirements, not for the

¹ The EPA explains and elaborates on these ambiguities and its approach to address them in its September 13, 2013 Infrastructure SIP Guidance (available at <https://www3.epa.gov/airquality/urbanair/sipstatus/docs/>)

Guidance on Infrastructure SIP Elements Multipollutant FINAL Sept 2013.pdf), as well as in numerous EPA actions, including the EPA’s prior action on California’s infrastructure SIP to address the 1997 and 2008 ozone NAAQS (79 FR 63350 (October 23, 2014)).

state's implementation of its SIP.² The EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc., that comprise its SIP.

II. Background

A. Statutory Requirements

As discussed in section I of this proposed rule, CAA section 110(a)(1) requires each state to submit to the EPA, within three years after the promulgation of a primary or secondary NAAQS or any revision thereof, an infrastructure SIP revision that provides for the implementation, maintenance, and enforcement of such NAAQS. Section 110(a)(2) contains the infrastructure SIP requirements, which generally relate to the information, authorities, compliance assurances, procedural requirements, and control measures that constitute the "infrastructure" of a state's air quality management program. These infrastructure SIP requirements (or "elements") required by section 110(a)(2) are as follows:

- Section 110(a)(2)(A): Emission limits and other control measures.
- Section 110(a)(2)(B): Ambient air quality monitoring/data system.
- Section 110(a)(2)(C): Program for enforcement of control measures and regulation of new and modified stationary sources.
- Section 110(a)(2)(D)(i): Interstate pollution transport.
- Section 110(a)(2)(D)(ii): Interstate pollution abatement and international air pollution.
- Section 110(a)(2)(E): Adequate resources and authority, conflict of interest, and oversight of local and regional government agencies.
- Section 110(a)(2)(F): Stationary source monitoring and reporting.
- Section 110(a)(2)(G): Emergency episodes.
- Section 110(a)(2)(H): SIP revisions.
- Section 110(a)(2)(J): Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection.
- Section 110(a)(2)(K): Air quality modeling and submittal of modeling data.
- Section 110(a)(2)(L): Permitting fees.
- Section 110(a)(2)(M): Consultation/participation by affected local entities.

Two elements identified in section 110(a)(2) are not governed by the three-

year submittal deadline of section 110(a)(1) and are therefore not addressed in this action. These two elements are: (i) Section 110(a)(2)(C) to the extent it refers to permit programs required under part D (nonattainment new source review (NSR)), and (ii) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address requirements for the nonattainment NSR portion of section 110(a)(2)(C) or the whole of section 110(a)(2)(I).

B. NAAQS Addressed by This Proposal

Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_x) in the presence of sunlight. These two pollutants, referred to as ozone precursors, are emitted by many types of sources, including on-and off-road motor vehicles and engines, power plants and industrial facilities, and smaller area sources such as lawn and garden equipment and paints. Scientific evidence indicates that adverse public health effects occur following exposure to elevated levels of ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases.

On October 26, 2015, the EPA promulgated a revised NAAQS for ozone.³ The EPA had previously promulgated NAAQS for ozone in 1979, 1997 and 2008. The 2015 ozone NAAQS revised the level of the standards to 0.070 parts per million (ppm) averaged across eight hours.

C. EPA Guidance Documents

EPA has issued several guidance memos on infrastructure SIPs that have informed our evaluation, including the following:

- March 2, 1978 guidance on the conflict of interest requirements of section 128, pursuant to the requirement of section 110(a)(2)(E)(ii).⁴
- August 15, 2006 guidance on the interstate transport requirements of section 110(a)(2)(D)(i) with respect to the 1997 ozone and 1997 fine particulate matter (PM_{2.5}) NAAQS ("2006 Transport Guidance").⁵

³ 80 FR 65292.

⁴ Memorandum dated March 2, 1978, from David O. Bickart, Deputy General Counsel, Office of General Counsel (OGC), "Guidance to States for Meeting Conflict of Interest Requirements of Section 128."

⁵ Memorandum dated August 15, 2006, from William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and

• September 25, 2009 guidance on infrastructure SIP requirements for the 2006 PM_{2.5} NAAQS ("2009 Infrastructure SIP Guidance").⁶

• September 13, 2013 guidance on infrastructure SIP requirements for the 2008 ozone, 2010 nitrogen dioxide (NO₂), 2010 sulfur dioxide (SO₂), 2012 PM_{2.5}, and future NAAQS ("2013 Infrastructure SIP Guidance").⁷

III. California's Submittal

In California, the California Air Resources Board (CARB or "State") is the state agency responsible for the adoption and submission to the EPA of California SIPs and SIP revisions. CARB submitted its infrastructure SIP revision ("2018 Infrastructure SIP" or "California's 2018 Submittal") for the 2015 ozone NAAQS on October 1, 2018.⁸

On June 25, 2020, CARB supplemented its 2018 Infrastructure SIP by submitting ozone emergency episode contingency plans for San Luis Obispo County APCD, Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD.⁹ It also submitted an exemption request from emergency episode planning requirements for Lake County AQMD based on that District's attainment status. This submittal ("California's 2020 Submittal") addresses CAA section 110(a)(2)(G) requirements for the 2015 ozone NAAQS.

We find that these submittals (referred to collectively herein as "California's Infrastructure SIP Submittals") meet the procedural requirements for public participation under CAA section 110(a)(2) and 40 CFR 51.102. We also find that they meet the applicable completeness criteria in Appendix V to

Standards (OAQPS), "Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards."

⁶ Memorandum dated September 25, 2009, from William T. Harnett, Director, Air Quality Policy Division, OAQPS, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particulate Matter National Ambient Air Quality Standards."

⁷ Memorandum dated September 13, 2013, from Stephen D. Page, Director, OAQPS, "Guidance on Infrastructure State Implementation Plan Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)."

⁸ Letter dated October 1, 2018, from Richard W. Corey, Executive Officer, CARB, to Michael Stoker, Regional Administrator, EPA Region IX.

⁹ Letter dated June 16, 2020, from Richard W. Corey, Executive Officer, CARB, to John Busterud, Regional Administrator, EPA Region IX, with Ozone Emergency Episode Plans for Amador County, San Luis Obispo County, Northern Sierra, Tuolumne County, Mariposa County, and Calaveras County and Exemption Request for Lake County.

² See U.S. Court of Appeals for the Ninth Circuit decision in *Montana Environmental Information Center v. EPA*, No. 16–71933 (Aug. 30, 2018).

40 CFR part 51. We are proposing to act on California's Infrastructure SIP Submittals.

IV. The EPA's Evaluation and Proposed Action

A. Proposed Approvals and Partial Approvals

Based upon the evaluation presented in this notice, the EPA proposes to approve California's Infrastructure SIP Submittals with respect to the 2015 ozone NAAQS for the following infrastructure SIP requirements. Proposed partial approvals are indicated by the parenthetical "(in part)."

- Section 110(a)(2)(A): Emission limits and other control measures.
- Section 110(a)(2)(B): Ambient air quality monitoring/data system.
- Section 110(a)(2)(C) (in part): Program for enforcement of control measures and regulation of new and modified stationary sources.
- 110(a)(2)(D)(i)(II) (in part): Interstate pollution transport.
- Section 110(a)(2)(D)(ii) (in part): Interstate pollution abatement and international air pollution.
- Section 110(a)(2)(E): Adequate resources and authority, conflict of interest, and oversight of local and regional government agencies.
- Section 110(a)(2)(F): Stationary source monitoring and reporting.
- Section 110(a)(2)(G): Emergency episodes.
- Section 110(a)(2)(H): SIP revisions.
- Section 110(a)(2)(J) (in part): Consultation with government officials, public notification, PSD, and visibility protection.
- Section 110(a)(2)(K): Air quality modeling and submittal of modeling data.
- Section 110(a)(2)(L): Permitting fees.
- Section 110(a)(2)(M): Consultation/participation by affected local entities.

B. Proposed Partial Disapprovals

EPA proposes to partially disapprove California's Infrastructure SIP Submittals with respect to the NAAQS identified for each of the following infrastructure SIP requirements (details of the partial disapprovals are presented after this list):

- Section 110(a)(2)(C) (in part): Program for enforcement of control measures and regulation of new and modified stationary sources (due to prevention of significant deterioration (PSD) program deficiencies in certain air districts).
- Section 110(a)(2)(D)(i)(II) (in part): Interstate pollution transport (due to PSD program deficiencies in certain air districts).

- Section 110(a)(2)(D)(ii) (in part): Interstate pollution abatement and international air pollution.

- Section 110(a)(2)(J) (in part): Consultation with government officials, public notification, PSD, and visibility protection (due to PSD program deficiencies in certain air districts).

These partial disapprovals are for districts in California that do not have fully SIP-approved PSD programs. The disapprovals will not create any new consequences for these districts or the EPA as the districts already implement the EPA's federal PSD program at 40 CFR 52.21, pursuant to delegation agreements, for all regulated NSR pollutants. They will also not create any new highway sanctions, which are not triggered by disapprovals of infrastructure SIPs.

At this time, the EPA is not acting on the interstate transport requirements of 110(a)(2)(D)(i)(I), which prohibits emission sources from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state. The EPA will propose action on the interstate transport requirements for the 2015 ozone NAAQS in a separate notice.

C. The EPA's Evaluation of California's Submittal

We have evaluated California's 2018 Infrastructure SIP and the existing provisions of the California SIP for compliance with the infrastructure SIP requirements of CAA section 110(a)(2) and applicable regulations in 40 CFR part 51 ("Requirements for Preparation, Adoption, and Submittal of State Implementation Plans").

1. CAA Section 110(a)(2)(A)—Emission Limits and Other Control Measures

a. Statutory and Regulatory Requirements

Section 110(a)(2)(A) requires SIPs to "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act."

In the 2013 Infrastructure SIP Guidance, the EPA states that a submittal meets the requirements of CAA section 110(a)(2)(A) if it identifies "existing EPA-approved SIP provisions or new SIP provisions that the air agency has adopted and submitted for EPA approval that limit emissions of pollutants relevant to the subject NAAQS, including precursors of the

relevant NAAQS pollutant where applicable."

VOC and NO_x are precursors to ozone formation across all source categories. Their emissions are grouped into two general categories: Stationary sources and mobile sources. Stationary sources are further divided into "point" and "area" sources. Point sources typically refer to permitted facilities that have one or more identified and fixed pieces of equipment and emissions points. Stationary area sources are many smaller point sources, and include sources that have internal combustion engines, and gasoline dispensing facilities (gas stations). Area sources consist of widespread and numerous smaller emission sources, such as small permitted facilities and households. The mobile sources category can be divided into two major subcategories: "on-road" and "off-road" mobile sources. On-road mobile sources include light-duty automobiles, light-, medium-, and heavy-duty trucks, and motorcycles. Off-road mobile sources include aircraft, locomotives, construction equipment, mobile equipment, and recreational vehicles.

b. Summary of the State's Submission

In its 2018 submittal, California describes different regulatory authorities in California involving state, local, and federal governments. The submittal explains that the state agency, California Air Resources Board (CARB), has authority to adopt and implement controls for on-road and off-road mobile sources, as well as for the fuels that power them. CARB also has authority to regulate consumer products. Local air pollution control districts have authority to adopt and implement controls for stationary sources and small local businesses. If a district fails to meet its responsibilities, CARB is authorized to act in its stead. Some of CARB's authorities also complement federal control measures, such as standards for fuels and vehicles that the EPA establishes. Although CARB acknowledges that several areas in California have not yet met the ozone standards, it notes that current and future regulations implemented under state and local authority will enable continued progress towards attaining those standards.

CARB describes how it has regulated a wide range of mobile sources, including heavy-duty trucks and passenger vehicles that are already in use. CARB has also regulated fuels. In the submittal, CARB states that these regulations have reduced emissions from vehicles and off-road sources such as lawn and garden equipment,

recreational vehicles and boats, and construction equipment.

Starting with mobile sources, California states that its stringent motor vehicle and fuel standards, in-use rules, and inspection programs such as Smog Check and heavy-duty truck inspections have resulted in cars and trucks that are 99 percent and 98 percent cleaner, respectively, than their uncontrolled counterparts. In addition, CARB describes its emission standards for off-road sources and states that it has collaborated with the EPA to regulate sources subject to a combination of state and federal authority, as exemplified by locomotive engine standards and low-sulfur diesel fuel standards for near-shore ships.

With respect to stationary sources and small local businesses, CARB states that emission limits are achieved through a combination of prohibitory rules establishing emission limits by facility type, permits specifying equipment use and operating parameters, and an NSR program that allows industrial growth while mitigating environmental

impacts. Examples of facilities regulated under such district programs include refineries, manufacturing facilities, cement plants, refinishing operations, electrical generation and biomass facilities, boilers, and generators.¹⁰ The state then provides examples of SIP-approved emission control measures for VOCs (listed as hydrocarbons, or HC) and NO_x.¹¹

Finally, CARB notes that all EPA-approved SIP provisions that limit emissions of ozone precursors, along with all other pollutants, are listed online at the website <https://www.epa.gov/sips-ca>. These rules, along with others mentioned in California's submittal, are discussed further in our evaluation section below.

c. The EPA's Review of the State's Submission

California's 2018 Infrastructure SIP broadly describes, and provides examples of, the emission limitations employed by the State and air districts to achieve emission reductions that will help areas within the State attain and maintain the 2015 ozone NAAQS. The

submittal also includes the table below with specific examples of measures that control emissions of ozone precursors. Some emissions control one precursor, while others control multiple precursors and may also control other pollutants that are not affected by the 2015 ozone NAAQS. The control measures in this table reflect the authorities of state and local air agencies in a variety of geographic areas in California. These measures control the ozone precursors of HCs, VOCs, and NO_x. The state-level regulations reflect state authority to regulate emissions from vehicles and fuels and to regulate consumer products. The local air district regulations reflect local authority to regulate stationary sources, such as boilers and cement kilns, as well as stationary area sources like confined animal feeding operations. Additional examples of rules that control ozone precursor emissions were discussed in the EPA's Overarching Technical Support Document¹² for our 2016 final action on California's Infrastructure SIP Submission for the 2008 ozone NAAQS.

TABLE 1—EXAMPLES OF CALIFORNIA SIP-APPROVED EMISSION CONTROL MEASURES

Rule description	Pollutant or precursor emission controlled ^a	Rule/regulation number ^b	Federal Register citation
Exhaust Emissions Standards and Test Procedures—1985 & Subsequent Model Heavy-Duty Engines and Vehicles.	HC, NO _x , PM, CO.	State Regulation 13 CCR 1956.8 ...	75 FR 26653.
Exhaust Emissions Standards and Test Procedures—2004 & Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles.	HC, NO _x , PM, CO.	State Regulation 13 CCR 1961	75 FR 26653.
California Reformulated Gasoline Regulations	HC, SO _x	State Regulation 13 CCR 2250–2297.	60 FR 43379, 75 FR 26653.
Regulations for Large Spark-Ignition Engines and Off-Road Large Spark Ignition Engine Fleet Requirements.	HC, NO _x	State Regulation 13 CCR 2433, 13 CCR 2775–2775.2.	80 FR 76468.
Consumer Products	VOC	State Regulation, 17 CCR Subchapter 8.5, Article 2.	77 FR 7535.
RECLAIM (Regional Clean Air Incentives Market) Program	NO _x	South Coast AQMD Rule 2002	80 FR 43176.
NO _x Emissions from Natural Gas Fired, Fan-Type Central Furnace	NO _x	South Coast AQMD Rule 1111	81 FR 17390.
Crude Oil Production Sumps	HC	San Joaquin Valley APCD Rule 4402.	77 FR 64227.
Confined Animal Facility Operations	VOC	San Joaquin Valley APCD Rule 4570.	77 FR 2228.
Portland Cement Kilns	NO _x	Mojave Desert AQMD Rule 1161 ...	68 FR 9015.
Glass Melting Furnaces	VOC, NO _x ...	Mojave Desert AQMD Rule 1165 ...	77 FR 39181.
Transfer of Gasoline into Vehicle Fuel Tanks	HC	Sacramento Metro AQMD Rule 449	78 FR 898.
Stationary Internal Combustion Engines Located at Major Stationary Sources of NO _x .	NO _x	Sacramento Metro AQMD Rule 412	61 FR 18962.
NO _x and CO from Boilers, Steam Generators and Process Heaters in Petroleum Refineries.	NO _x	Bay Area AQMD Rule 10	73 FR 17896.

^a HC = hydrocarbons; NO_x = oxides of nitrogen; PM = particulate matter; CO = carbon monoxide; SO_x = oxides of sulfur; VOC = volatile organic compounds, SO₂ = sulfur dioxide.

^b CCR = California Code of Regulations, AQMD = Air Quality Management District, APCD = Air Pollution Control District.

In sum, the state and local emission limit provisions in the California SIP, including those cited in California's 2018 Submittal, for mobile, area, and stationary sources address a wide variety of sources and are extensive. The

NO_x and VOC emission limits serve to limit ambient ozone concentrations, which will help all areas in the State attain and maintain the 2015 ozone NAAQS. We therefore propose to find that the SIP-approved emission limits

discussed in California's Infrastructure SIP Submittals and in this notice provide an adequate basis to conclude that California meets the requirements of CAA section 110(a)(2)(A) for the 2015 ozone NAAQS.

¹⁰ California's 2018 Infrastructure SIP, 6.

¹¹ Id. at 7, Table 3.

¹² California Infrastructure SIP Overarching Technical Support Document, U.S. EPA, Region 9 (September 2014).

2. CAA Section 110(a)(2)(B)—Ambient Air Quality Monitoring/Data System

a. Statutory and Regulatory Requirements

Section 110(a)(2)(B) of the CAA requires SIPs to “provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—(i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.”

In the 2013 Infrastructure SIP Guidance, the EPA states that a submittal meets the requirements of CAA section 110(a)(2)(B) if it cites its authority to perform air quality monitoring, collect air quality data, and submit that data to the EPA, and provides a narrative description of how those provisions meet the requirements. The guidance notes that some authorizing provisions may provide general authority that includes monitoring activities. In the 2013 Infrastructure SIP Guidance, the EPA also notes that, for new or revised NAAQS, submittals should describe how the state will meet changes in monitoring requirements.

b. Summary of the State’s Submission

In its 2018 Infrastructure SIP, California cites its overall authority to implement air quality control programs in Health and Safety Code (HSC) 39602. CARB also cites HSC 39607(a) and 39607(c) as the provisions that authorize it to collect air quality data and to monitor air pollutants in cooperation with local agencies, including local air districts.¹³ Although these provisions are not SIP-approved, they direct the state to “[e]stablish a program to secure data on air quality in each air basin” and to “[m]onitor air pollutants in cooperation with districts and with other agencies.”

In its submittal, California goes on to describe the state’s monitoring network and requirements. CARB notes that over 700 monitors operate at over 250 sites in the State and that current information about individual monitors, and the data the monitors collect, are available on CARB’s website. The data are also reported to the EPA’s Air Quality System.

CARB describes how it and local districts conduct annual evaluations of the adequacy of the monitoring networks in annual network monitoring reports submitted to the EPA. Ten districts submit their own reports, and CARB submits a report that covers the

remaining 25 districts. The reports provide information about monitoring locations and data collected at those sites. Types of monitoring conducted at these sites include “State and Local Air Monitoring sites, National Core multi-pollutant monitoring stations, Chemical Speciation Network sites, Special Purpose Monitoring sites, and Photochemical Assessment Monitoring sites operated by CARB and the districts, as well as other data providers such as the National Park Service in more than 30 Core Based Statistical Areas.”¹⁴ The EPA approves the reports and provides information on areas where the network can be improved. CARB explains that data that are collected for federal purposes are measured using EPA-approved methods and that they are subject to the quality assurance and siting requirements of 40 CFR part 58.

The 2018 Infrastructure SIP submission notes that the 2015 ozone standard did not establish new monitoring requirements, and states that the current network is adequate to continue monitoring for attainment status with the new standard.

c. The EPA’s Review of the State’s Submission

In its 2018 submittal, CARB cites HSC section 39602 for overarching SIP authority, and HSC sections 39607(a) and (c) for specific authority to establish air quality monitoring with the air districts. CARB also describes California’s network of monitors, how data are collected and made publicly available online, and how data are submitted to the EPA annually. We propose to find that California’s provisions for monitoring and data collection provide adequate authority to monitor ambient air quality for purposes of CAA section 110(a)(2)(B) with respect to the 2015 ozone NAAQS.

With respect to California’s compliance with the federal regulatory requirements relevant for section 110(a)(2)(B), we reviewed California’s 2018 Infrastructure SIP in conjunction with California’s 2019 Annual Network Plans (ANPs) and the EPA response letters to those plans. As California’s 2018 Infrastructure SIP notes, CARB and ten districts submit ANPs to the EPA every year. The most recent ANPs California was required to submit to the EPA were for the year 2019. The EPA has approved all of the 2019 ANPs, and they are included in the docket for this action, along with the EPA’s response letters. Consequently, California’s 2018 Infrastructure SIP, along with its 2017

ANPs, provide an adequate basis for the EPA to propose approval with respect to CAA section 110(a)(2)(B).

3. CAA Section 110(a)(2)(C)—Program for Enforcement of Control Measures and for Construction or Modification of Stationary Sources

a. Statutory and Regulatory Requirements

Section 110(a)(2)(C) requires that each SIP “include a program to provide for the enforcement of the measures described in [section 110(a)(2)(A)], and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C and D [of title I of the Act].”

In the 2013 Infrastructure SIP guidance, the EPA states, “[t]his element consists of three sub-elements; enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources; and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (*i.e.*, the major source PSD program).” The EPA’s guidance also explains that the element C requirement for infrastructure SIPs to comply with CAA title I part C requirements encompasses all regulated NSR pollutants, not just the 2015 ozone NAAQS.

i. Enforcement

With respect to the requirement to include a program to provide for the enforcement of control measures, the EPA is evaluating the state’s general enforcement authorities to determine whether they have been approved into California’s SIP and whether they adequately provide for SIP enforcement statewide. In the 2013 Infrastructure SIP Guidance, the EPA states, “To satisfy this subelement, an infrastructure SIP submission should identify the statutes, regulations, or other provisions in the existing SIP (or new provisions that are submitted as part of the infrastructure SIP to be incorporated into the SIP) that provide for enforcement of those emission limits and control measures that the air agency has identified in its submission for purposes of satisfying Element A.”

ii. PSD Permitting

The EPA is also evaluating whether California has a complete PSD permitting program in place covering the requirements for all NAAQS pollutants. The PSD program applies to

¹³ California’s 2018 Infrastructure SIP, 8.

¹⁴ *Id.* at 9.

any new major source or a source making a major modification in an attainment area. The program requirements include installation of the best available control technology (BACT), an air quality analysis, an additional impacts analysis, and public involvement. For the purposes of infrastructure SIPs, the EPA evaluates whether state PSD programs address the following “structural elements”: (1) Provisions identifying NO_x as an ozone precursor consistent with the requirements of the EPA’s Phase 2 implementation rule for the 1997 8-hour ozone NAAQS;¹⁵ (2) provisions to regulate PM_{2.5}, including condensable PM, and its precursor emissions (SO₂ in all areas, and NO_x and/or VOC as appropriate), consistent with the requirements of the EPA’s NSR/PSD implementation rule for the 1997 PM_{2.5} NAAQS;¹⁶ and (3) provisions to regulate Greenhouse Gases (GHGs) consistent with the EPA’s regulations to implement the PSD program for GHGs, including “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,”¹⁷ and “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans,”¹⁸ as applicable.

iii. Minor NSR

With respect to the requirement to include a program that provides for regulation of the modification and construction of stationary sources, the EPA is evaluating whether California has existing EPA-approved SIP provisions for Minor NSR for the 2015 ozone NAAQS. The Minor NSR program applies to a new minor source and/or a minor modification at both major and minor sources, in both attainment and nonattainment areas. Major sources are facilities that have the potential to emit pollutants in amounts equal to or greater than the corresponding major source threshold levels. These threshold levels vary by pollutant and/or source category. Major sources must comply with specific emission limits, which are generally more stringent in nonattainment areas. Minor sources are facilities that have the potential to emit pollutants in amounts less than the corresponding major source thresholds.

Under the Minor NSR program, new sources or modifications at existing

sources must comply with any emissions control measures required by the state. The program must not interfere with attainment or maintenance of the NAAQS or the control strategies of a SIP or tribal implementation plan (TIP).

b. Summary of the State’s Submission

i. Enforcement

California’s 2018 Infrastructure SIP describes three provisions of the state HSC that provide CARB and air districts with enforcement authority. HSC section 40001(a) states, “Subject to the powers and duties of the state board, the districts shall adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law.” HSC section 40000 gives CARB the authority to regulate mobile sources and local air districts the authority to regulate all other sources. California’s HSC thus provides for the control of all types of sources and for the enforcement of those controls. In addition, HSC section 39002 gives local and regional authorities primary responsibility for control of air pollution from all sources other than vehicular sources.

ii. PSD Permitting

In its 2018 Infrastructure SIP, CARB explains that districts have the authority to adopt and enforce PSD permitting programs under HSC section 40000. The state explains that PSD applies statewide for new major sources or major modifications to existing major sources of NO₂, SO₂ and CO because all areas in California are designated as attainment or unclassifiable for each NAAQS for those pollutants. PSD also applies in areas that are attainment or unclassifiable for the other NAAQS. A spreadsheet¹⁹ listing the attainment status of California air districts for all NAAQS is included in the docket for this rulemaking. PSD permits can be issued by local districts, the EPA, or both.

The submittal includes a table from the EPA’s website listing districts that have SIP-approved PSD permit programs. The table indicates that 14 districts have PSD programs that are approved into the SIP: Bay Area,²⁰ Butte County,²¹ Eastern Kern,²² Feather

River,²³ Great Basin,²⁴ Imperial County,²⁵ Monterey Bay,²⁶ Placer County,²⁷ Sacramento Metro,²⁸ San Joaquin Valley,²⁹ San Luis Obispo,³⁰ Santa Barbara,³¹ Yolo-Solano,³² and Ventura.³³ At the time of CARB’s submission of the 2018 Infrastructure SIP, Sacramento Metro was incorrectly listed on the EPA’s website as having a fully SIP-approved PSD program. Sacramento Metro, along with four other air districts (Mendocino, North Coast, Northern Sonoma, and South Coast) operate PSD programs under a partial Federal Implementation Plan (FIP) and are not completely SIP-approved. The website has since been corrected.³⁴ The remaining 17 districts in California operate either partially or fully under a FIP, and do not have full SIP-approved PSD programs. Therefore, 22 air districts in California do not fully meet the PSD requirements of element C.

iii. Minor NSR

For Minor NSR programs, California reiterates that local districts are responsible for regulating stationary sources in California under HSC 39002 and 40000. CARB explains that this responsibility extends to implementing a Minor NSR program, and that all 35 California air districts administer their own Minor NSR programs. CARB also explains that many of the NSR rules are SIP-approved and explains that information about the approval status of those rules is available from the EPA.

c. The EPA’s Review of the State’s Submission

i. Enforcement

California described HSC sections 39002, 40000, and 40001 in its 2018 Infrastructure SIP submittal. These three provisions provide authority to CARB and local air districts to enforce the emission limits on mobile and stationary sources which were described in element A.

In addition to the three authority provisions cited in California’s 2018 Infrastructure SIP, CARB has identified other statutory enforcement authorities in previous submittals. These include

²³ 80 FR 69880.

²⁴ Id.

²⁵ 77 FR 73316.

²⁶ 80 FR 15899 (March 26, 2015).

²⁷ 77 FR 73316.

²⁸ 76 FR 43183 (July 20, 2011).

²⁹ 77 FR 65305 (October 26, 2012).

³⁰ 80 FR 69880.

³¹ 80 FR 69880.

³² 77 FR 73316.

³³ 82 FR 13243 (March 10, 2017).

³⁴ <https://www.epa.gov/caa-permitting/air-permit-delegation-and-psd-sip-approval-status-epa-region-9/ca> (last visited on September 14, 2020).

¹⁵ 70 FR 71611 (November 29, 2005) (codified at 40 CFR 51.166(b)(1)(ii), (b)(2)(ii), (b)(23)(i), (b)(49)(i)).

¹⁶ 73 FR 28321 (May 16, 2008) (codified at 40 CFR 51.166(b)(23)(i), (b)(49)(i), (b)(49)(vi)).

¹⁷ 75 FR 31514 (June 3, 2010).

¹⁸ 75 FR 82535 (December 30, 2010).

¹⁹ EPA Region IX, Spreadsheet of Nonattainment Areas in California Air Districts.

²⁰ 83 FR 23372 (May 21, 2018).

²¹ 80 FR 69880 (November 12, 2015).

²² 77 FR 73316 (December 10, 2012).

HSC 40752, which requires the air pollution control officers for each air district to observe and enforce rules, regulations, and permit conditions, and HSC 40753, which gives air pollution control officers authority to enforce certain air pollution-related provisions of California's Vehicular Code. They also included the provisions of HSC section 42400 *et seq.*, which establish criminal and civil penalties for violations of state and district rules, regulations, and permits. Further, the EPA's proposal to approve California's previous infrastructure SIP identified additional statutory provisions that relate to inspection and enforcement authority at the state and district level. It also identified numerous SIP-approved state and local rules that provide CARB and the air districts with authority to enforce SIP-approved emissions limits on various types of sources. These measures are described in the EPA's Overarching Technical Support Document for the EPA's action on California's previous Infrastructure SIP submission.³⁵ Some of the enforcement authorities apply broadly, while others are specific to the SIP-approved rules they address. For example, Lassen County APCD's agricultural burning rule cites the penalty provisions of HSC 42400 and establishes procedures for documenting violations of that rule. San Joaquin Valley APCD's rules 1040 and 1050 are general enforcement and penalty provisions that incorporate the enforcement authorities and penalty provisions of the state HSC into district rules.

Based on the provisions cited in California's 2018 Infrastructure SIP and the SIP-approved provisions discussed in the EPA's previous action on California's multi-pollutant infrastructure SIP, we propose to approve California's 2018 Infrastructure SIP submittal with respect to the requirement in section 110(a)(2)(C) to include a program to provide for the enforcement of control measures.

ii. PSD Permitting

For the 13 local air districts with EPA-approved PSD programs, we are proposing to partially approve California's 2018 Infrastructure SIP for the PSD portion of 110(a)(2)(C). This represents an increase from the EPA's 2016 final action on California's previous infrastructure SIP, when only seven air districts met the PSD

requirements.³⁶ These districts' PSD programs met all of the structural elements, in addition to other requirements for PSD rule approval, and were fully approved into the SIP.

Of the remaining 22 local air districts, five are subject to a partial FIP, which means their programs cover some, but not all, of the structural elements. These are the Mendocino County, North Coast Unified, Northern Sonoma County, Sacramento Metro, and South Coast air district PSD programs. South Coast AQMD has a SIP-approved PSD program for GHGs only, but it does not have a SIP-approved PSD program to address the other two structural elements. Mendocino County AQMD, Northern Sonoma County APCD, and Sacramento Metro AQMD each have PSD programs that generally address the structural PSD elements, but certain sources are subject to a FIP rather than the local PSD program.³⁷ In addition, the PSD program of North Coast Unified AQMD is subject to a FIP to address deficiencies related to identifying NO_x as an ozone precursor and specifying requirements for the regulation of PM_{2.5}, PM_{2.5} precursors, condensable PM_{2.5}, or PSD increments for PM_{2.5}. None of the 17 remaining air districts in California have SIP-approved PSD programs. Consequently, they do not meet any of the structural elements.

For the 22 local air districts that do not meet each of the structural PSD elements for all criteria pollutants, we are proposing to partially disapprove California's 2018 Infrastructure SIP for the PSD-related requirements of CAA section 110(a)(2)(C). However, because each of these districts is already subject to a PSD FIP for each of the specific deficiencies, a final action of this proposed partial disapproval will not trigger any new obligation for the EPA to promulgate a FIP.

iii. Minor NSR

In the EPA's final rule approving California's previous infrastructure SIP, we determined that all California air districts had SIP-approved minor source permit programs that require minor sources to obtain a permit prior to construction. These Minor NSR programs cover all NAAQS through a broad definition of the term "air contaminants." The EPA's approvals are codified at 40 CFR 52.220 and have not

been removed or replaced. Some local program rules have been updated; a table of those rules and their citations is included in the docket for this rulemaking.³⁸ Because all districts in California continue to have approved minor source permit programs, the EPA proposes to approve the 2018 Infrastructure SIP for the Minor NSR requirements of element C.

4. CAA Section 110(a)(2)(D)—Interstate and International Air Pollution

a. Statutory and Regulatory Requirements

The requirements of CAA section 110(a)(2)(D) can be broken down into six sub-elements. The EPA refers to the first four of these sub-elements as "prongs." Prongs 1 and 2, which include the requirements of CAA section 110(a)(2)(D)(i)(I), prohibit emission sources from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state. The EPA is not evaluating California's 2018 Submittal against those requirements at this time and will propose action on the interstate transport requirements for the 2015 ozone NAAQS in a separate notice.

CAA section 110(a)(2)(D)(i)(II) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required of any other state to prevent significant deterioration of air quality (Prong 3) or from interfering with measures required of any other state to protect visibility in Class I areas (Prong 4). The EPA's 2006 Transport Guidance states that the requirements of interstate transport Prong 3 may be met by the state's confirmation in a SIP submission that major sources and major modifications in the state are subject to PSD and nonattainment NSR programs that implement the relevant standards.³⁹ The EPA's subsequent guidance memos rely or expand upon the legal and technical rationale presented in the 2006 Transport Guidance.⁴⁰

Therefore, to meet the requirements of Prong 3 in section 110(a)(2)(D)(i)(II) regarding measures to prevent significant deterioration of air quality, states may submit infrastructure SIPs confirming that major sources and major modifications in the state are subject to comprehensive EPA-approved PSD programs and nonattainment NSR programs that address the NAAQS

³⁶ 81 FR 18766 at 18772 (April 1, 2016).

³⁷ These sources are cogeneration and resource recovery projects, projects with stack heights greater than 65 meters or that use "dispersion techniques" as defined in 51.100 (which are major sources or major modifications under 52.21), and sources for which the EPA has issued permits under 52.21 for which applications were received by July 31, 1985.

³⁸ EPA Region IX, Spreadsheet of California Minor NSR Programs.

³⁹ 2006 Transport Guidance, 6.

⁴⁰ 2009 Infrastructure SIP Guidance, 4–5, and 2013 Infrastructure SIP Guidance, 30–32.

³⁵ California Infrastructure SIP Overarching Technical Support Document, U.S. EPA, Region 9 (September 2014).

pollutants for areas of the state that have been designated nonattainment. States waiting for EPA action on their nonattainment NSR programs may implement 40 CFR part 51 Appendix S to meet this infrastructure SIP requirement.

Prong 4 of section 110(a)(2)(D)(i)(II) prohibits emissions activity within one state from interfering with measures required in another state to protect visibility. In the 2013 Infrastructure SIP Guidance, the EPA indicates that states can meet the requirements of Prong 4 by having an approved SIP that fully meets the EPA's regulations for regional haze.

The fifth and sixth sub-elements under 110(a)(2)(D) concern the interstate pollution abatement requirements of CAA section 126 and the international transport requirements of CAA section 115. In the EPA's 2013 Infrastructure SIP Guidance, the EPA states that this sub-element is satisfied when an infrastructure SIP ensures compliance with the applicable requirements of CAA sections 126(a), 126(b) and 126(c), and 115.

b. Summary of the State's Submission

For Prong 3, California states in its 2018 submittal that the requirement to prevent states from interfering with the ability of other states to prevent significant deterioration of air quality can be satisfied by SIP-approved PSD programs and SIP-approved nonattainment NSR programs. CARB states that, as described in the submission for element C, 14 districts have SIP-approved PSD programs. However, as noted earlier in this notice, only 13 districts have SIP-approved PSD programs. CARB also notes that many districts in California have SIP-approved nonattainment NSR programs. For Prong 4, CARB states that the EPA fully approved California's Regional Haze SIP in June 2011.⁴¹

For the requirements of 110(a)(2)(D)(ii) concerning interstate pollution abatement and international transport, CARB states in its submittal that no CAA 126 petitions have been filed by other states against California regarding emissions from any source or group of stationary sources that cause or would cause or contribute to violations of the NAAQS in the petitioning state. With respect to the international pollution abatement provisions of CAA section 115, CARB states that the EPA Administrator has not made any findings that California causes or contributes to air pollution in a foreign country that may reasonably be

anticipated to endanger public health or welfare.

c. The EPA's Review of the State's Submission

In the 2013 Infrastructure SIP Guidance, the EPA explains its interpretation of Prong 3 "to mean that the infrastructure SIP submission should have provisions to prevent emissions of any regulated pollutant from interfering with any other air agency's comprehensive PSD permitting program, in addition to the new or revised NAAQS that is the subject of the infrastructure submission." It also notes that, since nonattainment NSR requirements are due after infrastructure SIPs for new and revised NAAQS, "a fully approved nonattainment NSR program with respect to any previous NAAQS may generally be considered by the EPA as adequate for purposes of meeting the requirement of prong 3 with respect to sources and pollutants subject to such program." Because all districts in California are in attainment for at least one NAAQS, a SIP-approved PSD program is necessary to meet the requirements of Prong 3. In areas that are nonattainment for any NAAQS, a prior SIP-approved nonattainment NSR program is also required. A spreadsheet listing the attainment status of all California air districts for all NAAQS is included in the docket for this rulemaking.⁴²

To determine whether California meets the Prong 3 requirements, we analyzed the attainment status of each district for all NAAQS to determine whether they are required to have SIP-approved PSD programs, SIP-approved nonattainment NSR programs, or both.

Nine districts have both SIP-approved PSD programs and SIP-approved nonattainment NSR programs: Bay Area, Butte, Eastern Kern, Feather River, Imperial, Placer, San Joaquin, Ventura, and Yolo-Solano. San Luis Obispo has a SIP-approved PSD program and submitted a 2008 ozone nonattainment NSR rule that has not yet been approved by the EPA, so the district relies on 40 CFR part 51 Appendix S for permitting of sources that emit ozone precursors.⁴³ We propose to fully approve these 10 districts for the requirements of element D, Prong 3.

Three additional districts, Great Basin, Monterey Bay, and Santa Barbara, have SIP-approved PSD programs.

⁴² EPA Region IX, Spreadsheet of Nonattainment Areas in California Air Districts.

⁴³ Letter dated September 25, 2019, from Dora K. Drexler, Manager, Engineering & Compliance Division, San Luis Obispo County Air Pollution Control District, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

Monterey Bay and Santa Barbara are in attainment with all NAAQS, so their PSD programs alone are sufficient to meet the requirements of Prong 3. Great Basin is a nonattainment area for PM₁₀ that has a previously approved nonattainment NSR program, which satisfies the requirements of Prong 3. We propose to fully approve these three districts for the requirements of element D, Prong 3.

Twelve districts have SIP-approved nonattainment NSR programs or are using Appendix S, but do not have a SIP-approved PSD program covering all pollutants. These districts are Amador,⁴⁴ Antelope Valley, Calaveras, El Dorado, Mariposa,⁴⁵ Mojave Desert, Northern Sierra,⁴⁶ Sacramento Metro, San Diego, South Coast, Tehama,⁴⁷ and Tuolumne.⁴⁸ We propose to partially disapprove these 12 districts for the PSD requirements of element D, Prong 3. Because these districts already implement the EPA's PSD FIP, there are no further consequences and no further FIP obligations on the EPA.

Ten districts are in attainment for all NAAQS and have no SIP-approved PSD programs in place. These districts are Colusa, Glenn, Lake, Lassen, Mendocino, Modoc, North Coast, Northern Sonoma, Shasta, and Siskiyou. Because these districts are not nonattainment for any NAAQS, nonattainment NSR requirements do not apply. However, because these districts all implement the EPA's PSD FIP, they do not meet the PSD requirements of element D, Prong 3. We propose to partially disapprove these districts for element D, Prong 3. Because these districts implement the EPA's PSD FIP, no further FIP obligation applies.

The requirements of Prong 4 relate to the Regional Haze Rule. The EPA previously approved California's most recent SIP submittal for Regional Haze.⁴⁹ As noted in the EPA's 2013 Infrastructure SIP Guidance, an

⁴⁴ Letter dated September 17, 2019, from Jim McHargue, Air Pollution Control Officer, Amador Air District, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

⁴⁵ Letter dated August 23, 2019, from Eric Sergienko, Director, Mariposa County Air Pollution Control District, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

⁴⁶ Letter dated August 27, 2019, from Gretchen Bennett, Executive Director, Northern Sierra Air Quality Management District, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

⁴⁷ Letter dated September 27, 2019, from Joseph Tona, County of Tehama Air Pollution Control District, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

⁴⁸ Letter dated November 4, 2019, from Kelle Schroeder, Air Pollution Control Officer, County of Tuolumne, to Gerardo Rios, Chief, Air Permits Office, EPA Region IX.

⁴⁹ 76 FR 34608 (June 14, 2011).

⁴¹ 76 FR 34608 (June 14, 2011).

approved Regional Haze submittal meets the requirements for Prong 4. We therefore propose to approve the 2018 Infrastructure SIP for the Prong 4 requirements of CAA section 110(a)(2)(D)(i)(II).

With respect to the requirement in CAA section 110(a)(2)(D)(ii) regarding compliance with the applicable requirements of section 126 relating to interstate pollution abatement, we note that the requirements of section 126(b) and (c), which pertain to petitions by affected states to EPA regarding sources violating the interstate transport provisions of CAA section 110(a)(2)(D)(i), do not apply to our action because there are no such pending petitions relating to California. We therefore concur with California in this regard and have evaluated its 2018 Submittal only for purposes of compliance with CAA section 126(a).

Section 126(a) of the CAA requires that each SIP require that proposed, major new or modified sources, which may significantly contribute to violations of the NAAQS in any air quality control region in other states, to notify all potentially affected, nearby states. Many of California's 35 permitting jurisdictions (*i.e.*, air districts) have SIP-approved PSD permit programs that require notice to nearby states consistent with the EPA's relevant requirements. Specifically, the following air districts meet the requirements of CAA section 126(a): Bay Area, Butte, Eastern Kern, Feather River, Imperial, Placer, San Joaquin, Ventura, Yolo-Solano, San Luis Obispo, Great Basin, Monterey Bay, and Santa Barbara. We are proposing partial approval of the 2018 Infrastructure SIP for these districts for the requirements of CAA 110(a)(2)(D)(ii).

The remaining air districts do not have fully SIP-approved PSD programs covering all pollutants. Thus, California remains deficient with respect to the PSD requirements in part C, title I of the Act and with respect to the requirement in CAA section 126(a) regarding notification to affected, nearby states of major new or modified sources proposing to locate in these remaining air districts. We are proposing partial disapproval of the 2018 Infrastructure SIP for the requirements of 110(a)(2)(D)(ii) for Amador, Antelope Valley, Calaveras, Colusa, El Dorado, Glenn, Lake, Lassen, Mariposa, Mendocino, Modoc, Mojave Desert, North Coast, Northern Sierra, Northern Sonoma, Sacramento Metro, San Diego, Shasta, Siskiyou South Coast, Tehama, and Tuolumne air districts. These deficiencies are, however, adequately addressed with respect to all regulated

NSR pollutants in such air districts by the Federal PSD program in 40 CFR 52.21 and no further action is required. For these reasons, we propose to find that the California SIP partially meets, and partially does not meet the requirement in CAA section 110(a)(2)(D)(ii) regarding compliance with the applicable interstate pollution abatement requirements of CAA section 126.

Section 115 of the CAA authorizes the EPA Administrator to require a state to revise its SIP when certain criteria are met and the Administrator has reason to believe that any air pollutant emitted in the United States causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country. The Administrator may do so by giving formal notification to the governor of the state in which the emissions originate. Because no such formal notification has been made with respect to emissions originating in California, as noted in California's 2018 Submittal, the EPA has no reason to approve or disapprove any existing state rules with regard to CAA section 115. Therefore, we propose to find that the existing California SIP is sufficient to satisfy the requirement in CAA section 110(a)(2)(D)(ii) regarding compliance with the applicable requirements of section 115.

5. CAA Section 110(a)(2)(E)—Resources, Authority, and Oversight

a. Statutory and Regulatory Requirements

Section 110(a)(2)(E) of the CAA requires SIPs to provide (i) necessary assurances that the state (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the state or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under state (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of federal or state law from carrying out such implementation plan or portion thereof), (ii) requirements that the state comply with the requirements regarding state boards under section 128, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision.

In the 2013 Infrastructure SIP Guidance, the EPA states that, in order

to meet the requirements of subelement (i) of 110(a)(2)(E) of the CAA, infrastructure SIP submittals should identify the organizations involved in developing, implementing, and enforcing EPA-approved SIP provisions for the relevant NAAQS, and describe their responsibilities. It also states that submittals should explain how resources, personnel, and legal authority are adequate to meet any changes in resources requirements that may be needed to meet the new or revised NAAQS.

In order to address the requirements of subelement (ii) regarding state boards under section 128, the provisions that implement section 128 need to be approved into the SIP. These provisions apply to any board or body that has responsibility for approving permits or enforcement orders or has authority to hear appeals of permits or enforcement orders. Specifically, such boards or bodies must have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to CAA permits or enforcement orders. In addition, any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers must be adequately disclosed. The EPA has previously approved California provisions that address these conflict of interest requirements⁵⁰ and is evaluating updates to those provisions in this submittal.

In order to meet subelement (iii), states that have authorized local or regional agencies to implement SIPs must provide necessary assurances that the state air agency retains responsibility for adequate SIP implementation of the relevant NAAQS, in this case the 2015 ozone NAAQS.

b. Summary of the State's Submission

Regarding legal authority, CARB's 2018 Infrastructure SIP cites HSC sections 39600 and 39602, which designate CARB as the authority responsible for all air pollution control purposes set forth in federal law. CARB also notes that HSC 39002 provides CARB authority to implement control activities in areas where local or regional authorities fail to meet their responsibilities under state law. In previous submittals, CARB also described various HSC provisions that give the state authority to regulate mobile sources, as well as provisions that give districts the authority to regulate stationary sources and

⁵⁰ 81 FR 18766 (April 1, 2016).

provisions that give other agencies, such as the California Department of Pesticide Regulation, the authority to regulate other sources, such as pesticides.⁵¹

Regarding funding and personnel, California states that “the 2017–2018 CARB and district budgets totaled over \$2.2 billion, with more than 3,600 full-time equivalent staff positions.” It explains that the state legislature approves CARB’s budget and staff resources every year and that district governing boards approve local air district budgets. CARB has the opportunity to present annual budget requests to meet the requirements of the CAA through the legislative budget process. While CARB cannot predict future levels of funding, it notes that CARB’s programs are mandated, that the agency has been funded through state appropriations for three decades, and that the Budget Act of 2018 included \$1.370 billion for CARB at the time of submission.

CARB notes that a majority of its budget and district budgets go toward meeting CAA requirements. It also explains that fees from regulated entities make up a portion of CARB’s budget and can only be used for air pollution control. Revenues from fees and taxes related to motor vehicles are also deposited into an account at the state level and are required to be used for mitigation of air and sound emissions from motor vehicles. At the district level, funding also comes from fees from regulated entities, motor vehicle registration fees, grants, and other sources.

Regarding conflict of interest provisions, California’s 2018 Submittal explains that Government Code (GC) 82048(a) and California Code of Regulations (CCR), Title 2, section 18700 define “public officials” and “members” of state or local government to include any “individual who performs duties as part of a committee, board, commission, group, or other body” that possesses “decisionmaking authority”, including by making “a final government decision.” CARB further explains that this broad definition encompasses the members of hearing boards and local district boards, as well as air pollution control officers, who approve permits or enforcement orders in California.

CARB also states that, under CCR, Title 2, section 18700, public officials may not make, participate in or influence decisions in which they have

a foreseeable material financial interest. This financial interest in a decision is defined in GC section 87103 as a material effect on the public official, or his or her immediate family, that is distinguishable from the financial effect on the public. According to the state, “section 87103 also provides that a public official has a financial interest in a decision if it involves: a business or property in which they have \$2,000 or more invested; any source of income amounting to \$500 or more within a year; any business where they are a director, officer, trustee, employee, or manager; or any donor who has given them \$250 or more within a year.”⁵² CARB goes on to note that GC section 87302 creates requirements for board members to file disclosures of economic interests in order to disclose potential conflicts of interest. This includes the regular filing of Form 700 statements, which are made public.

In its 2018 Infrastructure SIP, CARB updated some of the conflict of interest statutes that were previously submitted to the EPA. Specifically, CCR, Title 2, section 18700 was changed to incorporate certain conflict of interest requirements contained in the version of section 18701 that was approved into the SIP in our 2016 action on California’s multi-pollutant Infrastructure SIP.⁵³ Corresponding parts of section 18701 were also removed.⁵⁴ CARB’s 2018 submittal included the revised text of both sections 18700 and 18701.

c. The EPA’s Review of the State’s Submission

California’s 2018 Infrastructure SIP provides assurance that the agencies charged with implementing federal clean air requirements have the necessary authority and resources to do so. The EPA has previously determined that these authorities comply with 40 CFR 51.240,⁵⁵ and we find that they continue to do so. While California’s Infrastructure SIP Submittals do not provide specific personnel and funding figures for each of the state and district air agencies, the 2017–2018 total figures of \$2.2 billion with over 3,600 full-time equivalent staff positions represent a very large investment towards fulfilling state and federal clean air requirements and goals. The state also describes

funding that comes from the legislature, fees, state and federal grants in its submittal. We conclude that the information on funding levels and sources, as well as personnel levels, are a fair representation of the state’s resources and provide the necessary assurance of adequate funding and personnel to implement the 2015 ozone NAAQS. Therefore, we propose to find that California’s 2018 Submittal meets the resource- and authority-related requirements of CAA section 110(a)(2)(E)(i).

California’s SIP submission includes GC statutes and California CCR provisions that impose the requirements mandated by CAA section 128. The EPA previously approved several versions of these provisions into the SIP when it took final action on California’s multi-pollutant infrastructure SIP submittal in 2016.⁵⁶

In addition to referencing three provisions that the EPA relied upon in its final approval of California’s conflict of interest requirements in 2016, the State has also included an updated version of CCR, Title 2, section 18700, which maintains the key provisions of that section and also incorporates language in CCR, Title 2, section 18701 that the EPA previously approved into the SIP. We are proposing to approve the updated versions of CCR, Title 2, sections 18700 and 18701 into the SIP. These updated provisions continue to meet the conflict of interest requirements of CAA sections 110(a)(2)(E)(ii) and 128.

In our final approval of California’s conflict of interest requirements in 2016, the EPA concurred with California’s interpretation that “those who approve permits or enforcement orders within California . . . are ‘public officials’” and, by extension, that permits and enforcement orders fall within the meaning of “governmental decision.”⁵⁷ The revised provisions of CCR, Title 2, section 18700(a) continue to define public officials’ disqualifying financial interests based on reasonably foreseeable material financial effects. The revised section 18700 also continues to refer to section 18703 to define specific levels of financial interest and income that would constitute a disqualifying financial

⁵⁶ The provisions that were previously approved into the SIP in 2016, which remain in the SIP and form part of the basis of our proposed approval of California’s 2015 Ozone SIP submission for the conflict of interest requirements in CAA sections 110(a)(2)(E)(ii) and 128, include California Government Code sections 82048, 87103, and 87302.

⁵⁷ California Infrastructure SIP Conflict of Interest Technical Support Document, U.S. EPA, Region 9 (September 2014).

⁵¹ California Infrastructure SIP Overarching Technical Support Document, U.S. EPA, Region 9 (September 2014).

⁵² California’s 2018 Submittal, 17.

⁵³ 81 FR 18766 (April 1, 2016).

⁵⁴ See technical clarification dated March 21, 2019, from Matthew Densberger, CARB, to Panah Stauffer, EPA Region IX. Subject: California iSIP Conflict of Interest Provisions.

⁵⁵ California Infrastructure SIP Overarching Technical Support Document, U.S. EPA, Region 9 (September 2014).

interest for a public official. In addition, these limitations on a public official's actions continue to be on-going, and a public official must abide by them throughout his or her time as a public official. Thus, the requirements of the revised section 18700 apply in such a way that a board that acts on permits and/or enforcement orders may never have a majority of persons that have a conflict of interest. We find that the revised provisions of section 18700 meet the requirements of CAA section 128(a)(1).

The requirements for disclosure in GC section 87302 have not changed and continue to meet the requirements of CAA section 128(a)(2). GC 87302 creates requirements for the conflict of interest codes for local agencies, which must include initial and annual disclosures of financial interests. Air districts may have their own agency conflict of interest codes or may be governed by the conflict of interest provisions in their county administrative codes, depending on the geographic jurisdiction of the district. For example, San Joaquin Valley APCD has its own conflict of interest code that incorporates by reference the state conflict of interest regulations.⁵⁸ This and other air district codes identify which officials are required to file under the conflict of interest provisions. Those officials include district governing board members, hearing board members, and certain employees. In addition, governing boards may be mostly or entirely composed of elected officials, such as county supervisors and city councilmembers. Such officials are specifically required to disclose financial interests in the process of campaigning and being elected to those offices by GC 87200. The statewide statutes and regulations governing conflicts of interest ensure that air district boards and employees disclose their financial interests.

Therefore, we propose to find that GC sections 82048, 87103, and 87302, in combination with the updated version of CCR, Title 2, section 18700, are adequate to meet the requirements of CAA section 128. We also propose to approve the updated versions of CCR, Title 2, section 18700 and CCR, Title 2, section 18701 into the SIP to replace the previous versions of CCR, Title 2, sections 18700 and 18701.

Regarding oversight of local agencies, pursuant to CAA section 110(a)(2)(E)(iii), HSC section 41500(c)

requires CARB to review air district enforcement programs and determine whether "reasonable action is being taken to enforce their programs, rules, and regulations." In turn, if CARB finds that a district is not taking reasonable action, HSC section 41505 grants CARB the authority, after public hearing, to exercise the district's powers to achieve and maintain the state and federal ambient air quality standards. These provide the necessary assurances that, where the State has relied on the air districts, CARB retains responsibility for ensuring adequate implementation of the SIP. We propose to find that HSC sections 41500(c) and 41505 provide the State with adequate oversight authority as required under CAA section 110(a)(2)(E)(iii) and 40 CFR 51.232(b)(2).

6. CAA Section 110(a)(2)(F)—Stationary Source Monitoring and Reporting

a. Statutory and Regulatory Requirements

CAA section 110(a)(2)(F) requires: (i) The installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the CAA, which reports shall be available at reasonable times for public inspection.

Pursuant to 40 CFR 51.212, SIPs must provide for periodic testing and inspection of stationary sources as well as enforceable test methods for emission limits. In addition, plans must not preclude the use of credible evidence of compliance to establish whether emission standards have been violated. To meet these requirements, in the 2013 Infrastructure SIP Guidance the EPA indicates that SIP submissions should describe the air agency programs for source testing, reference the statutory authority for the air agency program, and certify the absence of any provision preventing the use of any credible evidence.

In addition, 40 CFR 51.211, 40 CFR 51.321–51.323, the EPA's Air Emissions Reporting Rule, and 40 CFR 51.45(b) establish requirements for states to receive emissions reports from stationary sources and to submit periodic emission inventory reports to the EPA. In the 2013 Infrastructure SIP Guidance, the EPA notes that all states have existing periodic source reporting and emission inventory practices, so

submittals may be able to certify existing air agency reporting authority and requirements.

Finally, 40 CFR 51.116 creates requirements for correlating source emissions reports with emission limitations or standards based on applicable test method(s) or averaging period(s). In the 2013 Infrastructure SIP Guidance, the EPA explains that submittals should reference or include air agency requirements that provide for correlation between estimated emissions and allowable emissions, as well as the public availability of emission reports by sources.

b. Summary of the State's Submission

In its 2018 submittal, CARB states that local districts are responsible for developing stationary source emission monitoring and reporting requirements. It cites HSC section 4001(a), which requires districts to adopt and enforce regulations to maintain federal ambient air quality standards, and HSC section 41511, which gives the state board and the district authority to require stationary source owners to determine the amount of emissions from their sources. For testing and inspection of stationary sources, California notes that districts have the authority to conduct inspections and take samples under HSC section 41510. Although CARB does not certify the absence of any provision preventing the use of credible evidence in its 2018 submittal, it notes that credible evidence includes the data from stationary source emission monitoring rules.⁵⁹

CARB says in its 2018 submittal that districts typically fulfill the stationary source monitoring requirements by adopting regulations that establish emission limits and reporting requirements, including the requirements under the Air Emissions Reporting Requirements (AERR) Rule. Under these rules, stationary source owners and operators must determine the amount of pollutants emitted by their facilities. CARB explains that these rules may be incorporated into the SIP after they are adopted by the districts. California's submittal includes a table of examples of SIP-approved local district rules that fulfill federal monitoring and reporting requirements.⁶⁰ These rules all require continuous emissions monitoring systems (CEMS) at stationary sources and include requirements for stationary sources to report their emissions or to maintain

⁵⁸ https://www.valleyair.org/Board_meetings/GB/agenda_minutes/Agenda/2019/August/final/18.pdf and https://www.valleyair.org/Board_meetings/GB/agenda_minutes/Agenda/2019/June/final/25.pdf (last visited on September 14, 2020).

⁵⁹ California's 2018 Infrastructure SIP, 18–19.

⁶⁰ California's 2018 Infrastructure SIP, 20.

emissions data and make them available to the local air district on request.

CARB goes on to explain that, while some districts have rules that cover both monitoring and reporting, others have separate requirements for stationary source reporting. A second table in the submittal⁶¹ provides examples of SIP-approved stationary source reporting rules. These rules range from requiring sources to provide written emissions statements to the local air district to making daily air monitoring data public.

In addition to the rules listed in the tables in the submittals, California's submittal includes links to two online databases. The first is California's District Rules Database,⁶² which has stationary source rules for all districts; the rules in this online database may be SIP-approved. The second is the EPA's website listing state rules that have been approved into the SIP.⁶³

For correlation of stationary source emission reports with applicable emission limits, California refers again to its overarching authorities in HSC section 41511. The state explains that all 35 local air districts in California address the correlation requirements through their programs for stationary source testing, inspection, and compliance. For example, some air districts have rules that require CEMS equipment. Those rules require sources to assess compliance with applicable emission limits and may include calculation procedures to correlate emissions with the applicable emission standards. CARB states that some air districts have SIP-approved rules that closely mirror the language of 40 CFR 51.116(c), such as Mendocino County AQMD Rule 240(e)(3) ("Permit to Operate—Compliance Verification") and Great Basin Unified APCD Rule 215(D) ("Public Availability of Emissions Data"). Finally, it states that all California air districts have federally-approved Title V operating permit programs wherein each permit specifies the air pollution requirements that apply to the permitted source, including those for emission limits, monitoring, recordkeeping, and reporting.

CARB explains that it is responsible for compiling stationary source emissions data from the districts and reporting it to the EPA. The submittal includes a link to CARB's internet Facility Search Tool, which allows the

public to search for facilities' emissions of criteria and toxic pollutants. CARB notes that California's emissions inventory includes information from over 14,000 stationary sources and requires sources to report at rates lower than the federal AERR's reporting thresholds. The emissions inventory is relevant to all federal criteria pollutant standards, including the 2015 ozone standard.

c. The EPA's Review of the State's Submission

California presents information in its 2018 Infrastructure SIP on the state's and districts' overarching authorities to adopt rules and regulations to determine emissions from stationary sources, specify recordkeeping and reporting requirements, assess compliance with emission limits and permit conditions, and make such data available to the public. The submittal also references databases of specific stationary sources within California, and representative examples of SIP-approved regulations that require stationary source monitoring, reporting, and correlation of emission limits with applicable emission limits and permit conditions. We find that the example SIP-approved rules cited in California's 2018 Infrastructure SIP submittal are representative of the State as a whole. Therefore, we propose to find that the overarching authorities and SIP-approved regulations provide an adequate basis to conclude that California meets the requirements of CAA section 110(a)(2)(F), as discussed below.

The underlying California statutes that provide authority for CARB and the air districts to adopt rules and regulations to determine emissions from stationary sources, specify recordkeeping and reporting requirements, assess compliance with emission limits and permit conditions, and make such data available to the public include HSC sections 40001(a), 41510, and 41511. CARB maintains an extensive online database of stationary sources and a means for the public to filter emissions data by air basin, county, or source category via a facility search engine on its website.⁶⁴

In reviewing SIP-approved regulations for stationary source monitoring and reporting, we primarily reviewed the examples provided in California's 2018 Submittal and present our evaluation for each of the three sub-elements of section

110(a)(2)(F) as follows. For section 110(a)(2)(F)(i), California's 2018 Submittal cites several rules that require stationary source monitoring, especially for CEMS on applicable equipment. For instance:

- Placer County APCD Rule 233, section 500 requires CEMS for NO_x emissions from biomass boilers;
- Santa Barbara County APCD Rule 328(C) requires continuous emissions monitoring for NO_x, SO₂, and opacity from fossil fuel-fired steam generators, for NO_x from nitric acid plants, and for SO₂ from sulfuric acid plants, for SO₂ from certain fluid bed cokers, for SO₂ from CO boilers of regenerators of fluid bed catalytic cracking units, and for SO₂ and opacity from fluid bed catalytic cracking units;
- South Coast AQMD Rule 1146 requires boilers, steam generators, and process heaters equal to or greater than 5 million British thermal units per hour to install CEMS for ammonia emissions; and
- San Joaquin Valley APCD Rule 4354, section (5.9) requires CEMS for emissions of NO_x, VOCs, and SO_x from glass melting furnaces under certain conditions.

We propose to find that these and other examples in the California SIP are consistent with the stationary source monitoring requirement of CAA section 110(a)(2)(F)(i).

With respect to CAA section 110(a)(2)(F)(ii), California's 2018 Submittal provides examples of SIP-approved regulations for several districts that require reporting of stationary source emissions data. For example:

- Bay Area Regulation 2, Rule 1–429 requires permitted sources that may emit VOC or NO_x and subject to the Rule to provide the District a written statement showing actual emissions from the source,
- Santa Barbara County APCD Rule 212 requires sources permitted to emit 10 tons per year (tpy) or more of NO_x or reactive organic compounds (ROG, or VOC) to annually report actual emissions of NO_x or VOC in writing to the air district,
- San Diego County APCD Rule 19.3, section (c)(3) similarly requires annual reporting by sources emitting 25 tpy or more of NO_x or VOC in writing to the air district, and
- South Coast AQMD Rule 1420.1, sections (m) and (n) set requirements for large lead-acid battery facilities to monitor lead (Pb) emissions, report them to the district, and retain records of emissions.

We propose to find that these examples and others in the California

⁶¹ Id. at 22.

⁶² <https://www3.arb.ca.gov/drdb/drdb.htm> (last visited on September 14, 2020).

⁶³ <https://www.epa.gov/air-quality-implementation-plans/approved-air-quality-implementation-plans-region-9?readform&count=100&state=California> (last visited on September 14, 2020).

⁶⁴ <https://www.arb.ca.gov/app/emsinv/facinfo/facinfo.php?ga=2.153745848.1835329346.1588725854-1437116183.1580401972> (last visited on September 14, 2020).

SIP provide for periodic reports on the nature and amount of emissions from applicable stationary sources, consistent with CAA section 110(a)(2)(F)(ii).

With respect to CAA section 110(a)(2)(F)(iii), California points to SIP-approved rules that require emission data from stationary source owners or operators to be correlated with applicable emission limitations and control measures and for that information to be available to the public during normal business hours at the district offices. For example, Mendocino County AQMD Rule 1–240(e)(3) and Great Basin Unified APCD Rule 215(D) track the language of 40 CFR 51.116(c) by requiring that emissions data will be correlated with applicable emission limits and other control measures and be made publicly available. California's online database includes a facility search engine, which makes emissions information publicly available for correlation. Therefore, based on the extent of the source categories and sizes that are required to report emissions, California's publicly available emissions databases, and the examples of SIP-approved rules requiring correlation of reported emissions with emission limitations, we propose to find that the California SIP meets the correlation and public availability requirements of CAA section 110(a)(2)(F)(iii).

7. CAA Section 110(a)(2)(G)—Emergency Powers and Contingency Plans

a. Statutory and Regulatory Requirements

Section 110(a)(2)(G) of the CAA requires infrastructure SIPs to “provide for authority comparable to that in [CAA section 303],” which reads as follows:

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is

based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

In the 2013 Infrastructure SIP Guidance, the EPA states that the best practice for states is to submit, for inclusion in the SIP, the statutory or regulatory provisions that provide authority comparable to CAA section 303 or to cite and include a copy of such provisions, without including them in the SIP, with a narrative of how they meet the requirements of section 110(a)(2)(G). The guidance also clarifies that contingency plans should be submitted for approval into the SIP (if not already in the SIP) for regions classified Priority I, IA, or II (Priority II applies only to the sulfur dioxide and particulate matter NAAQS).

The air quality thresholds for classifying air quality control regions (AQCRs) are prescribed in 40 CFR 51.150 and are pollutant-specific (e.g., ozone) rather than being specific to any given NAAQS (e.g., 1997 ozone NAAQS). For ozone, an AQCR with a 1-hour ozone level greater than 0.10 ppm over the most recent three-year period must be classified Priority I. If the ozone levels in an AQCR are primarily due to a single point source, it is classified as Priority IA. All other ozone areas are classified Priority III. Pursuant to 40 CFR 51.151 and 51.152, AQCRs that are classified Priority I or IA for ozone are required to have SIP-approved emergency episode contingency plans, while those classified Priority III are not required to have such plans. The purpose of emergency episode contingency plans is to ensure that the regions “provide for taking action necessary to prevent ambient pollutant concentrations” from reaching the significant harm levels defined in 40 CFR 51.151. For ozone, the significant harm level is 0.6 ppm for a 2-hour average.

Under 40 CFR 51.152 emergency episode contingency plans are required to specify two or more stages of episode criteria based on pollutant levels at any monitoring site. Plans must provide for public announcement whenever any episode stage has been determined to exist and must specify adequate emission control actions to be taken at each episode stage. Examples of adequate actions are provided in Appendix L to 40 CFR part 51.

In addition, 40 CFR 51.152 requires prompt acquisition of forecasts of atmospheric stagnation conditions and of updates of such forecasts as frequently as they are issued by the National Weather Service, inspection of sources to ascertain compliance with applicable emission control action requirements, and communications procedures for transmitting status reports and orders as to emission control actions to be taken during an episode stage. The provisions of 40 CFR 51.152(d) also allow the Administrator to exempt portions of Priority I regions that have been designated as attainment or unclassifiable for NAAQS such as the 2015 ozone standard.⁶⁵

b. Summary of the State's Submission

In the California 2018 Infrastructure SIP, the State requested that the EPA reclassify the Lake County, North Central Coast, and South Central Coast AQCRs from Priority III to Priority I based on hourly ozone data from 2015–2017.⁶⁶ Consistent with the provisions of 40 CFR 51.153, reclassification of AQCRs must rely on the most recent three years of air quality data. CARB states in its 2018 submittal that the remaining Priority III AQCRs remain Priority III for ozone. This means their ozone levels have not crossed the Priority I threshold for ozone based on the most recent three years of air quality data.

In its 2018 submittal, CARB identifies the air districts that fall within each AQCR in order to determine which districts need to develop emergency episode contingency plans. The Lake County AQCR includes the Lake County AQMD. The North Central Coast AQCR includes the Monterey Bay Air Resources District, which already has a SIP-approved emergency episode contingency plan. The South Central Coast includes the San Luis Obispo County APCD. CARB identifies Lake County AQMD and San Luis Obispo County APCD as needing to develop and submit emergency episode contingency plans for ozone based on the requested AQCR reclassifications.

In addition to the air districts identified above, five air districts in the Mountain Counties AQCR are identified in the 2018 plan as needing to develop and submit emergency episode

⁶⁵ This authority is delegated to the Regional Administrator based on Delegation 7–10 (“Approval/Disapproval of State Implementation Plans”), which grants Regional Administrators the authority to “propose or take final action on any State implementation plan under section 110 of the Clean Air Act.”

⁶⁶ EPA, Region IX, Spreadsheet of Air Quality Control Regions with Maximum 1-hour Ozone Values Over 100 ppb for 2015–2017.

contingency plans for ozone for the first time. These are Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD.

On June 25, 2020, CARB supplemented its 2018 Infrastructure SIP by submitting ozone emergency episode contingency plans for San Luis Obispo County APCD, Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD. It also submitted an exemption request from emergency episode planning requirements for Lake County AQMD based on that District's attainment status.

Pursuant to the requirements of 40 CFR 51.152, each of the emergency episode plans included in the submittal outlines three stages of an ozone emergency (*i.e.*, Alert, Warning and Emergency) based on monitored levels for the one-hour ozone concentration. For example, Amador, Western Nevada, Tuolumne, and Calaveras include an Alert stage of 0.20 ppm, a Warning stage of 0.40 ppm, and an Emergency stage of 0.50 ppm. At each episode stage, the plans provide actions to be implemented by the local air district, local offices of emergency services, local offices of education superintendents, local emitting facilities, and members of the public. These measures include prohibiting open burning, requesting that schools close, requesting that members of the public take mass transit instead of driving, and requesting that stationary sources emitting ozone precursors shut down. At the episode stages that include measures for stationary sources, the submitted plans also include provisions for inspection of those sources to make sure they are complying with the relevant plan requirements.

The emergency episode plans also provide for public announcement of these ozone emergency stages and communications procedures for transmitting status reports and orders during each episode stage. Each plan includes a list of government agencies, news media, facilities, and individuals who will be notified when any of the ozone emergency episode stages are reached. These lists include local county offices of emergency services, the county superintendents of education, outreach staff at the local air pollution control districts, and television and radio stations. The plans submitted to the EPA also account for acquiring forecasts from the National Weather Service, regional "Spare the Air" programs, and data generated internally by air districts for submission

to public air quality information resources such as the AirNow website.

The Lake County AQCR is made up of only one air district, the Lake County AQMD. In its 2018 submittal, CARB requests that this AQCR be reclassified to Priority I, and California's 2020 submittal includes an exemption request for Lake County from the emergency episode contingency planning requirements for ozone. The request is based on Lake County's attainment status and EPA discretion to exempt attainment areas from the emergency episode contingency planning requirements under 40 CFR 51.152(d)(1).

c. The EPA's Review of the State's Submission

In California's 2018 submittal, the State requests that three AQCRs be reclassified as Priority I for the purposes of requiring emergency episode contingency plans for ozone. In addition, it notes that 5 air districts in the Mountain Counties AQCR also met the threshold for Priority I ozone areas in the 2015–2017 time period. The air quality monitoring data for 2015–2017 indicates that the areas identified in the 2018 submission, along with the areas that have been previously classified as Priority I, are those that exceeded 0.10 ppm for 1-hour ozone measurements. In addition, the emissions inventory information provided in California's 2020 Submittal shows that the ozone levels in these areas are due to a mix of sources, including mobile sources, rather than to a single stationary source. On the basis of California's ambient air quality data for 2015–2017, we are proposing to grant California's requests to reclassify Lake County, North Central Coast, and South Central Coast to Priority I regions.

The ozone emergency episode contingency plans for San Luis Obispo County APCD, Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD meet the requirements of 51.152(a). Specifically, each plan specifies "two or more stages of episode criteria" and "adequate emission control actions to be taken at each episode stage". Each plan also provides for "public announcement whenever any episode stage has been determined to exist."

For example, Calaveras County APCD's ozone emergency episode contingency plan establishes three episode stages. At every stage, an emergency episode notification is prepared and sent to eight categories of recipients. These include the Calaveras County Health Officer, the Calaveras

County Office of Emergency Services, the Calaveras County of Education Superintendent, neighboring air pollution control districts, as well as major newspapers, television and radio stations and online services. Actions at the first stage, which corresponds to hourly ozone concentrations at or above 0.20 ppm, include prohibiting all open burning and requesting industrial permitted facilities to initiate control actions, including reducing or curtailing production. At stage 3, which corresponds to hourly ozone concentrations at or above 0.50 ppm, the plan specifies closing all non-emergency commercial and industrial facilities, all government facilities which are not immediately necessary for public health and safety, national security or national defense, and closing all recreational facilities. These closures would be implemented through the County Office of Emergency Services.

The ozone emergency episode contingency plans for San Luis Obispo County APCD, Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD also meet the requirements of 51.152(b). Specifically, they provide for "prompt acquisition of forecasts of atmospheric stagnation conditions and of updates of such forecasts as frequently as they are issued by the National Weather Service," as required by 40 CFR 51.152(b)(1). For example, the ozone emergency episode plan for Amador APCD explains that Amador APCD, Northern Sierra AQMD, Tuolumne APCD and Mariposa County APCD support the regional Spare the Air program in the Mountain Counties AQCR. This is "an air pollution forecasting program which provides notifications to the public on the daily ozone concentration forecasts, along with advisories with an episodic ozone reduction element, during the summer ozone season."⁶⁷ According to California's 2020 submittal, the Spare the Air program notifications include current ozone concentration measurements from all monitoring stations within the Mountain Counties Air Basin, and forecasts, based on the meteorological conditions from the National Weather Service advisories and local agencies.⁶⁸ The ozone emergency episode plan submitted for Calaveras County similarly discusses how the District participates in the same program, noting that the "District works cooperatively with CARB and neighboring counties on the daily burn

⁶⁷ California's 2020 submittal, 11.

⁶⁸ Id.

day information.” Tuolumne County APCD’s plan states that the District will “in coordination with the National Weather Service (NWS) Hanford and Sacramento forecast offices provide prompt notification of air quality forecasts to the public when atmospheric stagnation conditions would result in substantially high ozone concentrations.”⁶⁹ San Luis Obispo APCD’s plan describes how the district publishes 6-day air quality forecasts through its own website as well as the AirNow website, the EnviroFlash email program, the AirAware alerts text program, and through the National Weather Service’s communications.

Each of the district plans also provide for “communications procedures for transmitting status reports and orders as to emission control actions to be taken during an episode stage, including procedures for contact with public officials, major emission sources, public health, safety, and emergency agencies and news media”, as required by 40 CFR 51.152(b)(3). For example, the Northern Sierra AQMD notification list for each ozone emergency episode stage includes CARB, upwind and downwind districts, major newspapers, television and radio stations, regional Spare the Air programs, District permitted facilities, and District staff who do public outreach. The Tuolumne County APCD notification list for each ozone emergency episode stage includes CARB, the Tuolumne County Office of Emergency Services, the Tuolumne County Office of Education, adjacent air districts, as well as newspapers, television and radio stations, and online media.

Each of the district plans also provide for “inspection of sources to ascertain compliance with applicable emission control action requirements,” as required by 40 CFR 51.152(b)(2). For example, the Amador County APCD plan includes a provision to “[c]onduct on-site inspection of targeted facilities to ascertain accomplishment of applicable emission control actions” that applies beginning at the Alert (0.20ppm) stage.⁷⁰ The Northern Sierra AQMD plan states that it will “rely on both continuous emission monitoring technology and inspection to . . . ascertain compliance with applicable emission control action requirements during any ozone emergency episode stage . . .”⁷¹ Mariposa County APCD and Calaveras County APCD use similar language to Amador County in their plans. The Tuolumne County APCD

plan indicates the District will “strive to inspect those sources that represent the greatest contribution of ozone precursor emissions and will ascertain whether [they] are adhering to the applicable emission control action requirements specified in the Emergency Episode Actions.”⁷² The San Luis Obispo County APCD plan identifies the following action at each emergency episode stage: “If conditions do not threaten inspectors’ safety, confirm control actions have been implemented.”⁷³

The emergency episode contingency plans for ozone in California’s 2020 submittal for Amador County APCD, San Luis Obispo County APCD, Northern Sierra AQMD, Tuolumne County APCD, Mariposa County APCD, and Calaveras County APCD meet the requirements of 40 CFR 51.152(a) to specify two or more stages of episode criteria, provide for public announcement whenever any episode stage has been determined to exist, and to specify adequate emission control actions to be taken at each episode stage. These emergency episode contingency plans also meet the requirements of 40 CFR 51.152(b) to provide for prompt acquisition of forecasts of atmospheric stagnation conditions, to provide for inspection of sources to ascertain compliance with applicable emission control action requirements, and provide for communications procedures for transmitting status reports and orders as to emission control actions to be taken during an episode stage. We propose to approve these emergency episode contingency plans into the California SIP.

The other portion of California’s 2020 submittal is the exemption request for ozone emergency episode planning requirements for Lake County AQMD. The request is based on Lake County being in attainment for all ozone standards as well as all other NAAQS.⁷⁴ In this request, Lake County demonstrates the largely rural nature of the area and documents that the largest sources of ozone precursors in the county emit less than 50 tpy of each. Further, it notes that the highest 1-hour ozone concentration observed in the last 40 years has been 0.103 ppm.

Because of Lake County’s attainment status for ozone, it meets the criteria of 51.152(d)(1) that permit the Administrator to exempt those portions of Priority I regions which have been

designated as attainment under section 107 of the CAA. The mix of ozone precursor sources in the County, as well as the historical 1-hour ozone levels below 0.10 ppm make it unlikely that additional measures are needed to keep ozone pollution below the significant harm level of 0.6 ppm. We propose to approve the request to exempt the Lake County AQMD from emergency episode contingency planning requirements of 40 CFR 51.152.

8. CAA Section 110(a)(2)(H)—SIP Revisions

a. Statutory and Regulatory Requirements

Section 110(a)(2)(H) requires SIPs to “provide for revision of such plan—(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) except as provided in paragraph 110(a)(3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established” under this Act.

In the 2013 Infrastructure SIP Guidance, the EPA explains that states may comply with the requirements of element H by providing a reference or citation to the provisions that provide the air agency with authority to meet these requirements, along with a narrative explanation of how the provisions serve that function.

b. Summary of the State’s Submission

California states in its 2018 submittal that California has revised and will continue to revise its SIP as mandated by the EPA. It states that CARB is submitting a revised SIP for the 2015 ozone NAAQS and that CARB will continue to work with local districts to develop approvable SIPs as federal standards change, as new attainment methods become available, or as the EPA determines an existing SIP is inadequate. California’s 2018 Submittal also cites HSC section 39602 as designating CARB as the agency responsible for implementing the federal CAA, which includes responsibility for preparing and submitting revisions to the California SIP to address new or revised standards or improved methods of meeting the standards. CARB also states that HSC

⁶⁹ California’s 2020 Submittal, 67.

⁷⁰ California’s 2020 Submittal, 16.

⁷¹ Id. at 52.

⁷² Id. at 67.

⁷³ Id. at 35.

⁷⁴ EPA, Region IX, Spreadsheet of Nonattainment Areas in California Air Districts.

section 39602 gives it responsibility for revising the California SIP if the EPA finds the SIP inadequate. It states that CARB consults with the air districts and other affected entities in developing SIP revisions and receives public comments on SIP revisions before submitting them to the EPA.

c. The EPA's Review of the State's Submission

California's 2018 Infrastructure SIP describes the general capacity, commitment, and process of the State to submit SIP revisions as required. It cites the overarching statutory authority of CARB to implement the CAA, including submission of SIP revisions to address new and revised NAAQS and improved methods of meeting the NAAQS. We have reviewed the authority provisions of HSC section 39602 and considered the authority provisions analyzed under 110(a)(2)(E)(i) above. We propose to find that they provide for SIP revisions in response to NAAQS revisions or whenever the EPA Administrator finds the California SIP to be substantially inadequate to attain the NAAQS or does not comply with requirements established under the Act, and therefore meet the requirements of CAA section 110(a)(2)(H).

9. CAA Section 110(a)(2)(I)—Plan Revisions for Nonattainment Areas

CAA section 110(a)(2)(I) requires SIPs to “in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D (relating to nonattainment areas).”

While this section requires states to meet nonattainment area requirements, pursuant to CAA title I, part D, when submitting plans or plan revisions for nonattainment areas, the EPA has concluded that the submission of, and subsequent EPA action on, nonattainment SIP revisions by states is not governed by the three-year submission deadline identified in CAA section 110(a)(1). Instead, SIP revisions for nonattainment areas are due and evaluated under the requirements for nonattainment areas described in part D. Thus, we do not include a summary of California's response to this requirement nor an evaluation of such response.

10. CAA Section 110(a)(2)(J)—Consultation, Public Notification, Visibility Protection, and PSD

a. Statutory and Regulatory Requirements

Section 110(a)(2)(J) of the CAA requires SIPs to “meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to

public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection).”

Regarding the consultation portion of element J, in the 2013 Infrastructure SIP Guidance, the EPA explains that states may meet the requirements by showing that there is an established process for consultation with general-purpose local governments, designated organizations of elected officials of local governments, and any federal land manager having authority over federal land to which the plan applies. Submittals should also identify organizations that participate in plan development, implementation or enforcement under 40 CFR 51.240, and should include any related agreements among agencies to do this work.

CAA section 127 requires SIPs to contain measures to effectively notify the public during any calendar year on a regular basis of instances or areas in which any NAAQS is exceeded or was exceeded during any portion of the preceding calendar year; to advise the public of the health hazards associated with such pollution; and to enhance public awareness of the measures which can be taken to prevent such standards from being exceeded and the ways in which the public can participate in regulatory and other efforts to improve air quality. Such measures may include the posting of warning signs on interstate highway access points to metropolitan areas or television, radio, or press notices or information. In the 2013 Infrastructure SIP Guidance, the EPA indicates that state submittals can meet this portion of the requirement by showing the air agency regularly notifies the public of NAAQS exceedances and the associated health hazards, and that it makes the public aware of air quality measures and ways to participate in them.

In EPA's 2013 Infrastructure SIP Guidance, the EPA states that the PSD-related requirements of element J are the same as those of element C. For that reason, we refer to the 2018 state submittal and our evaluation of element C above for the PSD requirements of element J.

Regarding the visibility protection requirements of element J, the EPA's 2013 Guidance notes that the CAA visibility protection requirements do not change when the EPA issues a new or revised NAAQS. The guidance states that air agencies do not need to address visibility protection requirements in infrastructure SIP submissions.

b. Summary of the State's Submission

Regarding the consultation portion of element J, California's 2018 Submittal largely includes the same information as

prior infrastructure SIP submittals. It cites HSC section 39602, which designates CARB as the agency responsible for implementing the federal CAA and coordinating with local air districts.⁷⁵ CARB notes that the districts are governed by boards primarily composed of elected officials and that the districts also play a role in developing SIP provisions. It states that the air districts collaborate through workgroups under the California Air Pollution Control Officers Association (CAPCOA) to discuss air quality matters and that CAPCOA meets regularly with state and federal air quality officials to develop rules and ensure their consistent application. The submittal provides examples of the local, state, and federal stakeholders CARB works with in developing SIP revisions such as California's 2007 State Strategy for the 1997 ozone and 1997 PM_{2.5} NAAQS. These stakeholders include the metropolitan planning organizations (MPOs) and the regional transportation planning agencies (RTPAs) located throughout the State. The submittal also lists stakeholders, including federal land managers, with whom CARB consulted during the development of California's 2009 Regional Haze Plan, and describes how CARB coordinates with federal land managers and other agencies on an ongoing basis for Regional Haze planning. In addition, the submittal cites the public notification requirements for state regulations under the California Administrative Procedures Act as well as the public hearing requirements for district rules and regulations under HSC section 40725.

In California's 2018 Submittal, CARB also states that, once a SIP revision is submitted to the EPA, consultation is on-going. For example, CARB, the EPA, the California Environmental Protection Agency (CalEPA), and the South Coast and San Joaquin Valley air districts have signed a memorandum of agreement (MOA) committing to develop and test new air quality control technologies and creating the Clean Air Technology Initiative with the purpose of accelerating “progress in meeting current and future federal standards” in South Coast and San Joaquin Valley.⁷⁶ The submittal identifies another example of such consultation in CARB's memorandum of understanding (MOU) with Union Pacific and Burlington Northern Santa Fe railroads to reduce diesel emissions from rail yards.

Regarding public notification of exceedances of air quality standards, in

⁷⁵ California's 2018 Infrastructure SIP, 29.

⁷⁶ California's 2018 Infrastructure SIP, 34.

California's 2018 Submittal, CARB reiterates past submittals, referring to the requirements in HSC section 39607(a) for CARB to acquire and publicly report air quality data for each air basin in the State. CARB explains that it maintains both current and historical data online. CARB also notes that HSC 40718 requires CARB to publish maps online that show areas violating federal air quality standards.⁷⁷ In addition, the air districts provide daily information about local air quality levels online. Finally, the submittal cites several websites that contain information on the health effects of air pollution, current air quality, and what the public can do to reduce air pollution.⁷⁸

Regarding PSD requirements, California's 2018 Submittal refers to the PSD-approved programs described in element C. For visibility protection requirements, CARB notes the explanation in the EPA's 2013 Infrastructure SIP guidance that NAAQS revisions do not create new visibility protection requirements and points out that California has an approved Regional Haze SIP.⁷⁹

c. The EPA's Review of the State's Submission

Regarding the consultation requirements of element J, we have reviewed California's 2018 Submittal, and propose to find that it provides a satisfactory process of consultation, consistent with CAA section 121 and 40 CFR 51.240. In its submittal, CARB cites its overarching responsibility in HSC section 39602 to implement the CAA, including the requirement to coordinate the activities of all districts necessary to comply with the CAA. The districts are governed by boards comprised primarily of local elected officials. They also play a role in developing, implementing, and enforcing SIP provisions. CARB states that the air districts collaborate through workgroups under CAPCOA to discuss air quality matters and that CAPCOA meets regularly with state and federal air quality officials to develop rules and ensure their consistent application. California's submittal also provides examples of local government organizations, including MPOs, organizations of elected officials, and

federal land managers who are consulted during SIP development, and provides an example of an MOA among CARB, the EPA, CalEPA, San Joaquin Valley APCD, and South Coast AQMD. We propose to find that California's Infrastructure SIP meets the consultation requirement of CAA section 110(a)(2)(J).

In 1980, the EPA approved intergovernmental consultation procedures into California's SIP.⁸⁰ That SIP submittal fulfilled the requirements of 40 CFR 51.240, designating the local air districts as the lead agencies for the adoption, review, and periodic update of basin-wide air pollution control plans for submission to CARB. It also specified that the air districts will propose, adopt, implement, and enforce control measures concerning stationary sources within their jurisdictions. The "Chapter 25—Intergovernmental Relations"⁸¹ portion of that submittal included a MOU between CARB and Caltrans, the state transportation agency. The MOU outlined how the two agencies will work together on transportation controls in nonattainment air plans, on transportation plans and programs, and to ensure consistency of transportation plans, programs, and projects with the SIP. These provisions previously approved into the California SIP reinforce the consultation procedures described in California's recent SIP submittals.

With respect to the requirements of CAA section 127 and 40 CFR 51.285, California's 2018 Infrastructure SIP provides for adequate public notification. HSC section 39607(a) requires CARB to acquire and publicly report data on each air basin and HSC section 40718(a) requires CARB to publish maps of areas violating the NAAQS. In its 2018 submittal, CARB explains how it and the districts publish information online about air quality (including the current Air Quality Index), the health effects of air pollution, and what the public can do about air pollution. The submittal also describes the public hearing requirements applicable to CARB and the air districts. Thus, we propose to find that California's Infrastructure SIP Submittals meet the public notification requirements of CAA section 110(a)(2)(J).

As discussed above, when the EPA establishes or revises a NAAQS, the

visibility protection requirements under CAA title I, part C do not change and, therefore, there are no newly applicable visibility protection obligations pursuant to CAA section 110(a)(2)(J). We propose to find that California's Infrastructure SIP Submittals meets the visibility protection requirements of CAA section 110(a)(2)(J).

Regarding the PSD requirements of element J, we rely upon our earlier evaluation of the PSD portion of CAA section 110(a)(2)(C). For the 13 local air districts that have EPA-approved PSD programs, we are proposing to partially approve California's 2018 Infrastructure SIP. For the 22 local air districts that do not have EPA-approved PSD programs, we are proposing to partially disapprove California's 2018 Infrastructure SIP. Because the EPA has already delegated the PSD FIP at 40 CFR 52.21 to each of the districts without fully approved PSD programs, finalization of this proposed, partial disapproval will not trigger any new obligation for the EPA to promulgate a FIP.

11. CAA Section 110(a)(2)(K)—Air Quality Modeling and Submission of Modeling Data

a. Statutory and Regulatory Requirements

Section 110(a)(2)(K) requires SIPs to provide for: "(i) The performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator." To satisfy section 110(a)(2)(K), in the 2013 Infrastructure SIP Guidance, the EPA indicates that states can provide a reference or citation to the provisions that give it authority to do the modeling and data submission required by this element, as well as a narrative explanation of how the state meets the requirements of this element.

b. Summary of the State's Submission

California's 2018 Submittal refers to HSC 39602, which designates CARB as the air pollution agency for all purposes set forth in federal law and thereby gives it the authority to conduct air quality monitoring as required under the CAA. CARB explains in the submittal how California meets the modeling requirements of element K. It notes that CARB has established an air quality modeling group, which models primary and secondary pollutants, and states that CARB's modeling complies

⁷⁷ Website on "Area Designations Maps/State and National" (<http://www.arb.ca.gov/design/adm/adm.htm>) (last visited on September 14, 2020).

⁷⁸ CARB's websites on "Health Effects of Air Pollution" (<http://www.arb.ca.gov/research/health/health.htm>), AQMIS (<http://www.arb.ca.gov/aqmis2/aqmis2.php>), and "Air Pollution and What You Can Do" (<http://www.arb.ca.gov/html/cando.htm>) (last visited on September 14, 2020).

⁷⁹ 76 FR 34608 (June 14, 2011).

⁸⁰ 45 FR 53136 (August 11, 1980).

⁸¹ Chapter 25, Intergovernmental Relations, Revision to State of California Implementation Plan for the Attainment and Maintenance of Ambient Air Quality Standards. Adopted by the CARB, October 26, 1978.

with EPA guidance. It explains that CARB ensures modeling performed by districts complies with federal requirements and that CARB and the districts also document and make public their SIP-related modeling protocols as part of the SIP review process. CARB also notes that modeling results are made available to the EPA and other stakeholders upon request.

c. The EPA's Review of the State's Submission

California's 2018 Infrastructure SIP identifies HSC 39602, which grants CARB its overarching SIP authority, as its statutory basis for authority to conduct modeling, and describes how it and the districts perform air quality modeling following guidelines prescribed by the EPA. In the EPA's proposal to approve California's infrastructure SIP for earlier NAAQS, we also identified examples of attainment modeling, such as in the 2007 State Strategy for 1997 ozone and 1997 PM_{2.5}, and in the attainment SIP for the 2008 Pb NAAQS for Los Angeles County.⁸² We found they provided evidence of California's authority to conduct modeling and submit its data and analysis to the EPA in conjunction with a SIP revision. We propose to find that the broad authority of HSC section 39602 in conjunction with the various modeling efforts undertaken by CARB and the districts provide for ambient air quality modeling and data submission consistent with CAA section 110(a)(2)(K).

12. CAA Section 110(a)(2)(L)—Permit Fees

a. Statutory and Regulatory Requirements

Section 110(a)(2)(L) requires that each SIP require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under the Act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V of the Act.

In the 2013 Infrastructure SIP Guidance, the EPA states that fee programs are not required to be part of the EPA-approved SIP. We explain that

infrastructure SIP submittals should provide citations to the regulations that provide for the collection of permitting fees to cover all CAA permitting, implementation, and enforcement for new and modified major sources as well as existing major sources.

b. Summary of the State's Submission

In its 2018 submittal, California states that California's 35 air districts bear responsibility for stationary source permitting and have regulations requiring the payment of fees from facilities subject to CAA title V requirements. The submittal cites HSC section 42311 as authorizing local air districts "to adopt a schedule of fees for the evaluation, issuance, and renewal of permits to cover the cost of air district programs related to permitting stationary sources." It states that major source permit applicants are assessed a fee for processing their application for an authority to construct or a permit to operate. The submittal also provides a link to CARB's website that provides a general overview of title V permitting in California.⁸³

In its 2018 submittal, CARB further notes that the EPA has approved the title V programs of all 35 air districts, as reflected in 40 CFR part 70, Appendix A ("Approval Status of State and Local Operating Permits Programs") and provides a table that identifies the title V rule for each air district. The submittal explains that the rules cited in the table "represent the district's primary implementation rule, and in some cases, there may be other district rules that are also relevant to the Title V process."⁸⁴

c. The EPA's Review of the State's Submission

We have reviewed California's response to this requirement and have also considered air district provisions approved into the California SIP. We agree with California that HSC section 42311 provides authority to require fees for the evaluation, issuance, and renewal of stationary sources, including new and existing major sources, except for South Coast AQMD, whose similar permit fee authority is instead found in HSC section 40510(b). We also agree that all 35 air districts have fully approved title V operating permit programs. Such program approvals supersede the operating fee requirements of CAA section 110(a)(2)(L).

⁸³ <http://www.arb.ca.gov/fcaa/tv/tvinfo/overview.htm> (last visited on September 14, 2020).

⁸⁴ California's 2018 Submittal, 38.

In addition to the title V fee programs, districts in California have SIP-approved rules requiring the payment of fees for construction and operating permits. In the EPA's 2016 final action on California's Infrastructure SIP submittals for earlier NAAQS, we provided examples of these rules for Bay Area AQMD, Sacramento Metro AQMD, and Yolo-Solano AQMD.⁸⁵ Additional examples of local district fee rules that have recently been updated include Mojave Desert AQMD Rule 301,⁸⁶ San Joaquin Valley APCD Rule 3010,⁸⁷ Monterey Bay ARD Regulation III,⁸⁸ and South Coast AQMD Rule 301.⁸⁹

Therefore, based on the federally approved title V programs for all 35 air districts, the air district rules cited in California's 2018 submittal that establish permit fee requirements for major sources, and the local district rules that implement fees to cover permitting, implementation, and enforcement for new and modified major sources, we propose to find that California meets the requirements of CAA section 110(a)(2)(L).

13. CAA Section 110(a)(2)(M)—Consultation and Participation by Affected Local Entities

a. Statutory and Regulatory Requirements

Section 110(a)(2)(M) requires SIPs to "provide for consultation and participation by local political subdivisions affected by the plan." In the 2013 Infrastructure SIP Guidance, the EPA explains that, to meet the requirements of element M, states may identify their policies or procedures that allow and promote such consultation in their SIP submittals.

b. Summary of the State's Submission

In its 2018 submittal, California states that CARB "routinely consults and provides liaison" with all districts, particularly on SIP revisions. The submittal explains that district boards are composed of local elected officials, so consultation with air districts provides for consultation with and participation by local government

⁸⁵ <https://www.regulations.gov/document?D=EPA-R09-OAR-2014-0547-0008> (last visited on September 14, 2020).

⁸⁶ <http://mdaqmd.ca.gov/home/showdocument?id=6783> (last visited on September 14, 2020).

⁸⁷ <https://www.valleyair.org/rules/currentrules/2018/R3010-a2.pdf> (last visited on September 14, 2020).

⁸⁸ <https://www3.arb.ca.gov/drdb/mbu/curhtml/r300.pdf> (last visited on September 14, 2020).

⁸⁹ <http://www.aqmd.gov/docs/default-source/rule-book/reg-iii/rule-301-june-2019.pdf> (last visited on September 14, 2020).

entities. CARB states that HSC section 41650 *et seq.* requires CARB “to conduct public hearings and to solicit testimony from air districts, air quality planning agencies, and the public when adopting SIP-related documents” for nonattainment area plans. It also adds that the air districts have a similar process for participation and comment on proposed regulatory actions.

CARB reiterates that HSC section 39602 designates CARB as the agency in charge of implementing federal air pollution law and that it requires CARB to coordinate the activities of all air districts necessary to comply with the CAA. It also reiterates that the California Administrative Procedures Act, GC section 11340, *et seq.*, requires notification and comment opportunities to parties affected by proposed state regulations, and that HSC section 40725 requires air districts to provide for public review when adopting, amending, or repealing district rules.

c. The EPA’s Review of the State’s Submission

In its 2018 submittal, CARB highlights its regular consultation with the air districts, whose governing boards are made up of local elected officials. The submittal cites HSC section 41650, which requires CARB to conduct public hearings on nonattainment plans. The submittal cites HSC section 39602, which requires CARB to coordinate the SIP activities of the air districts, the California Administrative Procedures Act, which has public notification requirements for state regulations, and HSC section 40725, which has public notification requirements for district-level rules. In addition, as noted in our evaluation for the consultation requirements of CAA section 110(a)(2)(J), CARB also consults with MPOs and RTPAs, which can be considered local political subdivisions of the state in that they address metropolitan and regional transportation planning issues and include elected officials representing their respective local areas.

California’s SIP submittal demonstrates that the air districts and the government entities represented by their boards are the local political subdivisions affected by the plan. The submittal enumerates how the districts are involved and consulted during the planning process. We therefore propose to conclude that California adequately provides for consultation and participation by local political subdivisions affected by the California SIP, and that California’s Infrastructure SIP Submittals meet CAA section 110(a)(2)(M).

D. Proposed Approval of State and Local Provisions Into the California SIP

As part of this action, we are also proposing to approve two revised state regulations and five air district rules into the California SIP. Specifically, we propose to approve into the SIP the updated provisions CCR, Title 2, sections 18700 and 18701. These revised regulations were part of California’s 2018 Submittal and continue to address the conflict of interest requirements of CAA sections 110(a)(2)(E)(ii) and 128. We also propose to approve into the SIP five Ozone Emergency Episode Plans for Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD to address the emergency episode planning requirements of CAA section 110(a)(2)(G) and 40 CFR part 51, subpart H.

E. Proposed Approval of Reclassification Requests for Emergency Episode Planning

In its 2018 submittal, CARB requested that the EPA reclassify three AQCRs with respect to the emergency episode planning requirements of CAA section 110(a)(2)(G) and 40 CFR part 51, subpart H, as applicable to ozone, NO₂, and SO₂. The air quality tests for classifying AQCRs are prescribed in 40 CFR 51.150 and are pollutant-specific (*e.g.*, ozone) rather than being specific to any given NAAQS (*e.g.*, 1997 ozone NAAQS). Consistent with the provisions of 40 CFR 51.153, reclassification of AQCRs must rely on the most recent three years of air quality data. For ozone, an AQCR with a 1-hour ozone level greater than 0.10 ppm over the most recent three-year period must be classified Priority I, while all other areas are classified Priority III. AQCRs that are classified Priority I are required to have SIP-approved emergency episode contingency plans, while those classified Priority III are not required to have such plans, pursuant to 40 CFR 51.151 and 51.152. We interpret 40 CFR 51.153 as establishing the means for states to review air quality data and request a higher or lower classification for any given region and as providing the regulatory basis for the EPA to reclassify such regions, as appropriate, under CAA sections 110(a)(2)(G) and 301(a)(1).

On the basis of California’s ambient air quality data for 2015–2017, we are proposing to grant California’s request to reclassify Lake County, North Central Coast, and South Central Coast to Priority I areas.

F. The EPA’s Action

Under CAA 110(a), we are proposing to partially approve and partially disapprove California’s 2018 Infrastructure SIP. Specifically, we are proposing to approve the submittal for the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(B), 110(a)(2)(E), 110(a)(2)(F), 110(a)(2)(H), 110(a)(2)(K), 110(a)(2)(L), and 110(a)(2)(M). We are also proposing to partially approve and partially disapprove the submittal for CAA sections 110(a)(2)(C), 110(a)(2)(D)(ii), and 110(a)(2)(J) due to PSD program deficiencies in certain air districts. These partial disapprovals will not create any new consequences as the air districts with PSD deficiencies are already subject to PSD FIPs.

To meet CAA 110(a)(2)(E)(ii) requirements, we are proposing to approve into the SIP the updated versions of CCR, Title 2, sections 18700 and 18701, to replace the previous versions of 2 CCR 18700 and 18701.

To meet the requirements of CAA 110(a)(2)(G), we are proposing to approve California’s 2020 Submittal. This includes the ozone emergency episode contingency plans for Amador County APCD, San Luis Obispo County APCD, Northern Sierra AQMD, Tuolumne County APCD, Mariposa County APCD, and Calaveras County APCD, as well as the exemption request for Lake County AQMD.

At this time, EPA is not acting on 110(a)(2)(D)(i)(I), which prohibits emission sources from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state. The EPA will propose action on the interstate transport requirements for the 2015 ozone NAAQS in a separate notice.

We are soliciting comments on these proposed actions. We will accept comments from the public for 30 days following publication of this proposal in the **Federal Register** and will consider any relevant comments before taking final action.

V. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference two revised state provisions from the California Code of Regulations for the conflict of interest requirements of CAA sections 110(a)(2)(E)(ii) and 128. These revised provisions are California Code of Regulations, Title 2, Sections 18700 and 18701. Similarly, the EPA is also proposing to incorporate by reference

five Ozone Emergency Episode Plans for Amador County APCD, Calaveras County APCD, Mariposa County APCD, Northern Sierra AQMD, and Tuolumne County APCD for the emergency episode planning requirements of CAA section 110(a)(2)(G) and 40 CFR part 51, subpart H. The EPA has made, and will continue to make, these materials available through <https://www.regulations.gov> and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

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

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

Dated: September 30, 2020.

John Busterud,

Regional Administrator, Region IX.

[FR Doc. 2020-22061 Filed 10-15-20; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2020-0372; FRL-10015-53-OAR]

RIN 2060-AU91

Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing amendments to the Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23,

1984. We are proposing specific amendments that would allow owners or operators of storage vessels subject to the Standards of Performance for Volatile Organic Liquid Storage Vessels and equipped with either an external floating roof (EFR) or internal floating roof (IFR) to voluntarily elect to comply with the requirements specified in the National Emission Standards for Storage Vessels (Tanks)—Control Level 2 as an alternative standard, in lieu of the requirements specified in the Standards of Performance for Volatile Organic Liquid Storage Vessels, subject to certain caveats and exceptions for monitoring, recordkeeping, and reporting.

DATES:

Comments. Comments must be received on or before November 30, 2020. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 16, 2020.

Public hearing. If anyone contacts us requesting a public hearing on or before October 21, 2020, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2020-0372, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.

- **Email:** a-and-r-docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2020-0372 in the subject line of the message.

- **Fax:** (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2020-0372.

- **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2020-0372, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

- **Hand Delivery or Courier (by scheduled appointment only):** EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be

posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Mr. Neil Feinberg, Sector Policies and Programs Division (E143-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-2214; fax number: (919) 541-0516; and email address: feinberg.stephen@epa.gov.

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. Please note that the EPA is deviating from its typical approach because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA cannot hold in-person public meetings at this time.

If requested, the virtual hearing will be held on November 2, 2020. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details on the virtual public hearing website at <https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage>.

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available at [https://www.epa.gov/stationary-sources-](https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage)

[air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage](https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage) or contact Ms. Virginia Hunt at (919) 541-0832 or by email at hunt.virginia@epa.gov. The last day to pre-register to speak at the hearing will be October 28, 2020. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at <https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage>.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to Neil Feinberg and Virginia Hunt. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage>. While the EPA expects the hearing to go forward as set forth above, if requested, please monitor our website or contact Virginia Hunt at (919) 541-0832 or hunt.virginia@epa.gov to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with Virginia Hunt and describe your needs by October 23, 2020. The EPA may not be able to arrange accommodations without advance notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2020-0372. All documents in the docket are listed in *Regulations.gov*. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically in *Regulations.gov*.

Instructions. Direct your comments to Docket ID No. EPA-HQ-OAR-2020-0372. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov/>, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

The <https://www.regulations.gov/> website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <https://www.regulations.gov/>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the

EPA Docket Center homepage at <https://www.epa.gov/dockets>.

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov> as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

Submitting CBI. Do not submit information containing CBI to the EPA through <https://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2020-0372. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble.

While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AMP alternative monitoring plan
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
EFR external floating roof
EPA Environmental Protection Agency
ET Eastern Time
ICR information collection request
IFR internal floating roof
kPa kilopascals
m3 cubic meters
NAICS North American Industry Classification System
NESHAP national emission standards for hazardous air pollutants
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act
tpy tons per year
UMRA Unfunded Mandates Reform Act
VOC volatile organic compound(s)

Organization of this document. The information in this preamble is organized as follows:

- I. General Information
 - A. Does this action apply to me?
 - B. Where can I get a copy of this document and other related information?
- II. Background
- III. Discussion of the Proposed Amendments
 - A. What actions are we proposing?
 - B. What compliance dates are we proposing?
- IV. Summary of Cost, Environmental, and Economic Impacts
 - A. What are the affected facilities?
 - B. What are the air quality impacts?
 - C. What are the cost impacts?
 - D. What are the economic impacts?
 - E. What are the benefits?
- V. Request for Comments
- VI. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
 - C. Paperwork Reduction Act (PRA)
 - D. Regulatory Flexibility Act (RFA)
 - E. Unfunded Mandates Reform Act (UMRA)
 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
 - I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - J. National Technology Transfer and Advancement Act (NTTAA)

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

I. General Information

A. Does this action apply to me?

Categories and entities potentially affected by this proposed rule include those listed in Table 1 of this preamble.

TABLE 1—EXAMPLES OF POTENTIALLY AFFECTED ENTITIES BY CATEGORY

Category	NAICS code ¹	Examples of potentially regulated entities
Industrial	325	Chemical manufacturing facilities.
	324	Petroleum and coal products manufacturing facilities.
	422710	Petroleum bulk stations and terminals.

¹ North American Industry Classification System.

This table is not intended to be exhaustive but rather provides a guide for readers regarding entities likely to be affected by the proposed amendments. To determine whether your facility could be affected by the proposed amendments, you should carefully examine the applicability criteria in 40 CFR 60.110b and 60.112b(a)(1) and (2). If you have any questions regarding the applicability of the proposed amendments to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at <https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage>. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website.

A redline version of the regulatory language that incorporates the proposed changes in this action is available in the docket for this action (Docket ID No. EPA-HQ-OAR-2020-0372).

II. Background

Pursuant to the EPA's authority under Clean Air Act (CAA) section 111, the Agency proposed (49 FR 29698, July 23, 1984) and promulgated (52 FR 11420, April 8, 1987) new source performance standards (NSPS) at 40 CFR part 60, subpart Kb, for volatile organic liquid storage vessels, including petroleum liquid storage vessels, for which construction, reconstruction, or modification commenced after July 23, 1984. To reduce volatile organic compound (VOC) emissions from storage vessels with a capacity of 75 cubic meters (m³) or more that store organic liquids with a true vapor pressure over 27.6 kilopascals (kPa), and from storage vessels with a capacity of 151 m³ or more that store organic liquids with a true vapor pressure over 5.2 kPa, NSPS subpart Kb requires the use of either an EFR, an IFR, or a closed vent system and a control device. See 40 CFR 60.110b(a) and 60.112b(a) and (b).¹ NSPS subpart Kb also specifies testing, monitoring, recordkeeping, reporting, and other requirements in 40 CFR 60.113b through 60.116b to ensure compliance with the standards. More specifically, § 60.113b requires, among other things, that certain inspections for IFR and EFR occur at least once within certain defined timeframes (such as at least once every year, 5 years, or 10 years). Storage vessels with an EFR consist of an open-top cylindrical steel shell equipped with a deck that floats on the surface of the stored liquid (commonly referred to as a floating roof). Storage vessels with an IFR are fixed roof vessels² that also have a deck internal to the tank that floats on the liquid surface within the fixed roof vessel (commonly referred to as an internal floating roof).

The standards in NSPS subpart Kb for storage vessels with an EFR or IFR are a combination of a design, equipment, work practice, and operational standards set pursuant to CAA section 111(h). These standards require, among other things, that a rim seal be installed continuously around the circumference of the vessel (between the inner wall of the vessel and the floating roof) to prevent VOC from escaping to the atmosphere through gaps between the floating roof and the inner wall of the storage vessel. Similarly, NSPS subpart

Kb requires deck fittings³ on the floating roof to be equipped with a gasketed cover or lid that is kept in the closed position at all times (*i.e.*, no visible gap), except when the device (the deck fitting) is in actual use, to prevent VOC emissions from escaping through the deck fittings. In general, NSPS subpart Kb requires owners or operators to conduct visual inspections to check for defects in the floating roof, rim seals, and deck fittings (*e.g.*, holes, tears, or other openings in the rim seal, or covers and lids on deck fittings that no longer close properly) that could expose the liquid surface to the atmosphere and potentially result in VOC emission losses through rim seals and deck fittings.⁴

Pursuant to 40 CFR 60.113b(a)(4), and as one of the several inspection requirements included in § 60.113b, an owner or operator of a storage vessel subject to NSPS subpart Kb and equipped with an IFR must visually inspect the IFR, primary seal, secondary seal (if one is in service), gaskets, slotted membranes, and sleeve seals (if any) from inside the storage vessel (internal) each time the storage vessel is emptied and degassed (removed from service or out-of-service), and in no event can inspections be conducted at intervals greater than 10 years.⁵ There are no provisions in NSPS subpart Kb that allow the 40 CFR 60.113b(a)(4) inspections for IFRs to be conducted while liquids and vapors remain in the storage vessel (*i.e.*, in-service). Therefore, owners or operators that have not emptied and degassed their fixed roof storage vessel equipped with an IFR within a 10-year period for whatever reason (such as to perform cleaning, maintenance, inspections, and/or testing not required by NSPS subpart Kb) are required to do so for the sole purpose of complying with the inspection requirements in the rule at 40 CFR 60.113b(a)(4).⁶

³ Numerous fittings pass through or are attached to floating roof decks to accommodate structural support components or to allow for operational functions. Typical deck fittings include, but are not limited to, the following: Access hatches, gauge floats, gauge-hatch/sample ports, rim vents, deck drains, deck legs, vacuum breakers, and guidepoles. IFR tanks may also have deck seams, fixed-roof support columns, ladders, and/or stub drains.

⁴ For details about storage vessel emissions, refer to the Compilation of Air Pollutant Emission Factors, Volume 1: Stationary Point and Area Sources, AP-42, Fifth Edition, Chapter 7: Liquid Storage Tanks, dated June 2020 which is available at: <https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors>.

⁵ Degassing means the process of removing stored material vapors from the storage vessel.

⁶ "At least once every 10 years, the owner or operator is required to empty the storage vessel and

A similarly worded requirement (to visually inspect the floating roof, rim seals, and deck fittings when the tank is emptied and degassed) is required pursuant to 40 CFR 60.113b(b)(6) for storage vessels equipped with an EFR. However, this inspection for EFRs is not mandated to occur at least once every 10 years as is required for storage vessels equipped with an IFR. This inspection for EFRs is only required each time the tank is emptied and degassed. Further, other inspections required for EFRs by 40 CFR 60.113b(b) are conducted while the tank is in-service. As such, there is no provision in NSPS subpart Kb that would require a storage vessel equipped with an EFR to empty and degas for the sole purpose of conducting an inspection.

Since promulgation of NSPS subpart Kb, the EPA promulgated 40 CFR part 63, subpart WW, which is applicable to storage vessels containing organic materials, as part of the generic maximum achievable control technology standards program for setting national emission standards for hazardous air pollutants (NESHAP) under CAA section 112. See 64 FR 34854 (June 29, 1999). NESHAP subpart WW was developed for the purpose of providing consistent EFR and IFR requirements for storage vessels that could be referenced by multiple NESHAP subparts. Like the NSPS subpart Kb standards for floating roof tanks, NESHAP subpart WW is comprised of a combination of design, equipment, work practice, and operational standards. See proposed rule for NESHAP subpart WW (63 FR 55178, 55196 (October 14, 1998)). Both rules specify monitoring, recordkeeping, and reporting requirements for storage vessels equipped with EFR or IFR, and both include numerous requirements for inspections that occur at least once within certain defined timeframes. See 40 CFR 63.1063 for the IFR and EFR inspection requirements of NESHAP subpart WW. The inspections required by NESHAP subpart WW are intended to achieve the same goals as those inspections required by NSPS subpart Kb (*e.g.*, both rules require visual inspections to check for defects in the floating roof, rim seals, and deck fittings). Further, NESHAP subpart WW incorporates technical improvements based on the EPA's experience with implementation of other NESHAP. For storage vessels equipped with either an EFR or IFR, as long as there is visual

to inspect the internal floating roof, the primary seal, and the secondary seal, if one exists." 52 FR 11415, 11421 (April 8, 1987) (final rule for NSPS subpart Kb).

¹ All affected storage vessels storing organic liquids with a true vapor pressure of 76.6 kPa or more must use a closed vent system and a control device. 40 CFR 60.112b(b).

² A fixed roof storage vessel consists of a cylindrical steel shell with a permanently affixed roof, which may vary in design from cone or dome-shaped to flat.

access (as explained below), NESHAP subpart WW allows that the visual inspection of the floating roof deck, deck fittings, and rim seals may be conducted, while the tank remains in-service, from the top-side of the floating roof (meaning on top of the floating roof, and in the case of an IFR, under the fixed roof and internal to the tank); this is referred to as an in-service top-side of the floating roof visual inspection. In other words, in the case of an IFR, if an owner or operator has physical access to the inside of the tank above the floating roof and a floating roof design which allows inspectors to have visual access to all rim seals and deck fittings of the floating roof (meaning an inspector can see all the components required to be inspected) while the storage vessel is in-service, then NESHAP subpart WW does not require the owner or operator to take the storage vessel out of service to inspect the floating roof, rim seals, and deck fittings in accordance with 40 CFR 63.1063(d)(1).⁷ This contrasts with NSPS subpart Kb, which, as explained above, requires that these inspections be conducted when the storage vessel is out-of-service (compare 40 CFR 63.1063(d)(1) with 40 CFR 60.113b(a)(4) and (b)(6)).

Based on the EPA's experience, we are aware that at least some storage vessels subject to NSPS subpart Kb, and equipped with an IFR, can allow physical access to inside the tank above the floating roof and have a floating roof design which would allow the owner or operator to conduct an in-service top-side of the floating roof visual inspection consistent with the visual access requirement in NESHAP subpart WW. In recent years, owners or operators of IFR tanks that are subject to NSPS subpart Kb have submitted requests for alternative monitoring plans (AMPs), in accordance with 40 CFR 60.13(i), asking to use internal in-service top-side-of-the-floating-roof visual inspections consistent with the inspection requirements in NESHAP subpart WW at 40 CFR 63.1063(d)(1), in lieu of having to empty and degas the storage vessels. In response to these site-specific alternative requests, the EPA has required the owner or operator to demonstrate that the storage vessel design allows physical access to inside the tank above the floating roof and has a floating roof design which allows the owner or operator to have visual access to inspect the floating roof, rim seals, and all deck components. For example,

see Applicability Determination Index letter, control number Z140001 (dated August 2, 2013) which is available in the docket for this rulemaking.⁸ EPA Regional offices have been evaluating and approving similar AMPs, on a case-by-case basis, for years. More recently, EPA Regional offices have been inundated with hundreds of these types of AMP requests.

III. Discussion of the Proposed Amendments

A. What actions are we proposing?

For the reasons discussed in this section, and pursuant to the EPA's authority under CAA section 111(h), we are proposing amendments to NSPS subpart Kb in a new paragraph (see proposed 40 CFR 60.110b(e)(5)) that would allow owners or operators of storage vessels subject to NSPS subpart Kb, and equipped with either an EFR or IFR, the choice to elect to comply with the requirements specified in NESHAP subpart WW as an alternative standard, in lieu of the requirements specified in NSPS subpart Kb. Sources subject to NSPS subpart Kb that are equipped with either an EFR or IFR that elect to utilize the proposed alternative standard would comply with all of the requirements in NESHAP subpart WW instead of the requirements in NSPS subpart Kb §§ 60.112b through 60.117b, subject to certain caveats and exceptions explained below. Among other things, this proposed alternative will allow owners or operators of storage vessels subject to NSPS subpart Kb that are equipped with an IFR, and that can meet the visual access requirement of NESHAP subpart WW explained above, to conduct the internal in-service top-side of the floating roof visual inspection pursuant to NESHAP subpart WW, thereby avoiding the need to empty and degas the vessel for the sole purpose of conducting the inspection. While this proposed alternative standard covers more than just inspection requirements, and is available to all NSPS subpart Kb sources equipped with either an EFR or IFR, we anticipate that the benefits associated with avoiding the need to empty and degas the vessel for the sole purpose of conducting an inspection would be realized by vessels with an IFR that have visual access. We are not proposing any changes to the existing standards in either NSPS subpart Kb or NESHAP subpart WW aside from allowing this alternative standard for certain sources subject to NSPS subpart

Kb. Further, we are not proposing any changes to the underlying monitoring, reporting, or recordkeeping requirements in either NSPS subpart Kb or NESHAP subpart WW (with the exception of some conforming and referencing edits to recordkeeping and reporting as discussed below), nor are we proposing any changes to the applicability criteria in NSPS subpart Kb or NESHAP subpart WW. We are proposing to require that owners or operators that choose to use this optional alternative continue to use the same NSPS subpart Kb procedures for all storage vessels when determining applicability of NSPS subpart Kb; thus, owners or operators that choose to use this proposed alternative must continue to comply with the monitoring requirements of 40 CFR 60.116b(a), (c), (e), and (f)(1), and also must keep other records and furnish other reports (as discussed below) in addition to all of the requirements specified in 40 CFR 63.1060 through 40 CFR 63.1067 of NESHAP subpart WW. In addition, because NSPS subpart Kb applies to each single storage vessel (see 40 CFR 60.110b for NSPS subpart Kb applicability and definition of affected facility), this proposed alternative standard would be available for each affected facility as defined in NSPS subpart Kb. In other words, an owner or operator with multiple affected facilities can choose to use (or not use) the proposed alternative for each individual affected facility.

We have determined that the proposed alternative standard is appropriate because it will achieve a reduction in emissions at least equivalent to the reduction in emissions achieved under NSPS subpart Kb, and that the alternative standard is just as stringent as, if not more stringent than, the underlying standard. First, we note that numerous NESHAP (*e.g.*, 40 CFR part 63, subparts YY, EEEE, and FFFF) already reference NESHAP subpart WW because that rule is considered to be the EPA's flagship standard for EFR and IFR requirements under the NESHAP program. In developing and promulgating NESHAP subpart WW, the Agency determined that NESHAP subpart WW is "largely the same" and "similar to existing storage vessel standards" such as NSPS subpart Kb (see the memorandum, *Rationale for Subpart WW Proposed Rule for Storage Vessels*, which is available in the docket for this rulemaking). Many NESHAP contain overlap provisions that allow owners or operators to comply with NESHAP subpart WW alone in lieu of also complying with NSPS subpart Kb if

⁷ "The inspection may be performed entirely from the top side of the floating roof, as long as there is visual access to all deck components specified in paragraph (a) of this section." 40 CFR 63.1063(d)(1).

⁸ Other AMPs are available at <https://cfpub.epa.gov/adi/>.

the affected source or facility is subject to both NESHAP subpart WW and NSPS subpart Kb.⁹ However, those overlap provisions do not apply to storage vessels that are subject only to NSPS subpart Kb without also being subject to a NESHAP. This proposed alternative standard would afford these NSPS subpart Kb-only tanks the same option.

The storage vessel design, operation, inspection frequency, inspection procedure, and repair requirements are largely the same between NESHAP subpart WW and NSPS subpart Kb. However, the organization and phrasing of the two rules is different. Where they differ, the requirements in NESHAP subpart WW are clearer and more stringent than the requirements in NSPS subpart Kb. For example, NSPS subpart Kb requires that openings in deck fittings for an IFR or EFR be equipped with devices such that there is no “visible gap.” See 40 CFR 60.112b(a)(1)(iv) and (a)(2)(ii). However, NSPS subpart Kb does not define what it means to have a “visible gap.” To avoid any possible ambiguity associated with the “visible gap” language, a maximum gap width of $\frac{1}{8}$ inch is specified in NESHAP subpart WW (*i.e.*, pursuant to 40 CFR 63.1063(d)(1)(v) gaps of more than $\frac{1}{8}$ inch between any deck fitting gasket, seal,¹⁰ or wiper and any surface that it is intended to seal constitutes an inspection failure).

Moreover, both NSPS subpart Kb and NESHAP subpart WW have equivalent rim seal control requirements (for EFRs, both rules require a liquid-mounted or mechanical shoe primary seal, as well as a secondary seal; and for IFRs, both rules require a liquid-mounted or mechanical shoe primary seal, or two seals if the lower seal is vapor-mounted). Also, both rules require visual floating roof inspections each time the vessel is emptied and degassed in order to check for defects in the floating roof, rim seals, and deck fittings (*e.g.*, both rules generally require owners or operators to check for holes, tears, or other openings in the rim seal, or covers and lids on deck fittings that no longer close properly); and both rules require the owner or operator to repair these defects (if any are found) prior to refilling the storage vessel with liquid. See 40 CFR 63.1063(d)(1) as compared to 40 CFR 60.113b(a)(4). The IFR and EFR inspection requirements in NESHAP subpart WW are just as good as, and in some instances, better than,

the inspection requirements in NSPS subpart Kb.

The proposed alternative standard also provides certain benefits with respect to certain sources subject to NSPS subpart Kb that are equipped with an IFR. As previously discussed, for IFR that have visual access, NESHAP subpart WW allows the 10-year inspection to be conducted in-service top-side of the floating roof while NSPS subpart Kb requires that the 10-year inspections be conducted solely when the storage vessel is out of service, which requires the vessel to be emptied and degassed. Thus, in some instances, NSPS subpart Kb requires that the storage vessel be emptied and degassed only for the purpose of conducting the inspection, whereas the NESHAP subpart WW in-service inspection option allows a source to perform the requisite inspection without having to empty and degas the tank. Conducting the in-service top-side-of-the-floating-roof inspection per NESHAP subpart WW affords the inspector the same ability to examine all the listed components for all of the listed defects/inspection failures as if the storage vessel was emptied and degassed, but avoids the cost and emissions associated with that empty and degas event.

Emptying and degassing events are undesirable primarily because owners or operators must take the storage vessel completely out of service, which includes additional non-routine labor costs, results in the need for extra storage capacity, and creates VOC emissions. The process of taking a storage vessel out of service, emptying the vessel of all liquid inside, and then degassing the vessel requires labor hours which results in costs. When storage capacity is strained, there may be some additional costs (*e.g.*, potential need to reduce production) associated with taking a storage vessel out of service. Further, when degassing emissions must be controlled, there are more costs associated with renting portable control equipment or outsourcing the degassing controls. Historically, degassing vapors have been vented to the atmosphere or sent to flares or other control equipment. Thus, conducting the in-service top-side-of-the-floating-roof inspection per NESHAP subpart WW rather than taking the storage vessel out of service reduces both the costs incurred by the owners or operators and the VOC emissions that are otherwise released during emptying and degassing events. The mass of VOC emissions associated with degassing will vary depending on the size of the vapor space, the vapor pressure of the stored liquid, the amount of residual

liquid in the storage vessel, the degree of saturation in the vapor space when degassing begins, and the vapor molecular weight. For detailed information about costs and VOC emissions associated with emptying and degassing events, see the memorandum, *Impacts for Revision of Internal Floating Roof Storage Vessel (Tank) Inspection Requirements Subject to 40 CFR part 60 subpart Kb*, which is available in the docket for this rulemaking.

Both rules require repair if defects are found. See NESHAP subpart WW requirements (40 CFR 63.1063(e)(2)), and NSPS subpart Kb repair requirements (40 CFR 60.113b(a)(4)).

This proposed alternative standard does not change the underlying compliance schedule(s) for events under NSPS subpart Kb or NESHAP subpart WW, which are either based on the same intervals (*e.g.*, in the case of annual and 10-year inspections), or are established by NSPS subpart Kb and referenced from NESHAP subpart WW (*e.g.*, NESHAP subpart WW requires submittal of certain reports on dates as specified in the “referencing” subpart, which, in the case of the alternative, would be NSPS subpart Kb). Furthermore, under this proposed alternative the applicability criteria of NSPS subpart Kb at 40 CFR 60.110b continue to apply as do the General Provisions to 40 CFR part 60 (*e.g.*, 40 CFR 60.7(a)). A new source subject to NSPS subpart Kb would have the choice, at startup, of which standard would apply; either NSPS subpart Kb or NESHAP subpart WW. After that, the owner or operator would continue to follow the standard they have chosen to comply with until they notify the EPA of a change (if they choose to change) consistent with the process discussed below.

We are also proposing that the compliance schedule for events does not reset upon switching between standards. By way of example, we use the scenario of an owner or operator of a storage vessel with an IFR who conducted the “through manholes and roof hatches” inspection (required at least once every 12 months) in accordance with NSPS subpart Kb, 40 CFR 60.113b(a)(2). Subsequent to that inspection, but before the next 12-month inspection is due to be conducted in accordance with the compliance schedule in 40 CFR 60.113b(a)(2), the owner or operator chooses to switch to the alternative standard. Considering this example, we are proposing that the first annual inspection conducted under NESHAP subpart WW, 40 CFR 63.1063(c)(1)(i)(A) must occur within 12 months of the

⁹ For examples, see 40 CFR 63.1100(g)(1)(ii), 63.2396(a)(3) and (4), and 63.2535(c).

¹⁰ EPA does not apply this 1/8-inch maximum gap width criteria to rim seals.

prior inspection that was conducted under NSPS subpart Kb. The EPA is proposing this to ensure that choosing to utilize the alternative standard does not negate or extend the timing of a compliance event.

We are also proposing to require that the owner or operator notify the Administrator at least 30 days before the first inspection is conducted under the alternative standard of NESHAP subpart WW, no matter the type of inspection. After this notification is submitted to the Administrator, we are proposing to require that the owner or operator continue to comply with the alternative standard until the owner or operator submits another notification to the Administrator indicating the affected facility is choosing to switch back to use the NSPS subpart Kb requirements at 40 CFR 60.112b through 60.117b instead of the alternative standard. While under this proposal sources have the option to switch back and forth between NSPS subpart Kb and the alternative standard of NESHAP subpart WW, this notification process would repeat each time a source opts to switch. This notification system will allow the EPA to keep track of which sources subject to NSPS subpart Kb are choosing to utilize the alternative standard so that it is clear which standard applies when determining compliance.

Moreover, we are proposing to require that copies of all records and reports kept pursuant to 40 CFR 60.115b(a) and (b) (*i.e.*, those record and reports kept under NSPS subpart Kb before choosing to switch to the alternative standard) must be kept for 2 years from the date of submittal of the inspection notification described above irrespective of the retention schedule in 40 CFR 60.115b. Put another way, if a source chooses to switch from NSPS subpart Kb to NESHAP subpart WW, then that source must retain the records that it was keeping under NSPS subpart Kb, at the time of the switch, for 2 years from the date of the switch (based on the 2-year requirement in 40 CFR 60.115b). We believe this is important to ensure that records and reports are maintained for the full retention period under NSPS subpart Kb when sources choose to utilize the alternative standard. Likewise, if a source chooses to switch back to NSPS subpart Kb after using the alternative standard, then the source would be required to retain records that it was keeping under NESHAP subpart WW, at the time of the switch, for 5 years from the date of the switch (based on the 5-year requirement in 40 CFR 63.1065). These additional retention periods are necessary because without these records and reports, then a

source's compliance status, and the underlying applicable compliance dates, for the period before the source chose the alternative could be difficult to discern and, therefore, enforce. Moreover, we are proposing two exceptions to the reporting requirements of 40 CFR 63.1066 for sources that choose to utilize the alternative standard. First, we are proposing to require that the notification of initial startup required under 40 CFR 63.1066(a)(1) and (2) be submitted as an attachment to the notification required by 40 CFR 60.7(a)(3). Second, because 40 CFR 63.1066 uses the phrasing "in the periodic report specified in the referencing subpart" and NSPS subpart Kb does not have requirements for periodic reports, we are proposing that the reference to the periodic reports, if an inspection failure occurs as specified in 40 CFR 63.1066(b)(2), means that the owner or operator is required to submit inspections results within 60 days of the initial gap measurements required by 40 CFR 63.1063(c)(2)(i) and within 30 days of all other inspections required by 40 CFR 63.1063(c)(1) and (2).

While, as explained above, we believe allowing for this proposed alternative standard will be most helpful to a certain subcategory of storage vessels subject to NSPS subpart Kb (*i.e.*, storage vessels equipped with IFRs that have visual access to all deck components), it is both more equitable and efficient to amend NSPS subpart Kb to allow use of this alternative for all floating roof tanks subject to NSPS subpart Kb (EFR and IFR). The alternative standard, if finalized as proposed, should alleviate the need for many pending AMP requests, thereby reducing the administrative burden on EPA Regional offices as well as AMP requesters. The alternative would also provide flexibility for the regulated community, reduce emissions of VOC caused by degassing, and reduce the burden (cost of labor hours) on owners or operators associated with emptying and degassing.

B. What compliance dates are we proposing?

In accordance with CAA section 111(b)(1)(B), if finalized, the proposed revisions would become effective, and owners or operators may begin using the alternative standard, immediately upon publication of the final rule in the **Federal Register**.

IV. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected facilities?

We estimate that there are currently 8,753 storage vessels subject to NSPS subpart Kb. For details about this estimate and for information regarding how many of these storage vessels the EPA predicts may choose to utilize the proposed alternative standard, refer to the memorandum, *Impacts for Revision of Internal Floating Roof Storage Vessel (Tank) Inspection Requirements Subject to 40 CFR Part 60 Subpart Kb*, which is available in the docket for this rulemaking.

B. What are the air quality impacts?

We estimate that nationwide VOC emissions reductions would range from 65.8 tons per year (tpy) to 83.3 tpy as a result of the proposed amendments. These emissions reductions are documented in the memorandum, *Impacts for Revision of Internal Floating Roof Storage Vessel (Tank) Inspection Requirements Subject to 40 CFR Part 60 Subpart Kb*, which is available in the docket for this rulemaking.

C. What are the cost impacts?

We estimate that the proposed amendments will result in a nationwide net cost savings of between \$768,000 and \$1,091,000 per year (in 2019 dollars). For further information on the cost savings associated with the proposed amendments, see the memorandum, *Impacts for Revision of Internal Floating Roof Storage Vessel (Tank) Inspection Requirements Subject to 40 CFR Part 60 Subpart Kb*, which is available in the docket for this rulemaking.

D. What are the economic impacts?

As noted earlier, we estimated a nationwide cost savings associated with the proposed amendments. Therefore, we do not expect the actions in this proposed rulemaking to result in business closures, significant price increases or decreases in affected output, or substantial profit loss. For more information, refer to the *Economic Impact Analysis for the Proposed Alternative Standard Available to Floating Roof Storage Vessels (Tanks) Subject to 40 CFR Part 60 Subpart Kb*, which is in the docket for this rulemaking.

E. What are the benefits?

The EPA did not monetize the benefits from the estimated emission reductions of VOC associated with this proposed action. However, we expect this proposed action would provide

benefits associated with VOC emission reductions.

V. Request for Comments

The EPA is soliciting comment on the discrete proposed change to NSPS subpart Kb that would allow affected storage vessels equipped with either an EFR or IFR to voluntarily elect to comply with the requirements specified in NESHAP subpart WW, as an alternative standard, in lieu of the requirements of NSPS subpart Kb. We are considering only the use of the proposed alternative standard that is discussed in this preamble. We are not soliciting comment on, nor do we intend to make changes to, any other provisions of NSPS subpart Kb or NESHAP subpart WW aside from incorporating this proposed alternative standard.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

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

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

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

This action is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the EPA's analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 1854.12. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

See section III.A of this preamble ("What actions are we proposing?") for a description of the proposed alternative standard. Information about inspection activities related to NSPS subpart Kb is collected to assure compliance with NSPS subpart Kb. Most of the costs associated with the proposed alternative standard are associated with labor hours. The time needed to conduct an

in-service top-side-of-the-floating-roof visual inspection pursuant to the requirements in NESHAP subpart WW is expected to be less than the time needed to complete an out-of-service inspection pursuant to NSPS subpart Kb. Therefore, we anticipate a cost savings. This ICR documents the incremental burden imposed by the proposed amendments only. In summary, there is a decrease in the burden (labor hours) documented in this ICR due a reduction in the number of respondents (storage vessels subject to NSPS subpart Kb) that would be required to empty and degas their storage vessels equipped with an IFR.

Respondents/affected entities: Owners or operators of storage vessels constructed after July 23, 1984, that have capacity greater than or equal to 75 m³ used to store volatile organic liquids (including petroleum liquids) with a true vapor pressure greater than or equal to 3.5 kPa, and storage vessels constructed after July 23, 1984, that have capacity between 75 and 151 m³ capacity for which the true vapor pressure of the stored liquid is greater than or equal to 15 kPa.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart Kb, and 40 CFR part 63, subpart WW).

Estimated number of respondents: 385 facilities.

Frequency of response: Variable (storage vessel specific).

Total estimated burden: A reduction of 6,210 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: A savings of \$930,000 (per year), includes a savings of \$466,000 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to OIRA_submission@omb.eop.gov, Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than November 16, 2020. The EPA will respond to any ICR-related comments in the final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The proposed alternative standard is optional; therefore, small entities are not required to comply with the proposed alternative.

E. Unfunded Mandates Reform Act (UMRA)

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

F. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211 because it is not a

significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). Although the proposed alternative is optional, the alternative standard is at least as stringent as the current applicable requirements.

List of Subjects in 40 CFR Part 60

Environmental protection, Air pollution control, Reporting and recordkeeping requirements, Volatile organic compounds.

Andrew Wheeler,
Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart Kb—Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984

■ 2. Section 60.110b is amended by adding paragraph (e)(5) to read as follows:

§ 60.110b Applicability and designation of affected facility.

* * * * *

(e) * * *

(5) *Option to comply with part 63, subpart WW, of this chapter.* Except as specified in paragraphs (e)(5)(i) through (iv) of this section, owners or operators may choose to comply with 40 CFR part 63, subpart WW, to satisfy the requirements of §§ 60.112b through 60.117b for storage vessels either with a design capacity greater than or equal to 151 m³ containing a VOL that, as stored,

has a maximum true vapor pressure equal to or greater than 5.2 kPa but less than 76.6 kPa, or with a design capacity greater than or equal to 75 m³ but less than 151 m³ containing a VOL that, as stored, has a maximum true vapor pressure equal to or greater than 27.6 kPa but less than 76.6 kPa.

(i) The general provisions in subpart A of this part apply instead of the general provisions in subpart A of part 63 of this chapter.

(ii) Where terms are defined in both this subpart and 40 CFR part 63, subpart WW, the definitions in this subpart apply.

(iii) Owners or operators who choose to comply with 40 CFR part 63, subpart WW, also must comply with the monitoring requirements of § 60.116b(a), (c), (e), and (f)(1), except as specified in paragraphs (e)(5)(iii)(A) through (C) of this section.

(A) The reference to all records applies only to the records required by § 60.116b(c);

(B) The reference to § 60.116b(b) does not apply; and

(C) The reference to § 60.116b(g) does not apply.

(iv) Owners or operators who choose to comply with 40 CFR part 63, subpart WW, must also keep records and furnish reports as specified in paragraphs (e)(5)(iv)(A) through (F) of this section.

(A) For each affected facility, the owner or operator must notify the Administrator at least 30 days before the first inspection is conducted under 40 CFR part 63, subpart WW. After this notification is submitted to the Administrator, the owner or operator must continue to comply with the alternative standard described in this paragraph (e)(5) until the owner or operator submits another notification to the Administrator indicating the affected facility is using the requirements of §§ 60.112b through 60.117b instead of the alternative standard described in this paragraph (e)(5). The compliance schedule for events does not reset upon switching between compliance with this subpart and 40 CFR part 63, subpart WW.

(B) Keep a record of each affected facility using the alternative standard described in this paragraph (e)(5) when conducting an inspection required by § 63.1063(c)(1) of this chapter and submit with the report required under § 63.1066 of this chapter.

(C) Keep a record of each affected facility using the alternative standard described in this paragraph (e)(5) when conducting an inspection required by § 63.1063(c)(2) of this chapter and submit with the report required under § 63.1066 of this chapter.

(D) Copies of all records and reports kept pursuant to § 60.115b(a) and (b) that have not met the 2 year record retention required by the introductory text of § 60.115b must be kept for an additional 2 years after the date of submittal of the inspection notification specified in paragraph (e)(5)(iv)(A) of this section, indicating the affected facility is using the requirements of 40 CFR part 63, subpart WW.

(E) Copies of all records and reports kept pursuant to § 63.1065 of this chapter that have not met the 5-year record retention required by the introductory text of § 63.1065 must be kept for an additional 5 years after the date of submittal of the notification specified in paragraph (e)(5)(iv)(A) of this section, indicating the affected facility is using the requirements of §§ 60.112b through 60.117b.

(F) The following exceptions to the reporting requirements of § 63.1066 of this chapter apply:

(1) The notification of initial startup required under § 63.1066(a)(1) and (2) of this chapter must be submitted as an attachment to the notification required by §§ 60.7(a)(3) and 60.115b(a)(1);

(2) The reference in § 63.1066(b)(2) of this chapter to periodic reports “when inspection failures occur” means to submit inspections results within 60 days of the initial gap measurements required by § 63.1063(c)(2)(i) of this chapter and within 30 days of all other inspections required by § 63.1063(c)(1) and (2) of this chapter.

[FR Doc. 2020–22568 Filed 10–15–20; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[EPA–HQ–OPPT–2020–0411; FRL–10014–34]

RIN 2070–AB27

Significant New Use Rules on Certain Chemical Substances (20–9.B)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances which are the subject of premanufacture notices (PMNs). This action would require persons to notify EPA at least 90 days before commencing manufacture (defined by statute to include import) or processing of any of these chemical

substances for an activity that is designated as a significant new use by this proposed rule. This action would further require that persons not commence manufacture or processing for the significant new use until they have submitted a Significant New Use Notice (SNUN), and EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken any risk management actions as are required as a result of that determination.

DATES: Comments must be received on or before November 16, 2020.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2020-0411, using 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 emergency, 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: For technical information contact: William Wysong, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-4163; email address: wysong.william@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, process, or use the chemical substances contained in this proposed rule. 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:

- Manufacturers or processors of one or more subject chemical substances

(NAICS codes 325 and 324110), *e.g.*, chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import provisions. This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA, which would include the SNUR requirements should these proposed rules be finalized. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, pursuant to 40 CFR 721.20, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after November 16, 2020 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) and must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through [regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

II. Background

A. What action is the Agency taking?

EPA is proposing these SNURs under TSCA section 5(a)(2) for chemical substances which are the subjects of PMNs P-16-538 and P-18-308. These proposed SNURs would require persons who intend to manufacture or process any of these chemical substances for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

The record for these proposed SNURs, identified as docket ID number EPA-HQ-OPPT-2020-0411, includes information considered by the Agency in developing these proposed SNURs.

B. What is the Agency's authority for taking this action?

TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including the four TSCA section 5(a)(2) factors listed in Unit III.

C. Applicability of general provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. Pursuant to 40 CFR 721.1(c), persons subject to these SNURs must comply with the same SNUN requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A) (15 U.S.C. 2604(a)(1)(A)). In particular, these requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1) (15 U.S.C. 2604(b) and 2604(d)(1)), the exemptions authorized by TSCA sections 5(h)(1), 5(h)(2), 5(h)(3), and 5(h)(5) and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA must either determine that the use is not likely to present an unreasonable risk of injury under the conditions of use for the chemical substance or take such regulatory action as is associated with an alternative determination before the manufacture or processing for the significant new use can commence. If EPA determines that the chemical substance is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

III. Significant New Use Determination

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human

beings or the environment to a chemical substance.

- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.

- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In determining what would constitute a significant new use for the chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances, and potential human exposures and environmental releases that may be associated with the substances, in the context of the four bulleted TSCA section 5(a)(2) factors listed in this unit. During its review of these chemicals, EPA identified certain conditions of use that are not intended by the submitters, but reasonably foreseen to occur. EPA is proposing to designate those reasonably foreseen conditions of use as well as certain other circumstances of use as significant new uses.

IV. Substances Subject to This Proposed Rule

EPA is proposing significant new use and recordkeeping requirements be added to 40 CFR part 721, subpart E for the chemical substances identified in this unit. For each chemical substance, EPA provides the following information in this unit:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Basis for the SNUR.
- Potentially Useful Information.
- CFR citation assigned in the regulatory text section of these proposed rules.

The regulatory text section of these proposed rules specifies the activities designated as significant new uses. Certain new uses, including production volume limits and other uses designated in the proposed rules, may be claimed as CBI.

The chemical substances that are the subject of these proposed SNURs are undergoing premanufacture review. In addition to those conditions of use intended by the submitter, EPA has identified certain other reasonably foreseen conditions of use. EPA has preliminarily determined that the chemicals under their intended conditions of use are not likely to present an unreasonable risk. However, EPA has not assessed risks associated

with the reasonably foreseen conditions of use for these chemicals. EPA is proposing to designate these reasonably foreseen conditions of use and other circumstances of use as significant new uses. As a result, those significant new uses cannot occur without first going through a separate, subsequent EPA review and determination process associated with a SNUN.

The substances subject to these proposed rules are as follows:

PMN Number: P-16-538.

Chemical name: 9-Octadecenoic acid (9Z)-, compd. with N-cyclohexylcyclohexanamine.

CAS number: 22256-71-9.

Basis for action: The PMN states that the use of the substance will be as a corrosion inhibitor and emulsifier for metalworking fluids. Based on the physical/chemical properties of the PMN substance and Structure Activity Relationships (SAR) analysis of test data on analogous substances, EPA has identified concerns for acute toxicity, reproductive toxicity, serious eye damage, skin irritation, skin sensitization, and specific target organ toxicity if the chemical is not used following the limitations noted. This proposed SNUR designates the following as “significant new uses” requiring further review by EPA:

1. Domestic manufacture of the PMN substance.
2. Use of the PMN substance in a consumer product.
3. Release of the PMN substance resulting in surface water concentrations that exceed 4 ppb.

Potentially useful information: EPA has determined that certain information about the effects of the PMN substance may be potentially useful if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity, pulmonary effects, reproductive toxicity, and specific target organ toxicity testing would help characterize the potential environmental and health effects of the PMN substance.

CFR citation: 40 CFR 721.11559.

PMN Number: P-18-308

Chemical name: Bis[(hydroxyalkoxy)aryl]carbopolycyclic (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic use of the substance will be as an additive for engineering plastics. Based on the physical/chemical properties of the PMN substance and SAR analysis of test data on analogous substances, EPA has identified concerns

for eye and skin irritation, kidney and liver toxicity, and sensitization if the chemical is not used following the limitations noted. This proposed SNUR designates the following as “significant new uses” requiring further review by EPA:

- Release of the PMN substance resulting in surface water concentrations that exceed 3 ppb.

Potentially useful information: EPA has determined that certain information about the effects of the PMN substance may be potentially useful if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity and specific target organ toxicity testing would help characterize the potential health and environmental effects of the PMN substance.

CFR citation: 40 CFR 721.11560.

V. Rationale and Objectives of the Proposed Rule

A. Rationale

During review of the PMNs submitted for the chemical substances that are the subject of these proposed SNURs and as further discussed in Unit IV., EPA identified certain other reasonably foreseen conditions of use, in addition to those conditions of use intended by the submitter. EPA has preliminarily determined that the chemical under the intended conditions of use is not likely to present an unreasonable risk. However, EPA has not assessed risks associated with the reasonably foreseen conditions of use. EPA is proposing to designate these conditions of use as well as certain other circumstances of use as significant new uses. As a result, those significant new uses cannot occur without going through a separate, subsequent EPA review and determination process associated with a SNUN.

B. Objectives

EPA is proposing these SNURs because the Agency wants:

- To have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing a listed chemical substance for the described significant new use.
- To be obligated to make a determination under TSCA section 5(a)(3) regarding the use described in the SNUN, under the conditions of use. The Agency will either determine under TSCA section 5(a)(3)(C) that the chemical, under the conditions of use, is not likely to present an unreasonable

risk, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator under the conditions of use, or make a determination under TSCA section 5(a)(3)(A) or (B) and take the required regulatory action associated with the determination, before manufacture or processing for the significant new use of the chemical substance can occur.

- To be able to complete its review and determination on each of the PMN substances, while deferring analysis on the significant new uses proposed in these rules unless and until the Agency receives a SNUN.

Issuance of a proposed SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the internet at <https://www.epa.gov/tscainventory>.

VI. Applicability of the Proposed Rules to Uses Occurring Before the Effective Date of the Final Rule

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule were undergoing premanufacture review at the time of signature of this proposed rule and were not on the TSCA Inventory. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no person may commence such activities without first submitting a PMN. Therefore, for the chemical substances subject to these proposed SNURs, EPA concludes that the proposed significant new uses are not ongoing.

EPA designates September 4, 2020 (date of web posting of this proposed rule) as the cutoff date for determining whether the new use is ongoing. The objective of EPA's approach is to ensure that a person cannot defeat a SNUR by initiating a significant new use before the effective date of the final rule.

Persons who begin commercial manufacture or processing of the chemical substances for a significant new use identified on or after that date would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and EPA would have to take action under section 5 allowing manufacture or processing to proceed. In developing this proposed rule, EPA has recognized that, given EPA's general

practice of posting proposed rules on its website a week or more in advance of **Federal Register** publication, this objective could be thwarted even before **Federal Register** publication of the proposed rule.

VII. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require development of any particular new information (e.g., generating test data) before submission of a SNUN. There is an exception: If a person is required to submit information for a chemical substance pursuant to a rule, order or consent agreement under TSCA section 4 (15 U.S.C. 2603), then TSCA section 5(b)(1)(A) (15 U.S.C. 2604(b)(1)(A)) requires such information to be submitted to EPA at the time of submission of the SNUN.

In the absence of a rule, order, or consent agreement under TSCA section 4 covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known to or reasonably ascertainable by them (see 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. Unit IV. lists potentially useful information for all SNURs listed here. Descriptions are provided for informational purposes. The potentially useful information identified in Unit IV. will be useful to EPA's evaluation in the event that someone submits a SNUN for the significant new use. Companies who are considering submitting a SNUN are encouraged, but not required, to develop the information on the substance, which may assist with EPA's analysis of the SNUN.

EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. Furthermore, pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the recommended test data. EPA encourages dialog with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h).

The potentially useful information described in Unit IV. may not be the only means of providing information to evaluate the chemical substance associated with the significant new uses. However, submitting a SNUN

without any test data may increase the likelihood that EPA will take action under TSCA sections 5(e) or 5(f). EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.

VIII. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710-25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40 and 721.25. E-PMN software is available electronically at <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca>.

IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers and processors of the chemical substances subject to this proposed rule. EPA's complete economic analysis is available in the docket for this rulemaking.

X. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations-and-executive-orders>.

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

This action proposes to establish SNURs for new chemical substances that were the subject of PMNs. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act (PRA)

According to the PRA, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information

that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070-0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Regulatory Support Division, Office of Mission Support (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act (RFA)

Pursuant to section 605(b) of the RFA, 5 U.S.C. 601 *et seq.*, I hereby certify that promulgation of this proposed SNUR would not have a significant adverse economic impact on a substantial number of small entities. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a "significant new use." Because these uses are "new," based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities.

A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices

per year. For example, the number of SNUNs received was seven in Federal fiscal year (FY) 2013, 13 in FY2014, six in FY2015, 12 in FY2016, 13 in FY2017, and 11 in FY2018, only a fraction of these were from small businesses. In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from \$16,000 to \$2,800. This lower fee reduces the total reporting and recordkeeping of cost of submitting a SNUN to about \$10,116 for qualifying small firms. Therefore, the potential economic impacts of complying with this proposed SNUR are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL-5597-1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this proposed rule. As such, EPA has determined that this proposed rule does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1531-1538 *et seq.*).

E. Executive Order 13132: Federalism

This action will not have federalism implications because it is not expected to have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

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

This action will not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes, significantly or uniquely affect the communities of Indian Tribal governments, and does not involve or impose any requirements that affect

Indian Tribes, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000).

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

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

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

In addition, since this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

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

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: August 31, 2020.

Tala Henry,

Deputy Director, Office of Pollution Prevention and Toxics.

Therefore, for the reasons stated in the preamble, EPA proposes to amend 40 CFR part 721 as follows:

PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

Subpart E—Significant New Uses for Specific Chemical Substances

■ 2. Add §§ 721.11559 and 721.11560 to subpart E to read as follows:

§ 721.11559 9-Octadecenoic acid (9Z)-, compd. with N-cyclohexylcyclohexanamine (1:1).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 9-Octadecenoic acid (9Z)-, compd. with N-cyclohexylcyclohexanamine (1:1) (PMN P-16-538, CAS No. 22256-71-9) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (o).

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N= 4 ppb.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11560**Bis[(hydroxyalkoxy)aryl]carbopolycyclic (generic).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance generically identified as

bis[(hydroxyalkoxy)aryl]carbopolycyclic (PMN P-18-308) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. .

(2) The significant new uses are:

(i) *Releases to water.* Requirements as specified in § 721.90(a)(4), (b)(4) and (c)(4) where N= 3 ppb.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in

§ 721.125(a) through (c) and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2020-20058 Filed 10-15-20; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 252**

[Docket DARS-2020-0036]

RIN 0750-AL03

Defense Federal Acquisition Regulation Supplement: Source Restrictions on Auxiliary Ship Component (DFARS Case 2020-D017); Correction

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

ACTION: Proposed rule; correction.

SUMMARY: DoD is correcting proposed regulations that published in the **Federal Register** on September 29, 2020, to correct the clause number for the DFARS section on restriction on acquisition of large medium-speed diesel engines.

DATES: Comments on the proposed rule published on September 29, 2020, at 85 FR 60943, continue to be accepted on or before November 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D017, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Search for “DFARS Case 2020-D017” under the heading “Enter keyword or ID” and selecting “Search.” Select “Comment Now” and follow the instructions

provided to submit a comment. Please include “DFARS Case 2020-D017” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2020-D017 in the subject line of the message.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, OUSD (A&S) DPC (DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6100.

SUPPLEMENTARY INFORMATION: In the proposed rule DoD published in the **Federal Register** at 85 FR 60943 on September 29, 2020, titled “Source Restrictions on Auxiliary Ship Components”, make the following correction:

- 1. On page 60945, in the 3rd column, amendatory instruction 9 is corrected to read as follows:

- 9. Add section 252.225-70XX to read as follows:

252.225-70XX Restriction on Acquisition of Large Medium-Speed Diesel Engines.

As prescribed in 225.7010-5, use the following clause:

Restriction on Acquisition of Large Medium-Speed Diesel Engines (Date)

Unless otherwise specified in its offer, the Contractor shall deliver under this contract large medium-speed diesel engines manufactured in the United States, Australia, Canada, or the United Kingdom.

(End of clause)

Jennifer D. Johnson,
Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020-22754 Filed 10-15-20; 8:45 am]

BILLING CODE 5001-06-P

Notices

Federal Register

Vol. 85, No. 201

Friday, October 16, 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

Agricultural Marketing Service

[AMS–SC–20–0071; SC20–990–1–N]

Domestic Hemp Production Program, Request for Approval of a New Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Agricultural Marketing Service (AMS) invites public comments about our intention to request Office of Management and Budget (OMB) approval for a new information collection to collect data on hemp production through a producer survey. This survey is necessary to identify data in the emerging hemp industry and for administering the domestic hemp program.

DATES: Comments on this notice must be received by December 15, 2020 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. Comments must be sent to Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: www.regulations.gov. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: www.regulations.gov. All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals

or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

William Richmond, Chief, Domestic Hemp Program Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Room 1406, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: william.richmond@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Assistant to the Director, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: richard.lower@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Survey of Hemp Producers and Production Trends.

OMB Number: 0581–NEW.

Type of Request: New Information Collection.

Abstract: AMS proposes to conduct a survey to collect information from U.S. hemp producers on current production costs, production practices, and marketing practices. This voluntary questionnaire is organized into four general sections.

AMS has partnered with the University of Kentucky to develop and administer this hemp survey. The data obtained from the survey will be used for forecasting hemp activity and to develop a representative understanding of hemp production practices and costs at national, regional, and state levels. Once the survey has been administered and the results collected, the University of Kentucky will summarize the raw data from the survey into a comprehensive report for AMS.

The survey will be administered through the National Association of State Departments of Agriculture (NASDA) using each state department of agriculture. Respondents can participate in the survey online or by completing the paper version. The survey will also be administered to Tribes that have approved hemp production programs, in order to get input from tribal hemp production. USDA estimates the number of producers that will complete this

survey to be approximately 18,000. This figure was derived from 2019 growing season data provided to USDA by Vote Hemp, a National hemp advocacy organization, along with data from certain State Departments of Agriculture.

The first section of the survey, General Hemp Experience, requests data on production location, licensed acreage, planted acreage, and harvested acreage by end-use. Collecting this information is necessary to develop an understanding of the industry across the country.

The second section asks questions about production costs and practices. Data collected will include information on input costs including seed, labor, fertilizer, licensing fees, and testing. This section dives deeper into the production costs for hemp and asks specific questions about the types of hemp.

The third section covers contracting and marketing practices. Data collected will include information on farmgate pricing by end use, contract usage, contract structure, and storage.

The final section, Decision Maker Characteristics, will collect demographic information on producers age, education level, experience, household size, and race.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Description of Respondents: Domestic hemp producers.

Number of Respondents: 18,000 respondents.

Frequency of Responses: Once.

Total Burden Hours: 9,000 total burden hours.

Comments are invited on: (1) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on those who respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference this docket number and be sent electronically to www.regulations.gov, or in writing to the USDA in care of the Docket Clerk at the address above. All comments received within the provided comment period will be available for public inspection during regular business hours at the same address.

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

AMS 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.

A 60-day comment period is provided to allow interested persons to respond to the notice.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020-22924 Filed 10-15-20; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2019-0050]

Monsanto Company; Availability of a Draft Plant Pest Risk Assessment and Draft Environmental Assessment for Determination of Nonregulated Status of Cotton Genetically Engineered for Insect Resistance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a draft plant pest risk assessment and draft environmental assessment regarding a request from Monsanto Company seeking a determination of nonregulated status for cotton designated as MON 88702, which has been genetically engineered for resistance to certain insects, primarily *Lygus* spp. We are making these documents available for public review and comment.

DATES: We will consider all comments that we receive on or before November 16, 2020.

ADDRESSES: You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0050>.

- **Postal Mail/Commercial Delivery:** Send your comment to Docket No. APHIS-2019-0050, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

The draft environmental assessment, draft plant pest risk assessment, and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0050> or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 7997039 before coming.

Supporting documents for this petition are also available on the APHIS website at <https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/permits-notifications-petitions/petitions/petition-status>.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Eck, Biotechnology Regulatory Services, APHIS, 4700 River Road, Unit 147, Riverdale, MD 20737-1236; (301) 851-3892, email: cynthia.a.eck@usda.gov.

SUPPLEMENTARY INFORMATION: Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests," regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered "regulated articles."

Pursuant to the terms set forth in a final rule published in the **Federal Register** on May 17, 2020 (85 FR 29790-29838, Docket No. APHIS-2018-0034),¹ any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. APHIS received a petition (APHIS Petition Number 19-091-01p) from Monsanto Company (Monsanto) seeking a determination of nonregulated status of a cotton event designated as MON

88702, which has been genetically engineered for resistance to certain insects, primarily *Lygus* spp. The Monsanto petition stated that this cotton is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

According to our process² for soliciting public comment when considering petitions for determination of nonregulated status of GE organisms, APHIS accepts written comments regarding a petition once APHIS deems it complete. On Sep 26, 2019, APHIS announced in the **Federal Register**³ (84 FR 50818-50819, Docket No. APHIS-2019-0050) the availability of the Monsanto petition for public comment. APHIS solicited comments on the petition for 60 days ending November 25, 2019, in order to help identify potential environmental and interrelated economic issues and impacts that APHIS may determine should be considered in our evaluation of the petition.

Thirty-five comments were received during the comment period. Fifteen comments from the agricultural, academic, and private sector were in support of Monsanto's petition. Fourteen comments from individuals were opposed to approval of Monsanto's petition. Six comments provided input on analyses to be considered in the environmental assessment (EA), or comments on insect-resistant crops in general. Issues raised during the comment period include evaluation of potential ecological and economic impacts, and potential impacts on non-target organisms. APHIS has evaluated the issues raised during the comment period and, where appropriate, has provided a discussion of these issues in our EA.

After public comments are received on a completed petition, APHIS evaluates those comments and then provides a second opportunity for public involvement in our decisionmaking process. According to our public review process (see footnote 2), the second opportunity for public involvement follows one of two approaches, as described below.

² On March 6, 2012, APHIS published in the **Federal Register** (77 FR 13258-13260, Docket No. APHIS-2011-0129) a notice describing our public review process for soliciting public comments and information when considering petitions for determinations of nonregulated status for GE organisms. To view the notice, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0129>.

³ To view the notice, its supporting documents, or the comments that we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0050>.

¹ To view the final rule, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0034>.

If APHIS decides, based on its review of the petition and its evaluation and analysis of comments received during the 60-day public comment period on the petition, that the petition involves a GE organism that raises no substantive new issues, APHIS will follow Approach 1 for public involvement. Under Approach 1, APHIS announces in the **Federal Register** the availability of APHIS' preliminary regulatory determination along with its draft EA, preliminary finding of no significant impact (FONSI), and its draft plant pest risk assessment (PPRA) for a 30-day public review period. APHIS will evaluate any information received related to the petition and its supporting documents during the 30-day public review period.

For this petition, we are following approach 2. Under this approach, if APHIS decides, based on its review of the petition and its evaluation and analysis of comments received during the 60-day public comment period on the petition, that the petition involves a GE organism that raises substantive new issues, APHIS first solicits written comments from the public on a draft EA and draft PPRA for a 30-day comment period through the publication of a **Federal Register** notice. Then, after reviewing and evaluating the comments on the draft EA and draft PPRA and other information, APHIS will revise the draft PPRA as necessary. It will then prepare a final EA, and based on the final EA, a National Environmental Policy Act (NEPA) decision document (either a FONSI or a notice of intent to prepare an environmental impact statement).

As part of our decisionmaking process regarding a GE organism's regulatory status, APHIS prepares a PPRA to assess the plant pest risk of the article. APHIS also prepares the appropriate environmental documentation—either an EA or an environmental impact statement—in accordance with NEPA. This will provide the Agency and the public with a review and analysis of any potential environmental impacts that may result if the petition request is approved.

APHIS concludes in its draft PPRA that MON 88702 cotton, which as stated above has been genetically engineered for resistance to certain insects, primarily *Lygus* spp., is unlikely to pose a plant pest risk. In section 403 of the Plant Protection Act, "plant pest" is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a

virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing.

APHIS has also prepared a draft EA in which we present two alternatives based on our analysis of data Monsanto submitted, a review of other scientific data, field tests conducted under APHIS' oversight, and comments received on the petition (see footnote 3). APHIS is considering the following alternatives: (1) Take no action, *i.e.*, APHIS would not change the regulatory status of MON 88702 cotton, or (2) make a determination of nonregulated status for insect-protected MON 88702 cotton.

The draft EA was prepared in accordance with (1) NEPA, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Based on APHIS' analysis of field and laboratory data submitted by Monsanto, references provided in the petition, peer-reviewed publications, information analyzed in the draft EA, the draft PPRA, comments provided by the public on the petition, and discussion of issues in the draft EA, APHIS has determined that cotton designated as event MON 88702 is unlikely to pose a plant pest risk.

We are making available for a 30-day review period our draft PPRA and draft EA. The draft EA and draft PPRA are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above. Copies of these documents may also be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

After the 30-day review period closes, APHIS will review and evaluate any information received during the 30-day review period. APHIS will revise the draft PPRA as necessary and prepare a final EA and, based on the final EA, a NEPA decision document (either a FONSI or a notice of intent to prepare an environmental impact statement).

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 9th day of October 2020.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–22917 Filed 10–15–20; 8:45 am]

BILLING CODE 3410–34-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–60–2020]

Foreign-Trade Zone (FTZ) 90— Syracuse, New York; Notification of Proposed Production Activity; PPC Broadband, Inc. (Fiber Optic Cables); Dewitt, New York

PPC Broadband, Inc. (PPC Broadband) submitted a notification of proposed production activity to the FTZ Board for its facility in Dewitt, New York. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on October 8, 2020.

PPC Broadband already has authority to produce hardline coaxial cables within Subzone 90C. The current request would add finished products and foreign status components to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt PPC Broadband from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, for the foreign-status materials/components noted below and in the existing scope of authority, PPC Broadband would be able to choose the duty rates during customs entry procedures that apply to fiber optic cables and fiber optic terminated jumpers or patchcords (duty-free). PPC Broadband would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: Tight buffered fibers; aramid yarn, swellcoat blockers or equivalent; polymer pocan polybutylene terephthalate, crastin or equivalent; copper tone wires (0.182 mm); talc—magsil diamond; and, fiber optic connectors (duty rate ranges from duty-free to 8%). The request indicates that aramid yarn and swellcoat blockers or equivalent will be admitted to the zone in privileged foreign status (19 CFR 146.41), thereby precluding inverted tariff benefits on such items. The request also indicates that certain components are subject to duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country

of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: ftz@trade.gov. The closing period for their receipt is November 25, 2020.

A copy of the notification will be available for public inspection in the "Reading Room" section of the Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Christopher Wedderburn at Chris.Wedderburn@trade.gov or (202) 482-1963.

Dated: October 13, 2020.

Andrew McGilvray,
Executive Secretary.

[FR Doc. 2020-22954 Filed 10-15-20; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-908, A-583-869, A-549-842, A-552-828]

Passenger Vehicle and Light Truck Tires From the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

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

DATES: Applicable October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Leo Ayala at (202) 482-3945 (Republic of Korea (Korea) and Thailand); Lauren Caserta at (202) 482-4737 (Taiwan); and Jasun Moy at (202) 482-8194 (the Socialist Republic of Vietnam (Vietnam)), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 22, 2020, the Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of passenger vehicle and light truck tires (passenger tires) from Korea, Taiwan, Thailand, and Vietnam.¹

¹ See *Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-*

Currently, the preliminary determinations are due no later than November 9, 2020.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days of the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On October 1, 2020, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the petitioner) submitted a timely request that Commerce postpone the preliminary determinations in these LTFV investigations.² The petitioner stated that it requests postponement due to the complexity of selecting the mandatory respondents and obtaining initial and supplemental questionnaire responses. Under the current timeline, the petitioner believes that Commerce will not have complete responses and sufficient information to issue these preliminary determinations.³

For the reasons stated above, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), is postponing the deadline for the preliminary determinations by 50 days (*i.e.*, 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its

Than-Fair-Value Investigations, 85 FR 38854 (June 29, 2020).

² See Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Petitioner's Request for Extension of Preliminary Determination," dated October 1, 2020.

³ *Id.*

preliminary determinations no later than December 29, 2020. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations in these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

Notification to Interested Parties

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: October 9, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020-22958 Filed 10-15-20; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XA467]

Endangered and Threatened Species; Draft Recovery Plan and Draft Recovery Implementation Strategy for the Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment and Notice of Initiation of 5-Year Review

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

ACTION: Notice of availability of draft recovery plan and draft recovery implementation strategy; request for comments; notice of initiation of a 5-year review; request for information.

SUMMARY: We, the National Marine Fisheries Service (NMFS), announce the availability of the Draft Recovery Plan and Draft Recovery Implementation Strategy for the Main Hawaiian Islands Insular False Killer Whale (MHI IFKW; *Pseudorca crassidens*) Distinct Population Segment (DPS) for public review. We are soliciting review and comment from the public and all interested parties on the Draft Recovery Plan and Draft Recovery Implementation Strategy, and will consider all substantive comments received during the review period before submitting the Recovery Plan and Recovery Implementation Strategy for final approval. We are also initiating a 5-year review of the MHI IFKW and are requesting new information on its status.

DATES: Comments on the Draft Recovery Plan and Draft Recovery Implementation Strategy must be received by December 15, 2020.

ADDRESSES: You may submit comments on the Draft Recovery Plan, the Draft Recovery Implementation Strategy, and information for the 5-year review, identified by NOAA–NMFS–2020–124 by either of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal.

1. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-124.

2. Click the “Comment Now!” icon and complete the required fields, and

3. Enter or attach your comments.

- **Mail:** Submit written comments or information for the 5-year review to Ann Garrett, Assistant Regional Administrator, Protected Resources Division, NMFS, Pacific Islands Regional Office, Attn: Krista Graham, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

The Draft Recovery Plan and Draft Recovery Implementation Strategy are available online at www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-124 or from <https://www.fisheries.noaa.gov/species/false-killer-whale#conservation-management> or upon request from the NMFS Pacific Islands Regional Office, Protected Resources Division.

FOR FURTHER INFORMATION CONTACT:

Krista Graham, (808) 725–5152, krista.graham@noaa.gov; Kristen Koyama, (301) 427–8403, kristen.koyama@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act (ESA) of 1973, as amended (15 U.S.C. 1531 *et seq.*), requires that NMFS develop and implement recovery plans for the conservation and survival of threatened and endangered species under its

jurisdiction, unless it is determined that such plans would not promote the conservation of the species. Section 4(f)(1) of the ESA requires that recovery plans incorporate: (1) Objective, measurable criteria which, when met, would result in a determination that the species is no longer threatened or endangered; (2) site-specific management actions necessary to achieve the plan’s goals; and (3) estimates of the time required and costs to implement recovery actions.

The MHI IFKW was listed as an endangered DPS on November 28, 2012, under the ESA (77 FR 70915). The listing determination and the extinction risk assessment were informed by the best available scientific and commercial data, as well as the status review conducted by a Biological Review Team (Oleson *et al.* 2010). The final critical habitat rule for the MHI IFKW DPS was published in the **Federal Register** on July 24, 2018 (83 FR 35062).

Although three populations of false killer whales occur within the Hawaiian Archipelago, the MHI IFKW DPS is a unique island-associated population with a range that entirely surrounds the main Hawaiian Islands. The most recent abundance estimate from 2015 was 167 (SE=23; 95 percent CI=128–218) animals, with annual estimates over a 16-year survey period ranging from 144 to 187 animals (Bradford *et al.* 2018). This estimate is similar to multi-year aggregated estimates previously reported (Oleson *et al.* 2010). Several lines of evidence indicate that the MHI IFKW has likely declined until at least the early 2000s. Because of changes in survey design and effort, it is unknown whether the MHI IFKW has continued to decline, has recently stabilized, or has recently increased.

Development of the Draft Plan

In September 2016, we developed a recovery outline to systematically and cohesively guide recovery actions for the MHI IFKW until we completed a recovery plan. The recovery outline is available from our website at: <https://www.fisheries.noaa.gov/species/false-killer-whale#conservation-management>.

In October 2016, we held a four-day recovery planning workshop for the MHI IFKW. The purpose of the workshop was to review and update the original threats analysis from the 2010 status review report (Oleson *et al.* 2010) and the 2012 final listing rule (77 FR 70915), as well as identify potential recovery criteria and actions to address the threats to the species. We invited experts in specific topic areas, including the species’ biology/ecology, threats to the species and the species’ habitat, and

the recovery planning process itself. Identified experts included representatives of federal and state agencies, scientific experts, individuals from conservation partners and non-governmental organizations, and commercial and recreational fishermen. The workshop summary was published in February 2017 and is available from our website at: <https://www.fisheries.noaa.gov/species/false-killer-whale#conservation-management>.

The recovery planning components for the MHI IFKW DPS is divided into three separate documents. The first document, the Recovery Status Review (NMFS 2020a), provides all the detailed information on the MHI IFKW’s biology, ecology, status and threats, and conservation efforts to date, which have typically been included in the background section of a species’ recovery plan. This separate, peer-reviewed document is designed to inform all post-listing activities, including recovery planning, and is a comprehensive update to the original 2010 status review (Oleson *et al.* 2010). The Recovery Status Review is a living document that will be updated regularly. The second document, the Draft Recovery Plan (NMFS 2020b), focuses on the statutory requirements of the ESA: (1) A description of site-specific management actions necessary to conserve the species; (2) objective, measurable criteria that, when met, will allow the species to be removed from the endangered and threatened species list; and (3) estimates of the time and funding required to achieve the plan’s goals. Recovery actions in the Draft Recovery Plan are described at a higher-level and are more strategic. The third document, the Draft Recovery Implementation Strategy (NMFS 2020c), is a flexible, operational document separate from the Draft Recovery Plan that provides specific, prioritized activities necessary to fully implement recovery actions in the Draft Recovery Plan, while affording us the ability to modify these activities in real time to reflect changes in the information available as well as progress towards recovery. All recovery planning documents, including the Recovery Status Review, the Draft Recovery Plan, and the Draft Recovery Implementation Strategy, are available on the NMFS false killer whale species profile website at <https://www.fisheries.noaa.gov/species/false-killer-whale#conservation-management>.

We have determined that this Draft Recovery Plan for the MHI IFKW DPS meets the statutory requirements for a recovery plan and are proposing to adopt it as the ESA recovery plan for

this endangered DPS. Section 4(f) of the ESA, as amended in 1988, requires that public notice and an opportunity to comment be provided prior to final approval of a recovery plan. This notice solicits comments on this Draft Recovery Plan and Draft Recovery Implementation Strategy.

Contents of the Draft Recovery Plan

The Draft Recovery Plan presents NMFS' proposed recovery goal, objectives, and criteria for making a downlisting (to threatened) and delisting decision. The proposed demographic and threats-based recovery objectives and criteria are based on the five listing factors found in the ESA section 4(a)(1). Before NMFS can remove the MHI IFKW DPS from protection under the ESA, the factors that led to the ESA listing need to have been reduced or eliminated to the point where federal protection under the ESA is no longer needed, and there is reasonable certainty that the relevant regulatory mechanisms are adequate to protect MHI IFKWs. The proposed demographic and threats-based recovery objectives and criteria for the MHI IFKW address threats from small population size, incidental take, inadequate regulatory mechanisms, competition with fisheries for prey, environmental contaminants and biotoxins, anthropogenic noise, effects from climate change, and secondary threats and synergies. The Draft Recovery Plan also describes specific information on the following: Current status of MHI IFKWs; pressures (limiting factors) and threats that have contributed to the MHI IFKWs' decline; recovery strategies to address the threats based on the best available science; and site-specific actions with timelines. The Draft Recovery Plan also summarizes time and costs required to implement recovery actions.

The Draft Recovery Implementation Strategy provides specific, prioritized activities necessary to fully implement recovery actions in the Draft Recovery Plan. This stepped-down approach will afford us the ability to modify these activities in real time to reflect changes in the information available as well as progress towards recovery.

How NMFS and Others Expect To Use the Plan

In addition to continuing to carry out actions already underway, such as photo identification efforts and satellite tag deployment and analysis, we have begun implementation of outreach actions as described in the plan, such as developing strategic outreach messaging and tools for fishermen and boaters to

report sightings of false killer whales, and anonymously reporting interactions with false killer whales. After public comment and the adoption of the Final Recovery Plan and Final Recovery Implementation Strategy, we will implement the actions and activities for which we have authority and funding; encourage other federal, state, and local agencies to implement recovery actions and activities for which they have responsibility, authority, and funding; and work cooperatively with the public and local stakeholders on implementation of other actions and activities. We expect the Recovery Plan to guide us and other federal agencies in evaluating federal actions under ESA section 7, as well as in implementing other provisions of the ESA, such as considering permits under section 10, and other statutes.

When we are considering a species for delisting, the agency will examine whether the ESA section 4(a)(1) listing factors have been addressed. To assist in this examination, we will use the delisting criteria described in the Draft Recovery Plan, which include both demographic criteria and threats-based criteria addressing each of the ESA section 4(a)(1) listing factors, as well as any other relevant data and policy considerations.

Public Comments Solicited

We are soliciting written comments on the Draft Recovery Plan and Draft Recovery Implementation Strategy. All substantive comments received by the date specified above will be considered and incorporated, as appropriate, prior to our decision whether to approve this Recovery Plan and Recovery Implementation Strategy. While we invite comments on all aspects of the Draft Recovery Plan and Draft Recovery Implementation Strategy, we are particularly interested in comments on the proposed objectives, criteria, and actions, as well as comments on the estimated time and cost of recovery actions and activities.

In addition, the ESA requires that we conduct a review of listed species at least once every five years. On the basis of such review under section 4(c)(2)(B), we determine whether any species should be removed from the list (*i.e.*, delisted) or reclassified from endangered to threatened or from threatened to endangered (16 U.S.C. 1533(c)(2)(B)). Any change in federal classification would require a separate rulemaking process. The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice

announces our active review of the MHI IFKW listed as an endangered DPS (77 FR 70915; November 28, 2012). Comments and information submitted will be considered in the 5-year review, as applicable.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: October 13, 2020.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020-22950 Filed 10-15-20; 8:45 am]

BILLING CODE 3510-22-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions the Procurement List.

SUMMARY: The Committee is proposing to add product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: November 15, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202-4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603-2117, Fax: (703) 603-0655, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the product(s) and service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following product(s) and service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—*Product Name(s)*: 7930–01–671–7469—Dish Soap, Manual, EPA Certified

Designated Source of Supply: Asso. for the Blind and Visually Impaired—Goodwill Industries of Greater Rochester, Inc., Rochester, NY

Mandatory For: Total Government Requirement

Contracting Activity: FEDERAL ACQUISITION SERVICE, GSA/FSS GREATER SOUTHWEST ACQUISITI

Service(s)

Service Type: Custodial Service

Mandatory for: US Air Force, JBSA Lackland, Lackland Training Annex, Kelly Annex, San Antonio, TX

Designated Source of Supply: HHI Services Inc., San Antonio, TX

Contracting Activity: DEPT OF THE AIR FORCE, FA3016 502 CONS CL JBSA

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2020–22922 Filed 10–15–20; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE**Office of the Secretary****Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces; Notice of Federal Advisory Committee Meeting**

AGENCY: General Counsel of the Department of Defense, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces will take place.

DATES: Open to the public, Friday, November 6, 2020, from 11:00 a.m. to 3:45 p.m. EDT.

ADDRESSES: This public meeting will be held via teleconference. To access the teleconference dial: 410–874–6300, Conference Pin: 611 989 635.

FOR FURTHER INFORMATION CONTACT:

Dwight Sullivan, 703–695–1055 (Voice), [dwight.h.sullivan.civ@mail.mil](mailto:dwright.h.sullivan.civ@mail.mil) (Email). Mailing address is DAC–IPAD, One Liberty Center, 875 N Randolph Street, Suite 150, Arlington, Virginia 22203.

Website: <http://dacipad.whs.mil/>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: In section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), Congress tasked the DAC–IPAD to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces. This will be the twentieth public meeting held by the DAC–IPAD. At this meeting the Committee will deliberate and vote on the draft DAC–IPAD review and assessment of racial and ethnic disparities in the investigation, prosecution, and conviction of Service members for sexual offenses involving adult victims within the military justice system as required by section 540I of the National Defense Authorization Act for Fiscal Year 2020. The Committee will be briefed on the developing field of restorative justice and hear from a civilian expert on this topic followed by a staff briefing and discussion on victim impact statements at sentencing as requested by Congress in the FY20 NDAA. The Committee will receive briefing and update from the Policy Subcommittee on its interviews with civilian prosecutors and defense counsel.

Agenda: 11:00 a.m.–11:10 a.m. Public Meeting Begins—Welcome and Introduction; 11:10 a.m.–12:30 p.m. DAC–IPAD Deliberations on Draft Racial and Ethnic Disparities Report; 12:30 p.m.–1:00 p.m. Lunch Break; 1:00 p.m.–2:00 p.m. Continuation of DAC–IPAD Deliberations on Draft Racial and Ethnic Disparities Report; 2:00 p.m.–3:00 p.m. Staff Presentation and Testimony from a Civilian Expert on Restorative Justice and Staff Presentation on Victim Impact Statements at Sentencing Followed by Committee Discussion on These Topics as Requested by Congress in the FY20 NDAA; 3:00 p.m.–3:30 p.m. Policy Subcommittee Briefing on Interviews with Civilian Prosecutors and Defense Counsel and Update on Subcommittee Timeline for Review of Military Pretrial Processes; 3:30 p.m.–3:45 p.m.

Discussion about DAC–IPAD Bylaws, Meeting Wrap-Up and Public Comment; 3:45 p.m. Public Meeting Adjourns.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public. This public meeting will be held via teleconference. To access the teleconference dial: 410–874–6300, Conference Pin: 611 989 635. Please consult the website for any changes to the public meeting date or time.

Written Statements: Pursuant to 41 CFR 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public session. Written comments must be received by the DAC–IPAD at least five (5) business days prior to the meeting date so that they may be made available to the Committee members for their consideration prior to the meeting. Written comments should be submitted via email to the DAC–IPAD at whs.pentagon.em.mbx.dacipad@mail.mil in the following formats: Adobe Acrobat or Microsoft Word. Please note that since the DAC–IPAD operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection. Oral statements from the public will be permitted, though the number and length of such oral statements may be limited based on the time available and the number of such requests. Oral presentations by members of the public will be permitted from 3:30 p.m. to 3:45 p.m. EST on November 6, 2020.

Dated: October 9, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–22897 Filed 10–15–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE**Office of the Secretary****Board of Regents, Uniformed Services University of the Health Sciences; Notice of Federal Advisory Committee Meeting**

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Board of Regents (Board), Uniformed Services University of the Health Sciences (USU), Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Board, USU will take place.

DATES: Monday, November 2, 2020, open to the public from 8:00 a.m. to 10:50 a.m. The closed session will follow from approximately 11:00 a.m. to 11:30 a.m.

ADDRESSES: Both the open and closed portions of the meeting will be held online. If you are interested in observing the open portion of the Board meeting online, please contact usu_external_affairs@usuhs.edu for connectivity information.

FOR FURTHER INFORMATION CONTACT: Annette Askins-Roberts, Designated Federal Officer (DFO), at (301) 295-3066 or annette.asksin-roberts@usuhs.edu. Mailing address is 4301 Jones Bridge Road, Bethesda, MD 20814. Website: <https://www.usuhs.edu/vpe/bor>.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102-3.140 and 102-3.150.

Purpose of the Meeting: The purpose of the meeting is to provide advice and recommendations to the Secretary of Defense, through the USD(P&R), on academic and administrative matters critical to the full accreditation and successful operation of USU. These actions are necessary for USU to pursue its mission, which is to educate, train and comprehensively prepare uniformed services health professionals, officers, scientists, and leaders to support the Military and Public Health Systems, the National Security and National Defense Strategies of the United States, and the readiness of our Uniformed Services.

Agenda: The schedule includes reviews of administrative matters of general consent (*e.g.*, minutes approval, degree conferrals, faculty appointments and promotions, award recommendations, etc.) electronically voted on since the previous Board meeting on August 3, 2020. Recommendations for degree conferrals, faculty appointments and promotions, and faculty and student awards presented by the deans of USU's schools and colleges; a report by the USU President on recent actions affecting academic and operational aspects of USU; a report from the Assistant Secretary of Defense for Health Affairs about the Military Health System;

multiply reports covering academic summaries presented by various Deans (consisting of submissions from the School of Medicine, Graduate School of Nursing, Postgraduate Dental College, and College of Allied Health Sciences); a member report covering the Armed Forces Radiobiology Research Institute (AFRRI); presented by the Director of AFRRI; a report from the Brigade Commander; reports from the Senior Vice President Campus South, Senior Vice President Campus West, and Office of the Vice President for Research; a report from the Inspector General; a report from the Office of Accreditation and Organizational Assessment; a report from the Office of Information and Educational Technology. A closed session will be held following the open session to discuss active investigations and personnel actions.

Meeting Accessibility: Pursuant to Federal statutes and regulations (5 U.S.C., Appendix, 5 U.S.C. 552b, and 41 CFR 102-3.140 through 102-3.165), the meeting will be held online and is open to the public from 8:00 a.m. to 10:50 a.m. Members of the public wishing to observe the meeting should contact External Affairs via email at usu_external_affairs@usuhs.edu no later than 2 business days prior to the meeting. Pursuant to 5 U.S.C. 552b(c)(2, 5-7), the DoD has determined that the portion of the meeting from 11:00 a.m. to 11:30 a.m. shall be closed to the public. The USD(P&R), in consultation with the DoD Office of General Counsel, has determined in writing that this portion of the Board's meeting will be closed as the discussion will disclose sensitive personnel information, will include matters that relate solely to the internal personnel rules and practices of the agency, will involve allegations of a person having committed a crime or censuring an individual, and may disclose investigatory records compiled for law enforcement purposes.

Written Statements: Pursuant to section 10(a)(3) of the FACA and 41 CFR 102-3.140, the public or interested organizations may submit written comments to the Board about its approved agenda pertaining to this meeting or at any time regarding the Board's mission. Individuals submitting a written statement must submit their statement to the USU External Affairs email address at usu_external_affairs@usuhs.edu. Written statements that do not pertain to a scheduled meeting of the Board may be submitted at any time. If individual comments pertain to a specific topic being discussed at the planned meeting, then these statements must be received at least 5 calendar days prior to the meeting. Otherwise,

the comments may not be provided to or considered by the Board until a later date. The DFO will compile all timely submissions with the Board's Chair and ensure such submissions are provided to Board Members before the meeting.

Dated: October 13, 2020.

Morgan E. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020-22959 Filed 10-15-20; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF ENERGY

[FE Docket No. 20-127-LNG]

Cheniere Marketing, LLC and Corpus Christi Liquefaction, LLC; Application for Blanket Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Countries on a Short-Term Basis

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed on October 2, 2020, by Cheniere Marketing, LLC and Corpus Christi Liquefaction, LLC (collectively, Corpus Christi). Corpus Christi requests blanket authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to 767 billion cubic feet (Bcf) of natural gas on a cumulative basis over a two-year period commencing on December 12, 2020. Corpus Christi seeks to export this LNG from the Corpus Christi Liquefaction Project located in Corpus Christi, Texas. Corpus Christi filed the Application under the Natural Gas Act (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, November 16, 2020.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026-4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S.

Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Benjamin Nussdorf or Amy Sweeney, U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-7893 or (202) 586-2627; benjamin.nussdorf@hq.doe.gov or amy.sweeney@hq.doe.gov.

Cassandra Bernstein, U.S. Department of Energy (GC-76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-9793, cassandra.bernstein@hq.doe.gov.

SUPPLEMENTARY INFORMATION: Corpus Christi requests a short-term blanket authorization to export LNG from the Corpus Christi Liquefaction Project to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy. This includes both countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries), and any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries). This Notice applies only to the portion of the Application requesting authority to export domestically produced LNG to non-FTA countries pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a).¹ DOE/FE will review Corpus Christi's request for a FTA export authorization separately pursuant to section 3(c) of the NGA, 15 U.S.C. 717b(c).

Corpus Christi requests this authorization on its own behalf and as agent for other entities who hold title to the LNG at the time of export. Additional details can be found in the Application, posted on the DOE/FE website at: <https://www.energy.gov/fe/downloads/cheniere-marketing-llc-and-corpus-christi-liquefaction-llc-fe-dkt-no-20-127-lng>.

¹ Corpus Christi's existing non-FTA blanket authorization will expire on December 11, 2020. See *Cheniere Marketing, LLC and Corpus Christi Liquefaction*, Application for Blanket Authorization to Export Liquefied Natural Gas, FE Docket No. 20-127-LNG (Oct. 2, 2020) at 3 n.9.

DOE/FE Evaluation

In reviewing Corpus Christi's request, DOE will consider any issues required by law or policy. DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. As part of this analysis, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),² and DOE/FE's response to public comments received on that Study.³

Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States*, 79 FR 48132 (Aug. 15, 2014);⁴
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States*, 79 FR 32260 (June 4, 2014);⁵ and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update*, 84 FR 49278 (Sept. 19, 2019), and DOE/FE's response to public comments received on that study.⁶ Parties that may oppose this Application should address these issues and documents in their comments and protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

² See NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018), available at: <https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf>.

³ U.S. Dep't of Energy, *Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments*, 83 FR 67251 (Dec. 28, 2018).

⁴ The Addendum and related documents are available at: <http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states>.

⁵ The 2014 Life Cycle Greenhouse Gas Report is available at: <http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states>.

⁶ U.S. Dep't of Energy, *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update—Response to Comments*, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at: <https://fossil.energy.gov/app/docketindex/docket/index/21>.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Interested parties will be provided 30 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to fergas@hq.doe.gov, with FE Docket No. 20-127-LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 20-127-LNG. *Please note:* If submitting a filing via email, please include all related documents and attachments (e.g., exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based

on the official record, including the Application and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene, notices of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: <http://www.fe.doe.gov/programs/gasregulation/index.html>.

Signed in Washington, DC, on October 9, 2020.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Oil and Natural Gas.

[FR Doc. 2020-22928 Filed 10-15-20; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

[FE Docket No. 13-147-LNG]

Delfin LNG LLC; Application To Amend Export Term Through December 31, 2050, for Existing Non-Free Trade Agreement Authorization

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed on October 7, 2020, by Delfin LNG LLC (Delfin). Delfin seeks to amend the export term set forth in its current authorization to export liquefied natural gas (LNG) to non-free trade agreement countries, DOE/FE Order No. 4028, to a term ending on December 31, 2050. Delfin filed the Application under the Natural Gas Act (NGA) and DOE's policy statement entitled, "Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050" (Policy Statement). Protests, motions to intervene, notices of intervention, and written comments on the requested term extension are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later

than 4:30 p.m., Eastern time, November 2, 2020.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026-4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Beverly Howard or Amy Sweeney, U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-9387; (202) 586-2627, Beverly.howard@hq.doe.gov or amy.sweeney@hq.doe.gov

Cassandra Bernstein or Edward Toyozaki, U.S. Department of Energy (GC-76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D-033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-9793; (202) 586-0126, cassandra.bernstein@hq.doe.gov or edward.toyozaki@hq.doe.gov

SUPPLEMENTARY INFORMATION: On June 1, 2017, in Order No. 4028, DOE/FE authorized Delfin to export domestically produced LNG in a volume equivalent to 657.5 billion cubic feet per year of natural gas, pursuant to NGA section 3(a), 15 U.S.C. 717b(a).¹ Delfin is authorized to export this LNG by vessel from the proposed floating Delfin Liquefaction Facility to be located in West Cameron Block 167 in the Gulf of Mexico, offshore of Cameron Parish, Louisiana, to any country with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries) for a 20-year term. In the

Application,² Delfin asks DOE to extend its current export term to a term ending on December 31, 2050, as provided in the Policy Statement.³ Additional details can be found in the Application, posted on the DOE/FE website at: <https://www.energy.gov/sites/prod/files/2020/10/f79/Delfin%20Amendment%2010-07-20.pdf>.

DOE/FE Evaluation

In the Policy Statement, DOE adopted a term through December 31, 2050 (inclusive of any make-up period), as the standard export term for long-term non-FTA authorizations.⁴ As the basis for its decision, DOE considered its obligations under NGA section 3(a), the public comments supporting and opposing the proposed Policy Statement, and a wide range of information bearing on the public interest.⁵ DOE explained that, upon receipt of an application under the Policy Statement, it would conduct a public interest analysis of the application under NGA section 3(a). DOE further stated that "the public interest analysis will be limited to the application for the term extension—meaning an intervenor or protestor may challenge the requested extension but not the existing non-FTA order."⁶

Accordingly, in reviewing Delfin's Application, DOE/FE will consider any issues required by law or policy under NGA section 3(a), as informed by the Policy Statement. To the extent appropriate, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),⁷ DOE's response to public comments received on that Study,⁸ and the following environmental documents:

² *Delfin LNG LLC, Application to Amend Export Term for Existing Long-Term Authorizations Through December 31, 2050*, FE Docket Nos. 13-129-LNG and 13-147-LNG (Oct. 2, 2020). Delfin's request regarding its FTA authorization is not subject to this Notice. See 15 U.S.C. 717b(c).

³ U.S. Dep't of Energy, *Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050; Notice of Final Policy Statement and Response to Comments*, 85 FR 52237 (Aug. 25, 2020) [hereinafter *Policy Statement*].

⁴ See *id.*, 85 FR 52247.

⁵ See *id.*, 85 FR 52247.

⁶ *Id.*, 85 FR 52247.

⁷ See NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018), available at: <https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf>.

⁸ U.S. Dep't of Energy, *Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments*, 83 FR 67251 (Dec. 28, 2018).

¹ *Delfin LNG LLC*, DOE/FE Order No. 4028, FE Docket No. 13-147-LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel From a Proposed Floating Liquefaction Project and Deepwater Port 30 Miles Offshore of Louisiana to Non-Free Trade Agreement Nations (June 1, 2017), *reh'g denied* DOE/FE Order No. 4028-A (Apr. 3, 2018).

• *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States*, 79 FR 48132 (Aug. 15, 2014);⁹

• *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States*, 79 FR 32260 (June 4, 2014);¹⁰ and

• *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update*, 84 FR 49278 (Sept. 19, 2019), and DOE/FE's response to public comments received on that study.¹¹

Parties that may oppose the Application should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable, addressing the Application. Interested parties will be provided 15 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention. The public previously was given an opportunity to intervene in, protest, and comment on Delfin's long-term non-FTA application. Therefore, DOE will not consider comments or protests that do not bear directly on the requested term extension.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the

appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to fergas@hq.doe.gov, with FE Docket No. 13–147–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 13–147–LNG. Please note: If submitting a filing via email, please include all related documents and attachments (e.g., exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: <http://www.fe.doe.gov/programs/gasregulation/index.html>.

Signed in Washington, DC, on October 9, 2020.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Fossil Energy.

[FR Doc. 2020–22927 Filed 10–15–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL17–92–000]

East Texas Electric Cooperative, Inc.; Notice of Filing

Take notice that on October 8, 2020, East Texas Electric Cooperative, Inc. submitted a Supplement to the September 20, 2017 application for cost-based revenue requirements schedule for reactive power production capability.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

In addition to publishing the full text of this document in the **Federal Register**, The Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel

⁹ The Addendum and related documents are available at: <http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states>.

¹⁰ The 2014 Life Cycle Greenhouse Gas Report is available at: <http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states>.

¹¹ U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update—Response to Comments, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at: <https://fossil.energy.gov/app/docketindex/docket/index/21>.

Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on October 29, 2020.

Dated: October 9, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020-22934 Filed 10-15-20; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC20-21-000]

Commission Information Collection Activities (FERC-583); Comment Request; Extension With Revisions

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection FERC-583 (Annual Kilowatt Generating Report (Annual Charges)) and is submitting the information collection to the Office of Management and Budget (OMB) for review. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below.

DATES: Comments on the collection of information are due November 16, 2020.

ADDRESSES: Send written comments on FERC-583 to OMB through www.reginfo.gov/public/do/PRAMain, Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB control number (1902-0136) in the subject line. Your comments should be sent within 30 days of publication of this notice in the **Federal Register**.

Please submit copies of your comments to the Commission (identified by Docket No. IC20-21-000) by any of the following methods:

- eFiling at Commission's Website: <http://www.ferc.gov/docs-filing/efiling.asp>.
- *Mail/Express Services:* 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.

Instructions:

OMB submissions must be formatted and filed in accordance with submission guidelines at www.reginfo.gov/public/do/PRAMain; Using the search function under the "Currently Under Review field," select Federal Energy Regulatory Commission; click "submit" and select "comment" to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov/help/submission-guide.asp>. For user assistance, contact FERC Online Support by email at ferconlinesupport@ferc.gov, or by phone at: (866) 208-3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading

comments and issuances in this docket may do so at <http://www.ferc.gov/docs-filing/docs-filing.asp>.

FOR FURTHER INFORMATION: Ellen Brown may be reached by email at DataClearance@FERC.gov and telephone at (202) 502-8663.

SUPPLEMENTARY INFORMATION:

Title: FERC-583, Annual Kilowatt Generating Report (Annual Charges).
OMB Control No.: 1902-0136.

Type of Request: Three-year extension of the FERC-583 information collection requirements, with the addition of two activities that are in use without a control number: (1) Application of a State or municipal licensee or exemptee for total or partial exemption from the assessment of annual charges; and (2) Appeals and requests for rehearing of billing for annual charges.

Abstract: FERC-583 is an existing information collection that enables the Commission to determine amounts of annual charges in accordance with section 10(e)(1) of the Federal Power Act (FPA),¹ section 3401 of the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986),² and 18 CFR part 11. On June 16, 2020, the Commission published a Notice in the **Federal Register** in Docket No. IC20-21-000 inviting public comments.³ Public comments were due on August 17, 2020. No comments were filed in response to this Notice.

Types of Respondents: (1) Hydropower licensees of projects more than 1.5 megawatts of installed capacity; (2) Holders of exemptions under section 30 of the FPA⁴; and (3) exemptees under sections 405 and 408 of the Public Utility Regulatory Policy Act.⁵

Estimate of Annual Burden: The following table shows the estimated annual burdens:

A	B	C	D	E	F	G
Type of response	Number of respondents	Annual number of responses per respondent	Total number of responses (col. B x col. C)	Average hours & cost per response	Total annual burden hours and total annual cost (col. D x col. E)	Cost per respondent (col. F ÷ col. B)
Annual kilowatt generating report	520	1	520	2 hrs.; \$166	1,040 hrs.; \$86,320 ...	\$166
Application of a State or municipal licensee or exemptee for total or partial exemption from the assessment of annual charges.	48	1	48	2 hrs.; \$166	96 hrs.; \$7,968	166
Appeals and requests for rehearing of billing for annual charges.	3	1	3	40 hrs.; \$3,320 ..	120 hrs.; \$9,960	3,320
Totals	571	.....	571	.....	1,256 hrs.; \$104,248	.....

¹ 16 U.S.C. 803(e)(1).

² Public Law 99-5089, Title III, § 3401 (Oct. 21, 1986), 100 Stat. 1890 (codified at 42 U.S.C. 7178).

³ 85 FR 36396.

⁴ 16 U.S.C. 823a.

⁵ 16 U.S.C. 2705 and 2708.

Comments: Comments are invited on:
 (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
 (2) the accuracy of estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used;
 (3) ways to enhance the quality, utility and clarity of the information collection;
 and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: October 9, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020–22933 Filed 10–15–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9053–4]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS)

Filed October 5, 2020 10 a.m. EST

Through October 9, 2020 10 a.m. EST
 Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search>.

EIS No. 20200202, Final, GSA, AZ, Expansion and Modernization of the San Luis I Land Port of Entry, Review Period Ends: 11/16/2020, Contact: Osmahn A. Kadri 415–760–9239

EIS No. 20200203, Draft, USAF, VA, Fifth Generation Formal Training Unit Optimization, Comment Period Ends: 11/30/2020, Contact: Nolan Swick 210–925–3392

EIS No. 20200204, Final, BIA, OK, Osage County Oil and Gas, Review Period Ends: 11/16/2020, Contact: Mosby Halterman 918–781–4660

EIS No. 20200205, Second Draft Supplemental, USACE, MS, Draft Supplement No. 2 to the Final Supplement No. 1 to the 1982 Yazoo Area Pump Project Final

Environmental Impact Statement,
Comment Period Ends: 11/30/2020, Contact: Kenneth Parrish 601–631–5006

Dated: October 13, 2020.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2020–22931 Filed 10–15–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m. on Tuesday, October 20, 2020.

PLACE: The meeting is open to the public. Out of an abundance of caution related to current and potential coronavirus developments, the public's means to observe this Board meeting will be via a webcast live on the internet and subsequently made available on-demand approximately one week after the event. Visit <http://fdic.windrosemedia.com> to view the live event. Visit <http://fdic.windrosemedia.com/index.php?category=FDIC+Board+Meetings> after the meeting. If you need any technical assistance, please visit our Video Help page at: <https://www.fdic.gov/video.html>.

Observers requiring auxiliary aids (e.g., sign language interpretation) for this meeting should call 703–562–2404 (Voice) or 703–649–4354 (Video Phone) to make necessary arrangements.

STATUS: Open.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the “Government in the Sunshine Act” (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Final Rule on Branch Application Procedures.

Memorandum and resolution re: Notice of Proposed Rulemaking on Removal of Transferred OTS Regulations Regarding Subordinate Organizations (Part 390, Subpart O).

Memorandum and resolution re: Notice of Proposed Rulemaking on Role of Supervisory Guidance.

Report of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda

Memorandum and resolution re: Final Rule on Regulatory Capital Treatment for Investments in Certain Unsecured Debt Instruments of Global Systemically Important U.S. Bank Holding Companies, Certain Intermediate Holding Companies, and Global Systemically Important Foreign Banking Organizations; Total-Loss Absorbing Capacity Requirements.

Memorandum and resolution re: Final Rule on Net Stable Funding Ratio; Liquidity Risk Measurement Standards and Disclosure Requirements.

Memorandum and resolution re: Interim Final Rule on Applicability of Annual Independent Audits and Reporting Requirements for Fiscal Years Ending in 2021.

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at 202–898–7043.

Dated at Washington, DC, on October 13, 2020.

Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

[FR Doc. 2020–23119 Filed 10–14–20; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Thursday, October 22, 2020.

PLACE: This meeting will be conducted through a videoconference involving all Commissioners. Any person wishing to listen to the proceeding may call the number listed below.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor v. Consol Pennsylvania Coal Co., LLC*, Docket No. PENN 2018–0169 (Issues include whether the Judge erred in ruling that the operator had failed to adequately insulate and protect a power cable.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as

sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION:
Emogene Johnson, (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

Phone Number for Listening to Meeting: 1-(866) 236-7472.

Passcode: 678-100.

(Authority: 5 U.S.C. 552b.)

Dated: October 14, 2020.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2020-23039 Filed 10-14-20; 11:15 am]

BILLING CODE 6735-01-P

FEDERAL TRADE COMMISSION

Granting of Requests for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this

waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED

September 1, 2020 thru September 30, 2020

09/04/2020

20201342	G	Medtronic Public Limited Company; Companion Medical, Inc.; Medtronic Public Limited Company.
20201374	G	Oaktree Opportunities Fund Xb, L.P.; UP Energy Corporation; Oaktree Opportunities Fund Xb, L.P.
20201384	G	Elliott Associates, L.P.; Noble Energy Inc.; Elliott Associates, L.P.
20201385	G	Elliott International Limited; Noble Energy Inc.; Elliott International Limited.
20201386	G	American Express Company; Alpha Kabbage, Inc.; American Express Company.
20201387	G	Arches Holdings Inc.; Ancelux Topco S.C.A.; Arches Holdings Inc.
20201392	G	Capital Partners Private Equity Income Fund III, L.P.; YC Holdings, Inc.; Capital Partners Private Equity Income Fund III, L.P.
20201394	G	General Atlantic Partners AIV-1 B, L.P.; RAWK Holdings LLC; General Atlantic Partners AIV-1 B, L.P.
20201396	G	Senator Global Opportunity Master Fund L.P.; CoreLogic, Inc.; Senator Global Opportunity Master Fund L.P.
20201402	G	BidCo 100 Limited; OneWeb Global Limited; BidCo 100 Limited.
20201407	G	DiamondPeak Holdings Corp.; Stephen S. Burns; DiamondPeak Holdings Corp.
20201409	G	The Founders Fund II, LP; Palantir Technologies Inc.; The Founders Fund II, LP.
20201410	G	The Founders Fund III, LP; Palantir Technologies Inc.; The Founders Fund III, LP.
20201411	G	The Founders Fund IV, LP; Palantir Technologies Inc.; The Founders Fund IV, LP.
20201413	G	Peter Thiel; Palantir Technologies Inc.; Peter Thiel.
20201415	G	William G. Davis; James J. Arrigo; William G. Davis.
20201418	G	Software Acquisition Group Inc.; John S. Hendricks and Maureen D. Hendricks; Software Acquisition Group Inc.

09/09/2020

20201419	G	Clayton, Dubilier & Rice Fund XI, L.P.; HD Supply Holdings, Inc.; Clayton, Dubilier & Rice Fund XI, L.P.
20201425	G	Clayton, Dubilier & Rice Fund XI, L.P.; Construction Supply Investments, LLC; Clayton, Dubilier & Rice Fund XI, L.P.
20201426	G	Gridiron Capital Fund IV, L.P.; Clarion Investors II, LP; Gridiron Capital Fund IV, L.P.
20201430	G	EQT Infrastructure IV (No. 1) EUR SCSP; EdgeConnex, Inc.; EQT Infrastructure IV (No. 1) EUR SCSP.
20201431	G	Perpetual Limited; BrightSphere Investment Group Inc.; Perpetual Limited.
20201433	G	Cognizant Technology Solutions Corporation; ASH V1, LLC; Cognizant Technology Solutions Corporation.
20201434	G	Omnicell, Inc.; David A. Borden; Omnicell, Inc.
20201435	G	Palo Alto Networks, Inc.; Justin Jordan; Palo Alto Networks, Inc.
20201437	G	Southwestern Energy Company; Montage Resources Corporation; Southwestern Energy Company.
20201438	G	WEC Energy Group, Inc.; Iberdrola S.A.; WEC Energy Group, Inc.
20201447	G	Hennessy Capital Acquisition Corp. IV; Canoo Holdings Ltd.; Hennessy Capital Acquisition Corp. IV.
20201449	G	Alfa Laval AB; Neles Corporation; Alfa Laval AB.
20201450	G	Nippon Telegraph and Telephone Corporation; Frank Selldorff; Nippon Telegraph and Telephone Corporation.
20201451	G	GI Partners Fund V LP; Condor Top Holdco Limited; GI Partners Fund V LP.
20201455	G	Sovos Brands Limited Partnership; Matthew LaCasse; Sovos Brands Limited Partnership.
20201457	G	WorldRemit Group Limited; Chime Inc.; WorldRemit Group Limited.
20201461	G	Cryoport, Inc.; Chart Industries, Inc.; Cryoport, Inc.
20201462	G	Kinnevik AB; Teladoc Health, Inc.; Kinnevik AB.
20201467	G	RWS Holdings Plc; SDL plc; RWS Holdings Plc.
20201474	G	KPCI Holdings Ltd.; Partners Group Access 822, L.P.; KPCI Holdings Ltd.
20201477	G	Fastly, Inc.; Signal Sciences Corp.; Fastly, Inc.
20201479	G	Thomas H. Lee Parallel Fund VIII, L.P.; Insurance Technologies Holdings, LLC; Thomas H. Lee Parallel Fund VIII, L.P.

09/11/2020

20201253	G	Sunrun Inc.; Blackstone Capital Partners VI L.P.; Sunrun Inc.
20201255	G	Blackstone Capital Partners VI L.P.; Sunrun Inc.; Blackstone Capital Partners VI L.P.
20201460	G	Greenbridge Investment L.P.; Neo4j, Inc.; Greenbridge Investment L.P.

EARLY TERMINATIONS GRANTED—Continued

September 1, 2020 thru September 30, 2020

20201478	G	Emerson Electric Co.; Open Systems International, Inc.; Emerson Electric Co.
09/15/2020		
20201469	G	Gores Metropoulos, Inc.; Luminar Technologies, Inc.; Gores Metropoulos, Inc.
20201495	G	Unilever N.V.; The LIV Group Inc.; Unilever N.V.
20201499	G	Trident VIII, L.P.; Revere Parent, Inc.; Trident VIII, L.P.
20201501	G	Cognizant Technology Solutions Corporation; Pamlico Capital III, L.P.; Cognizant Technology Solutions Corporation.
20201502	G	Carlyle Partners VII, L.P.; Victory Innovations Company, Inc.; Carlyle Partners VII, L.P.
20201504	G	MRI Parent Holdings, LLC; Thomas C. Priore; MRI Parent Holdings, LLC.
20201505	G	Genstar Capital Partners IX, L.P.; Utopia Investment Holdings, LLC; Genstar Capital Partners IX, L.P.
20201506	G	Cove Hill Partners Fund I, L.P.; Vista Equity Endeavor Fund I, L.P.; Cove Hill Partners Fund I, L.P.
20201507	G	Trine Acquisition Corp.; Desktop Metal, Inc.; Trine Acquisition Corp.
20201510	G	GI Partners Fund V LP; Charlesbank Equity Fund VII, Limited Partnership; GI Partners Fund V LP.
09/16/2020		
20201496	G	KKR Next Generation Technology Growth Fund II SCSp; Zwift, Inc.; KKR Next Generation Technology Growth Fund II SCSp.
20201509	G	Roark Capital Partners V (T) LP; ServiceMaster Global Holdings, Inc.; Roark Capital Partners V (T) LP.
09/17/2020		
20201436	G	Daniel Kretinsky; Foot Locker, Inc.; Daniel Kretinsky.
09/21/2020		
20201494	G	KKR Raptor Aggregator L.P.; FTV IV, L.P.; KKR Raptor Aggregator L.P.
20201522	G	Snow Phipps III, L.P.; Prototek Holdings LLC; Snow Phipps III, L.P.
20201523	G	Progress Software Corporation; Chef Software Inc.; Progress Software Corporation.
20201524	G	Clayton, Dubilier & Rice Fund X, L.P.; KKR Element Aggregator L.P.; Clayton, Dubilier & Rice Fund X, L.P.
20201527	G	Universal Corporation; Heinz-Peter Schmidt; Universal Corporation.
20201529	G	The Veritas Capital Fund VI, L.P.; Rosetta Stone Inc.; The Veritas Capital Fund VI, L.P.
20201530	G	Temasek Holdings (Private) Limited; Farmer's Business Network Inc.; Temasek Holdings (Private) Limited.
20201531	G	Chelsea Worldwide, Inc.; Clene Nanomedicine, Inc.; Chelsea Worldwide, Inc.
20201534	G	HSI Holdings I, Inc.; AF Software Holdings, Inc.; HSI Holdings I, Inc.
09/22/2020		
20201484	G	Andreessen Horowitz LSV Fund I, L.P.; Coinbase Global, Inc.; Andreessen Horowitz LSV Fund I, L.P.
20201571	G	Cisco Systems, Inc.; Acacia Communications, Inc.; Cisco Systems, Inc.
09/23/2020		
20201439	G	NovaSource Power Holdings, Inc.; First Solar, Inc.; NovaSource Power Holdings, Inc.
20201489	G	Wellspring Capital Partners VI, L.P.; Tenex Capital Partners II, L.P.; Wellspring Capital Partners VI, L.P.
09/25/2020		
20201550	G	Riverstone/Carlyle Global Energy and Power Fund IV; Schlumberger N.V.; Riverstone/Carlyle Global Energy and Power Fund IV.
20201551	G	Schlumberger N.V.; Riverstone/Carlyle Global Energy and Power Fund IV; Schlumberger N.V.
09/29/2020		
20201349	G	Clarivate Plc; GEI VII Capri Holdings, LLC; Clarivate Plc.
20201547	G	Commonspirit Health; Yavapai Community Hospital Association; Commonspirit Health.
09/30/2020		
20201532	G	Palladium Equity Partners V, L.P.; ACP Investment Fund III-A, L.P.; Palladium Equity Partners V, L.P.
20201538	G	Backyard Limited Partnership; Yves Barrette; Backyard Limited Partnership.
20201540	G	TFI International Inc.; R.R. Donnelley & Sons Company; TFI International Inc.
20201546	G	JLL Partners Fund VIII, L.P.; MedAnalytics Parent, Inc.; JLL Partners Fund VIII, L.P.
20201552	G	Nordic Capital X Alpha, L.P.; Morten Ebbesen; Nordic Capital X Alpha, L.P.
20201553	G	Genossenschaft Zentralschweizer Milchproduzenten ZMP; The Interogo Foundation; Genossenschaft Zentralschweizer Milchproduzenten ZMP.
20201555	G	Third Point Reinsurance Ltd.; China Minsheng Investment Group Corp., Ltd.; Third Point Reinsurance Ltd.
20201556	G	China Minsheng Investment Group Corp., Ltd.; Third Point Reinsurance Ltd.; China Minsheng Investment Group Corp., Ltd.
20201558	G	Flying Eagle Acquisition Corp.; Andrew Paradise; Flying Eagle Acquisition Corp.
20201562	G	Conyers Park II Acquisition Corp.; Karman Topco L.P.; Conyers Park II Acquisition Corp.
20201563	G	Universities Superannuation Scheme Limited; TP Group PECO—LLC; Universities Superannuation Scheme Limited.
20201564	G	Odyssey Investment Partners Fund VI, LP; ProPharma Group Topco, LLC; Odyssey Investment Partners Fund VI, LP.

EARLY TERMINATIONS GRANTED—Continued

September 1, 2020 thru September 30, 2020

20201566	G	Clearlake Capital Partners VI, L.P.; Cardinal Parent, Inc.; Clearlake Capital Partners VI, L.P.
20201567	G	Carlyle Partners VII, L.P.; TriNetX, Inc.; Carlyle Partners VII, L.P.
20201574	G	Barings BDC, Inc.; MVC Capital, Inc.; Barings BDC, Inc.

FOR FURTHER INFORMATION CONTACT:

Theresa Kingsberry (202–326–3100),
Program Support Specialist, Federal
Trade Commission Premerger
Notification Office, Bureau of
Competition, Room CC–5301,
Washington, DC 20024.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–22943 Filed 10–15–20; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

**Granting of Requests for Early
Termination of the Waiting Period
Under the Premerger Notification
Rules**

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this

waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED

[August 1, 2020 thru August 31, 2020]

08/03/2020

20200299	G	London Stock Exchange Group plc; Blackstone Capital Partners (Cayman) VII L.P.; London Stock Exchange Group plc.
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08/04/2020

20200298	G	Blackstone Capital Partners (Cayman) VII L.P.; London Stock Exchange Group plc; Blackstone Capital Partners (Cayman) VII L.P.
20201260	G	Spartan Energy Acquisition Corp.; Dr. Geeta Gupta and Henrik Fisker; Spartan Energy Acquisition Corp.
20201261	G	Graf Industrial Corp.; David Hall; Graf Industrial Corp.
20201263	G	Churchill Capital Corp III; Polaris Investment Holdings, L.P.; Churchill Capital Corp III.
20201266	G	Madison Dearborn Capital Partners VIII–A, L.P.; Benefytt Technologies, Inc.; Madison Dearborn Capital Partners VIII–A, L.P.
20201269	G	2019 HS TopCo, LP; GlobalSCAPE, Inc.; 2019 HS TopCo, LP.
20201270	G	KKR Management LLP; Global Atlantic Financial Group; KKR Management LLP.
20201271	G	Westport Acquisition Parent LP; TPG Partners VII, L.P.; Westport Acquisition Parent LP.
20201272	G	Berkshire Fund IX, L.P.; Gregory A. Glassman; Berkshire Fund IX, L.P.
20201273	G	Stichting Administratiekantoor Westend; Meow Wolf, Inc.; Stichting Administratiekantoor Westend.
20201275	G	Hewlett Packard Enterprise Company; Silver Peak Systems, Inc.; Hewlett Packard Enterprise Company.
20201279	G	KPS Special Situations Fund V, L.P.; Briggs & Stratton Corporation; KPS Special Situations Fund V, L.P.
20201280	G	TCW Direct Lending, LLC; School Specialty, Inc.; TCW Direct Lending, LLC.
20201283	G	Mr. Troy Taylor and Mrs. LaVonda Taylor; Mr. James M. Groover; Mr. Troy Taylor and Mrs. LaVonda Taylor.

08/05/2020

20201265	G	Orlando Health, Inc.; Community Health Systems, Inc.; Orlando Health, Inc.
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08/11/2020

20201278	G	EQT IX (No. 1) EUR SCSP; EQT VII (No. 1) LP; EQT IX (No. 1) EUR SCSP.
20201284	G	Generation IM Sustainable Solutions Fund III (B), L.P.; Remitly Global, Inc.; Generation IM Sustainable Solutions Fund III (B), L.P.
20201292	G	Leviton Manufacturing Co., Inc.; Nexans S.A.; Leviton Manufacturing Co., Inc.
20201293	G	Alliant Holdings, L.P.; Milton M. Kleinberg and Marsha A. Kleinberg; Alliant Holdings, L.P.
20201295	G	Telus Corporation; STG V–A, L.P.; Telus Corporation.
20201297	G	Roark Capital Partners V (T) LP; Mr. Gary Mitchell; Roark Capital Partners V (T) LP.
20201298	G	Fortress Acquisition Sponsor LLC; JHL Capital Group Fund LLC; Fortress Acquisition Sponsor LLC.
20201303	G	Wind Point Partners IX–A, L.P.; James M. Jacobsen Family Trust; Wind Point Partners IX–A, L.P.
20201304	G	Wind Point Partners IX–A, L.P.; John A. Jacobsen Family Trust; Wind Point Partners IX–A, L.P.

08/12/2020

20201306	G	Thoma Bravo Discover Fund II, L.P.; Majesco Limited; Thoma Bravo Discover Fund II, L.P.
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EARLY TERMINATIONS GRANTED—Continued

[August 1, 2020 thru August 31, 2020]

20201309	G	KKR Energy Income and Growth Fund I L.P.; Liberty Mutual Holding Company Inc.; KKR Energy Income and Growth Fund I L.P.
20201310	G	Spectacle BidCo LP; TPG VII CDS Holdings, L.P.; Spectacle BidCo LP.
20201311	G	Stanley C. Middleman; Joseph C. Lewis; Stanley C. Middleman.
20201313	G	Cognizant Technology Solutions Corporation; BSI Platform Holdings, LLC; Cognizant Technology Solutions Corporation.
20201314	G	KPS Special Situations Fund V, LP; Ronald O. Perelman; KPS Special Situations Fund V, LP.
20201315	G	Atlas Capital Resources III LP; Exide Holdings, Inc.; Atlas Capital Resources III LP.
20201316	G	Thoma Bravo Explore Fund, L.P.; Frederick J. Ode; Thoma Bravo Explore Fund, L.P.

08/14/2020

20201175	G	Patrick G. Ryan and Shirley W. Ryan; Nicholas D. Cortezi; Patrick G. Ryan and Shirley W. Ryan.
20201317	G	Authentic Brands Group LLC; Brooks Brothers Group, Inc.; Authentic Brands Group LLC.
20201318	G	Simon Property Group, Inc.; Brooks Brothers Group, Inc.; Simon Property Group, Inc.

08/20/2020

20201312	G	Chevron Corporation; Noble Energy, Inc.; Chevron Corporation.
20201320	G	NRG Energy, Inc.; Public Service Enterprise Group Inc.; NRG Energy, Inc.
20201321	G	NRG Energy, Inc.; Citigroup Inc.; NRG Energy, Inc.
20201322	G	NewAge, Inc.; Ariix, LLC; NewAge, Inc.
20201326	G	Landcadia Holdings II, Inc.; Tilman J. Fertitta; Landcadia Holdings II, Inc.
20201327	G	ARYA Sciences Acquisition Corp II; Bain Capital Fund XII, L.P.; ARYA Sciences Acquisition Corp II.
20201330	G	SIJ Holdings, LLC; The McClatchy Company; SIJ Holdings, LLC.
20201333	G	GI Partners Fund V L.P.; NovaQuest Private Equity Fund I, L.P.; GI Partners Fund V L.P.
20201336	G	Clayton Dubilier & Rice Fund X, L.P.; Cheney Bros., Inc. Shares Trust; Clayton Dubilier & Rice Fund X, L.P.

08/21/2020

20201337	G	Jane Hsiao, Ph.D., MBA; OPKO Health, Inc.; Jane Hsiao, Ph.D., MBA.
20201338	G	New Mountain Partners V, L.P.; Jarrow Rogovin; New Mountain Partners V, L.P.
20201346	G	Michael J. Sheridan; DocuSign, Inc.; Michael J. Sheridan.
20201347	G	Madison Dearborn Capital Partners VIII-A, L.P.; IPL Plastics Inc.; Madison Dearborn Capital Partners VIII-A, L.P.
20201348	G	Crestview Partners IV, L.P.; Viad Corp; Crestview Partners IV, L.P.

08/24/2020

20201287	G	GreenPoint Ag, LLC; Land O'Lakes, Inc.; GreenPoint Ag, LLC.
20201288	G	GreenPoint Ag, LLC; Alabama Farmers Cooperative, Inc.; GreenPoint Ag, LLC.
20201289	G	GreenPoint Ag, LLC; Tennessee Farmers Cooperative; GreenPoint Ag, LLC.
20201325	G	Coliseum Capital Partners, L.P.; Purple Innovation, Inc.; Coliseum Capital Partners, L.P.

08/25/2020

20200503	S	Arko Holdings Ltd.; Empire Petroleum Partners, LLC; Arko Holdings Ltd.
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08/26/2020

20201351	G	TCV X, L.P.; Luminate Capital Fund I, L.P.; TCV X, L.P.
20201355	G	Bruin Purchaser LLC; Bruin E&P Partners, LLC; Bruin Purchaser LLC.
20201356	G	Aspen Cayman Holdings LLC; Revionics, Inc.; Aspen Cayman Holdings LLC.
20201360	G	Healthcare Merger Corp.; Warburg Pincus Private Equity XI, L.P.; Healthcare Merger Corp.
20201362	G	Corsair V Financial Services Capital Partners, L.P.; World Fuel Services Corporation; Corsair V Financial Services Capital Partners, L.P.
20201363	G	FinTech Acquisition Corp. III Parent Corp.; GTCR Fund XI/B LP; FinTech Acquisition Corp. III Parent Corp.
20201364	G	Edgewell Personal Care Company; Cremo Holding Company, LLC; Edgewell Personal Care Company.
20201367	G	PropTech Acquisition Corporation; Porch.com, Inc.; PropTech Acquisition Corporation.
20201371	G	TA XIII-A, L.P.; Snowbird Investment Holdings, L.P.; TA XIII-A, L.P.
20201372	G	General Atlantic Partners (Bermuda) IV, L.P.; Benjamin Francis; General Atlantic Partners (Bermuda) IV, L.P.
20201375	G	Ophir Sternberg; John Rosatti; Ophir Sternberg.
20201376	G	QR Master Holdings USA I LP; Tom Scott; QR Master Holdings USA I LP.
20201378	G	Roper Technologies, Inc.; Project Viking Holdings, Inc.; Roper Technologies, Inc.
20201381	G	Phillip Frost, M.D.; OPKO Health, Inc.; Phillip Frost, M.D.
20201383	G	Levine Leichtman Capital Partners VI, L.P.; Tropical Smoothie Cafe Holdings, LLC; Levine Leichtman Capital Partners VI, L.P.
20201390	G	Derby TopCo Partnership LP; Francisco Partners III (Cayman), L.P.; Derby TopCo Partnership LP.

08/27/2020

20201328	G	Merck & Co., Inc.; Lumos Pharma, Inc.; Merck & Co., Inc.
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08/31/2020

20201365	G	Ellie Mae Parent, LP; Intercontinental Exchange, Inc.; Ellie Mae Parent, LP.
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EARLY TERMINATIONS GRANTED—Continued

[August 1, 2020 thru August 31, 2020]

20201366	G	Intercontinental Exchange, Inc.; Ellie Mae Parent, LP; Intercontinental Exchange, Inc.
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FOR FURTHER INFORMATION CONTACT:

Theresa Kingsberry (202–326–3100),
Program Support Specialist, Federal
Trade Commission Premerger
Notification Office, Bureau of
Competition, Room CC–5301,
Washington, DC 20024.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–22942 Filed 10–15–20; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION**Granting of Requests for Early Termination of the Waiting Period Under the Premerger Notification Rules**

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this

waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED

[July 1, 2020 thru July 31, 2020]

07/02/2020

20201140	G	LS Power Equity Partners III, L.P.; FirstEnergy Corp.; LS Power Equity Partners III, L.P.
20201161	G	Mitsui & Co., Ltd.; Thorne Holding Corp.; Mitsui & Co., Ltd.
20201167	G	Kirin Holdings Company, Limited; Thorne Holding Corp.; Kirin Holdings Company, Limited.

07/07/2020

20201128	G	OMV Aktiengesellschaft; Mubadala Investment Company PJSC; OMV Aktiengesellschaft.
20201148	G	LS Power Equity Partners III, L.P.; LS Power Equity Partners II, L.P.; LS Power Equity Partners III, L.P.
20201156	G	Sierra Pacific Land & Timber Company; Soper Company; Sierra Pacific Land & Timber Company.
20201169	G	Highmark Health; HealthNow Systems, Inc.; Highmark Health.
20201172	G	Trey J. Mytty; Harrison Corporation; Trey J. Mytty.
20201177	G	Raul Marcelo Claude; Deutsche Telekom AG; Raul Marcelo Claude.
20201178	G	L'Oreal S.A.; John Gehr; L'Oreal S.A.
20201179	G	Vista Equity Partners Perennial A, L.P.; Sandler Capital Partners V, L.P.; Vista Equity Partners Perennial A, L.P.
20201180	G	Forum Merger II Corporation; Salvatore Galletti; Forum Merger II Corporation.
20201181	G	Just Eat Takeaway.com N.V.; GrubHub Inc.; Just Eat Takeaway.com N.V.
20201184	G	Deutsche Telekom AG; Deutsche Telekom AG; Deutsche Telekom AG.
20201193	G	Steven M. Rales; Danaher Corporation; Steven M. Rales.

07/13/2020

20201190	G	General Dynamics Corporation; Medico Industries, Inc.; General Dynamics Corporation.
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07/14/2020

20200034	S	Bayer AG; Elanco Animal Health Incorporated; Bayer AG.
20200035	Y	Elanco Animal Health Incorporated; Bayer AG; Elanco Animal Health Incorporated.
20201194	G	Desmarais Residuary Family Trust; Personal Capital Corporation; Desmarais Residuary Family Trust.
20201196	G	Athene Holding Ltd.; Prudential plc; Athene Holding Ltd.
20201199	G	Investindustrial VII L.P.; Knoll, Inc.; Investindustrial VII L.P.
20201200	G	Tortoise Acquisition Corp.; Hyllion Inc.; Tortoise Acquisition Corp.
20201203	G	Arsenal Capital Partners V LP; Cello Health plc; Arsenal Capital Partners V LP.

07/15/2020

20201204	G	Sompo Holdings, Inc.; Palantir Technologies, Inc.; Sompo Holdings, Inc.
20201205	G	IIF US Holding 2 LP; IIF US Holding LP; IIF US Holding 2 LP.
20201206	G	Gregg L. Engles; Borden Dairy Holdings, LLC; Gregg L. Engles.
20201208	G	Unilever PLC; Unilever N.V.; Unilever PLC.
20201210	G	Sanofi; Translate Bio, Inc.; Sanofi.
20201211	G	Invitae Corporation; ArcherDX, Inc.; Invitae Corporation.
20201214	G	MiddleGround Como Co-Invest Partners, L.P.; Charlton Holdings LLC; MiddleGround Como Co-Invest Partners, L.P.

EARLY TERMINATIONS GRANTED—Continued

[July 1, 2020 thru July 31, 2020]

20201217	G	Oaktree Power Opportunities Fund V, L.P.; Montrose Environmental Group, Inc.; Oaktree Power Opportunities Fund V, L.P.
20201220	G	General Atlantic Partners 100, L.P.; Doctor on Demand, Inc.; General Atlantic Partners 100, L.P.

07/16/2020

20201198	G	Enviva Partners, LP; RWE Aktiengesellschaft; Enviva Partners, LP.
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07/17/2020

20201192	G	Vista Equity Partners Fund V, L.P.; 4C Insights, Inc.; Vista Equity Partners Fund V, L.P.
20201207	G	Genstar Capital Partners IX, L.P.; Sentinel Capital Partners V, L.P.; Genstar Capital Partners IX, L.P.

07/27/2020

20201218	G	Fiera Infrastructure Fund; CSC CUB Holdings, LP; Fiera Infrastructure Fund.
20201219	G	Stichting Pensioenfond ABP; CSC CUB Holdings, LP; Stichting Pensioenfond ABP.
20201221	G	Citadel Kensington Global Strategies Fund Ltd.; UP Energy Corporation; Citadel Kensington Global Strategies Fund Ltd.
20201222	G	Sony Corporation; Timothy D. Sweeney; Sony Corporation
20201223	G	Crescent Acquisition Corp; F45 Training Holdings Inc.; Crescent Acquisition Corp.
20201224	G	VPI Holding Company, LLC; Centerbridge Capital Partners III, L.P.; VPI Holding Company, LLC.
20201231	G	Thomas Tull; Acrisure Holdings, Inc.; Thomas Tull.
20201234	G	Temasek Holdings (Private) Limited; LegalApp Holdings, Inc.; Temasek Holdings (Private) Limited.
20201235	G	Authentic Brands Group LLC; LBD Parent Holdings, LLC; Authentic Brands Group LLC.

07/29/2020

20201233	G	Roark Capital Partners III LP; Roark Capital Partners IV Cayman AIV LP; Roark Capital Partners III LP.
20201238	G	Insurance Acquisition Corp.; Shift Technologies, Inc.; Insurance Acquisition Corp.
20201241	G	GT Polaris Holdings, L.P.; I. Charles Widger; GT Polaris Holdings, L.P.
20201242	G	GT Polaris Holdings, L.P.; NorthStar Topco, LLC; GT Polaris Holdings, L.P.
20201248	G	KIA X (Breathe), L.P.; GlaxoSmithKline plc; KIA X (Breathe), L.P.
20201249	G	Eppendorf AG; Promega Corporation; Eppendorf AG.
20201250	G	Naspers Limited; Remitly Global, Inc.; Naspers Limited.
20201251	G	Blackstone Capital Partners VII L.P.; Gregory Burgess; Blackstone Capital Partners VII L.P.
20201258	G	Hargray Acquisition Holdings, LLC; Cable One, Inc.; Hargray Acquisition Holdings, LLC.

07/31/2020

20201252	G	EQT VIII (No. 1) SCSp; Rancher Labs, Inc.; EQT VIII (No. 1) SCSp.
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FOR FURTHER INFORMATION CONTACT:

Theresa Kingsberry (202–326–3100),
Program Support Specialist, Federal
Trade Commission Premerger
Notification Office, Bureau of
Competition, Room CC–5301,
Washington, DC 20024.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–22944 Filed 10–15–20; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND
HUMAN SERVICESCenters for Disease Control and
PreventionOrder Suspending the Right To
Introduce Certain Persons From
Countries Where a Quarantinable
Communicable Disease Exists

AGENCY: Centers for Disease Control and
Prevention (CDC), Department of Health
and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease
Control and Prevention (CDC), a
component of the Department of Health
and Human Services (HHS), announces
the issuance of an Order suspending the
right to introduce certain persons into
the United States from countries where
a quarantinable communicable disease
exists. This Order is based on the CDC
Director's determination that
introduction of aliens, regardless of
their country of origin, migrating

through Canada and Mexico into the
United States creates a serious danger of
the introduction of COVID–19 into the
United States, and the danger is so
increased by the introduction of such
aliens that a temporary suspension is
necessary to protect the public health.

DATES: This action took effect October
13, 2020.

FOR FURTHER INFORMATION CONTACT:

Nina B. Witkofsky, Office of the Chief of
Staff, Centers for Disease Control and
Prevention, 1600 Clifton Road NE, MS
V18–2, Atlanta, GA 30329. Phone: 404–
639–7000. Email: cdcregulations@cdc.gov.

SUPPLEMENTARY INFORMATION: The
Director of the CDC (Director) is issuing
this Order pursuant to Sections 362 and
365 of the Public Health Service (PHS)
Act, 42 U.S.C. 265, 268, and their
implementing regulations,¹ which
authorize the Director of the Centers for
Disease Control and Prevention (CDC) to

¹ 85 FR 56424.

suspend the right to introduce² persons into the United States when the Director determines that the existence of a quarantinable communicable disease in a foreign country or place creates a serious danger of the introduction of such disease into the United States and the danger is so increased by the introduction of persons from the foreign country or place that a temporary suspension of the right of such introduction is necessary to protect public health. This Order replaces the Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, issued on March 20, 2020 (March 20, 2020 Order), extended on April 20, 2020, and amended May 19, 2020, which were based on the prior interim final rule.³

This Order applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to the exceptions detailed below.

This Order does not apply to U.S. citizens and lawful permanent residents; members of the armed forces of the United States, and associated personnel, and their spouses and children; persons from foreign countries who hold valid travel documents and arrive at a POE; or persons from foreign countries in the visa waiver program who are not otherwise subject to travel restrictions and arrive at a POE. Additionally, this Order does not apply to any alien who must test negative for COVID-19 before they are expelled to their home country. Further, this Order does not apply to persons whom customs officers determine, with approval from a supervisor, should be excepted based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests. DHS shall consult with CDC concerning how these types of case-by-case, individualized exceptions shall be made to help ensure consistency with current CDC guidance and public health assessments.

DHS has informed CDC that persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in

congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended at or near the border seeking to unlawfully enter the United States between POEs. This Order is intended to cover all such aliens. For simplicity, I shall refer to the persons covered by this Order as “covered aliens.”

This Order, which is substantially the same as the amended and extended March 20, 2020 Order, is necessary to continue to protect the public health from an increase in the serious danger of the introduction of Coronavirus Disease 2019 (COVID-19) into the POEs, and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico. Those facilities are operated by U.S. Customs and Border Protection (CBP), an agency within DHS. This Order is intended to help mitigate the continued risks of transmission and spread of COVID-19 to CBP personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior of the United States; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.⁴

There is a serious danger of the introduction of COVID-19 into the POEs and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the United States land and coastal borders with Canada and Mexico. Those persons are subject to immigration processing in the POEs and Border Patrol stations. Many of those persons (typically aliens who lack valid travel documents and are therefore inadmissible) are held in the common areas of the facilities, in close proximity to one another, for hours or days, as they undergo immigration

processing. The common areas of such facilities were not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19. The introduction into congregate settings in land and coastal POEs and Border Patrol stations of persons from Canada or Mexico increases the already serious danger to the public health to the point of requiring a temporary suspension of the right of introduction of such persons into the United States.

The public health risks of inaction include transmission and spread of COVID-19 to CBP personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.

These risks are troubling because POEs and Border Patrol stations were not designed and are not equipped to deliver medical care to numerous persons exposed to or infected with a quarantinable communicable disease, nor are they capable of providing the level of medical care that would be necessary in the cases of serious COVID-19 infection that occur with greater frequency in vulnerable populations like the elderly and those with certain pre-existing conditions. Indeed, CBP transfers persons with acute presentations of illness to local or regional healthcare providers for treatment. Outbreaks of COVID-19 in POEs or Border Patrol stations would lead to transfers of such persons to local or regional health care providers, which would exhaust the local or regional healthcare resources, or at least reduce the availability of such resources to the domestic population, and further expose local or regional healthcare workers to COVID-19. The continuing availability of healthcare resources to the domestic population is a critical component of the federal government's overall public health response to COVID-19.

Based on these ongoing concerns and to protect the public health, I hereby suspend the introduction of all covered aliens into the United States until I determine that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health. Every 30 days, CDC shall review the latest information regarding the status of the COVID-19 pandemic and associated

² *Suspension of the right to introduce* means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States. 42 CFR 71.40(b)(5).

³ 85 FR 16559, 85 FR 17060, 85 FR 22424, 85 FR 31503.

⁴ As of October 1, 2020, CBP has had 2,195 employees contract COVID-19. In addition, 13 employees and one USBP transportation contractor have died due to the virus. Any outbreak of COVID-19 among CBP personnel in land POEs or Border Patrol stations would impact CBP operations negatively. Although not part of the CDC public health analysis, it bears emphasizing that the impact on CBP could reduce the security of U.S. land borders and the speed with which cargo moves across the same.

public health risks to ensure that the Order remains necessary to protect the public health. Upon determining that the further introduction of COVID-19 into the United States is no longer a serious danger to the public health necessitating the continuation of this Order, I will publish a notice in the **Federal Register** terminating this Order and its Extensions. I may amend this Order as necessary to protect the public health.

A copy of the Order is provided below and a copy of the signed Order can be found at <https://www.cdc.gov/coronavirus/2019-ncov/order-suspending-introduction-certain-persons.html>.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Order Under Sections 362 & 365 of the Public Health Service Act

(42 U.S.C. 265, 268):

Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists

I. Purpose and Application

I issue this Order pursuant to Sections 362 and 365 of the Public Health Service (PHS) Act, 42 U.S.C. 265, 268, and their implementing regulations,⁵ which authorize the Director of the Centers for Disease Control and Prevention (CDC) to suspend the right to introduce⁶ persons into the United States when the Director determines that the existence of a quarantinable communicable disease in a foreign country or place creates a serious danger of the introduction of such disease into the United States and the danger is so increased by the introduction of persons from the foreign country or place that a temporary suspension of the right of such introduction is necessary to protect public health. This Order replaces the Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, issued on March 20, 2020 (March 20, 2020 Order), extended on April 20, 2020, and amended May 19, 2020, which were based on the prior interim final rule.⁷

This Order applies to persons traveling from Canada or Mexico

(regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to the exceptions detailed below.

This Order does not apply to U.S. citizens and lawful permanent residents; members of the armed forces of the United States or U.S. government personnel serving overseas, and associated personnel, and their spouses and children; persons from foreign countries who hold valid travel documents and arrive at a POE; or persons from foreign countries in the visa waiver program who are not otherwise subject to travel restrictions and arrive at a POE. Additionally, this Order does not apply to any alien who must test negative for COVID-19 before they are expelled directly to their home country. Further, this Order does not apply to persons whom customs officers determine, with approval from a supervisor, should be excepted based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests. DHS shall consult with CDC concerning how these types of case-by-case, individualized exceptions shall be made to help ensure consistency with current CDC guidance and public health assessments.

DHS has informed CDC that persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended at or near the border seeking to unlawfully enter the United States between POEs. This Order is intended to cover all such aliens. For simplicity, I shall refer to the persons covered by this Order as “covered aliens.”

This Order, which is substantially the same as the amended and extended March 20, 2020 Order, is necessary to continue to protect the public health from an increase in the serious danger of the introduction of Coronavirus Disease 2019 (COVID-19) into the POEs, and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico. Those facilities are operated by U.S. Customs and Border Protection (CBP), an agency within the U.S. Department of Homeland Security (DHS). This Order is

intended to help mitigate the continued risks of transmission and spread of COVID-19 to CBP personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior of the United States; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.⁸

There is a serious danger of the introduction of COVID-19 into the POEs and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the United States land and coastal borders with Canada and Mexico. Those persons are subject to immigration processing in the POEs and Border Patrol stations. Many of those persons (typically aliens who lack valid travel documents and are therefore inadmissible) are held in the common areas of the facilities, in close proximity to one another, for hours or days, as they undergo immigration processing. The common areas of such facilities were not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19. The introduction into congregate settings in land and coastal POEs and Border Patrol stations of persons from Canada or Mexico increases the already serious danger to the public health to the point of requiring a temporary suspension of the right of introduction of such persons into the United States.

The public health risks of inaction include transmission and spread of COVID-19 to CBP personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.

⁸ As of October 1, 2020, CBP has had 2,195 employees contract COVID-19. In addition, 13 employees and one USBP transportation contractor have died due to the virus. Any outbreak of COVID-19 among CBP personnel in land and coastal POEs or Border Patrol stations would impact CBP operations negatively. Although not part of the CDC public health analysis, it bears emphasizing that the impact on CBP could reduce the security of U.S. borders and the speed with which cargo moves across the same.

⁵ 85 FR 56424, 42 CFR 71.40.

⁶ *Suspension of the right to introduce* means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States. 42 CFR 71.40(b)(5).

⁷ 85 FR 17060, 85 FR 22424, 85 FR 31503.

These risks are troubling because POEs and Border Patrol stations were not designed and are not equipped to deliver medical care to numerous persons exposed to or infected with a quarantinable communicable disease, nor are they capable of providing the level of medical care that would be necessary in the cases of serious COVID-19 infection that occur with greater frequency in vulnerable populations like the elderly and those with certain pre-existing conditions. Indeed, CBP transfers persons with acute presentations of illness to local or regional healthcare providers for treatment. Outbreaks of COVID-19 in POEs or Border Patrol stations would lead to transfers of such persons to local or regional health care providers, which would exhaust the local or regional healthcare resources, or at least reduce the availability of such resources to the domestic population, and further expose local or regional healthcare workers to COVID-19. The continuing availability of healthcare resources to the domestic population is a critical component of the federal government's overall public health response to COVID-19.

Based on these ongoing concerns and to protect the public health, I hereby suspend the introduction of all covered aliens into the United States until I determine that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health. Every 30 days, CDC shall review the latest information regarding the status of the COVID-19 pandemic and associated public health risks to ensure that the Order remains necessary to protect the public health. Upon determining that the further introduction of COVID-19 into the United States is no longer a serious danger to the public health necessitating the continuation of this Order, I will publish a notice in the **Federal Register** terminating this Order and its Extensions. I may amend this Order as necessary to protect the public health.

II. Factual Basis for Order⁹

1. COVID-19 is a global pandemic that has spread rapidly

COVID-19 is a quarantinable communicable disease caused by a novel (new) coronavirus, SARS-CoV-2,

⁹ Given the dynamic nature of the public health emergency, CDC recognizes that the types of facts and data set forth in this section may change rapidly (even within a matter of hours). The facts and data cited by CDC in this order represent a good-faith effort by the agency to present the current factual justification for the order.

that was first identified as the cause of an outbreak of respiratory illness that began in Wuhan, Hubei Province, People's Republic of China (China). As of October 1, 2020, there were over 34,103,279 cases of COVID-19 globally, resulting in over 1,016,167 deaths.

COVID-19 spreads easily and sustainably within communities.¹⁰ The virus is thought to transfer principally by person-to-person contact through respiratory droplets produced during exhalation, such as breathing, speaking, coughing, and sneezing. Droplets can span a wide spectrum of sizes that can remain airborne from seconds for larger droplets to several hours for smaller droplets and particles. The virus may also transfer through contact with surfaces or objects contaminated with these droplets.¹¹ There is also evidence of asymptomatic transmission, in which an individual infected with COVID-19 is capable of spreading the virus to others before exhibiting symptoms.¹²

Symptoms may include fever or chills, cough, and shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea, and typically appear 2–14 days after exposure to the virus.¹³ Manifestations of severe disease have included severe pneumonia, acute respiratory distress syndrome (ARDS), septic shock, and multi-organ failure.¹⁴ Mortality rates are higher among seniors and those with certain underlying medical conditions, such as chronic

¹⁰ *COVID-19 Pandemic Planning Scenarios*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>, (last visited Oct. 3, 2020), (CDC estimates that the viral transmissibility (R_0) of COVID-19 is around 2.5, but may be as high as 4, meaning that a single infected person will on average infect between 2 to 4 others).

¹¹ *Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Finfection-control%2Fcontrol-recommendations.html (last visited Sept. 29, 2020),

¹² *COVID-19 Pandemic Planning Scenarios*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>, (last visited Sept. 29, 2020), (CDC's current best estimate is that between 30 to 70% of infections are transmitted prior to symptom onset (pre-symptomatic transmission)).

¹³ *Coronavirus Disease 2019 (COVID-19): Symptoms of Coronavirus*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated May 13, 2020).

¹⁴ Sevim Zaim, et al., *COVID-19 and Multiorgan Response*, 00 *Current Problems in Cardiology* 2020, (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7187881/pdf/main.pdf>).

obstructive pulmonary disease (COPD), serious heart conditions, cancer, Type 2 diabetes, and those with compromised immune systems.¹⁵

Unfortunately, at this time, there is no vaccine against COVID-19, although several are in development. While U.S. Food and Drug Administration (FDA) has not approved drugs to treat patients with COVID-19 based on a demonstration of safety and efficacy in randomized controlled trials, FDA has granted an Emergency Use Authorization for the use of VEKLURY® (remdesivir) and other investigational therapeutics in the treatment of COVID-19 infection. Beyond these therapeutics, treatment is currently limited to supportive care to manage symptoms. Hospitalization may be required in severe cases and mechanical respiratory support may be needed in the most severe cases.

Global efforts to slow the spread of COVID-19 have included sweeping travel limitations and lockdowns. Nations such as the European Union (EU) Member States and Schengen Area countries,¹⁶ Australia, New Zealand, and Canada have imposed restrictions on international travelers.¹⁷ In many countries, individuals are being asked to self-quarantine for 14 days—the outer limit of the COVID-19's estimated incubation period—following return from a foreign country with sustained community transmission. For example, all returning citizens and residents of Australia and New Zealand are subject to a mandatory 14-day quarantine at

¹⁵ *Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (last updated Sept. 11, 2020).

¹⁶ *Migration and Home Affairs: Schengen Area*, Eur. Comm'n (Jan. 1, 2020), https://ec.europa.eu/home-affairs/what-we-do/policies/order-and-visas/schengen_en ("Today, the Schengen Area [of the EU] encompasses most EU States, except for Bulgaria, Croatia, Cyprus, Ireland and Romania. However, Bulgaria, Croatia and Romania are currently in the process of joining the Schengen Area. Of non-EU States, Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area."); *Travel to and from the EU during the pandemic: Travel restrictions*, Eur. Comm'n, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-and-transportation-during-coronavirus-pandemic/travel-and-eu-during-pandemic_en (last visited Aug. 31, 2020).

¹⁷ See Andrea Salcedo, Sanam Yar, & Gina Cherelus, *Coronavirus Travel Restrictions, Across the Globe*, N.Y. Times (July 16, 2020), <https://www.nytimes.com/article/coronavirus-travel-restrictions.html>.

designated secure facilities, such as a hotel at their port of arrival.¹⁸

2. The March 20, 2020 Order has reduced the risk of COVID-19 transmission in POEs and Border Patrol stations

I issued the March 20, 2020 Order pursuant to Sections 362 and 365 of the Public Health Service (PHS) Act, 42 U.S.C. 265, 268, and an interim final rule implementing Section 362.¹⁹ The March 20, 2020 Order suspended the introduction of certain “covered aliens” into the United States for a period of 30 days. The definition of “covered aliens” in the March 20, 2020 Order is substantially the same as in this Order. The March 20, 2020 Order was based on the following determinations:

- COVID-19 is a communicable disease that poses a danger to the public health;
- COVID-19 is present in numerous foreign countries, including Canada and Mexico;
- There is a serious danger of the introduction of COVID-19 into the land POEs and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the land borders with Canada and Mexico;
- But for a suspension-of-entry order under 42 U.S.C. § 265, covered aliens would be subject to immigration processing at the land POEs and Border Patrol stations and, during that processing, many of them (typically aliens who lack valid travel documents and are therefore inadmissible) would be held in the congregate areas of the facilities, in close proximity to one another, for hours or days; and
- Such introduction into congregate settings of persons from Canada or Mexico would increase the already serious danger to the public health of the United States to the point of requiring a temporary suspension of the introduction of covered aliens into the United States.

The March 20, 2020 Order was extended on April 20, 2020 and amended on May 19, 2020, to clarify

that it applies to all land and coastal POEs and Border Patrol stations²⁰ at or near the United States’ border with Canada or Mexico that would otherwise hold covered aliens in a congregate setting.²¹ Pursuant to the May 19, 2020 Amendment, the March 20, 2020 Order was again extended with CDC thereafter conducting reviews every 30 days.²² Upon conducting these reviews, I have kept the amended Order in place; the current 30 day period lapses on October 17, 2020.

In general, the federal government’s overall experience under the March 20, 2020 Order, together with the factual developments since May 20, 2020, sustain the policy rationales for issuing this Order.

Since the March 20, 2020 Order was issued, the daily average population in CBP custody is 1,134 individuals. This is a 64% reduction of daily in custody numbers since the March 20, 2020 Order went into effect and a 67% reduction from the same period in 2019. In the 50 days preceding the March 20, 2020 Order, CBP officers made over 1,600 trips to community hospitals to facilitate advanced medical care for individuals. For the first 80 days after the March 20, 2020 Order’s implementation, CBP made only 400 trips for individuals to receive medical care from community hospitals. This represents a 75% decrease in utilization. In the 60 days preceding September 16, 2020, CBP made 746 trips for individuals to receive medical care from community hospitals. The increase in hospital utilization corresponds with a month-over-month increase in CBP enforcement encounters, including encounters with covered aliens who have subsequently tested positive for COVID-19. The risks of COVID-19 transmission and overutilization in community hospitals serving domestic populations would have been greater absent the March 20, 2020 Order.

The March 20, 2020 Order has reduced the risk of COVID-19 transmission in POEs and Border Patrol stations, and thereby reduced risks to DHS personnel and the U.S. health care system. The public health risks to the DHS workforce—and the erosion of DHS operational capacity—would have been greater absent the March 20, 2020 Order. DHS data shows that the March 20, 2020 Order has significantly reduced the population of covered aliens held in congregate settings in POEs and Border

Patrol stations, thereby reducing the risk of COVID-19 transmission for DHS personnel and others within these facilities.

By significantly reducing the number of covered aliens held in POEs and Border Patrol stations, the March 20, 2020 Order reduced the density of covered aliens held in congregate custody within these facilities, which reduced the risk of exposure to COVID-19 for DHS personnel and others in POEs and Border Patrol stations.

3. Conditions in Canada, Mexico, and the United States warrant issuing this Order

COVID-19 has continued to spread since the March 20, 2020 Order. Canada, Mexico, and the countries of origin of many of the individuals who travel to the United States through Canada or Mexico continue to see increasing numbers of COVID-19 infections and deaths.

i. Canada

As detailed in the March 20, 2020 Order, approximately 33 million individuals crossed the Canadian border into the United States in 2017. Historically, inadmissible aliens attempting to unlawfully enter the United States from Canada have included not only Canadian nationals, but also nationals of countries experiencing, or suspected of experiencing, widespread COVID-19 transmission such as the member countries of the Schengen Area, China, and Iran.²³ From March through August, 2020, CBP has processed 28,841 inadmissible aliens at POEs at the U.S.-Canadian border, and CBP has apprehended 2,014 inadmissible aliens attempting to unlawfully enter the United States between POEs, of which DHS determined 1,126 were covered aliens subject to the March 20, 2020 Order.²⁴

As of October 6, 2020, Canada reported over 171,300 cases of COVID-19 and over 9,500 confirmed deaths with a seven day average of 1,797 new

¹⁸ *Id.*; *COVID-19 and the border: Travel restrictions*, Cmth. of Austl, Dep’t of Home Aff., <https://covid19.homeaffairs.gov.au/travel-restrictions-0> (last updated Aug. 28, 2020); *COVID-19: New Zealanders in the UK—Frequently Asked Questions*, N.Z. Foreign Aff. & Trade, <https://www.mfat.govt.nz/en/countries-and-regions/europe/united-kingdom/new-zealand-high-commission/living-in-the-uk/covid-19-coronavirus/> (last visited Aug. 28, 2020).

¹⁹ 85 FR 16559.

²⁰ As explained below, air POEs are excluded from the Amended Order and Extension because they do not present the same public health risk as land and coastal POEs.

²¹ 85 FR 22424.

²² 85 FR 31503.

²³ *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector in Fiscal Years 2007 to 2019*, U.S. Border Patrol, U.S. Dep’t. of Homeland Security, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Nationwide%20Apprehensions%20by%20Citizenship%20and%20Sector%20%28FY2007%20-%20FY%202019%29_1.pdf (last visited Oct. 9, 2020).

²⁴ *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. Customs and Border Protection, U.S. Dep’t. of Homeland Security, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last visited Oct. 9, 2020).

cases.²⁵ In response to increases in the level of community transmission, authorities in Toronto, Ottawa, and several other Ontario cities have mandated indoor mask use. On September 19, 2020, Ontario issued new restrictions limiting indoor gatherings to 10 people and outdoor gatherings to 25.²⁶ In Quebec masks have been mandated in all indoor public places since July 27, 2020. In an effort to slow the transmission and spread of the virus, the Canadian government banned most foreign nationals from entry and mandated that returning Canadians and excepted foreign nationals (including Americans) self-monitor for COVID-19 symptoms for 14 days following their return.²⁷ Canadian public health officials have expressed alarm at the recent increase in new COVID-19 cases after several months of low level community transmission, particularly as Canada begins to enter influenza season.²⁸

ii. Mexico

As of October 1, 2020, Mexico has 738,163 confirmed cases, and 77,163 reported deaths.²⁹ While Mexico's official statistics for COVID-19 infections and number of deaths provide insights to general trends, they have serious deficiencies that greatly understate actual totals. COVID-19 infections and deaths are likely multiples of what is reported as Mexico has the lowest diagnostic testing per capital of OECD countries. Mexico's positivity rate is estimated to be around 44% based on confirmed positive cases, confirmed negative tests, and suspected cases. This is an improvement from a positivity rate of approximately 50% in mid-July. However, Mexico's Health Ministry, SALUD, reported on

September 4, 2020 excess mortality totals of 122,765 deaths through August 28, 2020 as compared to 2019 totals. This figure includes confirmed cases of COVID-19 and deaths confirmed from other causes, but the excess suggests the true number of deaths from COVID-19 in Mexico is much higher than official counts.

While the data on Mexico is more limited, there are signs that the rate of COVID-19 community transmission in Mexico is slowing as the overall public health situation improves somewhat. As of September 25, 2020, under SALUD's "stoplight" designation system, none of Mexico's 32 states are red, 15 are orange, 16 are yellow and 1, Colima, is green. According to SALUD, Mexico City has the most lab-confirmed cases with 121,087 and the most deaths with 11,814 as of September 24, 2020.

Hospital occupancy rates have also improved in recent weeks—the national hospital occupancy rate is 28 percent—hospital occupancy rates remain elevated in Mexican border-states such as Nuevo Leon (47 percent). As of September 25, 2020, several Mexican border states report relatively high numbers of active COVID-19 infections: Tamaulipas (3,566 active cases), Nuevo Leon (6,028 active cases) and Baja California (1,440 active cases).

The COVID-19 pandemic in Mexican states along the U.S.-Mexico border region presents increased concerns for the United States because all covered aliens crossing the U.S.-Mexico border necessarily travel through that region and the level of migration is so high. From March to August, 2020, DHS has processed 54,503 inadmissible aliens at POEs along the border, and U.S. Border Patrol has apprehended 345,267 aliens attempting to unlawfully enter the United States between POEs.³⁰ DHS determined 153,569 were covered aliens subject to the March 20, 2020 Order, of which over 70% were Mexican nationals. With the continued growth of COVID-19 cases in Central and South America, the overwhelming majority of covered aliens encountered on the U.S.-Mexico border are nationals of countries experiencing sustained human to human transmission of COVID-19.

The continued prevalence of COVID-19 in Mexico continues to present a serious danger of the introduction of COVID-19 into the United States. If community transmission in the Mexican border region accelerates, experience shows then the numbers of COVID-19 cases in that region are likely to increase, as are the numbers of infected covered aliens who seek to introduce

themselves into the United States. The introduction of more infected covered aliens would likely have a negative impact on community transmission in the United States.

iii. United States

While pandemic conditions have improved, community transmission of COVID-19 is continuing across the United States. The United States has recorded over 7,200,000 cumulative confirmed cases; and more than 200,000 deaths.³¹ The country is averaging around 36,000 to 40,000 new cases a day.³² Nationally, since mid-July, there has been an overall decreasing trend in the percentage of specimens testing positive and a decreasing or stable (change of $\leq 0.1\%$) trend in the percentage of hospitalizations.³³ To wit, as of October 3, 2020, the seven day average of new cases and deaths are down 35.8% and 40.3% respectively from their peak levels. Similarly, the seven day positivity rate, as of October 3, 2020, was 4.6%. This low positivity rate is not shared uniformly, Arizona and Texas both report positivity rates of between 11–20%.³⁴

Millions of Americans are subject to local and state public health restrictions and precautions calculated to slow the spread of, and protect others from, COVID-19. CDC continues to recommend that all Americans practice vigorous hand hygiene, engage in social distancing,³⁵ limit non-essential travel,³⁶ and wear cloth face coverings or masks when out in public.³⁷ Public health measures intended to slow the spread of COVID-19 in order to avoid

³¹ CDC COVID Data Tracker: United States COVID-19 Cases and Deaths by State, Ctrs. for Disease Control & Prevention https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last visited Oct. 6, 2020).

³² *Id.*

³³ COVID View: A Weekly Summary of U.S. COVID-19 Activity Week 39, Ctrs. for Disease Control & Prevention <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last visited Oct. 6, 2020).

³⁴ CDC COVID Data Tracker: United States Laboratory Testing, Ctrs. for Disease Control & Prevention https://covid.cdc.gov/covid-data-tracker/#testing_totalpercentpositive (last visited Oct. 6, 2020).

³⁵ How to Protect Yourself & Others, Ctrs. for Disease Control & Prevention <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Oct. 6, 2020).

³⁶ Travel During the COVID-19 Pandemic, Ctrs. for Disease Control & Prevention <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (last visited Oct. 6, 2020).

³⁷ COVID-19: Use of Cloth Face Coverings to Help Slow the Spread of COVID-19, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html> (last reviewed Oct. 6, 2020).

²⁵ Coronavirus Disease (COVID-19): Outbreak Update, Gov't of Can., <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html> (last updated Oct. 6, 2020).

²⁶ Reopening Ontario in Stages: Gathering Limits, Gov't of Ontario, <https://www.ontario.ca/page/reopening-ontario-stages#restrictions> (last updated Oct. 2, 2020).

²⁷ Travel Restriction Measures: COVID-19 Program Delivery Travel Restriction Exemptions for Those Departing From a Country Other Than the U.S., Gov't of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/travel-restrictions.html#travel-restriction-exemptions> (last updated Jul. 23, 2020).

²⁸ Statement from the Chief Public Health Officer of Canada on October 3, 2020, Gov't of Canada, <https://www.canada.ca/en/public-health/news/2020/10/statement-from-the-chief-public-health-officer-of-canada-on-october-3-2020.html> (last updated Oct. 3, 2020).

²⁹ WHO Coronavirus Disease (COVID-19) Dashboard, WHO, <https://covid19.who.int/table> (last visited Oct. 2, 2020).

³⁰ *Supra*, note 21.

overwhelming healthcare systems have largely proven successful. However, several cities and states, including several located at or near U.S. borders, continue to experience widespread, sustained community transmission that has strained their healthcare and public health systems. Furthermore, continuing to slow the rate of COVID-19 transmission is critical as states and localities ease public health restrictions on businesses and public activities in an effort to mitigate the economic and other costs of the COVID-19 pandemic.

III. Determination and Implementation

Based on the foregoing, I find that COVID-19 is a quarantinable communicable disease³⁸ and that there is a serious danger of the introduction of COVID-19 into the POEs and Border Patrol stations at or near the United States borders with Canada and Mexico, and the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the countries or places of origin of the covered aliens who migrate to the United States across the land and coastal borders with Canada and Mexico. I also find that the introduction into land and coastal POEs and Border Patrol stations of covered aliens increases the seriousness of the danger to the point of requiring a temporary suspension of the right to introduce covered aliens into the United States. Therefore, I am suspending the right to introduce and prohibiting the introduction of covered aliens travelling into the United States from Mexico and Canada.

In making this determination, I have considered facts including the overall number of cases of COVID-19 reported in Mexico, Canada, and the countries or places of origin of the covered aliens who migrate to the United States across the land and coastal borders with Canada and Mexico, the influx of cases in areas near the U.S.-Mexico border, epidemiological factors including the viral transmissibility and asymptomatic transmission of the disease, the morbidity and mortality associated with the disease for individuals in certain risk categories, and the negative effects of the disease already experienced by CBP. Therefore, it is necessary for the United States to continue the suspension of the right to introduce covered aliens at this time.

The continued suspension of the right to introduce covered aliens requires the

movement of all such aliens to the country from which they entered the United States, their country of origin, or another practicable location outside the United States, as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances. The faster a covered alien is returned to the country from which they entered the United States, to their country of origin, or another location as practicable, the lower the risk the alien poses of introducing, transmitting, or spreading COVID-19 into POEs, Border Patrol stations, other congregate settings, and the interior.

I consulted with DHS and other federal departments as needed before I issued this Order, and requested that DHS aid in the enforcement of this Order because CDC does not have the capability, resources, or personnel needed to do so. As part of the consultation, CBP developed an operational plan for implementing this Order. The plan is generally consistent with the language of this Order directing that covered aliens spend as little time in congregate settings as practicable under the circumstances. Additionally, DHS will continue to use repatriation flights as necessary to move covered aliens on a space-available basis, as authorized by law. In my view, DHS's assistance with implementing the Order is necessary, as CDC's other public health tools are not viable mechanisms given CDC resource and personnel constraints, the large numbers of covered aliens involved, and the likelihood that covered aliens do not have homes in the United States.³⁹

This Order is not a rule subject to notice and comment under the Administrative Procedure Act (APA). Notice and comment and a delay in effective date are not required because there is good cause to dispense with prior public notice and the opportunity to comment on this Order and a delay in effective date. Given the public health emergency caused by COVID-19, it would be impracticable and contrary to public health practices—and, by extension, the public interest—to delay the issuing and effective date of this Order. In addition, because this Order concerns the ongoing discussions with Canada and Mexico on how best to control COVID-19 transmission over our shared border, it directly “involve[s] . . . a . . . foreign affairs function of the United States.” 5 U.S.C. 553(a)(1).

Notice and comment and a delay in effective date would not be required for that reason as well.

* * * * *

This Order shall remain effective until I determine that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of this Order is no longer necessary to protect public health. Every 30 days, the CDC shall review the latest information regarding the status of the COVID-19 pandemic and associated public health risks to ensure that the Order remains necessary to protect public health.

Upon determining that the further introduction of COVID-19 into the United States is no longer a serious danger to the public health necessitating the continuation of this Order, I will publish a notice in the **Federal Register** terminating this Order and its Extensions. I retain the authority to extend, modify, or terminate the Order, or implementation of this Order, at any time as needed to protect public health.

Authority

The authority for this Order is Sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and 42 CFR 71.40.

Nina B. Witkofsky,

Acting Chief of Staff, Centers for Disease Control and Prevention.

[FR Doc. 2020-22978 Filed 10-13-20; 4:15 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-3399-FN]

Medicare and Medicaid Programs: Application from DNV-GL Healthcare USA, Inc. for Continued Approval of its Critical Access Hospital Accreditation Program

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

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve DNV-GL Healthcare USA, Inc. (DNV-GL) for continued recognition as a national accrediting organization for critical access hospitals that wish to participate in the Medicare or Medicaid programs.

³⁸ COVID-19 is a severe acute respiratory syndrome, which is one of the diseases included in the “Revised List of Quarantinable Communicable Diseases.” Exec. Order 13295 (Apr. 4, 2003), as amended by Exec. Order 13375 (Apr. 1, 2005) and Exec. Order 13674 (July 31, 2014).

³⁹ CDC relies on the Department of Defense, other federal agencies, and state and local governments to provide both logistical support and facilities for federal quarantines. CDC lacks the resources, manpower, and facilities to quarantine covered aliens.

DATES: The approval announced in this notice is effective December 23, 2020 through December 23, 2024.

FOR FURTHER INFORMATION CONTACT: Caecilia Blondiaux, (410) 786-2190.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a Critical Access Hospital (CAH) provided certain requirements are met. Sections 1820(c)(2)(B), 1820(e) and 1861(mm)(1) of the Social Security Act (the Act) establishes distinct criteria for facilities seeking designation as a CAH. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at part 42 CFR 485, subpart F, specify the conditions of participation (CoPs) that a CAH must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for CAHs. The regulations at part 42 CFR 485.647 specify that a CAH's psychiatric or rehabilitation distinct part unit (DPU), if any, must meet the hospital requirements specified in subparts A, B, C, and D of part 482 in order for the CAH DPU to participate in the Medicare program.

Prior to becoming a CAH, to enter into an agreement, a CAH must first be certified by a state survey agency as a hospital complying with the conditions or requirements at part 482, then can convert to a CAH by complying with the conditions or requirements at part 485, subpart F. Thereafter, the CAH is subject to regular surveys by a state survey agency to determine whether it continues to meet these requirements. However, there is an alternative to surveys by state agencies. Certification by a nationally recognized accreditation program can substitute for ongoing state review.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare requirements are met or exceeded, we will deem those provider entities as having met such requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services (the Secretary) as having standards for accreditation that meet or exceed Medicare requirements,

any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare requirements. A national AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare requirements.

Our regulations concerning the approval of AOs are at §§ 488.4 and 488.5. The regulations at § 488.5(e)(2)(i) require an AO to reapply for continued approval of its accreditation program every 6 years or sooner, as determined by CMS. The DNV-GL Healthcare USA, Inc. (DNV-GL) current term of approval for their CAH accreditation program expires December 23, 2020.

II. Application Approval Process

Section 1865(a)(3)(A) of the Act provides a statutory timetable to ensure that our review of applications for CMS approval of an accreditation program is conducted in a timely manner. The Act provides us 210 days after the date of receipt of a complete application, with any documentation necessary to make the determination, to complete our survey activities and application process. Within 60 days after receiving a complete application, we must publish a notice in the **Federal Register** that identifies the national accrediting body making the request, describes the request, and provides no less than a 30-day public comment period. At the end of the 210-day period, we must publish a notice in the **Federal Register** approving or denying the application.

III. Provisions of the Proposed Notice

On May 18, 2020, we published a proposed notice in the **Federal Register** (85 FR 29723), announcing DNV-GL's request for continued approval of its Medicare hospital accreditation program. In the May 18, 2020 proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act and our regulations at § 488.5, we conducted a review of DNV-GL's Medicare CAH accreditation application in accordance with the criteria specified by our regulations, which include, but are not limited to the following:

- A virtual administrative review of DNV-GL's: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its surveyors; (4) ability to investigate and respond appropriately to complaints against accredited facilities; and, (5) survey review and decision-making process for accreditation.

- A comparison of DNV-GL's accreditation to our current Medicare CAH conditions of participation (CoPs).

- A documentation review of DNV-GL's survey process to:

- ++ Determine the composition of the survey team, surveyor qualifications, and DNV-GL's ability to provide continuing surveyor training.

- ++ Compare DNV-GL's processes to those of state survey agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

- ++ Evaluate DNV-GL's procedures for monitoring CAH out of compliance with DNV-GL's program requirements. The monitoring procedures are used only when DNV-GL identifies noncompliance. If noncompliance is identified through validation reviews, the state survey agency monitors corrections as specified at § 488.7(d).

- ++ Assess DNV-GL's ability to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

- ++ Establish DNV-GL's ability to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

- ++ Determine the adequacy of staff and other resources.

- ++ Confirm DNV-GL's ability to provide adequate funding for performing required surveys.

- ++ Confirm DNV-GL's policies with respect to whether surveys are announced or unannounced.

- ++ Obtain DNV-GL's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

IV. Analysis of and Responses to Public Comments on the Proposed Notice

In accordance with section 1865(a)(3)(A) of the Act, the May 18, 2020 proposed notice also solicited public comments regarding whether DNV-GL's requirements met or exceeded the Medicare CoPs for CAHs. No comments were received in response to our proposed notice.

V. Provisions of the Final Notice

A. Differences Between DNV-GL's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements:

We compared DNV-GL's CAH requirements and survey process with the Medicare CoPs and survey process as outlined in the State Operations Manual (SOM). Our review and

evaluation of DNV–GL’s CAH application were conducted as described in section III of this final notice and has yielded the following areas where, as of the date of this notice, DNV–GL has completed revising its standards and certification processes in order to—

- Meet the standard’s requirements of all of the following regulations:

- ++ Section 482.12(c)(1)(i), to include that DNV–GL’s comparable standard contains the full CMS requirement to not limit the authority of a doctor of medicine or osteopathy to delegate tasks to other qualified health care personnel to the extent recognized under state law or a state’s regulatory mechanism.

- ++ Section 482.41(c), to remove reference of the National Fire Protection Association (NFPA) 110 references and revise DNV–GL’s standard language in accordance with the Life Safety Code and NFPA 99, Sections 1.3—Application.

- ++ Section 482.45(b)(1), to include language that “no hospital is considered to be out of compliance with section 1138(a)(1)(B) of the Act, or with the requirements of this paragraph, unless the Secretary has given the Organ Procurement and Transplantation Network (OPTN) formal notice that he or she approves the decision to exclude the hospital from the OPTN and has notified the hospital in writing.”

- ++ Section 482.52(c)(2), to include comparable language that the request for exemption and recognition of state laws regarding the practice of certified registered nurse-anesthetists (CRNAs), and the withdrawal of the request may be submitted at any time, and are effective upon submission.

In addition to the standards review, CMS also reviewed DNV–GL’s comparable survey processes, which were conducted as described in section III. of this final notice, and yielded the following areas where, as of the date of this notice, DNV–GL has completed revising its survey processes in order to demonstrate that it uses survey processes that are comparable to state survey agency processes by:

- ++ Clarifying and providing proof of documentation that in accordance with § 488.5(a)(7), DNV–GL’s surveyors meet the description of the education and experience required. More specifically providing verification that the Physical Environment Specialists have completed the NFPA 2012 Health Care Facilities Code training.

- ++ Providing clarifications on DNV–GL’s process related to non-conformity and the levels—Category 1 and 2, comparable to CMS standard and condition level deficiencies.

- ++ Plan of Corrections/Correction of Deficiencies: Adjusting surveyor guidance and survey report language related to DNV–GL’s process for continued monitoring activities of facilities with condition level deficiencies and providing training to surveyors on the applicable changes to ensure comparability with § 488.28(d).

- ++ Revising and adjusting DNV–GL’s crosswalks and deficiency reports related to surveying and referencing § 485.627—Condition of Participation: Organizational Structure, when a facility is found out of compliance, consistent with the intent at § 488.26(b).

- ++ Adjusting DNV–GL’s matching of the CoPs to their comparable standards. Specifically, ensuring reference to the correct Medicare conditions for the CAH provider as intended at § 488.26(c).

- ++ Providing training and education to DNV–GL’s surveyors related to the CAH Medicare conditions, including education on surveyor documentation principles cross match citations of the DNV–GL comparable standard for governing body to the CMS CoPs.

B. Term of Approval

Based on our review and observations described in section III. and section V. of this final notice, we approve DNV–GL as a national AO for CAHs that request participation in the Medicare program. The decision announced in this final notice is effective December 23, 2020 through December 23, 2024 (4 years). In accordance with § 488.5(e)(2)(i), the term of the approval will not exceed 6 years. Due to travel restrictions and the reprioritization of survey activities brought on by the 2019 Novel Coronavirus Disease (COVID–19) Public Health Emergency (PHE), CMS was unable to observe a CAH survey observation completed by DNV–GL surveyors as part of the application review process. The survey observation is one component of the comparability evaluation; therefore, we are providing a shorter term of approval for DNV–GL. While DNV–GL has taken actions based on the findings annotated in section V.A. of this final notice, as authorized at § 488.8, we will continue ongoing review of DNV–GL’s CAH survey processes and will conduct a survey observation once the PHE has expired. In keeping with CMS’s initiative to increase AO oversight broadly, and ensure that our requested revisions by DNV–GL’s are completed, CMS expects more frequent review of DNV–GL’s activities in the future.

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Seema Verma, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: October 8, 2020.

Lynette Wilson,

Federal Register Liaison, Department of Health and Human Services.

[FR Doc. 2020–22883 Filed 10–13–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10749]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS’ intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency’s functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of

information technology to minimize the information collection burden.

DATES: Comments must be received by December 15, 2020.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to <http://www.regulations.gov>. Follow the instructions for “Comment or Submission” or “More Search Options” to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____ Room C4-26-05, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS’ website address at website address at <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html>.

2. Call the Reports Clearance Office at (410) 786-1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection’s supporting statement and associated materials (see **ADDRESSES**).

CMS-10749 National Plan and Provider Enumeration System (NPPES) Supplemental Data Collection

Under the PRA (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term “collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA

requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* National Plan and Provider Enumeration System (NPPES) Supplemental Data Collection; *Use:* The adoption by the Secretary of HHS of the standard unique health identifier for health care providers is a requirement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The unique identifier is to be used on standard transactions and may be used for other lawful purposes in the health care system. The CMS Final Rule published on January 23, 2004 adopts the National Provider Identifier (NPI) as the standard unique health identifier for health care providers. Health care providers that are covered entities under HIPAA must apply for and use NPIs in standard transactions. The law requires that data collection standards for these measures be used, to the extent that it is practical, in all national population health surveys. It applies to self-reported optional information only. The law also requires any data standards published by HHS to comply with standards created by the Office of Management and Budget (OMB).

The web based optional data fields can be seen in Appendix A1: Data Collected for the Office of Minority and Appendix A2: Data collected for the 21st Century Cures Act, interoperability. The standards apply to population health surveys sponsored by HHS, where respondents either self-report information or a knowledgeable person responds for all members of a household. HHS is implementing these data standards in all new surveys. *Form Number:* CMS-10749 (OMB control number: 0938-NEW); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profit institutions; *Number of Respondents:* 999,291; *Total Annual Responses:* 999,291; *Total Annual Hours:* 169,880. (For policy questions regarding this collection contact DaVona Boyd at 410-786-7483.)

Dated: October 9, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020-22892 Filed 10-15-20; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-1742-N]

Medicare Program; Town Hall Meeting on the FY 2022 Applications for New Medical Services and Technologies Add-On Payments

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

ACTION: Notice of meeting.

SUMMARY: This notice announces a Town Hall meeting in accordance with section 1886(d)(5)(K)(viii) of the Social Security Act (the Act) to discuss fiscal year (FY) 2022 applications for add-on payments for new medical services and technologies under the hospital inpatient prospective payment system (IPPS). The United States is responding to an outbreak of respiratory disease caused by the virus “SARS-CoV-2” and the disease it causes “coronavirus disease 2019” (abbreviated “COVID-19”). Due to the COVID-19 pandemic, the Town Hall Meeting will be held virtually rather than as an in-person meeting. Interested parties are invited to this meeting to present their comments, recommendations, and data regarding whether the FY 2022 new medical services and technologies applications meet the substantial clinical improvement criterion.

DATES:

Meeting Date(s): The Town Hall Meeting announced in this notice will be held virtually on Tuesday, December 15, 2020 and Wednesday, December 16, 2020 (the number of new technology applications submitted will determine if a second day for the meeting is necessary; see the **SUPPLEMENTARY INFORMATION** section for details regarding the second day of the meeting and the posting of the preliminary meeting agenda). The Town Hall Meeting will begin each day at 9:00 a.m. Eastern Standard Time (e.s.t.) and check-in via online platform will begin at 8:30 a.m. e.s.t.

Deadline for Requesting Special Accommodations: The deadline to submit requests for special

accommodations is 5:00 p.m., e.s.t. on Monday, November 23, 2020.

Deadline for Registration of Presenters at the Town Hall Meeting: The deadline to register to present at the Town Hall Meeting is 5:00 p.m., e.s.t. on Monday, November 23, 2020.

Deadline for Submission of Agenda Item(s) or Written Comments for the Town Hall Meeting: Written comments and agenda items for discussion at the Town Hall Meeting, including agenda items by presenters, must be received by 5:00 p.m. e.s.t. on Monday, November 30, 2020.

Deadline for Submission of Written Comments after the Town Hall Meeting for consideration in the Fiscal Year (FY) 2022 Hospital Inpatient Prospective Payment System/Long Term Care PPS (IPPS/LTCH PPS) Proposed Rule: Individuals may submit written comments after the Town Hall Meeting, as specified in the **ADDRESSES** section of this notice, on whether the service or technology represents a substantial clinical improvement. These comments must be received by 5:00 p.m. e.s.t. on Monday, December 28, 2020, for consideration in the FY 2022 IPPS/LTCH PPS proposed rule.

ADDRESSES:

Meeting Location: The Town Hall Meeting will be held virtually via live stream technology or webinar and listen-only via toll-free teleconference. Live stream or webinar and teleconference dial-in information will be provided through an upcoming listserv notice and will appear on the final meeting agenda, which will be posted on the New Technology website when available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/newtech.html>. Continue to check the website for updates.

Registration and Special Accommodations: Individuals wishing to present at the meeting must follow the instructions located in section III. of this notice. Individuals who need special accommodations should send an email to newtech@cms.hhs.gov.

Submission of Agenda Item(s) or Written Comments for the Town Hall Meeting: Each presenter must submit an agenda item(s) regarding whether a FY 2022 application meets the substantial clinical improvement criterion. Agenda items, written comments, questions or other statements must not exceed three single-spaced typed pages and may be sent via email to newtech@cms.hhs.gov.

FOR FURTHER INFORMATION CONTACT:

Michelle Joshua, (410) 786-6050, michelle.joshua@cms.hhs.gov; or

Cristina Nigro, (410) 786-7763, cristina.nigro@cms.hhs.gov.

Alternatively, you may forward your requests via email to newtech@cms.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Add-On Payments for New Medical Services and Technologies Under the IPPS

Sections 1886(d)(5)(K) and (L) of the Social Security Act (the Act) require the Secretary to establish a process of identifying and ensuring adequate payments to acute care hospitals for new medical services and technologies under Medicare. Effective for discharges beginning on or after October 1, 2001, section 1886(d)(5)(K)(i) of the Act requires the Secretary to establish (after notice and opportunity for public comment) a mechanism to recognize the costs of new services and technologies under the hospital inpatient prospective payment system (IPPS). In addition, section 1886(d)(5)(K)(vi) of the Act specifies that a medical service or technology will be considered “new” if it meets criteria established by the Secretary (after notice and opportunity for public comment). (See the fiscal year (FY) 2002 IPPS proposed rule (66 FR 22693, May 4, 2001) and final rule (66 FR 46912, September 7, 2001) for a more detailed discussion.)

As finalized in the FY 2020 and FY 2021 IPPS/Long-term Care Hospital (LTCH) Prospective Payment System (PPS) final rules, technologies which are eligible for the alternative new technology pathway for transformative new devices or the alternative new technology pathway for certain antimicrobials do not need to meet the requirement under 42 CFR 412.87(b)(1) that the technology represent an advance that substantially improves, relative to technologies previously available, the diagnosis or treatment of Medicare beneficiaries. These medical devices or products will also be considered new and not substantially similar to an existing technology for purposes of new technology add-on payment under the IPPS. (See the FY 2020 IPPS/LTCH PPS final rule (84 FR 42292 through 42297) and the FY 2021 IPPS/LTCH PPS final rule (85 FR 58733 through 58742) for additional information.)

In the FY 2020 IPPS/LTCH PPS final rule (84 FR 42289 through 42292), we codified in our regulations at § 412.87 the following aspects of how we evaluate substantial clinical improvement for purposes of new technology add-on payments under the IPPS in order to determine if a new technology meets the substantial clinical improvement requirement:

- The totality of the circumstances is considered when making a determination that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of Medicare beneficiaries.

- A determination that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of Medicare beneficiaries means—

- ++ The new medical service or technology offers a treatment option for a patient population unresponsive to, or ineligible for, currently available treatments;

- ++ The new medical service or technology offers the ability to diagnose a medical condition in a patient population where that medical condition is currently undetectable or offers the ability to diagnose a medical condition earlier in a patient population than allowed by currently available methods, and there must also be evidence that use of the new medical service or technology to make a diagnosis affects the management of the patient; or

- ++ The use of the new medical service or technology significantly improves clinical outcomes relative to services or technologies previously available as demonstrated by one or more of the following:

- A reduction in at least one clinically significant adverse event, including a reduction in mortality or a clinically significant complication.
- A decreased rate of at least one subsequent diagnostic or therapeutic intervention (for example, due to reduced rate of recurrence of the disease process).
- A decreased number of future hospitalizations or physician visits.
- A more rapid beneficial resolution of the disease process treatment including, but not limited to, a reduced length of stay or recovery time; an improvement in one or more activities of daily living; an improved quality of life; or, a demonstrated greater medication adherence or compliance.

- ++ The totality of the circumstances otherwise demonstrates that the new medical service or technology substantially improves, relative to technologies previously available, the diagnosis or treatment of Medicare beneficiaries.

- Evidence from the following published or unpublished information

sources from within the United States or elsewhere may be sufficient to establish that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of Medicare beneficiaries: Clinical trials, peer reviewed journal articles; study results; meta-analyses; consensus statements; white papers; patient surveys; case studies; reports; systematic literature reviews; letters from major healthcare associations; editorials and letters to the editor; and public comments. Other appropriate information sources may be considered.

- The medical condition diagnosed or treated by the new medical service or technology may have a low prevalence among Medicare beneficiaries.
- The new medical service or technology may represent an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of a subpopulation of patients with the medical condition diagnosed or treated by the new medical service or technology.

Section 1886(d)(5)(K)(viii) of the Act requires that as part of the process for evaluating new medical services and technology applications, the Secretary shall do the following:

- Provide for public input regarding whether a new service or technology represents an advance in medical technology that substantially improves the diagnosis or treatment of Medicare beneficiaries before publication of a proposed rule.
- Make public and periodically update a list of all the services and technologies for which an application is pending.
- Accept comments, recommendations, and data from the public regarding whether the service or technology represents a substantial improvement.
- Provide for a meeting at which organizations representing hospitals, physicians, manufacturers and any other interested party may present comments, recommendations, and data to the clinical staff of CMS as to whether the service or technology represents a substantial improvement before publication of a proposed rule.

The opinions and presentations provided during this meeting will assist us as we evaluate the new medical services and technology applications for FY 2022. In addition, they will help us to evaluate our policy on the IPPS new technology add-on payment process before the publication of the FY 2022 IPPS/LTCH PPS proposed rule.

II. Town Hall Meeting Format and Conference Call/Live Streaming Information

A. Format of the Town Hall Meeting

As noted in section I. of this notice, we are required to provide for a meeting at which organizations representing hospitals, physicians, manufacturers and any other interested party may present comments, recommendations, and data to the clinical staff of CMS concerning whether the service or technology represents a substantial clinical improvement. This meeting will allow for a discussion of the substantial clinical improvement criterion for the FY 2022 new medical services and technology add-on payment applications. Information regarding the applications can be found on our website at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/newtech.html>.

The majority of the meeting will be reserved for presentations of comments, recommendations, and data from registered presenters. The time for each presenter's comments will be approximately 10 to 15 minutes and will be based on the number of registered presenters. Individuals who would like to present must register and submit their agenda item(s) via email to newtech@cms.hhs.gov by the date specified in the **DATES** section of this notice.

Depending on the number of applications received, we will determine if a second meeting day is necessary. A preliminary agenda will be posted on the CMS website at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/newtech.html> by November 23, 2020 to inform the public of the number of days of the meeting.

In addition, written comments will also be accepted and presented at the meeting if they are received via email to newtech@cms.hhs.gov by the date specified in the **DATES** section of this notice. Written comments may also be submitted after the meeting for our consideration. If the comments are to be considered before the publication of the FY 2022 IPPS/LTCH PPS proposed rule, the comments must be received via email to newtech@cms.hhs.gov by the date specified in the **DATES** section of this notice.

B. Conference Call, Live Streaming, and Webinar Information

As noted previously, the Town Hall meeting will be held virtually due to the COVID-19 pandemic. There will be an option to participate in the Town Hall

Meeting via live streaming technology or webinar and a toll-free teleconference phone line. Information on the option to participate via live streaming technology or webinar and a teleconference dial-in will be provided through an upcoming listserv notice and will appear on the final meeting agenda, which will be posted on the New Technology website at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/newtech.html>. Continue to check the website for updates.

C. Disclaimer

We cannot guarantee reliability for live streaming technology or a webinar.

III. Registration Instructions

The Division of New Technology in CMS is coordinating the meeting registration for the Town Hall Meeting on substantial clinical improvement. While there is no registration fee, individuals planning to present at the Town Hall Meeting must register to present.

Registration for presenters may be completed by sending an email to newtech@cms.hhs.gov. Please include your name, address, telephone number, email address and fax number.

Registration for attendees not presenting at the meeting is not required.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Seema Verma, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: October 8, 2020.

Lynette Wilson,
Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2020-22894 Filed 10-14-20; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-D-1876]

Testing for Biotin Interference in In Vitro Diagnostic Devices; 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 final

guidance entitled “Testing for Biotin Interference in In Vitro Diagnostic Devices; Guidance for Industry.” The guidance provides FDA’s recommendations on the testing for interference by biotin on the performance of in vitro diagnostic devices (IVDs). The guidance is intended to help device developers and clinicians understand how FDA recommends biotin interference testing be performed, and how the results of the testing should be communicated to end users, including clinical laboratories and clinicians. The guidance announced in this notice finalizes the draft guidance of the same title dated June 2019.

DATES: The announcement of the guidance is published in the **Federal Register** on October 16, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management

Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA-2019-D-1876 for “Testing for Biotin Interference in In Vitro Diagnostic Devices; Guidance for Industry.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to 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 or the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist the office in processing your requests. The 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 guidance document.

FOR FURTHER INFORMATION CONTACT: Shruti Modi, 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 document entitled “Testing for Biotin Interference in In Vitro Diagnostic Devices; Guidance for Industry.” The guidance provides FDA’s recommendations on the testing for interference by biotin on the performance of IVDs. The guidance is intended to help device developers and clinicians understand how FDA recommends biotin interference testing be performed, and how the results of the testing should be communicated to end users, including clinical laboratories and clinicians. The recommendations apply to IVDs, including devices that are licensed under section 351 of the Public Health Service Act (42 U.S.C. 262) and used in donor screening, that use biotin technology.

Biotin, also known as vitamin B7, is a water-soluble vitamin often found in multivitamins, prenatal vitamins, and dietary supplements marketed for hair, skin, and nail growth. FDA has become aware of potential biotin interference with IVDs that use biotin/avidin interactions as part of the device technology. Biotin levels in samples from patients who consume more than the recommended daily intake of biotin can cause falsely high or falsely low results, depending on the test principle.

In the **Federal Register** of June 10, 2019 (84 FR 27781), FDA announced the availability of the draft guidance of the same title. FDA received a few

comments on the draft guidance and those comments were considered as the guidance was finalized. We considered comments on the recommended level of biotin concentration for evaluation. We decline to recommend evaluating a concentration level below 3,500 nanograms per milliliter. We believe this level is appropriate for minimizing the risk to patients from incorrect test results. Further, this level is consistent with best practices among the industry to test at three times the highest concentration levels observed, as recommended in the FDA-recognized standard published by the Clinical Laboratory Standards Institute. Other comments recommended FDA clarify or expand upon the necessity of mitigation strategies to address biotin interference other than labeling. We decline to recommend other specific mitigation strategies, but note that other mitigation strategies such as customer information letters and technical mitigations may be considered when the risk of potentially incorrect results from biotin interference could significantly affect patient or public health. Finally, we considered comments regarding additional types of information to be communicated to end-users, but we declined to provide more specific recommendations because manufacturers may not have sufficient data to provide more specific information in the labeling. In addition, editorial edits were made to improve clarity. The guidance announced in this notice finalizes the draft guidance of the same title dated June 2019.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on testing for biotin interference in in vitro diagnostic devices. 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

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 809 have been approved under OMB control number 0910–0485.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products>, or <https://www.regulations.gov>.

Dated: October 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–22926 Filed 10–15–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1127]

Listing of Patent Information in the Orange Book; Establishment of a Public Docket; Request for Comments; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is reopening the comment period for the notice entitled “Listing of Patent Information in the Orange Book; Establishment of a Public Docket; Request for Comments” that appeared in the **Federal Register** of June 1, 2020. The notice announced the establishment of a docket to solicit comments on the listing of patent information in the FDA publication, “Approved Drug Products With Therapeutic Equivalence Evaluations” (commonly known as the “Orange Book”). The Agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: FDA is reopening the comment period for the notice published on June 1, 2020 (85 FR 33169). Submit either electronic or written comments by November 16, 2020.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before November 16, 2020. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time

at the end of November 16, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2020–N–1127 for “Listing of Patent Information in the Orange Book; Establishment of a Public Docket; Request for Comments; Reopening of Comment Period.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff

between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Elizabeth Giaquinto Friedman, Office of Generic Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1670, Silver Spring, MD 20993–0002, 240–402–7930.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 1, 2020 (85 FR 33169), FDA published a notice with a 90-day comment period to solicit comments on the listing of patent information in the FDA publication, “Approved Drug Products With Therapeutic Equivalence Evaluations” (commonly known as the “Orange Book”).

The Agency has received a request for an extension of the comment period for the public docket in order to develop a response to the request for comment.

FDA has considered the request and is reopening the comment period for the public docket for 30 days, until November 16, 2020. The Agency believes that an additional 30 days will allow adequate time for interested persons to submit comments.

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–22969 Filed 10–15–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–D–1136 and FDA–2020–D–1106]

Guidance Documents Related to Coronavirus Disease 2019 (COVID–19); 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 FDA guidance documents related to the Coronavirus Disease 2019 (COVID–19) public health emergency (PHE). This notice of availability (NOA) is pursuant to the process that FDA announced, in the **Federal Register** of March 25, 2020, for making available to the public COVID–19-related guidances. The guidances identified in this notice address issues related to the COVID–19 PHE and have been issued in accordance with the process announced in the March 25, 2020, notice. The guidances have been implemented without prior comment, but they remain subject to comment in accordance with the Agency’s good guidance practices.

DATES: The announcement of the guidances is published in the **Federal Register** on October 16, 2020. The guidances have been implemented without prior comment, but they remain subject to comment in accordance with the Agency’s good guidance practices.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

• **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the name of the guidance document that the comments address and the docket number for the guidance (see table 1). Received comments will be placed in the docket(s) 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 these guidances to the address noted in table 1. Send two self-addressed adhesive labels to assist that office in processing your requests. See

the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidances.

FOR FURTHER INFORMATION CONTACT: Kimberly Thomas, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6220, Silver Spring, MD 20993-0002, 301-796-2357.

SUPPLEMENTARY INFORMATION:

I. Background

On January 31, 2020, as a result of confirmed cases of COVID-19, and after consultation with public health officials as necessary, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority under section 319 of the Public Health Service Act (42 U.S.C. 247d) (PHS Act), determined that a PHE exists and has existed since January 27, 2020, nationwide.¹ On March 13, 2020, President Donald J. Trump declared that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.²

In the **Federal Register** of March 25, 2020 (the March 25, 2020, notice) (available at <https://www.govinfo.gov/content/pkg/FR-2020-03-25/pdf/2020-06222.pdf>), FDA announced procedures for making available FDA guidances related to the COVID-19 PHE. These procedures, which operate within FDA’s established good guidance practices regulations, are intended to allow FDA to rapidly disseminate Agency recommendations and policies related to COVID-19 to industry, FDA staff, and other stakeholders. The March 25, 2020, notice stated that due to the need to act quickly and efficiently to respond to the COVID-19 PHE, FDA believes that prior

public participation will not be feasible or appropriate before FDA implements COVID-19-related guidances. Therefore, FDA will issue COVID-19-related guidances for immediate implementation without prior public comment (see section 701(h)(1)(C) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 371(h)(1)(C) and 21 CFR 10.115(g)(2) (§ 10.115(g)(2))). The guidances are available at FDA’s web page entitled “COVID-19-Related Guidance Documents for Industry, FDA Staff, and Other Stakeholders” (<https://www.fda.gov/emergency-preparedness-and-response/mcm-issues/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders>) and through FDA’s web page entitled “Search for FDA Guidance Documents” available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>.

The March 25, 2020, notice further stated that, in general, rather than publishing a separate NOA for each COVID-19-related guidance, FDA intends to publish periodically a consolidated NOA announcing the availability of certain COVID-19-related guidances that FDA issued during the relevant period, as included in table 1. This notice announces COVID-19-related guidances that are posted on FDA’s website.

II. Availability of COVID-19-Related Guidance Documents

Pursuant to the process described in the March 25, 2020, notice, FDA is announcing the availability of the following COVID-19-related guidances:

TABLE 1—GUIDANCES RELATED TO THE COVID-19 PUBLIC HEALTH EMERGENCY

Docket No.	Center	Title of guidance	Contact information to request single copies
FDA-2020-D-1136	CDER	Manufacturing, Supply Chain, and Drug and Biological Product Inspections During COVID-19 Public Health Emergency Questions and Answers (August 2020).	druginfo@fda.hhs.gov . Please include the docket number FDA-2020-D-1136 and complete title of the guidance in the request.
FDA-2020-D-1136	CDER	Resuming Normal Drug and Biologics Manufacturing Operations During the COVID-19 Public Health Emergency (September 2020).	druginfo@fda.hhs.gov . Please include the docket number FDA-2020-D-1136 and complete title of the guidance in the request.
FDA-2020-D-1106	CDER	FDA Guidance on Conduct of Clinical Trials of Medical Products during COVID-19 Public Health Emergency (March 2020) (Updated September 2020).	Clinicaltrialconduct-COVID19@fda.hhs.gov . Please include the docket number FDA-2020-D-1106 and complete title of the guidance in the request.

Although these guidances have been implemented immediately without prior comment, FDA will consider all

comments received and revise the guidances as appropriate (see § 10.115(g)(3)).

These guidances are being issued consistent with FDA’s good guidance practices regulation (§ 10.115). The

¹ On April 21, 2020, the PHE Determination was extended, effective April 26, 2020; on July 23, 2020, it was extended, effective July 25, 2020; on October 2, 2020, it was extended, effective October 23, 2020. These PHE Determinations are available at <https://www.fda.gov/emergency-preparedness-and-response/mcm-issues/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders>.

www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.

² Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020),

available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

guidances represent the current thinking of FDA. They do not establish any rights for any person and are not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

CDER Guidances

The guidances listed in the table below refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C.

3501–3521) is not required for these guidances. However, these previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following FDA regulations and guidances have been approved by OMB as listed in the following table:

TABLE 2—CDER GUIDANCES AND COLLECTIONS

COVID–19 guidance title	CFR cite referenced in COVID–19 guidance	Another guidance title referenced in COVID–19 guidance	OMB control No(s).
Guidance for Industry: Resuming Normal Drug and Biologics Manufacturing Operations During the COVID–19 Public Health Emergency.	21 CFR 210 and 211, 21 CFR 514.80, 21 CFR 600.	<ul style="list-style-type: none"> —Q7 Good Manufacturing Practice Guidance for Active Pharmaceutical Ingredients. —Planning for the Effects of High Absenteeism to Ensure Availability of Medically Necessary Drug Products. —Notifying FDA of a Permanent Discontinuation or Interruption in Manufacturing Under Section 506C of the FD&C Act. —Reporting and Mitigating Animal Drug Shortages During the COVID–19 Public Health Emergency. 	0910–0001, 0910–0032, 0910–0139, 0910–0338, 0910–0669, 0910–0675, 0910–0759, 0910–0806.
Manufacturing, Supply Chain, and Drug and Biological Product Inspections During COVID–19 Public Health Emergency; Questions and Answers.	21 CFR 314.50; 314.95, 314.125, 314.127; 601.2 and 601.20.	<ul style="list-style-type: none"> —Prioritization of the Review of Original ANDAs, Amendments, and Supplements. —Requests for Expedited Review of New Drug Application and Biologics License Application Prior Approval Supplements Submitted for Chemistry, Manufacturing, and Controls Changes. —Administrative Processing of Original Biologics License Applications (BLA) and New Drug Applications (NDA). —Changes to an Approved Application for Specified Biotechnology and Specified Synthetic Biological Products. —Changes to an Approved Application: Biological Products. —Changes to an Approved NDA or ANDA; Questions and Answers. —Changes to an Approved NDA or ANDA. —CMC Postapproval Manufacturing Changes To Be Documented in Annual Reports. —Changes to an Approved Application: Biological Products: Human Blood and Blood Components Intended for Transfusion or for Further Manufacture. —CMC Postapproval Manufacturing Changes for Specified Biological Products To Be Documented in Annual Reports. —Chemistry, Manufacturing, and Controls Changes to an Approved Application: Certain Biological Products. —Immediate Release Solid Oral Dosage Forms; Scale-Up and Postapproval Changes: Chemistry, Manufacturing, and Controls, In Vitro Dissolution Testing, and In Vivo Bioequivalence Documentation. —SUPAC–IR: Questions and Answers about SUPAC–IR Guidance. —Nonsterile Semisolid Dosage Forms; Scale-Up and Postapproval Changes: Chemistry, Manufacturing, and Controls; In Vitro Release Testing and In Vivo Bioequivalence Documentation. —SUPAC–MR: Modified Release Solid Oral Dosage Forms; Scale-Up and Postapproval Changes: Chemistry, Manufacturing, and Controls; In Vitro Dissolution Testing and In Vivo Bioequivalence Documentation. 	0910–0001, 0910–0014, 0910–0338, 0910–0045, 0910–0139, 0910–0759.

TABLE 2—CDER GUIDANCES AND COLLECTIONS—Continued

COVID-19 guidance title	CFR cite referenced in COVID-19 guidance	Another guidance title referenced in COVID-19 guidance	OMB control No(s).
		—SUPAC: Manufacturing Equipment Addendum.	

The guidance listed in the table below refers to previously approved FDA collections of information. Therefore, clearance by OMB under the PRA is not required for this guidance. However, these collections of information are subject to review by OMB under the PRA. The previously approved

collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the table below. This guidance also contains a collection of information not approved under a current collection. This collection of information has been granted a PHE waiver from the PRA by

the Department of Health and Human Services (HHS) on March 19, 2020, under section 319(f) of the PHS Act. Information concerning the PHE PRA waiver can be found on the HHS website at <https://aspe.hhs.gov/public-health-emergency-declaration-pwaivers>.

TABLE 3—CDER GUIDANCES AND COLLECTIONS

COVID-19 guidance title	CFR cite referenced in COVID-19 guidance	Another guidance referenced in COVID-19 guidance	OMB control No(s).	Collection covered by PHE PRA waiver
Guidance on Conduct of Clinical Trials of Medical Products during COVID-19 Public Health Emergency (Updated September 21, 2020).	21 CFR part 11, 21 CFR part 50, 21 CFR part 56, 21 CFR part 312, 21 CFR part 314, 21 CFR part 320, 21 CFR part 601, 21 CFR part 812.	Formal Meetings Between the FDA and Sponsors or Applicants of PDUFA Products. Formal Meetings Between the FDA and Sponsors or Applicants of BsUFA Products. Pediatric Study Plans: Content of and Process for Submitting Initial Pediatric Study Plans and Amended Pediatric Study Plans. Draft Guidance for Industry on Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products. Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Design. Pregnant Women: Scientific and Ethical Considerations for Inclusion in Clinical Trials. Part 11, Electronic Records; Electronic Signatures Scope and Application. Use of Electronic Records and Electronic Signatures in Clinical Investigations under 21 CFR Part 11—Questions and Answers. Safety Reporting Requirements for INDs and BA/BE Studies. Adverse Event Reporting to IRBs—Improving Human Subject Protection. Use of Electronic Informed Consent In Clinical Investigations. E6(R2) Good Clinical Practice: Integrated Addendum to ICH E6(R1). Providing Regulatory Submissions in Electronic Format—Certain Human Pharmaceutical Product Applications and Related Submissions Using the eCTD Specifications. Best Practices for Communication Between IND Sponsors and FDA During Drug Development. Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program..	0910-0001, 0910-0014, 0910-0130, 0910-0303, 0910-0338, 0910-0119, 0910-0581, 0910-0733, 0910-0078	Submission by investigators of informed consent forms to third parties.

IV. Electronic Access

Persons with access to the internet may obtain COVID-19-related guidances at:

- The FDA web page entitled “COVID-19-Related Guidance

Documents for Industry, FDA Staff, and Other Stakeholders,” available at <https://www.fda.gov/emergency-preparedness-and-response/mcm-issues/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders>;

- the FDA web page entitled “Search for FDA Guidance Documents” available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>; or
- <https://www.regulations.gov>.

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-22968 Filed 10-15-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2020-N-2031]

Quality Management Maturity for Finished Dosage Forms Pilot Program for Domestic Drug Product Manufacturers; Program Announcement

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency), Center for Drug Evaluation and Research (CDER) is announcing its Quality Management Maturity for Finished Dosage Forms Pilot Program (QMM FDF Pilot Program) for domestic drug product manufacturers of prescription and over-the-counter (OTC) drug products. The purpose of the QMM FDF Pilot Program is to gain insight from third-party assessments of a manufacturer's quality management system to inform future development of an FDA rating system to characterize quality management maturity (QMM). Such a rating system would allow a cross-sectional comparison of manufacturers. Manufacturers that choose to disclose their facility ratings could benefit from a competitive advantage, as knowledge of QMM ratings would enable health systems and other purchasers and payers of medications to differentiate among drug manufacturers. This notice invites manufacturers that are interested in participating in the QMM FDF Pilot Program to submit a request to participate.

DATES: FDA will accept requests to participate in the QMM FDF Pilot Program through November 30, 2020, and the QMM FDF Pilot Program will run through December 31, 2021. See the "Participation" section for selection criteria and instructions on how to submit a request to participate.

FOR FURTHER INFORMATION CONTACT: *For general questions about the QMM FDF Pilot Program:* Jennifer Maguire, Center for Drug Evaluation and Research (CDER), 10903 New Hampshire Ave., Silver Spring, MD 20993, Bldg. 51, Rm.

4134, 240-402-4817, *Jennifer.Maguire@fda.hhs.gov*.

To submit a request to participate in the QMM FDF Pilot Program: Seongjin (Cindy) Pak, CDER, Bldg. 51, Rm. 4220, 301-796-1673, *Seongjin.Pak@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In 2002, FDA launched an initiative, "Pharmaceutical CGMPs for the 21st Century—A Risk-Based Approach," to enhance and modernize the regulation of pharmaceutical manufacturing and product quality.¹ One objective, among others, was to facilitate the implementation of a modern, risk-based pharmaceutical quality assessment system. The desired state has been described as a maximally efficient, agile, flexible pharmaceutical manufacturing sector that reliably produces high-quality drug products without extensive regulatory oversight.

There has been significant progress toward this vision as evidenced by FDA programs and initiatives in such areas as pharmaceutical development and quality by design, quality risk management and pharmaceutical quality systems, process validation, and emerging technologies. These programs and initiatives promote use of the best pharmaceutical science and engineering principles throughout the product life cycle.

Another example is the FDA Quality Metrics Program, described in the November 2016 revised draft guidance for industry "Submission of Quality Metrics Data" (81 FR 85226). When final, this guidance will represent FDA's current thinking on this issue. In June 2018, FDA initiated two voluntary programs that sought additional industry input on quality metrics. FDA solicited industry participation for a Site Visit Program (83 FR 30751) for manufacturing establishments to present the advantages and challenges associated with implementing and managing a quality metrics program, and for a Quality Metrics Feedback Program (83 FR 30748) to engage stakeholders in identifying mutually useful and objective quality metrics.

The Agency continues to develop the FDA Quality Metrics Program but recognizes that quality metrics are only one element within a manufacturer's larger effort to increase the maturity of their quality management system. Manufacturers that demonstrate QMM

operate under an enhanced quality management system that exceeds the minimum standards specified in current good manufacturing practice regulations and focuses on continual improvement. Characteristics of a mature quality management system include, for example, the ability to consistently and reliably deliver quality product over time, operational stability, and a strong quality culture. Additionally, for manufacturers with a mature quality management system, FDA can exercise a more flexible regulatory approach, leading toward the goal of producing high-quality drug products without extensive regulatory oversight.

A transparent method of evaluating and communicating QMM is needed to fully realize the 21st century pharmaceutical quality vision. Toward that end, FDA is announcing the start of the QMM FDF Pilot Program. Through this pilot program, a third-party contractor identified by FDA will conduct an assessment of a manufacturer's quality management system, accompanied by FDA staff. The Agency will gain insight from the results of the QMM assessments to inform the development of a rating system to measure and rate QMM. Assessments under the QMM FDF Pilot Program will cover multiple topics. Examples include but are not limited to:

1. Supply chain management;
2. manufacturing strategy and operations;
3. safety, environmental, and regulatory compliance;
4. inventory management;
5. performance management and continual improvement;
6. risk management;
7. management review and responsibility;
8. planning;
9. workforce management;
10. quality culture; and
11. customer experience.

In the same timeframe as the QMM FDF Pilot Program, FDA will conduct a QMM pilot program for foreign manufacturers of active pharmaceutical ingredients (APIs), including facilities manufacturing drug substance intermediates used to produce APIs. These pilot programs are funded separately and are intended to provide FDA with representative information about QMM from different types of drug manufacturers (API and FDF). Elsewhere in this issue of the **Federal Register**, FDA is publishing "Quality Management Maturity for Active Pharmaceutical Ingredients Pilot Program for Foreign Facilities; Program Announcement."

¹ See FDA's final report: "Pharmaceuticals CGMPs for the 21st Century—A Risk-Based Approach" (September 2004) at <https://www.fda.gov/media/77391/download>.

II. Participation

Drug product manufacturers located in the United States that are interested in participating in the QMM FDF Pilot Program should submit a written request directly to Seongjin (Cindy) Pak (see **FOR FURTHER INFORMATION CONTACT**). Participation in the QMM FDF Pilot Program is voluntary. Participants in the Quality Metrics Feedback Program are encouraged to participate in the QMM FDF Pilot Program. FDA will select up to nine participants for the QMM FDF Pilot Program. Participation in the QMM FDF Pilot Program is limited to domestic manufacturing facilities since FDA's funding source for this program is specific to activities related to domestic manufacturing.

A. Selection Criteria

To be considered for the QMM FDF Pilot Program, participants must meet the following selection criteria:

1. Participant is a U.S.-based manufacturing facility of prescription and/or OTC drug products.

2. All FDA inspection(s) of the manufacturing facility conducted within the 5 years prior to October 1, 2020, received a final classification of "No Action Indicated" or "Voluntary Action Indicated."

3. Participant agrees to:

a. Permit a third-party contractor to conduct a QMM assessment, whether the assessment is conducted on-site or remotely. FDA will identify an external contractor having the expertise to assess QMM, and FDA staff will join the contractor for the assessment.

b. Collect and submit metrics data to FDA and the contractor by an agreed upon date, prior to the assessment. As part of the scoping discussions for the assessment, FDA will provide the manufacturer with templates and additional details about the data collection.

c. Be available for consultations with the contractor and FDA prior to and after the assessment, including discussions regarding the participant's established QMM-related activities and the contractor's post-assessment recommendations regarding these activities.

During this QMM FDF Pilot Program, the contractor and FDA staff will be available to answer questions and address concerns that arise.

B. Information To Include in the Request

When submitting a request to participate in the QMM FDF Pilot Program, include the information below to aid in FDA's selection and planning.

FDA will not consider requests submitted without the following minimal information:

1. A contact person (name and email);
2. manufacturing facility location;
3. facility FDA Establishment Identifier and Data Universal Numbering System numbers;
4. a brief description of the manufacturing operations conducted at the facility;
5. preferred dates for the assessment;
6. written confirmation that the facility meets the selection criteria in section II.A, including agreement to items 3a–c;
7. written confirmation that the facility can handle a visit of up to 10 FDA staff and contractors; and
8. a brief description of prior experiences undergoing an assessment related to the maturity of the facility's quality culture, including the name of the organization that conducted the assessment and date of the assessment.

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–22976 Filed 10–15–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0073]

Agency Information Collection Activities; Proposed Collection; Comment Request; Irradiation in the Production, Processing, and Handling of Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, we, or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of our requirements for food irradiation processors.

DATES: Submit either electronic or written comments on the collection of information by December 15, 2020.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 15, 2020. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 15, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2018–N–0073 for "Agency Information

Collection Activities; Proposed Collection; Comment Request; Irradiation in the Production, Processing, and Handling of Food.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Irradiation in the Production, Processing, and Handling of Food

OMB Control Number 0910–0186—Extension

This information collection supports FDA regulations. Specifically, under sections 201(s) and 409 of the Federal

Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321(s) and 348), food irradiation is subject to regulation under the food additive premarket approval provisions of the FD&C Act. The regulations providing for uses of irradiation in the production, processing, and handling of food are found in part 179 (21 CFR part 179). To ensure safe use of a radiation source, § 179.21(b)(1) (21 CFR 179.21(b)(1)) requires that the label of sources bear appropriate and accurate information identifying the source of radiation and the maximum (or minimum and maximum) energy of the emitted radiation. Section 179.21(b)(2) requires that the label or accompanying labeling bear adequate directions for installation and use and a statement supplied by us that indicates maximum dose of radiation allowed. Section 179.26(c) (21 CFR 179.26(c)) requires that the label or accompanying labeling bear a logo and a radiation disclosure statement. Section 179.25(e) (21 CFR 179.25(e)) requires that food processors who treat food with radiation make and retain, for 1 year past the expected shelf life of the products up to a maximum of 3 years, specified records relating to the irradiation process (e.g., the food treated, lot identification, scheduled process, etc.). The records required by § 179.25(e) are used by our inspectors to assess compliance with the regulation that establishes limits within which radiation may be safely used to treat food. We cannot ensure safe use without a method to assess compliance with the dose limits, and there are no practicable methods for analyzing most foods to determine whether they have been treated with ionizing radiation and are within the limitations set forth in part 179. Records inspection is the only way to determine whether firms are complying with the regulations for treatment of foods with ionizing radiation.

Description of Respondents: Respondents to the information collection are businesses engaged in the irradiation of food.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
179.25(e), large processors	4	300	1,200	1	1,200
179.25(e), small processors	4	30	120	1	120

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹—Continued

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Total	1,320

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate. Our estimate of the recordkeeping burden under § 179.25(e) is based on our experience regulating the safe use of radiation as a direct food additive. The number of firms who process food using irradiation is extremely limited. We estimate that there are four irradiation plants whose business is devoted primarily (*i.e.*, approximately 100 percent) to irradiation of food and other agricultural products. Four other firms also irradiate small quantities of food. We estimate that this irradiation accounts for no more than 10 percent of the business for each of these firms. Therefore, the average estimated burden is based on four facilities devoting 100 percent of their business to food irradiation, and four facilities devoting 10 percent of their business to food irradiation.

No burden has been estimated for the labeling requirements in §§ 179.21(b)(1), 179.21(b)(2), and 179.26(c) because the disclosures are supplied by FDA. Under 5 CFR 1320.3(c)(2), the public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not subject to review by OMB under the PRA.

Dated: October 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-22939 Filed 10-15-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2018-D-1216]

Electronic Common Technical Document; Data Standards; Support Ends for Electronic Common Technical Document Module 1 U.S. Regional Document Type Definition Version 2.01 and Requirement Begins for Electronic Common Technical Document Module 1 U.S. Regional Document Type Definition Version 3.3

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA or Agency) Center for Drug Evaluation and Research and Center for Biologics Evaluation and Research are announcing the date that FDA will no longer support electronic submissions using the Electronic Common Technical Document (eCTD) Backbone Files Specification for Module 1 Version 1.3, Comprehensive Table of Contents Headings and Hierarchy Version 1.2.2, U.S. Regional Document Type Definition (DTD) Version 2.01, and U.S. Regional Stylesheet Version 1.1, and will require electronic submissions to be submitted using eCTD Module 1 U.S. Regional DTD Version 3.3. The Agency will update the eCTD Submission Standards document to reflect these changes.

DATES: The requirement for electronic submissions to be submitted using eCTD Module 1 U.S. Regional DTD Version 3.3 will begin on March 1, 2022.

ADDRESSES: You may submit either electronic or written comments at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are

solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2018-D-1216 for "Electronic Common Technical Document; Data Standards; Support Ends for Electronic Common Technical Document Module 1 U.S. Regional Document Type Definition Version 2.01 and Requirement Begins for Electronic Common Technical Document Module 1 U.S. Regional Document Type Definition Version 3.3." 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.

FOR FURTHER INFORMATION CONTACT: Jonathan Resnick, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3160, Silver Spring, MD 20993-0002, 301-796-7997, jonathan.resnick@fda.hhs.gov, or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION: FDA is issuing this **Federal Register** notice pursuant to the guidelines described in the FDA guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Submissions Under Section 745A(a) of the Federal Food, Drug, and Cosmetic Act" (December 2014, available at <https://www.fda.gov/media/88120/download>), section III.F "When will revisions or updates to existing formats take effect?" to announce the end of support for

electronic submissions using eCTD Module 1 U.S. Regional DTD Version 2.01 and the date the requirement begins to submit using eCTD Module 1 U.S. Regional DTD Version 3.3 as described in this notice.

On June 15, 2015, FDA began accepting electronic submissions using eCTD Module 1 U.S. Regional DTD Version 3.3 as described in "The eCTD Backbone Files Specification for Module 1" Version 2.3. This upgrade of eCTD Module 1 includes functionality for promotional material and risk evaluation and mitigation strategies submissions, the ability to dynamically update certain heading elements (e.g., FDA forms), and the ability to submit grouped submissions. FDA has continued to accept electronic submissions using the previous version of the eCTD Module 1, using U.S. Regional DTD Version 2.01 as described in "The eCTD Backbone Files Specification for Module 1" Version 1.3.

Due to the limitations of eCTD Module 1 U.S. Regional DTD Version 2.01, FDA support for electronic submissions using eCTD Backbone Files Specification for Module 1 Version 1.3, Comprehensive Table of Contents Headings and Hierarchy Version 1.2.2, U.S. Regional DTD Version 2.01, and U.S. Regional Stylesheet Version 1.1 will end on March 1, 2022. The requirement for electronic submissions to be submitted using eCTD Module 1 U.S. Regional DTD Version 3.3 will begin on March 1, 2022. The Agency will update the eCTD Submission Standards document to reflect these changes.

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-22971 Filed 10-15-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2020-N-2018]

Quality Management Maturity for Active Pharmaceutical Ingredients Pilot Program for Foreign Facilities; Program Announcement

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency), Center for Drug Evaluation and Research (CDER) is announcing its Quality

Management Maturity for Active Pharmaceutical Ingredients Pilot Program (QMM API Pilot Program) for foreign facilities manufacturing active pharmaceutical ingredients (APIs), including facilities manufacturing drug substance intermediates used to produce APIs, that are used in FDA-regulated prescription and over-the-counter (OTC) drug products. The purpose of the QMM API Pilot Program is to gain insight from third-party assessments of a facility's quality management system to inform future development of an FDA rating system to characterize quality management maturity (QMM). Such a rating system would allow a cross-sectional comparison of facilities. Facilities that choose to disclose their facility ratings to drug product manufacturers could benefit from a competitive advantage, as knowledge of QMM ratings would enable drug product manufacturers to differentiate among facilities when purchasing APIs. This notice invites foreign facilities that are interested in participating in the QMM API Pilot Program to submit a request to participate.

DATES: FDA will accept requests to participate in the QMM API Pilot Program through November 30, 2020, and the QMM API Pilot Program will run through December 31, 2021. See the "Participation" section for selection criteria and instructions on how to submit a request to participate.

FOR FURTHER INFORMATION CONTACT: *For general questions about the QMM API Pilot Program:* Jennifer Maguire, Center for Drug Evaluation and Research (CDER), 10903 New Hampshire Ave., Bldg. 51, Rm. 4134, Silver Spring, MD 20993, 240-402-4817, Jennifer.Maguire@fda.hhs.gov.

To submit a request to participate in the QMM API Pilot Program: Seongjin (Cindy) Pak, CDER, 10903 New Hampshire Ave., Bldg. 51, Rm. 4220, 301-796-1673, Seongjin.Pak@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In 2002, FDA launched an initiative "Pharmaceutical CGMPs for the 21st Century—A Risk-Based Approach," to enhance and modernize the regulation of pharmaceutical manufacturing and product quality.¹ One objective, among others, was to facilitate the implementation of a modern, risk-based

¹ See FDA's final report: "Pharmaceuticals CGMPs for the 21st Century—A Risk-Based Approach" (September 2004) at <https://www.fda.gov/media/77391/download>.

pharmaceutical quality assessment system. The desired goal has been described as a maximally efficient, agile, flexible pharmaceutical manufacturing sector that reliably produces high-quality drug products without extensive regulatory oversight.

There has been significant progress toward this vision as evidenced by FDA programs and initiatives in such areas as pharmaceutical development and quality by design, quality risk management and pharmaceutical quality systems, process validation, and emerging technologies. These programs and initiatives promote use of the best pharmaceutical science and engineering principles throughout the product life cycle.

Another example is the FDA Quality Metrics Program, described in the November 2016 revised draft guidance for industry, "Submission of Quality Metrics Data" (81 FR 85226). When final, this guidance will represent FDA's current thinking on this issue. In June 2018, FDA initiated two voluntary programs that sought additional industry input on quality metrics. FDA solicited industry participation for a Site Visit Program (83 FR 30751) for manufacturing establishments to present the advantages and challenges associated with implementing and managing a quality metrics program and for a Quality Metrics Feedback Program (83 FR 30748) to engage stakeholders in identifying mutually useful and objective quality metrics.

The Agency continues to develop the FDA Quality Metrics Program but recognizes that quality metrics are only one element within a manufacturer's larger effort to increase the maturity of their quality management system. Manufacturers that demonstrate QMM² operate under an enhanced quality management system that exceeds the minimum standards specified in current good manufacturing practice regulations and focuses on continual improvement. Characteristics of a mature quality management system include, for example, the ability to consistently and reliably deliver quality product over time, operational stability, and a strong quality culture. Additionally, for manufacturers with a mature quality management system, FDA can exercise a more flexible regulatory approach, leading toward the goal of producing high-quality drug products without extensive regulatory oversight.

A transparent method of evaluating and communicating QMM is needed to fully realize the 21st century pharmaceutical quality vision. Toward that end, FDA is announcing the start of the QMM API Pilot Program. Through this pilot program, a third-party contractor identified by the FDA will conduct an assessment of a facility's quality management system, accompanied by FDA staff. The Agency will gain insight from the results of the QMM assessments to inform the development of a rating system to measure and rate QMM. Assessments under the QMM API Pilot Program will cover multiple topics. Examples include but are not limited to:

1. Supply chain management;
2. manufacturing strategy and operations;
3. safety, environmental, and regulatory compliance;
4. inventory management;
5. performance management and continual improvement;
6. risk management;
7. management review and responsibility;
8. planning;
9. workforce management;
10. quality culture; and
11. customer experience.

In the same timeframe as the QMM API Pilot Program, FDA will conduct a QMM pilot program for domestic manufacturers of finished dosage forms (FDF). These pilot programs are funded separately and are intended to provide FDA with representative information about QMM from different types of drug manufacturers (API and FDF). Elsewhere in this issue of the **Federal Register**, FDA is publishing "Quality Management Maturity for Finished Dosage Forms Pilot Program for Domestic Drug Product Manufacturers; Program Announcement."

II. Participation

Facilities located outside the United States that manufacture APIs or drug substance intermediates used to produce APIs and are interested in participating in the QMM API Pilot Program should submit a written request directly to Seongjin (Cindy) Pak (see **FOR FURTHER INFORMATION CONTACT**). Participation is voluntary. Participants in the Quality Metrics Feedback Program are encouraged to participate in the QMM API Pilot Program. FDA will select up to nine participants for the QMM API Pilot Program. Participation in the QMM API Pilot Program is limited to foreign manufacturing facilities since FDA's funding source for this program is specific to activities

related to the surveillance of foreign sites.

A. Selection Criteria

To be considered for the QMM API Pilot Program, participants must meet the following selection criteria:

1. Participant is a facility located outside the United States that manufactures APIs or drug substance intermediates used to produce APIs for FDA-regulated prescription and OTC drug products. Facilities located in Puerto Rico or other U.S. territories are not considered to be foreign facilities and thus are not eligible to participate in the QMM API Pilot Program.

2. All FDA inspection(s) of the manufacturing facility conducted within the 5 years prior to September 15, 2020, received a final classification of "No Action Indicated" or "Voluntary Action Indicated."

3. Participant agrees to:

a. Permit a third-party contractor to conduct a QMM assessment, whether the assessment is conducted on-site or remotely. FDA will identify an external contractor having the expertise to assess QMM, and FDA staff will join the contractor for the assessment.

b. Collect and submit metric data to FDA and the contractor by an agreed upon date, prior to the assessment. As part of the scoping discussions for the assessment, FDA will provide the facility with templates and additional details about the data collection.

c. Be available for consultations with the contractor and FDA prior to and after the assessment, including discussions regarding the participant's established QMM-related activities and the contractor's post-assessment recommendations regarding these activities.

During this QMM API Pilot Program, the contractor and FDA staff will be available to answer questions and address concerns that arise.

B. Information To Include in the Request

When submitting a request to participate in the QMM API Pilot Program, include the information below to aid in FDA's selection and planning. FDA will not consider requests submitted without the following minimal information:

1. A contact person (name and email);
2. facility location;
3. facility FDA Establishment Identifier and Data Universal Numbering System numbers;
4. a brief description of the manufacturing operations conducted at the facility;
5. preferred dates for the assessment;

² For additional information on quality management maturity, see FDA's Report: "Drug Shortages: Root Causes and Potential Solutions" (October 2019) at <https://www.fda.gov/media/131130/download>.

6. written confirmation that the facility meets the selection criteria in section II.A, including agreement to items 3a–c;

7. written confirmation that the facility can handle a visit of up to 10 FDA staff and contractors; and

8. a brief description of prior experiences undergoing an assessment related to the maturity of the facility's quality culture, including the name of the organization that conducted the assessment and date of the assessment.

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–22977 Filed 10–15–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0878]

Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification for a New Dietary Ingredient

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the procedure by which a manufacturer or distributor of a new dietary ingredient or of a dietary supplement containing a new dietary ingredient is to submit to FDA information upon which it has based its conclusion that a dietary supplement containing the new dietary ingredient will reasonably be expected to be safe.

DATES: Submit either electronic or written comments on the collection of information by December 15, 2020.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 15,

2020. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 15, 2020.

Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2013–N–0878 for “Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification for a New Dietary Ingredient.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential

Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–420–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrahi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, PRStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests

or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA'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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Premarket Notification for a New Dietary Ingredient—21 CFR 190.6

OMB Control Number 0910–0330—Extension

This information collection supports Agency regulations. Under section 413(a) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 350b(a)), the manufacturer or distributor of a new dietary ingredient (NDI), or of the dietary supplement that contains the NDI, must submit a premarket notification to FDA (as delegate for the Secretary of Health and Human

Services) at least 75 days before introducing the product into interstate commerce or delivering it for introduction into interstate commerce, unless the NDI and any other dietary ingredients in the dietary supplement “have been present in the food supply as an article used for food in a form in which the food has not been chemically altered” (21 U.S.C. 350b(a)(1)). The notification must contain the information which provides the basis on which the manufacturer or distributor of the NDI or dietary supplement has concluded that the dietary supplement containing the NDI will reasonably be expected to be safe (21 U.S.C. 350b(a)(2)). FDA's implementing regulation, § 190.6 (21 CFR 190.6), specifies the procedure for submitting a premarket NDI notification and the information the manufacturer or distributor must include in the notification. Under § 190.6(b), the notification must include the following: (1) The name and complete address of the manufacturer or distributor; (2) the name of the NDI; (3) a description of the dietary supplement(s) that contains the NDI, including the level of the NDI in the dietary supplement and the conditions of use recommended or suggested in the labeling of the dietary supplement, or if no conditions of use are recommended or suggested in the supplement's labeling, the ordinary conditions of use of the supplement; (4) the history of use or other evidence of safety establishing that the NDI will reasonably be expected to be safe when used under the conditions recommended or suggested in the labeling of the dietary supplement; and (5) the signature of a responsible person designated by the manufacturer or distributor.

These premarket notification requirements are designed to enable us to monitor the introduction into the marketplace of NDIs and dietary

supplements that contain NDIs in order to protect consumers from ingredients and products whose safety is unknown. We use the information collected in NDI notifications to evaluate the safety of NDIs in dietary supplements and to support regulatory action against ingredients and products that are potentially unsafe.

FDA developed an electronic portal (Form FDA 3880) that respondents may use to electronically submit their notifications to us via the Center for Food Safety and Applied Nutrition (CFSAN) Online Submission Module (COSM). COSM was developed to assist respondents when filing regulatory submissions and is specifically designed to aid users wishing to file submissions with CFSAN. COSM allows safety and other information to be uploaded and submitted online via Form FDA 3880. This form provides a standard format to describe the history of use or other evidence of safety on which the manufacturer or distributor bases its conclusion that the NDI is reasonably expected to be safe under the conditions of use recommended or suggested in the labeling of the dietary supplement, as well as a description of the ingredient and other information. Firms that prefer to submit a paper notification in a format of their own choosing have the option to do so; however, Form FDA 3880 prompts a submitter to input the elements of an NDI notification in a standard format that we will be able to review efficiently. Form FDA 3880 may be accessed at <https://www.fda.gov/Food/DietarySupplements/NewDietaryIngredientsNotificationProcess/default.htm>.

Description of Respondents: The respondents to this collection of information are certain manufacturers and distributors in the dietary supplement industry.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
190.6; Dietary Supplements	55	1	55	20	1,100

¹ There are no operating and maintenance costs associated with this collection of information.

Based on our experience with the information collection over the past 3 years, we estimate that 55 respondents will submit 1 premarket notification each. We estimate that extracting and summarizing the relevant information from what exists in the company's files

and presenting it in a format that meets the requirements of § 190.6 will take approximately 20 hours of work per notification. We believe that the burden of the premarket notification requirement on industry is reasonable because we are requesting only safety

and identity information that the manufacturer or distributor should already have developed to satisfy itself that a dietary supplement containing the NDI is in compliance with the FD&C Act. If the required premarket notification is not submitted to FDA,

section 413(a) of the FD&C Act provides that the dietary supplement containing the NDI is deemed to be adulterated under section 402(f) of the FD&C Act (21 U.S.C. 342(f)). Even if the notification is submitted as required, the dietary supplement containing the NDI is adulterated under section 402(f) of the FD&C Act unless there is a history of use or other evidence of safety establishing that the NDI, when used under the conditions recommended or suggested in the labeling of the dietary supplement, will reasonably be expected to be safe. This requirement is separate from and additional to the requirement to submit a premarket notification for the NDI. FDA's regulation on NDI notifications, § 190.6(a), requires the manufacturer or distributor of the dietary supplement or of the NDI to submit to FDA the information that forms the basis for its conclusion that a dietary supplement containing the NDI will reasonably be expected to be safe. Thus, § 190.6 only requires the manufacturer or distributor to extract and summarize information that should have already been developed to meet the safety requirement in section 413(a)(2) of the FD&C Act.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: October 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-22930 Filed 10-15-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2018-N-3179]

Request for Nominations on Public Advisory Panels of the Medical Devices Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of nonvoting industry representatives to serve on certain panels of the Medical Devices Advisory Committee (MDAC or Committee) in the Center for Devices and Radiological Health (CDRH) notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to serve on certain device panels of the MDAC in the CDRH. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current and upcoming vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to FDA by November 16, 2020 (see sections I and II of this document for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by November 16, 2020.

ADDRESSES: All statements of interest from industry organizations interested in participating in the selection process of nonvoting industry representative nomination should be sent to Margaret Ames (see **FOR FURTHER INFORMATION CONTACT**). All nominations for nonvoting industry representatives should be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: <https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm> or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993-0002. Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm>.

FOR FURTHER INFORMATION CONTACT: Margaret Ames, Center for Devices and Radiological Health, Food and Drug

Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5213, Silver Spring, MD 20993, 301-796-5960, email: margaret.ames@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: The Agency is requesting nominations for nonvoting industry representatives to the panels listed in the table in this document.

I. Medical Devices Advisory Committee

The Committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. The panels engage in a number of activities to fulfill the functions the Federal Food, Drug, and Cosmetic Act (the FD&C Act) envisions for device advisory panels. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, advises the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification or reclassification of devices into one of three regulatory categories; advises on any possible risks to health associated with the use of devices; advises on formulation of product development protocols; reviews premarket approval applications for medical devices; reviews guidelines and guidance documents; recommends exemption of certain devices from the application of portions of the FD&C Act; advises on the necessity to ban a device; and responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices. The Committee also provides recommendations to the Commissioner or designee on complexity categorization of in vitro diagnostics under the Clinical Laboratory Improvement Amendments of 1988.

Panels	Function
Anesthesiology and Respiratory Therapy Devices Panel.	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in anesthesiology and respiratory therapy and makes appropriate recommendations to the Commissioner.
Dental Products Panel (one representative—to represent the dental drug industry).	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational products for use in dentistry, endodontics or bone physiology relative to the oral and maxillofacial area and makes appropriate recommendations to the Commissioner.

Panels	Function
Medical Devices Dispute Resolution Panel	Provides advice to the Center Director on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies.
Microbiology Devices Panel	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational in vitro diagnostic devices for use in clinical laboratory medicine including microbiology, virology, and infectious disease and makes recommendations to the Commissioner.
Molecular and Clinical Genetics Panel	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational in vitro devices for use in clinical laboratory medicine including clinical and molecular genetics and makes appropriate recommendations to the Commissioner.
Neurological Devices Panel	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in the neurological system and makes appropriate recommendations to the Commissioner.
Radiological Devices Panel	Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational diagnostic or therapeutic radiological and nuclear medicine devices and makes appropriate recommendations to the Commissioner.

II. Qualifications

Persons nominated for the device panels should be full-time employees of firms that manufacture products that would come before the panel, or consulting firms that represent manufacturers, or have similar appropriate ties to industry.

III. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current résumés. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for a particular device panel. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

IV. Application Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Nomination must include a current, complete résumé or curriculum vitae for each nominee including current business address and telephone number, email address if available, and a signed copy

of the Acknowledgement and Consent form available at the FDA Advisory Committee Membership Nomination Portal (see **ADDRESSES**) within 30 days of publication of this document (see **DATES**). Nominations must also specify the advisory panel for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the particular device panels listed in the table. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore encourages nominations of appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: October 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-22911 Filed 10-15-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request Information Collection Request Title: Survey of Eligible Users of the National Practitioner Data Bank, OMB No. 0915-0366—Reinstatement With Change

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR. **DATES:** Comments on this ICR should be received no later than December 15, 2020.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email paperwork@hrsa.gov or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443-1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the

information request collection title for reference.

Information Collection Request Title: Survey of Eligible Users of the National Practitioner Data Bank, OMB No. 0915–0366—Reinstatement With Change.

Abstract: HRSA plans to survey the users National Practitioner Data Bank (NPDB). The purpose of this survey is to assess the overall satisfaction of the eligible users of the NPDB. This survey will evaluate the effectiveness of the NPDB as a flagging system, source of information, and its use in decision making. Furthermore, this survey will collect information from organizations and individuals who query the NPDB to understand and improve their user experience. This survey is a reinstatement of the 2012 NPDB survey with some changes.

Need and Proposed Use of the Information: The survey will collect information regarding the participants' experiences of querying and reporting to the NPDB, perceptions of health care practitioners with reports, impact of NPDB reports on organizations' decision-making, and satisfaction with various NPDB products and services.

The survey will also be administered to health care practitioners that use the self-query service provided by the NPDB. The self-queriers will be asked about their experiences of querying, the impact of having reports in the NPDB on their careers and health care organizations' perceptions, and their satisfaction with various NPDB products and services. Understanding self-queriers' satisfaction and their use of the information is an important component of the survey.

Proposed changes to this ICR include the following:

1. In the proposed entity survey, there are 37 modules and 258 questions. From the previous 2012 survey, there are 15 deleted questions and 13 new questions in addition to proposed changes to 12 survey questions.

2. In the proposed self-query survey, there are 22 modules and 88 questions. From the previous 2012 survey, there are 5 deleted questions and 5 new questions in addition to proposed changes to two survey questions.

Likely Respondents: Eligible users of the NPDB will be asked to complete a web-based survey. Data gathered from

the survey will be compared with previous survey results. This survey will provide HRSA with the information necessary for research purposes and for improving the usability and effectiveness of the NPDB.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
NPDB Users Entities Respondents	15,000	1	15,000	0.25	3,750
NPDB Self-Query Respondents	2,000	1	2,000	0.10	200
Total	17,000	.....	17,000	.....	3,950

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–22964 Filed 10–15–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners—45 CFR Part 60 Regulations and Forms, OMB No. 0915–0126—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection

Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than December 15, 2020.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email paperwork@hrsa.gov or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting

information, please include the ICR title for reference.

Information Collection Request Title: National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners—45 CFR part 60 Regulations and Forms, OMB No. 0915–0126—Revision.

Abstract: This is a request for OMB's approval for a revision to the information collection contained in regulations found at 45 CFR part 60 governing the National Practitioner Data Bank (NPDB) and the forms to be used in registering with, reporting information to, and requesting information from the NPDB.

Administrative forms are also included to aid in monitoring compliance with Federal reporting and querying requirements. Responsibility for NPDB implementation and operation resides in HRSA's Bureau of Health Workforce. The intent of the NPDB is to improve the quality of health care by encouraging entities such as hospitals, State licensing boards, professional societies, and other eligible entities¹ providing health care services to identify and discipline those who engage in unprofessional behavior, and to restrict the ability of incompetent health care practitioners, providers, or suppliers to move from state to state without disclosure or discovery of previous damaging or incompetent performance. It also serves as a fraud and abuse clearinghouse for the reporting and disclosing of certain final adverse actions (excluding settlements in which no findings of liability have been made) taken against health care practitioners, providers, or suppliers by

health plans, Federal agencies, and State agencies. Users of the NPDB include reporters (entities that are required to submit reports) and queriers (entities and individuals that are authorized to request for information).

The reporting forms, request for information forms (query forms), and administrative forms (used to monitor compliance) are accessed, completed, and submitted to the NPDB electronically through the NPDB website at <https://www.npdb.hrsa.gov/>. All reporting and querying is performed through the secure portal of this website.

This revision proposes changes to improve overall data integrity. In addition, this revision contains the four NPDB forms that were originally approved in the "National Practitioner Data Bank (NPDB) Attestation of Reports by Hospitals, Medical Malpractice Payers, Health Plans, and Certain Other Health Care Entities, OMB No. 0906–0028" which will be discontinued upon approval of this ICR.

Need and Proposed Use of the Information: The NPDB acts primarily as a flagging system; its principal purpose is to facilitate comprehensive review of practitioners' professional credentials and background. Information is collected from, and disseminated to, eligible entities (entities that are entitled to query and/or report to the NPDB as authorized in Title 45 CFR part 60 of the Code of Federal Regulations) on the following: (1) Medical malpractice payments, (2) licensure actions taken by Boards of Medical Examiners, (3) State licensure and certification actions, (4) Federal

licensure and certification actions, (5) negative actions or findings taken by peer review organizations or private accreditation entities, (6) adverse actions taken against clinical privileges, (7) Federal or State criminal convictions related to the delivery of a health care item or service, (8) civil judgments related to the delivery of a health care item or service, (9) exclusions from participation in Federal or State health care programs, and (10) other adjudicated actions or decisions. It is intended that NPDB information should be considered with other relevant information in evaluating credentials of health care practitioners, providers, and suppliers.

Likely Respondents: Eligible entities or individuals that are entitled to query and/or report to the NPDB as authorized in regulations found at 45 CFR part 60.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Regulation citation	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours (rounded up)
§ 60.6: Reporting errors, omissions, revisions or whether an action is on appeal..	Correction, Revision-to-Action, Void, Notice of Appeal (manual).	11,918	1	11,918	.25	2,980
	Correction, Revision-to-Action, Void, Notice of Appeal (automated).	18,301	1	18,301	.0003	5
§ 60.7: Reporting medical malpractice payments.	Medical Malpractice Payment (manual).	11,481	1	11,481	.75	8,611
	Medical Malpractice Payment (automated).	296	1	296	.0003	1

¹ "Other eligible entities" that participate in the NPDB are defined in the provisions of Title IV, Section 1921, Section 1128E, and implementing regulations. In addition, a few federal agencies also participate with the NPDB through federal memorandums of understanding. Eligible entities

are responsible for complying with all reporting and/or querying requirements that apply; some entities may qualify as more than one type of eligible entity. Each eligible entity must certify its eligibility in order to report to the NPDB, query the NPDB, or both. Information from the NPDB is

available only to those entities specified as eligible in the statutes and regulations. Not all entities have the same reporting requirements or level of query access.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Regulation citation	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours (rounded up)
§ 60.8: Reporting licensure actions taken by Boards of Medical Examiners.	State Licensure or Certification (manual).	19,749	1	19,749	.75	14,812
§ 60.9: Reporting licensure and certification actions taken by States.	State Licensure or Certification (automated).	17,189	1	17,189	.0003	5
§ 60.10: Reporting Federal licensure and certification actions..	DEA/Federal Licensure	600	1	600	.75	450
§ 60.11: Reporting negative actions or findings taken by peer review organizations or private accreditation entities.	Peer Review Organization	10	1	10	.75	8
§ 60.12: Reporting adverse actions taken against clinical privileges.	Accreditation	10	1	10	.75	8
	Title IV Clinical Privileges Actions.	978	1	978	.75	734
§ 60.13: Reporting Federal or State criminal convictions related to the delivery of a health care item or service.	Professional Society	41	1	41	.75	31
	Criminal Conviction (Guilty Plea or Trial) (manual).	1,174	1	1,174	.75	881
	Criminal Conviction (Guilty Plea or Trial) (automated).	683	1	683	.0003	1
	Deferred Conviction or Pre-Trial Diversion.	70	1	70	.75	53
	Nolo Contendere (no contest plea).	127	1	127	.75	95
	Injunction	10	1	10	.75	8
	Civil Judgment	9	1	9	.75	7
§ 60.14: Reporting civil judgments related to the delivery of a health care item or service.						
§ 60.15: Reporting exclusions from participation in Federal or State health care programs.	Exclusion or Debarment (manual).	1,707	1	1,707	.75	1,280
	Exclusion or Debarment (automated).	2,506	1	2,506	.0003	1
§ 60.16: Reporting other adjudicated actions or decisions.	Government Administrative (manual).	1,750	1	1,750	.75	1,313
	Government Administrative (automated).	39	1	39	.0003	1
§ 60.17 Information which hospitals must request from the National Practitioner Data Bank.	Health Plan Action	488	1	488	.75	366
	One-Time Query for an Individual (manual).	1,958,176	1	1,958,176	.08	156,654
§ 60.18 Requesting Information from the NPDB.	One-Time Query for an Individual (automated).	3,349,778	1	3,349,778	.0003	1,005
	One-Time Query for an Organization (manual).	50,681	1	50,681	.08	4,054
	One-Time Query for an Organization (automated).	25,610	1	25,610	.0003	8
	Self-Query on an Individual	168,557	1	168,557	.42	70,794
	Self-Query on an Organization	1,059	1	1,059	.42	445
	Continuous Query (manual)	806,971	1	806,971	.08	64,558

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Regulation citation	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours (rounded up)
§ 60.21: How to dispute the accuracy of NPDB information.	Continuous Query (automated)	619,001	1	619,001	.0003	186
	Subject Statement and Dispute	3,264	1	3,264	.75	2,448
Administrative	Request for Dispute Resolution	74	1	74	8	592
	Entity Registration (Initial)	3,484	1	3,484	1	3,484
	Entity Registration (Renewal & Update).	13,245	1	13,245	.25	3,311
	State Licensing Board Data Request.	60	1	60	10.5	630
	State Licensing Board Attestation.	325	1	325	1	325
	Authorized Agent Attestation	350	1	350	1	350
	Health Center Attestation	722	1	722	1	722
	Hospital Attestation	3,416	1	3,416	1	3,416
	Medical Malpractice Payer, Peer Review Organization, or Private Accreditation Organization Attestation.	274	1	274	1	274
	Other Eligible Entity Attestation	1,884	1	1,884	1	1,884
	Corrective Action Plan (Entity)	10	1	10	.08	1
	Reconciling Missing Actions	1,491	1	1,491	.08	119
	Agent Registration (Initial)	44	1	44	1	44
	Agent Registration (Renewal & Update).	304	1	304	.08	24
	Electronic Funds Transfer (EFT) Authorization.	644	1	644	.08	52
	Authorized Agent Designation ..	183	1	183	.25	46
	Account Discrepancy	85	1	85	.25	21
	New Administrator Request	600	1	600	.08	48
	Purchase Query Credits	1,786	1	1,786	.08	143
	Education Request	40	1	40	.08	3
	Account Balance Transfer	10	1	10	.08	1
	Missing Report From Query Form.	10	1	10	.08	1
Total .....	.....	7,101,274	.....	7,101,274	.....	347,294

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020-22953 Filed 10-15-20; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Urban Indian Education and Research Program

Announcement Type: Competing Supplement.

Funding Announcement Number: HHS-2020-IHS-UIHP3-0002.

Assistance Listing (Catalog of Federal Domestic Assistance or CFDA) Number: 93.193.

Key Dates

Application Deadline Date: November 6, 2020.

Earliest Anticipated Start Date: November 25, 2020.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting applications for a competing supplement to current cooperative

agreements for the Urban Indian Education and Research Program. This program is authorized under: The Snyder Act, 25 U.S.C. 13; and the Public Health Service Act, 42 U.S.C. 241(a) Section 301(a). This supplement is authorized and funded by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Public Law (Pub. L.) 116-136. This program is described in the Assistance Listings located at <https://beta.sam.gov> (formerly known as Catalog of Federal Domestic Assistance) under 93.193.

Background

The Office of Urban Indian Health Programs (OUIHP) oversees the implementation of the Indian Health Care Improvement Act (IHCIA) provisions for making health care services more accessible to Urban Indians. Pursuant to those authorities, the IHS enters into contracts and grants with Urban Indian Organizations (UIOs) for the provision of health care and

referral services for Urban Indians residing in urban centers. Due to the rapidly evolving nature of the coronavirus (COVID-19) pandemic, this program provides public health support to focus on response, recovery, and prevention in UIOs.

Purpose

The purpose of this program is to fund an organization to provide COVID-19 education and services in the following five COVID-19 project areas: (1) Public policy; (2) research and data; (3) training and technical assistance; (4) education, public relations, and marketing; and (5) payment system reform/monitoring regulations, and act as a COVID-19 public health support partner for OUIHP and UIOs funded under the IHCLA.

II. Award Information

Funding Instrument—Cooperative Agreement

Estimated Funds Available

The total funding identified for fiscal year (FY) 2020 is approximately \$1,000,000. Award amount for the first budget year is anticipated to be \$1,000,000. The funding available for competing and subsequent continuation awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. The IHS is under no obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards

One award will be issued under this program announcement.

Period of Performance

The period of performance is for two years.

Cooperative Agreement

Cooperative agreements awarded by the Department of Health and Human Services (HHS) are administered under the same policies as grants. However, the funding agency, IHS, is anticipated to have substantial programmatic involvement in the project during the entire award segment. Below is a detailed description of the level of involvement required of IHS.

Substantial Involvement Description for Cooperative Agreement

In addition to the usual monitoring and technical assistance provided under the cooperative agreement, the IHS OUIHP responsibilities shall include:

A. Assurance of the availability of services from experienced OUIHP staff

to participate in the planning and development of all phases of this cooperative agreement;

B. Participation in, including the planning of, any meetings conducted as part of the five COVID-19 projects;

C. Assistance in establishing Federal interagency contacts necessary for the successful completion of tasks and activities identified in the approved scope of work;

D. Identification of organizations with whom the awardee will be asked to develop cooperative and collaborative relationships;

E. Assisting the awardee to establish, review, and update priorities for the five COVID-19 projects conducted under this cooperative agreement;

F. Assisting the awardee in determining issues to be addressed during the project period, sequence in which they will be addressed, what approaches and strategies will be used, and how relevant information will be transmitted to specified target audiences and used to enhance core project activities and advance the program; and

G. Assisting in identifying and documenting the achievement of goals and objectives for the five COVID-19 projects. This may include the development of both process and outcome measures and determining timelines and data sources.

III. Eligibility Information

1. Eligibility

Eligibility for this “Competing Supplement Announcement,” is limited to the current awardees in the IHS Urban Indian Health Education and Research program. Applicants must demonstrate that they have complied with previous terms and conditions of the IHS Urban Indian Health Education and Research program. The applicant must be a national organization with at least ten years of experience providing national awareness, visibility, advocacy, education and outreach related to urban Indian health care on a national scale.

Note: Please refer to Section IV.2 (Application and Submission Information/Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as a letter of support from the organization’s Board of Directors, proof of non-profit status, etc.

2. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

Applications with budget requests that exceed the highest dollar amount

outlined under Section II Award Information, Estimated Funds Available, or exceed the Period of Performance outlined under Section II Award Information, Period of Performance, will be considered not responsive and will not be reviewed. The Division of Grants Management (DGM) will notify the applicant.

Proof of Non-Profit Status

Organizations claiming non-profit status must submit a current copy of the 501(c)(3) Certificate with the application.

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are hosted on <https://www.Grants.gov>.

Please direct questions regarding the application process to Mr. Paul Gettys at (301) 443-2114 or (301) 443-5204.

2. Content and Form Application Submission

The applicant must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Abstract (one page) summarizing the project.

- Application forms:

1. SF-424, Application for Federal Assistance.

2. SF-424A, Budget Information—Non-Construction Programs.

3. SF-424B, Assurances—Non-Construction Programs.

- Project Narrative (not to exceed 20 pages). See Section IV.2.A Project Narrative for instructions.

1. Background information on the organization.

2. Proposed scope of work, objectives, and activities that provide a description of what the applicant plans to accomplish.

- Budget Justification and Narrative (not to exceed 5 pages). See Section IV.2.B Budget Narrative for instructions.

- One-page Timeframe Chart.

- Letter of Support from organization’s Board of Directors.

- 501(c)(3) Certificate.

- Biographical sketches for all Key Personnel.

- Contractor/Consultant resumes or qualifications and scope of work.

- Disclosure of Lobbying Activities (SF-LLL).

- Certification Regarding Lobbying (GG-Lobbying Form).

- Copy of current Negotiated Indirect Cost rate (IDC) agreement (required in order to receive IDC).

- Organizational Chart.
- Documentation of current Office of Management and Budget (OMB) Financial Audit (if applicable).

Acceptable forms of documentation include:

1. Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or

2. Face sheets from audit reports.

Applicants can find these on the FAC website: <https://harvester.census.gov/facdissem/Main.aspx>.

Public Policy Requirements

All Federal public policies apply to IHS grants and cooperative agreements with the exception of the Discrimination Policy.

Requirements for Project and Budget Narratives

A. Project Narrative: This narrative should be a separate document that is no more than 20 pages and must: (1) Have consecutively numbered pages; (2) use black font 12 points or larger; (3) be single-spaced; (4) and be formatted to fit standard letter paper (8½ x 11 inches).

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation Criteria) and place all responses and required information in the correct section noted below or they will not be considered or scored. If the narrative exceeds the page limit, the application will be considered not responsive and not be reviewed. The 20-page limit for the narrative does not include the standard forms, line item budgets, budget justifications and narratives, and/or other appendix items.

There are four parts to the project narrative: Part 1—Statement of Need; Part 2—Program Information/Proposed Approach; Part 3—Organizational Capacity and Staffing/Administration; and Part 4—Performance Measurement Plan and Evaluation. See below for additional details about what must be included in the project narrative.

Part 1: Statement of Need

The applicant must provide COVID-19 education and services under public health support to focus on response, recovery, and prevention in UIOs. The five COVID-19 projects are: (1) Public policy; (2) research and data; (3) training and technical assistance; (4) education, public relations, and marketing; and (5) payment system reform/monitoring regulations, and act as a COVID-19 public health support partner for OUIHP and UIOs funded under the IHCI.

This section will describe the UIOs impacted by COVID-19 to be served by this proposed project. Summarize the

overall need for assistance, including: (1) Target population and its unmet health needs; and (2) sociocultural determinants of health and health disparities impacting the urban Indian population or communities served and unmet. Demographic data should be used and cited whenever possible to support the information provided. Data may come from a variety of qualitative and quantitative sources. For example, sources for quantitative data might include epidemiologic data obtained through legally permissible arrangements from Tribal Epidemiology Centers, IHS Area Offices, state data, and/or national data from the Centers for Disease Control and Prevention. This list is not exhaustive.

Part 2: Program Information/Proposed Approach

The applicant must have: (1) A national information-sharing infrastructure which will facilitate the timely exchange of COVID-19 information between IHS and UIOs on a broad scale; (2) a national perspective on the needs of urban Indian communities impacted by COVID-19 to ensure the information developed and disseminated is appropriate, useful, and addresses the most pressing needs of urban Indian communities; and (3) an established relationship with UIOs to foster open and honest participation by urban Indian communities.

Describe the purpose of the proposed project to COVID-19, including a clear statement of goals and objectives. Clearly state how proposed activities address the needs detailed in the statement of need. The applicant is required to address all five COVID-19 projects in the project narrative and address each project with a corresponding time frame.

Part 3: Organizational Capacity and Staffing/Administration

Describe the organizational capacity for all five COVID-19 projects and the organization's experience working with UIOs. Outline current staff and future positions for the five program components.

Part 4: Performance Measurement Plan and Evaluation

Describe the plan to evaluate program activities. Describe (the prior sentence states that this paragraph will be about the "evaluation plan") the expected results and identify key performance indicators on how program goals and objectives will be met. Incorporate process and outcome measures, including documentation of lessons learned.

Describe efforts to collect and report project data that will support and demonstrate grant activities for all five COVID-19 projects. Data may come from a variety of qualitative and quantitative sources. For example, sources for quantitative and qualitative data might include surveys, assessments, UIO satisfaction surveys, and/or meeting evaluations. This list is not exhaustive.

B. Budget and Budget Narrative: Provide a budget narrative that explains the amounts requested for each line item of the budget. The budget narrative should specifically describe how each item will support the achievement of all five COVID-19 projects. Be very careful about showing how each item in the "Other" category is justified. For subsequent budget years, the narrative should highlight the changes from year 1 or clearly indicate that there are no substantive budget changes during the period of performance. Do NOT use the budget narrative to expand the project narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m. Eastern Daylight Time (EDT) on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact information at <https://www.Grants.gov>). If problems persist, contact Mr. Paul Gettys (Paul.Gettys@ihs.gov), Acting Director, DGM, by telephone at (301) 443-2114 or (301) 443-5204. Please be sure to contact Mr. Gettys at least ten days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are allowable up to 90 days before the start date of the award provided the costs are otherwise allowable if awarded. Pre-award costs are incurred at the risk of the applicant.

- The available funds are inclusive of direct and indirect costs.
- Only one cooperative agreement may be awarded per applicant.

6. Electronic Submission Requirements

All applications must be submitted via *Grants.gov*. Please use the <https://www.Grants.gov> website to submit an application. Find the application by selecting the “Search Grants” link on the homepage. Follow the instructions for submitting an application under the Package tab. No other method of application submission is acceptable.

If the applicant cannot submit an application through *Grants.gov*, a waiver must be requested. Prior approval must be requested and obtained from Mr. Paul Gettys, Acting Director, DGM. A written waiver request must be sent to GrantsPolicy@ihs.gov with a copy to Paul.Gettys@ihs.gov. The waiver request must: (1) Be documented in writing (emails are acceptable) before submitting an application by some other method, and (2) include clear justification for the need to deviate from the required application submission process.

Once the waiver request has been approved, the applicant will receive a confirmation of approval email containing submission instructions. A copy of the written approval must be included with the application that is submitted to the DGM. Applications that are submitted without a copy of the signed waiver from the Acting Director of the DGM will not be reviewed. The Grants Management Officer of the DGM will notify the applicant via email of this decision. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m., EDT, on the Application Deadline Date. Late applications will not be accepted for processing. Applicants that do not register for both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in <https://www.Grants.gov> by entering the Assistance Listing (CFDA) number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at <https://www.Grants.gov>).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there

are technical issues that cannot be resolved and a waiver from the agency must be obtained.

- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov* as the registration process for SAM and *Grants.gov* could take up to twenty working days.

- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by this funding announcement.

- Applicants must comply with any page limits described in this funding announcement.

- After submitting the application, the applicant will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify the applicant that the application has been received.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

Applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the SAM database. The DUNS number is a unique 9-digit identification number provided by D&B that uniquely identifies each entity. The DUNS number is site specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, please access the request service through <https://fedgov.dnb.com/webform>, or call (866) 705-5711.

The Federal Funding Accountability and Transparency Act of 2006, as amended (“Transparency Act”), requires all HHS recipients to report information on sub-awards. Accordingly, all IHS grantees must notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its DUNS number to the prime grantee organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

System for Award Management (SAM)

Organizations that are not registered with SAM must have a DUNS number first, then access the SAM online registration through the SAM home page at <https://www.sam.gov/SAM/> (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active). Please see *SAM.gov* for details on the registration process and timeline. Registration with the SAM is

free of charge, but can take several weeks to process. Applicants may register online at <https://www.sam.gov/SAM/>.

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and SAM, are available on the DGM Grants Management, Policy Topics web page: <https://www.ihs.gov/dgm/policytopics/>.

V. Application Review Information

Weights assigned to each section are noted in parentheses. The 20-page project narrative should include only the first year of activities; information for multi-year projects should be included as an appendix. See “Multi-year Project Requirements” at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to fully understand the project. Points will be assigned to each evaluation criteria adding up to a total of 100 possible points. Points are assigned as follows:

1. Evaluation Criteria

A. Statement of Need (25 Points)

(1) Describe and document the target population and its unmet needs for the duration of the COVID–19 pandemic and beyond, including, but not limited to, the varying needs of different UIO types, e.g., ambulatory, outreach and referral, and residential treatment centers.

(2) Based on the information and/or data currently available, document the need to implement, sustain, and improve health care services offered to urban Indians to address COVID–19 pandemic and beyond, including, but not limited to, telehealth services and other interactive telecommunication systems. Data may come from a variety of qualitative and quantitative sources. For example, sources might include data obtained through legally permissible arrangements from Tribal Epidemiology Centers, IHS Area Offices, state data, and/or national data for the CDC. This list is not exhaustive. Applicants may submit other valid data, as appropriate.

(3) Based on available information and/or data, describe COVID–19 service gaps and other challenges related to the needs of urban Indians such as screening, detection, and monitoring. Identify the source of the information and/or data. Needed documentation may come from a variety of qualitative and quantitative sources.

(4) Describe the need for COVID-19 data for planning, revenue generation, and other operational systems to improve health care services for urban Indians.

B. Program Information/Proposed Approach (30 Points)

Describe the purpose of the proposed project to address the COVID-19 pandemic and beyond, including a clear and concise statement of goals and objectives. Provide a work plan for the first year of the project period that details expected key activities, accomplishments, and includes responsible staff for each of the five COVID-19 projects. The project narrative must address all five COVID-19 projects of the program, see below:

(1) Public Policy: There is a need for knowledge and expertise in a wide range of COVID-19 public policy areas for UIOs. Identify, evaluate, and summarize public policy opportunities and challenges impacting UIOs during the COVID-19 pandemic. Evaluation may include collecting and analyzing public policy laws including activities, characteristics, outcomes, and informed decisions affecting UIOs.

Describe efforts to increase awareness and actively seek support for the health care needs of urban Indians impacted by COVID-19. Describe efforts to engage UIO leaders' participation in policy workgroups, Urban Confers, and listening sessions to address COVID-19 pandemic and beyond.

(2) Research and Data: Data can be used to help monitor and track the spread of COVID-19, support better understanding of the illness, and inform and prepare UIOs. Describe the need to collect and analyze COVID-19 health disparities data, morbidity and mortality data, and urban IHS cost data in order to reduce urban Indian health disparities. Incorporate process and outcome measures. Identify, evaluate, and summarize best practices from UIOs during the COVID-19 pandemic. Evaluation may include collecting and analyzing program activities, issues, policies, patient care, and safety.

Describe efforts to initiate or solidify partnerships with UIOs, Tribal and urban epidemiology centers, and other data and research partners to improve and increase COVID-19 research and data on urban Indian health needs. Identify, evaluate, and summarize partnerships to increase COVID-19 research and data on urban Indian needs. Evaluation may include analyzing and collecting data from local, Tribal, state, and Federal partnerships.

(3) Training and Technical Assistance: Constant changes

surrounding COVID-19 demand the need for continuous training and technical assistance opportunities. Describe the need for COVID-19 leadership training and technical assistance to support UIO executive directors/chief executive officers, board of directors, and program staff (clinical staff, administration, business office, health information technology, integrated behavioral health, etc.) focusing on, but not limited to, maintaining perspective in a crisis, reinforcing guidance, obtaining data for decision-making, reviewing recovery assessments, establishing risks and priorities, and managing medical supplies and equipment.

(a) Further describe the need for COVID-19 training and technical assistance to support UIO administration in facilitating change management to improve understanding, and encourage adoption for new practices and maximize personal resilience and professional performance.

(b) Describe the need for technical assistance and training for UIOs to develop integrated approaches for contact tracing including protocols for contact tracing of personnel or contact with an individual with a confirmed or probable COVID-19 status. Describe training and technical assistance for UIOs to create COVID-19 education and training plans focused on continuity of care for urban Indians, including workforce support to maximize employee retention and increase readiness for future developments and circumstances. Describe training and technical assistance to assist UIOs with organizing, developing, and/or refining their COVID-related recovery capabilities in accordance with Federal, state, local, and other guidance. Describe training and technical assistance to assist UIOs to develop a telehealth strategy to meet the post-COVID-19 environment of care.

(4) Education, Public Relations, and Marketing: COVID-19 affected public relations and marketing strategies further delaying focus on urban Indian health needs. Summarize the need to market the UIOs through development of national, regional, and local marketing strategies and campaigns during COVID-19 pandemic and beyond.

(a) Describe efforts to increase awareness of COVID-19 health care needs of urban Indians. Describe efforts to engage UIOs to participate in national health campaigns related to COVID-19 prevention including vaccines. Describe the need for enhanced communication among local private and non-profit

health care entities to increase COVID-19 outreach efforts.

(b) Summarize the need to enhance communication, interaction, and coordination on policy and health care reform activities to address COVID-19 by initiating and maintaining partnerships and collaborative relationships with other UIOs, national Indian organizations, key state and local health entities, and education and public safety networks.

(c) Describe efforts to strengthen the capacity of UIOs to work as a community to improve COVID-19 knowledge sharing and promote collaboration through learning from success stories, sharing resources, and driving activities together.

(5) Payment System Reform/Monitoring Regulations: Urban Indian health care systems need to manage the health crisis and the economic crisis, in light of the reduction in revenue, yet surging demands for services.

(a) Describe services for UIOs to address COVID-19, e.g., billing, health information technology, CMS waivers, regulations, etc. Describe efforts to support UIOs' efforts to diversify funding and increase third party reimbursement to ensure UIOs' sustainability in COVID-19 pandemic and beyond.

(b) Describe technical assistance, training, and tools to be provided on COVID-19 billing and coding best practices, and negotiating with private health insurers and health plans. Describe efforts to establish and enhance third party billing for UIOs to address COVID-19 pandemic and beyond.

(c) Describe the need to understand, document, and analyze current and new Federal COVID-19 related regulations impacting UIOs for reimbursement. Describe services to be provided to UIOs on COVID-19 regulations and types of regulatory activities needed to support efforts to lessen the impact on UIOs' financial and operational systems.

C. Organizational Capacity and Staffing/Administration (15 Points)

(1) Describe the management capability of the applicant and other participating organizations in administering similar projects.

(2) Identify staff to maintain open and consistent communication with the IHS program official on any financial or programmatic barriers to meeting the requirements of the award.

(3) Identify the department(s) and/or division(s) that will administer all five COVID-19 projects. Include a description of these department(s) and/or division(s), their functions, and their

placement within the applicant and their direct link to management.

(4) Discuss the applicant's experience and capacity to provide culturally appropriate and competent services to UIOs and specific populations of focus as described in this project.

(5) Describe the resources available for the proposed project (e.g., facilities, equipment, information technology systems, and financial management systems).

(6) Identify other organization(s) that will participate in the proposed project. Describe their roles and responsibilities and demonstrate their commitment to all five COVID-19 projects.

(7) Describe how project continuity will be maintained if there is a change in the operational environment (e.g., staff turnover, change in project leadership, etc.) to ensure project stability over the life of the grant.

(8) Provide a list of staff positions for the project and other key personnel, showing the role of each and their level of effort and qualifications for all five COVID-19 projects. Key personnel include the Chief Executive Officer or Executive Director, Chief Financial Officer, Deputy Director, and Information Officer.

(9) Demonstrate successful project implementation for the level of effort budgeted for the project staff and other key staff.

(10) Include position descriptions as attachments to the application for all key personnel. Position descriptions should not exceed one page each.

(11) For individuals who are currently on staff, include a biographical sketch with their name for each individual that will be listed as the project staff and other key positions. Describe the experience of identified staff in all five COVID-19 projects. Include each biographical sketch as an attachment to the project proposal/application. Biographical sketches should not exceed one page per staff member. Do not include any of the following:

- (a) Personally Identifiable Information (social security number and date and place of birth);
- (b) Resumes; or
- (c) Curriculum Vitae.

D. Performance Measurement Plan and Evaluation (20 Points)

Describe key performance indicators to monitor activities under all five COVID-19 projects, explain measurable progress toward program goals and objectives by incorporating processes and outcomes with quarterly timelines, and advising on future program decisions through evaluating success at reaching targets over the 2-year project

period. Describe how issues affecting progress will be addressed during the project period and sequence in which they will be addressed. Identify what approaches and strategies will be used to address issues and how relevant information will be transmitted to specified target audiences and used to enhance project activities and advance the program.

(1) Describe proposed COVID-19 data collection efforts (performance measures and associated data) and how you will use the data to answer evaluation questions. Evaluation questions may include, were activities implemented as planned? Did activities meet measurable targets? Did activities reach target population and how do you know?

This should include a logic model with data collection method, data source, data measurement tool, identified staff for data management, and data collection timeline.

(2) Identify key program partners and describe how they will participate in the implementation of the evaluation plan (e.g., Tribal Epidemiology Centers, universities, etc.).

(3) Describe how evaluating findings will be used at the applicant level. Discuss how data collected (e.g., performance measurement data) will be used and shared by the key program partners.

(4) Discuss any barriers or challenges expected for implementing the plan, collecting data (e.g., responding to performance measures), and reporting on evaluation results. Describe how these potential barriers would be overcome. In addition, applicants may also describe other measures to be developed or additional data sources and data collection methods that applicant will use.

E. Budget and Budget Narrative (10 Points)

(1) Include a line item budget for all five COVID-19 projects including expenditures identifying reasonable and allowable costs necessary to accomplish the goals and objectives as outlined in the project narrative for budget year one only.

(2) Provide a categorized budget for all five COVID-19 projects. If it is anticipated that there will be travel costs to cover the cost of staff and UIO leaders' attendance at national advisory committees and workgroups, the applicant should ensure the associated travel costs are included in the categorized budget for public policy.

(3) Ensure that the budget and budget narrative are aligned with the project narrative. Questions to address include: What resources are needed to

successfully carry out and manage the five COVID-19 projects? What other resources are available from the organization? Will new staff be recruited? Will outside contractors/consultants be required?

(4) Include the total cost for any outside contractors/consultants broken down by activity within each core project.

(5) If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the current negotiated IDC rate agreement in the appendix.

Multi-Year Project Requirements

Applications must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project. This attachment will not count as part of the project narrative or the budget narrative.

Additional documents can be uploaded as Appendix Items in *Grants.gov*:

- Work plan.
- Logic model.
- Timeline with proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).

• Current Indirect Cost Rate Agreement.

- Organizational chart.
- Additional documents to support narrative (i.e., data tables, key news articles, etc.).

2. Review and Selection

Each application will be prescreened for eligibility and completeness as outlined in the funding announcement. Applications that meet the eligibility criteria shall be reviewed for merit by the Objective Review Committee (ORC) based on evaluation criteria. Incomplete applications and applications that are not responsive to the administrative thresholds will not be referred to the ORC and will not be funded. The applicant will be notified of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the IHS OUIHP within 30 days of the conclusion of the ORC outlining the strengths and weaknesses of their application. The summary statement will be sent to the Authorizing Official

identified on the face page (SF-424) of the application.

A. Award Notices for Funded Applications

The Notice of Award (NoA) is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for the systems contact information.

B. Approved but Unfunded Applications

Approved applications not funded due to lack of available funds will be held for one year. If funding becomes available during the course of the year, the application may be reconsidered.

Note: Any correspondence other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Cooperative agreements are administered in accordance with the following regulations and policies:

A. The criteria as outlined in this program announcement.

B. Administrative Regulations for Grants:

- Uniform Administrative Requirements for HHS Awards, located at 45 CFR part 75.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, "Cost Principles," located at 45 CFR part 75, subpart E.

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, "Audit Requirements," located at 45 CFR part 75, subpart F.

2. Indirect Costs

This section applies to all recipients that request reimbursement of indirect costs (IDC) in their application budget. In accordance with HHS Grants Policy Statement, Part II-27, IHS requires applicants to obtain a current IDC rate agreement, and submit it to DGM, prior to DGM issuing an award. The rate

agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate agreement is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Available funds are inclusive of direct and appropriate indirect costs.

Approved indirect funds are awarded as part of the award amount, and no additional funds will be provided.

Generally, IDC rates for IHS grantees are negotiated with the Division of Cost Allocation (DCA) <https://rates.psc.gov/> or the Department of the Interior (Interior Business Center) <https://ibc.doi.gov/ICS/tribal>. For questions regarding the indirect cost policy, please call the Grants Management Specialist listed under "Agency Contacts" or the main DGM office at (301) 443-5204.

3. Reporting Requirements

The grantee must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the awardee organization or the individual responsible for preparation of the reports. Per DGM policy, all reports are required to be submitted electronically by attaching them as a "Grant Note" in GrantSolutions. Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please see the Agency Contacts list in Section VII for the systems contact information.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required quarterly, within 30 days after the budget period ends (specific dates will be listed in the NoA Terms and Conditions). These reports must include a brief comparison of actual

accomplishments to the goals established for the period, a summary of progress to date or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 90 days of expiration of the period of performance.

B. Financial Reports

Federal Financial Report (FFR or SF-425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Payment Management Services, HHS at <https://pms.psc.gov>. The applicant is also requested to upload a copy of the FFR (SF-425) into our grants management system, GrantSolutions. Failure to submit timely reports may result in adverse award actions blocking access to funds.

Grantees are responsible and accountable for accurate information being reported on all required reports: The Progress Reports and Federal Financial Report.

C. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a \$25,000 sub-award obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary) IHS awards (where the period of performance is made up of more than one budget period) and where: (1) The period of performance start date was October 1, 2010 or after, and (2) the primary awardee will have a \$25,000 sub-award obligation dollar threshold during any specific reporting period will be required to address the FSRS reporting.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Grants

Policy website at <https://www.ihs.gov/dgm/policytopics/>.

D. Compliance With Executive Order 13166 Implementation of Services Accessibility Provisions for All Grant Application Packages and Funding Opportunity Announcements

Recipients of Federal financial assistance (FFA) from HHS must administer their programs in compliance with Federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age and, in some circumstances, religion, conscience, and sex. This includes ensuring programs are accessible to persons with limited English proficiency. The HHS Office for Civil Rights provides guidance on complying with civil rights laws enforced by HHS. Please see <https://www.hhs.gov/civil-rights/for-providers/provider-obligations/index.html> and <http://www.hhs.gov/ocr/civilrights/understanding/section1557/index.html>.

- Recipients of FFA must ensure that their programs are accessible to persons with limited English proficiency. HHS provides guidance to recipients of FFA on meeting their legal obligation to take reasonable steps to provide meaningful access to their programs by persons with limited English proficiency. Please see <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/fact-sheet-guidance/index.html> and <https://www.lep.gov>. For further guidance on providing culturally and linguistically appropriate services, recipients should review the National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care at <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=53>.

- Recipients of FFA also have specific legal obligations for serving qualified individuals with disabilities. Please see <http://www.hhs.gov/ocr/civilrights/understanding/disability/index.html>.

- HHS funded health and education programs must be administered in an environment free of sexual harassment. Please see <https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html>; <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; and <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>.

- Recipients of FFA must also administer their programs in compliance with applicable Federal religious nondiscrimination laws and applicable Federal conscience protection and associated anti-discrimination laws. Collectively, these laws prohibit exclusion, adverse

treatment, coercion, or other discrimination against persons or entities on the basis of their consciences, religious beliefs, or moral convictions. Please see <https://www.hhs.gov/conscience/conscience-protections/index.html> and <https://www.hhs.gov/conscience/religious-freedom/index.html>.

Please contact the HHS Office for Civil Rights for more information about obligations and prohibitions under Federal civil rights laws at <https://www.hhs.gov/ocr/about-us/contact-us/index.html> or call 1-800-368-1019 or TDD 1-800-537-7697.

E. Federal Awardee Performance and Integrity Information System (FAPIS)

The IHS is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information System (FAPIS), at <https://www.fapis.gov>, before making any award in excess of the simplified acquisition threshold (currently \$250,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. IHS will consider any comments by the applicant, in addition to other information in FAPIS 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 45 CFR 75.205.

As required by 45 CFR part 75 Appendix XII of the Uniform Guidance, non-Federal entities (NFEs) are required to disclose in FAPIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than \$10,000,000 for any period of time during the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance, and the HHS implementing regulations at 45 CFR part 75, the IHS must require a non-Federal entity or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

Submission is required for all applicants and recipients, in writing, to

the IHS and to the HHS Office of Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 45 CFR 75.113.

Disclosures must be sent in writing to:

U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Paul Gettys, Acting Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, (Include "Mandatory Grant Disclosures" in subject line), Office: (301) 443-5204, Fax: (301) 594-0899, Email: Paul.Gettys@ihs.gov

And

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen Building, Room 5527, Washington, DC 20201, URL: <https://oig.hhs.gov/fraud/report-fraud/> (Include "Mandatory Grant Disclosures" in subject line), Fax: (202) 205-0604 (Include "Mandatory Grant Disclosures" in subject line) or Email:

MandatoryGranteeDisclosures@oig.hhs.gov

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371. Remedies for noncompliance, including suspension or debarment (see 2 CFR parts 180 & 376).

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: Shannon Beyale, Health System Specialist, Office of Urban Indian Health Programs, 5600 Fishers Lane, Mail Stop: 08E65D, Rockville, MD 20857, Phone: (301) 945-3657, Fax: (301) 443-8446, Email: shannon.beyale@ihs.gov.

2. Questions on grants management and fiscal matters may be directed to: Donald Gooding, Grants Management Specialist, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Phone: (301) 443-2298, Fax: (301) 594-0899, Email: donald.gooding@ihs.gov.

3. Questions on systems matters may be directed to: Paul Gettys, Acting Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Phone: (301) 443-2114; or the DGM main line (301) 443-5204, Fax: (301) 594-0899, Email: Paul.Gettys@ihs.gov.

VIII. Other Information

The Public Health Service strongly encourages all grant, cooperative agreement and contract recipients to provide a smoke-free workplace and

promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Michael D. Weahkee,
*RADM, Assistant Surgeon General, U.S.
 Public Health Service, Director, Indian Health
 Service.*

[FR Doc. 2020–22940 Filed 10–15–20; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Community Opioid Intervention Pilot Projects

Announcement Type: New.
Funding Announcement Number:
 HHS–2021–IHS–COIPP–0001.
*Catalog of Federal Domestic
 Assistance Number:* 93.933.

Key Dates

Application Deadline Date: December
 15, 2020.
Earliest Anticipated Start Date:
 January 14, 2021.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting applications for grants for the Community Opioid Intervention Pilot Projects (COIPP). This program was first established by the Consolidated Appropriations Act of 2019, (Pub. L. 116–6) and the accompanying Conference Report, H. Rpt. 116–9. IHS received a new appropriation of \$10 million in FY 2019 to better combat the opioid epidemic by creating a pilot program to address the opioid epidemic in Indian Country to award grants that support the development, documentation, and sharing of locally designed and culturally appropriate prevention, treatment, recovery, and aftercare services for mental health and substance use disorders in American Indian and Alaska Native communities. The IHS received a second appropriation of \$10 million in the FY 2020 Further Consolidated Appropriations Act (Pub. L. 116–94). IHS will provide technical assistance to grantees to collect and evaluate performance of the pilot program. This

program is authorized under the authority of 25 U.S.C. 13, the Snyder Act, and the Indian Health Care Improvement Act, 25 U.S.C. 1601–1683. This program is described in the Assistance Listings located at <https://beta.sam.gov> (formerly known as Catalog of Federal Domestic Assistance) under 93.933.

Background

The impact of the opioid crisis on American Indian and Alaska Native (AI/AN) populations is immense. The rate of drug overdose deaths among AI/ANs is above the national average. The Centers for Disease Control and Prevention (CDC) data indicate that AI/ANs had the second highest overdose death rates from all opioids in 2017 (15.7 deaths/100,000 population) among racial/ethnic groups in the United States. AI/ANs had the second highest overdose death rates from heroin (5.2 deaths/100,000 population), third highest from synthetic opioids (6.5 deaths/100,000 population), and the highest rate from prescription opioids (7.2 deaths/100,000 population) during 2016–2017. The overall rate of overdose deaths for AI/ANs increased by 13% during 2015–2017. These numbers may be underestimated for the AI/AN population due to racial misclassification on death certificates as recently published by the CDC Morbidity and Mortality Weekly Report, resulting in inaccurate public health data for the AI/AN population.¹

The family remains the primary source of attachment, nurturing, and socialization for humans in our current society, and opioid use disorder (OUD) has had a devastating effect on families. The impact of substance use disorders (SUDs) on the family and individual family members merits attention. Each family and each family member is uniquely affected by the individual using substances including having unmet developmental needs, impaired attachment, economic hardship, legal problems, emotional distress, and sometimes violence being perpetrated against them. For children there is also an increased risk of developing a SUD themselves. Thus, treating only the individual with the active disease of addiction is limited in effectiveness. This grant aims to address the increasing number of infants born to mothers with a SUD, and children who reside in homes with parents with OUD by awarding at least six grant sites to programs that focus on maternal and child health issues.

¹ Joshi, Weiser, & Warren-Mears, Dec 2018. CDC Morbidity and Mortality Weekly Report.

In keeping with the IHS policy stating that Tribal consultation occurs when a new or revised policy or program is proposed, IHS held a tribal consultation and Urban confer process on the development of a new opioid grant program from June 21, 2019 to September 3, 2019. Formal sessions were held to allow for feedback on priorities, methodologies, and desired outcomes to be used in the selection and award process. IHS received a total of 119 comments from all 12 IHS areas. The comments received represented a wide range of suggestions but several themes emerged, most notably the importance of allowing flexibility in program design and focus areas. Respondents also requested that IHS ensure that programs include: Culturally responsive approaches to addressing the opioid crisis; a focus on education and training for communities on opioids and treatment options; and a high priority area of focus on serving addicted pregnant women and infants pre-exposed to opioids. IHS published a Dear Tribal Leader Letter and Consultation and Conference Summary Report in the IHS Newsroom on April 3, 2020. https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/2020-Letters/DTLL_DUIOLL_OGPP_04032020.pdf.

Purpose

The purpose of this IHS grant is to address the opioid crisis in AI/AN communities by developing and expanding community education and awareness of prevention, treatment and/or recovery activities for opioid misuse and opioid use disorder. The intent is to increase knowledge and use of culturally appropriate interventions and to encourage an increased use of medication-assisted treatment (MAT). This program will support Tribal and Urban Indian communities in their effort to provide prevention, treatment, and recovery services to address the impact of the opioid crisis within their communities. Each application for the COIPP will be required to address the following objectives:

1. Increase public awareness and education about culturally-appropriate and family-centered opioid prevention, treatment, and recovery practices and programs in AI/AN communities.

2. Create comprehensive support teams to strengthen and empower AI/AN families in addressing the opioid crisis in Tribal or Urban Indian communities.

3. Reduce unmet treatment needs and opioid overdose related deaths through the use of MAT.

In alignment with the IHS 2019–2023 Strategic Plan Goal 1: To ensure that comprehensive, culturally appropriate personal and public health services are available and accessible to American Indian and Alaska Native people, the COIPP is designed to provide Tribes with the ability to develop unique and innovative community interventions that will address the opioid crisis at a local level. The IHS supports Tribal and Urban Indian efforts that include addressing substance use prevention, treatment, and aftercare from a community-driven context. The IHS encourages applicants to develop and submit a plan that emphasizes cross-system collaboration, the inclusion of family, youth, and community resources, and culturally appropriate approaches.

II. Award Information

Funding Instrument—Grant

Estimated Funds Available

The total funding identified for fiscal year (FY) 2021 is approximately \$16,500,000. This includes approximately \$8,250,000 in FY 2019 funds, and \$8,250,000 in FY 2020 funds. Individual award amounts for the first budget year are anticipated to be \$500,000. The amount of funding available for competing and continuation awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. IHS expects to allocate funding for each IHS area to support Tribes, Tribal organizations and Urban Indian Organizations (UIO). The IHS is under no obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards

Approximately 33 awards will be issued under this program announcement.

Grant awards will be distributed as follows in the approximate numbers:

- 2 grants in each IHS Area (24 awards total).
- 6 set-aside grants for Urban Indian Organizations.
- 3 set-aside grants with Maternal & Child Health as the population of focus. One grant will be funded in each of the three highest priority IHS Areas (Alaska, Bemidji, and Billings). These priority areas were determined by reviewing opioid-related mortality data from the CDC and opioid use disorder data and opioid-related birth data from the IHS National Data Warehouse.

Period of Performance

The period of performance is for three years.

III. Eligibility Information

1. Eligibility

To be eligible for this New FY 2021 funding opportunity applicants must be one of the following as defined by 25 U.S.C. 1603:

- A Federally-recognized Indian Tribe as defined by 25 U.S.C. 1603(14). The term “Indian Tribe” means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

- A Tribal organization as defined by 25 U.S.C. 1603(26). The term “Tribal organization” has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304): “Tribal organization” means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided that, in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant. Applicant shall submit letters of support and/or Tribal Resolutions from the Tribes to be served.

- An Urban Indian organization, as defined by 25 U.S.C. 1603(29), that currently has a grant or contract award from the IHS under the Indian Health Care Improvement Act, 25 U.S.C. 1651–1660h. The term “Urban Indian organization” means a nonprofit corporate body situated in an urban center, governed by an urban Indian controlled board of directors, and providing for the maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purpose of performing the activities described in 25 U.S.C. 1653(a). Applicants must provide proof of non-

profit status with the application, *e.g.*, 501(c)(3).

Note: Please refer to Section IV.2 (Application and Submission Information/Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as Tribal resolutions, proof of non-profit status, etc.

2. Cost Sharing or Matching

IHS does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

Applications with budget requests that exceed the highest dollar amount outlined under the Award Information, Estimated Funds Available section, or exceed the Period of Performance outlined under Section II Award Information, Period of Performance will be considered not responsive and will not be reviewed. The Division of Grants Management (DGM) will notify the applicant.

Additional Required Documentation

Tribal Resolution

The DGM must receive an official, signed Tribal Resolution prior to issuing a Notice of Award (NoA) to any applicant selected for funding. An Indian Tribe or Tribal organization that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. However, if an official, signed Tribal Resolution cannot be submitted with the application prior to the application deadline date, a draft Tribal Resolution must be submitted with the application by the deadline date in order for the application to be considered complete and eligible for review. The draft Tribal Resolution is not in lieu of the required signed resolution, but is acceptable until a signed resolution is received. If an official, signed Tribal Resolution is not received by DGM when funding decisions are made, then a NoA will not be issued to that applicant, and the applicant will not receive IHS funds until it has submitted a signed resolution to the Grants Management Specialist listed in this funding announcement.

Proof of Non-Profit Status

Organizations claiming non-profit status must submit a current copy of the 501(c)(3) Certificate with the application.

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are hosted on <https://www.Grants.gov>.

Please direct questions regarding the application process to Mr. Paul Gettys at (301) 443-2114 or (301) 443-5204.

2. Content and Form Application Submission

The applicant must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Abstract (one page) summarizing the project.
- Application forms:
 1. SF-424, Application for Federal Assistance.
 2. SF-424A, Budget Information—Non-Construction Programs.
 3. SF-424B, Assurances—Non-Construction Programs.
- Project Narrative (not to exceed 10 pages). See Section IV.2.A Project Narrative for instructions.
 1. Background information on the organization.
 2. Proposed scope of work, objectives, and activities that provide a description of what the applicant plans to accomplish.
 - Budget Justification and Narrative (not to exceed 4 pages). See Section IV.2.B Budget Narrative for instructions.
 - Timeline (one-page)
 - Tribal Resolution or Tribal Letter of Support (only required for Tribes and Tribal organizations).
 - Letter(s) of Commitment:
 1. From Local Organizational Partners;
 2. From Community Partners;
 3. For Tribal organizations: From the board of directors (or relevant equivalent);
 4. For urban Indian organizations: From the board of directors (or relevant equivalent).
 - 501(c)(3) Certificate (if applicable).
 - Biographical sketches for all key personnel (e.g., project director, project coordinator, grants coordinator, etc.) (not to exceed 1 page each).
 - Contractor/consultant qualifications and scope of work.
 - Disclosure of Lobbying Activities (SF-LLL).
 - Certification Regarding Lobbying (GG-Lobbying Form).
 - Copy of current Negotiated Indirect Cost rate (IDC) agreement (required in order to receive IDC).
 - Documentation of current Office of Management and Budget (OMB) Financial Audit (if applicable).

Acceptable forms of documentation include:

1. Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
2. Face sheets from audit reports. Applicants can find these on the FAC website: <https://harvester.census.gov/facdissem/Main.aspx>.

Public Policy Requirements

All Federal public policies apply to IHS grants and cooperative agreements with the exception of the Discrimination Policy.

Requirements for Project and Budget Narratives

A. Project Narrative: This narrative should be a separate document that is no more than 10 pages and must: (1) Have consecutively numbered pages; (2) use black font 12 points or larger; (3) be single-spaced; (4) and be formatted to fit standard letter paper (8½ x 11 inches).

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation Criteria) and place all responses and required information in the correct section noted below or they will not be considered or scored. If the narrative exceeds the page limit, the application will be considered not responsive and not be reviewed. The 10-page limit for the narrative does not include the standard forms, Tribal Resolutions, budget, budget justification and narrative, and/or other appendix items.

There are four (4) parts to the project narrative:

Part 1—Statement of Need

Part 2—Program Plan (Objectives and Activities)

Part 3—Organizational Capacity

Part 4—Program Evaluation (Data Collection and Reporting)

Part 1: Statement of Need (Limit—1 Page)

Describe the extent of the problem related to opioid misuse in the applicant's community ("community" means the applicant's Tribe, village, Tribal organization, consortium of Tribes or Tribal organizations, or urban center). Provide the facts and evidence that support the need for the project and establish that the Tribe, Tribal organization, or UIO understand the problems and can reasonably address them. This section must also succinctly but completely answer the questions listed under the evaluation criteria in Section V.1.A Statement of Need.

Part 2: Program Plan (Objectives and Activities) (Limit—6 Pages)

Describe the scope of work the Tribe, Tribal organization, or UIO by clearly and concisely outlining the following required components:

1. Goals and Objectives. Reference all required objectives.
2. Project Activities. Link your project activities to your outlined goals and objectives.

This section must also succinctly but completely answer the questions listed under the evaluation criteria in Section V.1.B Program Plan (Objectives and Activities).

Part 3: Organizational Capacity (Limit—2 Pages)

Describe the Tribe, Tribal organization, or UIO's organizational capacity to implement the proposed activities, in the following areas: Ability to provide direct care, treatment and services, including MAT; Current or ongoing projects related to opioid prevention, treatment, recovery support, and aftercare; and a detailed description of partnerships and networks with opioid misuse providers. Provide detail on significant program activities and achievements/accomplishments over the past five years associated with opioid prevention, treatment, recovery support, and aftercare activities. Provide success stories, data or other examples of how other funded projects/programs made an impact in your community to address opioid use. If applicable, provide justification for lack of progress of previous efforts. This section must also succinctly but completely answer the questions listed under the evaluation criteria in Section V.1.C Organizational Capacity.

Part 4: Program Evaluation (Limit—1 Page)

Based on the required activities in Section V describe how the Tribe, Tribal organization, or UIO plans to collect data for the proposed project and activities. Identify any type(s) of evaluation(s) that will be used and how you will collaborate with partners to complete any evaluation efforts or data collection. Progress reports will include compilation of quantitative data (e.g., number served; screenings completed) and qualitative or narrative (text) data. Reporting elements should be specific to activities/programs, processes and outcomes such as performance measures and other data relevant to evaluation outcomes including intended results (i.e., impact and outcomes). The IHS will partner with Technical Assistance Providers to assist grantees in

developing data collection and evaluation plans and tools. Grantees will be required to collect and submit semi-annual and annual progress reports. Additional information regarding Data Collection refer to Section V.1.D. Program Evaluation (Data Collection & Reporting).

In an effort to reduce the data collection burden for this grant program, IHS will compile and analyze aggregate program statistics from existing data sources to assist in evaluation of the projects. Aggregate data may include, but is not limited to, associated community-level Government Performance and Results Act (GPRA) health care facility data available in the National Data Warehouse. For additional information regarding IHS Government Performance and Results Act (GPRA) <https://www.ihs.gov/crs/gprareporting/>. Comprehensive information about CRS software and logic is at <https://www.ihs.gov/crs/>.

B. Budget Narrative (Limit—4 Pages): Provide a budget narrative that explains the amounts requested for each line item of the budget. The budget narrative should specifically describe how each item will support the achievement of proposed objectives. Be very careful about showing how each item in the “Other” category is justified. For subsequent budget years, the narrative should highlight the changes from year 1 or clearly indicate that there are no substantive budget changes during the period of performance. Do NOT use the budget narrative to expand the project narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m. Eastern Daylight Time (EDT) on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact information at <https://www.Grants.gov>). If problems persist, contact Mr. Paul Gettys (Paul.Gettys@ihs.gov), Acting Director, DGM, by telephone at (301) 443–2114 or (301) 443–5204. Please be sure to contact Mr. Gettys at least ten days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are allowable up to 90 days before the start date of the award provided the costs are otherwise allowable if awarded. Pre-award costs are incurred at the risk of the applicant.
- The available funds are inclusive of direct and indirect costs.
- Only one grant will be awarded per applicant.
- The purchase of food (*i.e.*, as supplies, for meetings or events) is not an allowable cost with this grant funding and should not be included in the budget/budget justification. If food is included in the budget of an awarded application, those funds will be restricted until the applicant supplies a modified budget eliminating those costs.

6. Electronic Submission Requirements

All applications must be submitted via *Grants.gov*. Please use the <https://www.Grants.gov> website to submit an application. Find the application by selecting the “Search Grants” link on the homepage. Follow the instructions for submitting an application under the Package tab. No other method of application submission is acceptable.

If the applicant cannot submit an application through *Grants.gov*, a waiver must be requested. Prior approval must be requested and obtained from Mr. Paul Gettys, Acting Director, DGM. A written waiver request must be sent to GrantsPolicy@ihs.gov with a copy to Paul.Gettys@ihs.gov. The waiver request must: (1) Be documented in writing (emails are acceptable) before submitting an application by some other method, and (2) include clear justification for the need to deviate from the required application submission process.

Once the waiver request has been approved, the applicant will receive a confirmation of approval email containing submission instructions. A copy of the written approval must be included with the application that is submitted to the DGM. Applications that are submitted without a copy of the signed waiver from the Acting Director of the DGM will not be reviewed. The Grants Management Officer of the DGM will notify the applicant via email of this decision. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m., EDT, on the Application Deadline Date. Late

applications will not be accepted for processing. Applicants that do not register for both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in <https://www.Grants.gov> by entering the Assistance Listing (CFDA) number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at <https://www.Grants.gov>).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov* as the registration process for SAM and *Grants.gov* could take up to twenty working days.
- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by this funding announcement.
- Applicants must comply with any page limits described in this funding announcement.
- After submitting the application, the applicant will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify the applicant that the application has been received.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

Applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the SAM database. The DUNS number is a unique 9-digit identification number provided by D&B that uniquely identifies each entity. The DUNS number is site specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, please access the request service through <https://fedgov.dnb.com/webform>, or call (866) 705–5711.

The Federal Funding Accountability and Transparency Act of 2006, as amended (“Transparency Act”), requires all HHS recipients to report information on sub-awards. Accordingly, all IHS grantees must

notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its DUNS number to the prime grantee organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

System for Award Management (SAM)

Organizations that are not registered with SAM must have a DUNS number first, then access the SAM online registration through the SAM home page at <https://www.sam.gov/SAM/> (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active). Please see *SAM.gov* for details on the registration process and timeline. Registration with the SAM is free of charge, but can take several weeks to process. Applicants may register online at <https://www.sam.gov/SAM/>.

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and SAM, are available on the DGM Grants Management, Policy Topics web page: <https://www.ihs.gov/dgm/policytopics/>.

V. Application Review Information

Weights assigned to each section are noted in parentheses. The 10-page project narrative should include only the first year of activities; information for multi-year projects should be included as an appendix. See “Multi-year Project Requirements” at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully. Points will be assigned to each evaluation criteria adding up to a total of 100 possible points. Points are assigned as follows:

1. Evaluation Criteria

Required Activities

The focus of this pilot program is to support AI/ANs in their efforts to provide prevention, treatment, aftercare, and recovery services to address the impact of the opioid crisis in Native communities. All COIPP activities should be culturally-based, and family-oriented.

IHS is seeking applications that include all of the following required activities:

1. Community Awareness and Education:

a. Grantees shall promote family, youth and community engagement in the planning and implementation of opioid use prevention.

b. Grantees shall design community awareness campaigns and education programs that inform and train community members on how to recognize the signs of opioid misuse and overdose. Educational tool(s) shall be culturally-appropriate and intended to engage families.

c. Grantees will develop educational resources, such as factsheets using culturally relevant messaging; disseminate materials through community stakeholders and community partners, and identify culturally appropriate ways to implement educational programs in their local communities.

d. Awareness Campaign should include instructions on the following, among others:

- How to access local opioid-specific services.
- How to safeguard controlled prescription medications from children and adolescents.
- How to dispose properly of unused controlled prescription medications.

2. Expand access to MAT services that include Tribal values, culture, and treatments:

a. Promote family, youth and community engagement in the planning and implementation of opioid use treatment.

b. Increase number of providers receiving training in MAT services that include Tribal values, culture, and treatments.

c. Increase access to continuing education on MAT.

d. Expand access to integrated MAT services for Tribal communities, including TeleMAT.

e. Increase the availability and utilization of MAT to include Buprenorphine (all FDA approved formulations for OUD); buprenorphine/naloxone combination product, and/or naltrexone to Tribal communities in both rural and urban settings.

f. Increase awareness and distribution of naloxone as an overdose intervention and teach skills in how to use it.

3. Build a support system for strengthening Native families by implementing culturally-appropriate approaches.

a. Promote family, youth and community engagement in the planning and implementation of opioid use recovery activities.

b. Develop a family-focused and culturally-based assessment that

captures biopsychosocial needs of AI/ANs.

c. Link assessment needs to support and recovery services.

d. Collaborate with relevant partners to build a support system for recovery.

Applications will be reviewed and scored according to the quality of responses to the required application components in Sections A–E. The number of points after each heading is the maximum number of points a review committee may assign to that section. Although scoring weights are not assigned to individual numbers, responses to each number are assessed in deriving the overall section score.

A. Statement of Need (20 Points)

1. Describe the extent of the problem related to opioid misuse in the applicant's community (“community” means the applicant's Tribe, village, Tribal organization, consortium of Tribes or Tribal organizations, or urban center). Provide the facts and evidence that support the need for the project and establish that the Tribe, Tribal organization, or UIO understands the problems and can reasonably address them.

2. Include a description of social determinants of health that may contribute to the opioid crisis in the community. Include details on economic stability (such as housing and food insecurity); education (such as early childhood education and development, high school graduation, and language and literacy); social and community context (such as discrimination, incarceration, and social cohesion); health and health care (such as access to health care and health literacy); and neighborhood and built environment (such as access to foods that support healthy eating patterns, crime and violence, environmental conditions, and quality of housing).

3. Provide background information on the Tribe, Tribal organization, or UIO.

4. Based on the information and/or data currently available, document the prevalence of opioid misuse rates.

5. Based on the information and/or data currently available, document the need to increase the capacity to implement, sustain, and improve effective opioid misuse prevention, treatment, aftercare, and recovery services in the proposed catchment area that is consistent with the purpose of this funding opportunity announcement.

6. Describe the service gaps and other problems related to the need for funds targeting opioid misuse. Identify the source of the data.

7. Describe potential Tribal and community partners and resources in the catchment area that can participate in the broad community awareness campaign.

8. Affirm that the goals of the project are consistent with priorities of the Tribal government or board of directors and that the governing body is in support of this application.

B. Program Plan (Objectives and Activities) (35 Points)

1. Identify the population of focus for your project. Describe the purpose of the proposed project, including goals and objectives and how they are linked. Describe how the achievement of goals will increase Tribe, Tribal organization, or UIO's capacity to support the goals and required activities identified in Section I of this announcement.

2. Describe how the proposed project activities are related to the proposed project's goals and objectives. Describe how the project activities will increase the capacity of the community to prevent, and treat opioid addiction in the communities.

3. Describe organizational capacity to implement the proposed activities, including increased public awareness and education on opioids; developing a comprehensive support team to strengthen and empower AI/AN families in addressing the opioid crisis in Tribal or Urban Indian communities; and integrating the use of MAT into their community.

4. Describe how community partners (prevention and recovery support providers, substance use disorder treatment programs, peer recovery specialists, social workers, behavioral health clinics, community health centers, youth serving organizations, family and youth homeless providers, child welfare agencies, and primary care providers, pharmacists, schools, clergy, and law enforcement, among others) will be involved in the planning and implementation of the project.

5. Describe if/how the efforts of the proposed project will be coordinated with any other related Federal grants or programs funded through IHS, SAMHSA, BIA, or other Federal agencies.

6. Provide a chart depicting a realistic timeline for the project period showing key activities, milestones, and responsible staff. These key activities should include the required activities identified in Section V of this announcement.

C. Organizational Capacity (15 Points)

Describe organizational capacity to implement the proposed activities, including increased public awareness

and education on opioids; developing a comprehensive support team to strengthen and empower AI/AN families in addressing the opioid crisis in Tribal or Urban Indian communities; and integrating the use of MAT into the Tribal community.

1. Describe significant program activities and achievements or accomplishments over the past 5 years associated with opioid use prevention, treatment and aftercare.

2. Describe the applicant Tribe, Tribal organization, or UIO's experience and capacity to provide culturally appropriate/competent opioid use services to the community and specific populations of focus.

3. Describe the resources available for the proposed project (e.g., facilities, equipment, information technology systems, and financial management systems).

4. Describe how project continuity will be maintained if/when there is a change in the operational environment (e.g., staff turnover, change in project leadership, change in elected officials) to ensure project stability over the life of the grant.

5. Provide a complete list of staff positions anticipated for the project, including the Project Director, Project Coordinator, and other key personnel, showing the role of each and their level of effort and qualifications.

6. For key staff currently on board, include a biographical sketch for the Project Director, Project Coordinator, or other key positions as attachments to the project proposal/application. Do not include any of the following in the biographical sketch:

- Personally Identifiable Information (i.e., SSN, home address);
- Resumes; or
- Curriculum Vitae.

D. Program Evaluation (Data Collection and Reporting) (20 Points)

Grantees will be required to collect and submit semi-annual and annual progress reports. Logic Models are highly recommended to provide guidance on collecting data for evaluation purposes (see Attachment A). Applicants are expected to collect data within their communities on prevalence rates on opioid use disorders and other data metrics related to opioid-related mortality and morbidity.

1. Progress reports will include the compilation of quantitative data (e.g., number served; screenings completed) and qualitative or narrative (text) data.

2. Reporting elements should include data from local community-based and evidence-based programs which pertain to proposed activities, processes and outcomes such as performance measures

and other data relevant to evaluation outcomes including intended results (i.e., impact and outcomes).

3. Describe how the applicant will measure variables, what method will be used and how the data will be used for quality improvement and sustainability of program and meeting required reporting deadlines.

4. Based on the required objectives, describe the type(s) of evaluation(s) that will be used and how the applicant will collaborate with partners such as Tribal Epidemiology Centers or Urban Epidemiology Centers to complete any evaluation efforts or data collection.

5. Describe a data plan on how to prioritize screening efforts such as the Screening, Brief Intervention, and Referral to Treatment (SBIRT) to identify patients at at-risk levels who use illicit drugs and are referred for appropriate services. Describe how the data collection plan includes efforts that support the IHS Division of Behavioral Health (DBH) GPRA measure 1) Proportion of AI/ANs that received the Screening, Brief Intervention, and Referral to Treatment (SBIRT).

6. Describe how annual progress reports will be entered into the Behavioral Health Reporting portal system and capability and experience with similar evaluations.

7. Describe any data-sharing agreements that are established, or which will be established, in support of these activities.

E. Budget and Budget Justification (10 Points)

1. Include a line item budget for all expenditures identifying reasonable and allowable costs necessary to accomplish the goals and objectives as outlined in the project narrative for Project Year 1 only. The budget expenditures should correlate with the scope of work described in the project narrative for the first project year expenses only.

2. Provide a narrative justification of the budget line items, as well as a description of existing resources and other support the applicant expects to receive for the proposed project. Other support is defined as funds or resources, whether Federal, non-Federal or institutional, in direct support of activities through fellowships, gifts, prizes, in-kind contributions or non-Federal means. (This should correspond to Item #18 on the SF-424, Estimated Funding, and SF-424A Budget Information, Section C Non-Federal resources.)

3. Provide a narrative justification supporting the development or continued collaboration with other

partners regarding the proposed activities to be implemented.

4. Depending on the availability of funds, the IHS may host annual meetings to provide in-depth training and technical assistance to awardees. In order to help establish critical mass of community and staff members who are informed and committed to implement the project, awardees should plan to send a minimum of three people (including the Project Director/Project Coordinator) to one meeting of all awardees in each year of the grant. At these meetings, awardees will receive training related to grant objectives, discuss success and challenges in implementation of the program, present the results of their projects, and receive other technical assistance from IHS staff and/or contractors. Each meeting may be up to 3 days. The locations will be determined at a later date, but applicants should estimate costs for Denver, CO as a potential site that is accessible to most of “Indian Country” and attendance is strongly encouraged.

Multi-Year Project Requirements

Applications must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project. This attachment will not count as part of the project narrative or the budget narrative.

Additional documents can be uploaded as Appendix Items in *Grants.gov*

- Work plan, logic model and/or time line for proposed objectives.
- Position descriptions for key staff (i.e., Project Director, Project Coordinator).
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Organizational chart.
- Map of area identifying project location(s).
- Additional documents to support narrative (e.g., data tables, relevant news articles).
- Advisory board(s) description (membership, roles and functions, and frequency of meetings).

2. Review and Selection

Each application will be prescreened for eligibility and completeness as outlined in the funding announcement. Applications that meet the eligibility criteria shall be reviewed for merit by the Objective Review Committee (ORC) based on evaluation criteria. Incomplete applications and applications that are not responsive to the administrative thresholds will not be referred to the ORC and will not be funded. The

applicant will be notified of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the IHS DBH within 30 days of the conclusion of the ORC outlining the strengths and weaknesses of their application. The summary statement will be sent to the Authorizing Official identified on the face page (SF-424) of the application.

A. Award Notices for Funded Applications

The Notice of Award (NoA) is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for the systems contact information.

B. Approved but Unfunded Applications

Approved applications not funded due to lack of available funds will be held for one year. If funding becomes available during the course of the year, the application may be reconsidered.

Note: Any correspondence other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Grants are administered in accordance with the following regulations and policies:

A. The criteria as outlined in this funding announcement.

B. Administrative Regulations for Grants:

- Uniform Administrative Requirements for HHS Awards, located at 45 CFR part 75.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, “Cost Principles,” located at 45 CFR part 75, subpart E.

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, “Audit Requirements,” located at 45 CFR part 75, subpart F.

2. Indirect Costs

This section applies to all recipients that request reimbursement of indirect costs (IDC) in their application budget. In accordance with HHS Grants Policy Statement, Part II-27, IHS requires applicants to obtain a current IDC rate agreement, and submit it to DGM, prior to DGM issuing an award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate agreement is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Available funds are inclusive of direct and appropriate indirect costs.

Approved indirect funds are awarded as part of the award amount, and no additional funds will be provided.

Generally, IDC rates for IHS grantees are negotiated with the Division of Cost Allocation (DCA) <https://rates.psc.gov/> or the Department of Interior (Interior Business Center) <https://ibc.doi.gov/ICS/tribal>. For questions regarding the indirect cost policy, please call the Grants Management Specialist listed under “Agency Contacts” or the main DGM office at (301) 443-5204.

3. Reporting Requirements

The awardee must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the awardee organization or the individual responsible for preparation of the reports. Per DGM policy, all reports are required to be submitted electronically by attaching them as a “Grant Note” in GrantSolutions. Personnel responsible for submitting

reports will be required to obtain a login and password for GrantSolutions. Please see the Agency Contacts list in Section VII for the systems contact information.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi-annually, within 30 days after the budget period ends (specific dates will be listed in the NoA Terms and Conditions). These reports must include a brief comparison of actual accomplishments to the goals established for the period, a summary of progress to date or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 90 days of expiration of the period of performance.

B. Financial Reports

Federal Financial Report (FFR or SF-425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Payment Management Services, HHS at <https://pms.psc.gov>. The applicant is also requested to upload a copy of the FFR (SF-425) into our grants management system, GrantSolutions. Failure to submit timely reports may result in adverse award actions blocking access to funds.

Grantees are responsible and accountable for accurate information being reported on all required reports: The Progress Reports and Federal Financial Report.

C. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a \$25,000 sub-award obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary)

IHS awards (where the period of performance is made up of more than one budget period) and where: (1) The period of performance start date was October 1, 2010 or after, and (2) the primary awardee will have a \$25,000 sub-award obligation dollar threshold during any specific reporting period will be required to address the FSRS reporting.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Grants Policy website at <http://www.ihs.gov/dgm/policytopics/>.

D. Compliance With Executive Order 13166 Implementation of Services Accessibility Provisions for All Grant Application Packages and Funding Opportunity Announcements

Recipients of Federal financial assistance (FFA) from HHS must administer their programs in compliance with Federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age and, in some circumstances, religion, conscience, and sex. This includes ensuring programs are accessible to persons with limited English proficiency. The HHS Office for Civil Rights provides guidance on complying with civil rights laws enforced by HHS. Please see <https://www.hhs.gov/civil-rights/for-providers/provider-obligations/index.html> and <http://www.hhs.gov/ocr/civilrights/understanding/section1557/index.html>.

- Recipients of FFA must ensure that their programs are accessible to persons with limited English proficiency. HHS provides guidance to recipients of FFA on meeting their legal obligation to take reasonable steps to provide meaningful access to their programs by persons with limited English proficiency. Please see <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/fact-sheet-guidance/index.html> and <https://www.lep.gov>. For further guidance on providing culturally and linguistically appropriate services, recipients should review the National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care at <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=53>.

- Recipients of FFA also have specific legal obligations for serving qualified individuals with disabilities. Please see <http://www.hhs.gov/ocr/civilrights/understanding/disability/index.html>.

- HHS funded health and education programs must be administered in an environment free of sexual harassment. Please see <https://www.hhs.gov/civil->

[rights/for-individuals/sex-discrimination/index.html](https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html); <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; and <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>.

- Recipients of FFA must also administer their programs in compliance with applicable Federal religious nondiscrimination laws and applicable Federal conscience protection and associated anti-discrimination laws. Collectively, these laws prohibit exclusion, adverse treatment, coercion, or other discrimination against persons or entities on the basis of their consciences, religious beliefs, or moral convictions. Please see <https://www.hhs.gov/conscience/conscience-protections/index.html> and <https://www.hhs.gov/conscience/religious-freedom/index.html>.

Please contact the HHS Office for Civil Rights for more information about obligations and prohibitions under Federal civil rights laws at <https://www.hhs.gov/ocr/about-us/contact-us/index.html> or call 1-800-368-1019 or TDD 1-800-537-7697.

E. Federal Awardee Performance and Integrity Information System (FAPIIS)

The IHS is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information System (FAPIIS), at <https://www.fapiis.gov>, before making any award in excess of the simplified acquisition threshold (currently \$150,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. IHS will consider any comments by the applicant, in addition to 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 45 CFR 75.205.

As required by 45 CFR part 75 Appendix XII of the Uniform Guidance, non-Federal entities (NFEs) are required to disclose in FAPIIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than \$10,000,000 for any period of time during the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance, and the HHS implementing regulations at 45 CFR part 75, the IHS must require a non-Federal entity or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

Submission is required for all applicants and recipients, in writing, to the IHS and to the HHS Office of Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 45 CFR 75.113.

Disclosures must be sent in writing to: U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Paul Gettys, Acting Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857 (Include "Mandatory Grant Disclosures" in subject line), Office: (301) 443-5204, Fax: (301) 594-0899, Email: Paul.Gettys@ihs.gov

And

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen Building, Room 5527, Washington, DC 20201, URL: <http://oig.hhs.gov/fraud/report-fraud/index.asp> (Include "Mandatory Grant Disclosures" in subject line), Fax: (202) 205-0604 (Include "Mandatory Grant Disclosures" in subject line) or Email: MandatoryGranteeDisclosures@oig.hhs.gov

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371 Remedies for noncompliance, including suspension or debarment (see 2 CFR parts 180 & 376).

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: JB Kinlacheeny, Alcohol and Substance Abuse Lead, Indian Health Service, Office of Clinical and Preventative Services/Division of Behavioral Health, 5600 Fishers Lane 08-N34B, Rockville, MD 20857, Phone: 301-443-0104, Email: jb.kinlacheeny@ihs.gov.

2. Questions on grants management and fiscal matters may be directed to: Patience Musikikongo, Grants

Management Specialist, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Phone: 301-443-2059, Fax: (301) 594-0899, Email: Patience.Musikikongo@ihs.gov.

3. Questions on systems matters may be directed to: Paul Gettys, Acting Director, DGM, Rockville, MD 20857, Phone: (301) 443-2114; or the DGM main line (301) 443-5204, Fax: (301) 443-9602, EMail: Paul.Gettys@ihs.gov.

VIII. Other Information

The Public Health Service strongly encourages all grant, cooperative agreement and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103-227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Michael D. Weahkee,

RADM, Assistant Surgeon General, U.S. Public Health Service, Director, Indian Health Service.

**ATTACHMENT A: COMMUNITY OPIOID INTERVENTION PILOT PROJECTS
LOGIC MODEL (example)**

INPUT	ACTIVITIES	OUTPUTS	OUTCOMES
<ul style="list-style-type: none"> Implementing agency leadership and support Participants (families, community leaders, Tribal leaders, professional staff) Community support and partnerships Program management, evaluation and continuous improvement Training Technical Assistance to grantees Annual convening of grantees 	1. Community awareness/education <ul style="list-style-type: none"> a. Cultural integration b. Promote family and community engagement 	<ul style="list-style-type: none"> # of trainings offered # of educational awareness campaigns across service population 	<ul style="list-style-type: none"> Increased community awareness
	2. Build support system to strengthen AI/AN families <ul style="list-style-type: none"> a. Cultural integration b. Maternal & Child Health c. Promote family and community engagement 	<ul style="list-style-type: none"> # of partnerships / collaboration (MOU, MOA) # of providers supporting activities # of facilities providing MAT # of referrals to treatment # of systems involved (social services, child advocacy) 	<ul style="list-style-type: none"> A response team
	3. Expand access to MAT <ul style="list-style-type: none"> a. Cultural integration b. Naloxone c. Buprenorphine (all FDA approved formulations for OUD); buprenorphine/naloxone combination product, and/or naltrexone d. Promote family and community engagement 	<ul style="list-style-type: none"> # of Naloxone provided # of Naloxone administered # of providers trained in MAT # of Buprenorphine / Suboxone administered # of active MAT prescribers Promote family engagement in treatment 	<ul style="list-style-type: none"> Increased access to treatment

[FR Doc. 2020-22941 Filed 10-15-20; 8:45 am]

BILLING CODE 4165-16-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Mental Health; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Advanced Laboratories for Accelerating the Reach and Impact Research Centers (P50).

Date: November 9, 2020.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Serena Chu, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6000, MSC 9606, Bethesda, MD 20852, 301-500-5829, serena.chu@nih.gov

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Mental Health Practices in Low-Resource Settings to Achieve Mental Health Equity.

Date: November 9, 2020.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Aileen Schulte, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892-9608, 301-443-1225, aschulte@mail.nih.gov

Name of Committee: National Institute of Mental Health Special Emphasis Panel; NIMH Biobehavioral Research Awards for Innovative New Scientists (NIMH BRAINS).

Date: November 9, 2020.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Erin E. Gray, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Boulevard, NSC 6152B, Bethesda, MD 20892, 301-402-8152, erin.gray@nih.gov.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; NIMH Pathway to Independence Awards (K99/R00, K22).

Date: November 10, 2020.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892-9608, 301-443-9734, millerda@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: October 9, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020-22888 Filed 10-15-20; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Submission for OMB Review; 30-Day Comment Request; The National Institute of Mental Health Data Archive (NDA), NIMH**

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent

within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Andrew Hooper, NIMH Health Science Policy Analyst, Science Policy and Evaluation Branch, Office of Science Policy, Planning, and Communications, NIMH, Neuroscience Center, 6001 Executive Boulevard, MSC 9667, Bethesda, Maryland 20892, or call non-toll-free number (301) 480-8433 or Email your request, including your address to: nimhprapubliccomments@mail.nih.gov.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on June 18, 2020, page 36869 (85 FR 36869) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of Mental Health (NIMH), National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection: The National Institute of Mental Health Data Archive (NDA), REVISION—0925-0667—expiration date 11/30/2020, National Institute of Mental Health (NIMH), National Institutes of Health (NIH).

Need and Use of Information Collection: The NIMH Data Archive (NDA) is an infrastructure that allows for the submission and storage of human subjects' data from researchers conducting studies related to many scientific domains, regardless of the source of funding. The NIH and NIMH developed this resource to allow for the public collection of information from: (1) Individuals who seek permission to access data from the NDA for the purpose of scientific investigation, scholarship or teaching, or other forms of research and research development,

via the Data Use Certification (DUC), and (2) individuals who request permission to submit data to the NDA for the purpose of scientific investigation, scholarship or teaching, or other forms of research and research development, via the Data Submission Agreement (DSA). The extensive information stored in the NDA continues to provide a rare and valuable

scientific resource to the field and plays an integral part in fulfilling research objectives in multiple scientific domains. The NIH and the NIMH seek to encourage use of the NDA by investigators in the field of multiple scientific research domains to achieve rapid scientific progress. In order to take full advantage of this resource and maximize its research value, it is

important that data are made broadly available, on appropriate terms and conditions, to the largest possible number of investigators.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 1875.

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 hour
NDA Data Submission Agreement (DSA)	Private Sector	300	1	90/60	450
NDA Data Use Certification (DUC)	Private Sector	950	1	90/60	1,425
Total .....	.....	.....	1,250	.....	1,875

Dated: October 8, 2020.

Andrew A. Hooper,

Project Clearance Liaison, National Institute of Mental Health, National Institutes of Health.

[FR Doc. 2020-22932 Filed 10-15-20; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Senior Executive Service Performance Review Board

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice announces the appointment of the members of the Senior Executive Service (SES) Performance Review Boards (PRBs) for the Department of Homeland Security (DHS). The purpose of the PRBs is to review and make recommendations concerning performance appraisals, ratings, performance awards, pay adjustments, and other appropriate personnel actions for incumbents of SES, Senior Level (SL), and Scientific and Professional (ST) positions of the Department.

DATES: This Notice is effective as of October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Stephen McDermid, Office of the Chief Human Capital Officer, stephen.mcdermid@hq.dhs.gov, or by telephone (202) 754-0561.

SUPPLEMENTARY INFORMATION: Each Federal agency is required to establish one or more performance review boards to make recommendations, as necessary, regarding the performance of senior executives within the agency (5 U.S.

Code 4314(c) and 5 CFR 430.311). This notice announces the appointment of the members of the PRB for DHS. The purpose of the PRB is to review and make recommendations concerning proposed performance appraisals, ratings, performance awards, and pay adjustments, and other appropriate personnel actions for incumbents of SES, SL, and ST positions within DHS.

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half of 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 below:

List of Names (Alphabetical Order)

Adamcik, Carol
Aguilar, Max
Alfonso-Royals, Angelica
Allen, Matthew C.
Allende, Pedro
Alles, Randolph D.
Ammons, Nicholas
Anderson, Rose
Anderson, Sandra D.
Archambeault, Gregory J.
Arratia, Juan
Arvelo, Ivan J.
Asher, Nathalie R.
Awni, Muhammad H.
Bailey, Angela S.
Baker, Jeremy D.
Baker, Paul E.
Banister, Diana
Baran, Kathy A.
Baroukh, Nader
Barrera, Staci A.
Barrett, Lawrence R.
Barrow, William
Beagles, James M.
Bean, Bridget E.
Benner, Derek N.

Berg, Peter B.
Berger, Katrina W.
Bhagowalia, Sanjeev
Bhirud, Ketan
Bible, Daniel A.
Blackwell, Juliana J.
Blessey, Caroline
Bobich, Jeffrey M.
Bonner, Bryan
Borgen, Michael R.
Bowes, Lee F.
Boyd, John
Boyd, Valerie
Boyer, Stephen A.
Bradshaw, Patricia S.
Brekke, Ian
Brewer, Julie S.
Bright, Andrea J.
Brito, Roberto
Brown, Scott A.
Browne, Rene
Brundage, William
Bryan, Michelle C.
Bryan, William N.
Bryson, Tony
Brzozowski, Christa M.
Bucholtz, Kathleen
Bullock, Edna
Bunker, Michael D.
Burgess, Kenneth
Burns, Robert P.
Bush, Thomas L.
Bush, William B.
Butt, Mark
Cagen, Steven W.
Caggiano, Marshall
Caine, Jeffrey
Calkins, Aaron L.
Cameron, Michael
Campagnolo, Donna P.
Campo, Brian
Campudoni, Luis A.
Caneva, Duane
Canty, Rachel E.
Cappello, Elizabeth A.
Carpio, Philip

Carraway, Melvin J.
Castro, Raul M.
Chaleki, Thomas D.
Chau, Anna
Cheatle, Kimberly A.
Cheng, Wen-Ting
Chip, William W.
Christian, Bryan
Cicccone, Christine
Clark, Kenneth N.
Cleary Stannard, Jennifer S.
Clift, William
Cline, Richard K.
Cloe, David
Collins, James
Conklin, Jeffery A.
Cormier, Tracy J.
Coronado, Luis
Correa, Soraya
Corsano, Anne
Cotter, Daniel
Courey, Marc
Courtney, Paul
Cox, Adam
Cox, Debra S.
Crandall, Kristine R.
Cribbs, Carol
Cronen, Christopher M.
Cross, Catherine C.
Crumpacker, Jim H.
Cuccinelli, Kenneth T.
Curda, Susan M.
Dainton, Albert J.
D'Ambrosio, Michael R.
Dargan, John L.
Davidson, Andrew
Davidson, Michael J.
Davis, Michael P.
Dawson, Inga I.
Dawson, Mark B.
Decker, Thomas R.
Dedvukaj, Mirash
Delaney, Laura
Dembling, Ross
DeNayer, Larry C.
Denton, David L.
DeQuattro, Pat
DeStefano, Ernest
Di Pietro, Joseph R.
DiFalco, Frank J.
Dimoff, Lowell H.
Dobitsch, Stephanie M.
Dolan, Mark E.
Doran, Thomas J.
Dorey, David
Dornburg, Erica
Dorow, Brian
Dougherty, Michael
Dougherty, Thomas E.
Douglas, David
Dragani, Nancy J.
Drumm, Robert
Dunbar, Susan
Duquette, Amanda K.
Ederheimer, Joshua A.
Edgar, Troy D.
Edlow, Joseph
Edwards, Benjamin R.
Edwards, Eric L.

Eisert, John
Eldredge, Deborah
Emrich, Matthew D.
Erichs, Alysa D.
Erickson, Scott
Evans, Karen
Evetts, Mark V.
Falk, Scott
Fallon, William T.
Feeley, Thomas E.
Fenton, Jennifer M.
Filipponi, Karen B.
Fischer, John W.
Fishman, George
Fitzhugh, Peter C.
Fitzmaurice, Stacey D.
Flores Lund, Simona L.
Flory, Gillian
Folden, Shane M.
Francis, Steve K.
Frazier, Denise M.
Frazier, Sterling T.
Fujimura, Paul
Gabbrielli, Tina W.
Gantt, Kenneth D.
Gersten, David
Gibbons, James M.
Glabe, Scott
Goad, Robert
Gountanis, John
Grable, Samuel D.
Granger, Christopher
Graviss, Matthew
Grazzini, Christopher
Groom, Molly
Gunter, Brett A.
Guzman, Nicole G.
Hall, Daniel
Hammersley, Bonnie M.
Hampton, Stephanie L.
Hanna, Matthew L.
Harris, Melvin
Harris, Steven
Harvey, Melanie K.
Hatch, Peter
Havranek, John
Hayes, Bradley
Heinz, Todd W.
Hess, David A.
Hickey, Gary
Higgins, Jennifer B.
Highsmith, AnnMarie
Hill, John
Hochman, Kathleen
Holtermann, Keith
Holzer, James
Horton, Michael G.
Houghton, Timothy
Houlton, Tyler
Howard, Tammy
Howard, Jr., Percy L.
Huang, Paul P.
Hughes, Clifford T.
Huse, Thomas F.
Hutchison, Steven J.
Ileto, Carlene
Jackson, Arnold D.
Jacksta, Linda L.
James, Michele

Jansson, Scott W.
Jenkins, Donna
Jennings, David W.
Jeronimo, Jose M.
Johnson, James V.
Johnson, Jo Linda
Johnson, Tae D.
Jones, Allen
Kaplan, Philip
Kasper, Joseph
Kaufman, Steven
Kelly, Kevin M.
Kendall, Sarah
Kerner, Francine
Kim, Ted
King, Matthew H.
King, Tatum S.
Kirchner, Julie
Klopp, Jacalynne B.
Kolbe, Kathryn
Koncar, Steven
Kopel, Richard S.
Koumans, Marnix R.
Kozanas, Constantina
Kramar, John W.
Kronisch, Matthew
Kuepper, Andrew
Kuhn, Karen
Lafferty, John L.
LaJoye, Darby R.
Lambeth, John
Lang, Thresa
Lanum, Scott F.
Laurance, Stephen A.
Law, Robert
Lechleitner, Patrick J.
Lee, Kimya
Letowt, Philip J.
Lew, Kimberly D.
Loiacono, Adam V.
Lucero, Enrique M.
Lundgren, Karen
Lynch, Jeffrey D.
Lynch, Steven M.
Lyon, Shonnie R.
Magrino, Christopher
Maher, Joseph
Mapar, Jalal
Marcott, Stacy
Marin, David A.
Martin, Joseph F.
McCament, James W.
McComb, Richard
McCullar, Shannon
McDermott, Thomas
McDonald, Christina
McElhaney, William S.
McElwain, Patrick J.
McLane, Jo Ann
McMullen, Robert
Meckley, Tammy
Medina, Yvonne R.
Mehring, Holly C.
Michael, Brian A.
Miles, Jere T.
Miles, John D.
Miller, Loren
Mina, Peter E.
Mitchell, Kathryn

Mizelle, Chad
Moman, Christopher C.
Moncarz, Benjamin D.
Moses, Patrick D.
Moss, Rita
Mulligan, George D.
Murphy, Brian J.
Murray, James M.
Muzyka, Carolyn L.
Nally, Kevin J.
Nation, Patricia
Neumeister, James
Newman, Robert B.
Newsome III, Leonza
Nolan, Connie L.
Nunan, Joanna M.
Ondocin, Michael A.
Ortiz, Mario
Ortiz, Raul E.
Oshinnaiye, Yemi
Otero, Carin M.
Ow, Alanna
Padilla, Kenneth
Palmer, David
Paramore, Faron K.
Paschall, Robert D.
Patel, Kalpesh A.
Patterson, Leonard E.
Perazzo, Stephen F.
Perez, Nelson
Perryman, Janet
Pham, Tony
Piccone, Colleen
Pietropaoli, Lori
Pineiro, Marlen
Podonsky, Glenn S.
Pohlman, Teresa R.
Porto, Victoria
Price, Corey A.
Prince, David A.
Propis, Ryan J.
Prosnitz, Susan
Punteney, James
Raymond, John J.
Rehberg, Sarah
Renaud, Daniel A.
Renaud, Tracy L.
Rexrode, Kathryn
Richardson, David
Richardson, Gregory A.
Rinehart, Brett
Riordan, Denis
Robbins, Timothy S.
Robinson, Terri
Rodi III, Louis A.
Rodriguez, Waldemar
Roessler, John
Rogers, Debra A.
Roncone, Stephen A.
Rosenberg, Ron M.
Rosenblum, Marc R.
Rubino, Jaclyn
Ruppel, Joanna
Rynes, Joel C.
Sabatino, Diane J.
Sahakian, Diane V.
Salazar, Rebekah A.
Salazar, Ronald M.
Saltalamachea, Michael

Salvano-Dunn, Dana
Scardaville, Michael
Scott, Kika
Selby, Cara M.
Sellers, Frederick E.
Sevier, Adrian
Seymour, Donna K.
Shaw, David C.
Shearer, Ruth C.
Short, Cherie
Short, Victoria D.
Sloan, Terry
Smislova, Melissa
Smith, Frederick
Smith, Stewart D.
Sohn, Eunice
Spero, Adrienne
Spero, James
Spivey, Beth
Spradlin, Ryan L.
Staton, Jack P.
Stephens, Celisa M.
Stiefel, Nathaniel I.
Stough, Michael S.
Sulc, Brian
Sutherland, Dan
Swain, Donald R.
Swartz, Neal
Sykes, Gwendolyn
Taylor, Clothilda
Taylor, Robin M.
Teeple, Brian
Teitelbaum, Andrew
Thompson, John E.
Thompson, Kirt
Tomney, Christopher J.
Toris, Randolph B.
Travis, Matthew
Ulrich II, Dennis A.
Valverde, Michael
Van Houten, Ann
Vande Beek, Dirk
Venture, Veronica
Villanueva, Raymond
Wade, David S.
Wales, Brandon
Wallen, Steven
Walton, Kimberly H.
Wasowicz, John
Watkins, Tracey
Watson, Andre R.
Wawro, Joseph D.
Wells, John A.
Whalen, Mary Kate
Wheaton, Kelly
Whitehouse, Joshua
Whittenburg, Cynthia F.
Wiese, Eric
Willoughby, Melika
Wolf, Chad F.
Wolfe, Herbert
Woltornist, Daniel
Wong, Ricardo A.
Wong, Sharon M.
Wright, Christopher J.
Yarwood, Susan A.
Zemek, Alex
Zuchowski, Laura B.

Dated: October 8, 2020.

Greg Ruocco,

*Director, Executive Resources Policy, Office
of the Chief Human Capital Officer.*

[FR Doc. 2020-22923 Filed 10-15-20; 8:45 am]

BILLING CODE 9112-FC-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615-0016]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act

AGENCY: U.S. Citizenship and
Immigration Services, Department of
Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland
Security (DHS), U.S. Citizenship and
Immigration Services (USCIS) will be
submitting the following information
collection request to the Office of
Management and Budget (OMB) for
review and clearance in accordance
with the Paperwork Reduction Act of
1995. The purpose of this notice is to
allow an additional 30 days for public
comments.

DATES: Comments are encouraged and
will be accepted until November 16,
2020.

ADDRESSES: Written comments and/or
suggestions regarding the item(s)
contained in this notice, especially
regarding the estimated public burden
and associated response time, must be
submitted via the Federal eRulemaking
Portal website at [http://
www.regulations.gov](http://www.regulations.gov) under e-Docket ID
number USCIS-2006-0070. All
submissions received must include the
OMB Control Number 1615-0016 in the
body of the letter, the agency name and
Docket ID USCIS-2006-0070.

FOR FURTHER INFORMATION CONTACT:
USCIS, Office of Policy and Strategy,
Regulatory Coordination Division,
Samantha Deshommes, Chief,
Telephone number (202) 272-8377
(This is not a toll-free number;
comments are not accepted via
telephone message.). Please note contact
information provided here is solely for
questions regarding this notice. It is not
for individual case status inquiries.
Applicants seeking information about
the status of their individual cases can
check Case Status Online, available at
the USCIS website at <http://>

www.uscis.gov, or call the USCIS Contact Center at (800) 375-5283; TTY (800) 767-1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on July 7, 2020, at 85 FR 41061, allowing for a 60-day public comment period. USCIS received three comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: <http://www.regulations.gov> and enter USCIS-2006-0070 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). 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 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 Act notice that is available via the link in the footer of <http://www.regulations.gov>.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) 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;

(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 This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Relief under Former Section 212(c) of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I-191; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS and EOIR use the information on the form to properly assess and determine whether the applicant is eligible for a waiver under former section 212(c) of INA.

(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-191 is 116 and the estimated hour burden per response is 1.75 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 is 203 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 \$59,740.

Dated: October 13, 2020.

Jerry L Rigdon,

Deputy Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2020-22945 Filed 10-15-20; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R8-ES-2020-N141;
FXES1113080000-212-FF08E00000]

Endangered and Threatened Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered

or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before November 16, 2020.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (e.g., TXXXXXX).

- *Email:* permitsr8es@fws.gov.

- *U.S. Mail:* Susie Tharratt, Regional Recovery Permit Coordinator, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W-2606, Sacramento, CA 95825.

FOR FURTHER INFORMATION CONTACT:

Susie Tharratt, Regional Recovery Permit Coordinator, via phone at 916-414-6561, via email at permitsr8es@fws.gov, or via the Federal Relay Service at 1-800-877-8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered or threatened under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of "take" includes such activities as pursuing, harassing, trapping, capturing, or collecting, in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations at 50 CFR 17.22 for endangered wildlife species, 50 CFR

17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Proposed activities in the following permit requests are for the recovery and

enhancement of propagation or survival of the species in the wild. The ESA requires that we invite public comment before issuing these permits.

Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these

applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
TE-83425D	Scott Soares, Hollister, California.	<ul style="list-style-type: none"> California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). 	CA	Capture, handle, and release	New.
TE-225970	Charlotte Marks, Sacramento, California.	<ul style="list-style-type: none"> Conservancy fairy shrimp (<i>Branchinecta conservatio</i>). Longhorn fairy shrimp (<i>Branchinecta longiantenna</i>). San Diego fairy shrimp (<i>Branchinecta sandiegonensis</i>). Riverside fairy shrimp (<i>Streptocephalus woottoni</i>). Vernal pool tadpole shrimp (<i>Lepidurus packardii</i>). California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). 	CA	Capture, handle, release, and collect vouchers.	New.
TE-08293C	Travis Marella, Ventura, California.	<ul style="list-style-type: none"> Tidewater goby (<i>Eucyclogobius newberryi</i>) 	CA	Capture, handle, and release	Renew and amend.
TE-73946B	Austin Parker, Long Beach, California.	<ul style="list-style-type: none"> Palos Verdes blue butterfly (<i>Glaucopsyche lygdamus palosverdesensis</i>). 	CA	Pursue, capture, handle, and release.	Amend.
TE-84156D	Stephen Gergeni, Sacramento, California.	<ul style="list-style-type: none"> California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). 	CA	Capture, handle, and release	New.
TE-50510A	Geoffrey Cline, Truckee, California.	<ul style="list-style-type: none"> California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). Giant kangaroo rat (<i>Dipodomys ingens</i>). Tipton kangaroo rat (<i>Dipodomys nitratooides nitratooides</i>). Fresno kangaroo rat (<i>Dipodomys nitratooides exilis</i>). 	CA	Capture, handle, collect tissue samples, and release.	Renew and amend.
TE-84165D	Kaia Colestock, Fresno, California.	<ul style="list-style-type: none"> California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). 	CA	Capture, handle, and release	New.
TE-200340	Andrew Hatch, South Lake Tahoe, California.	<ul style="list-style-type: none"> California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSS)) (<i>Ambystoma californiense</i>). Mountain yellow-legged frog (<i>Rana muscosa</i>). Sierra Nevada Yellow-legged Frog (<i>Rana sierrae</i>). Unarmored threespine stickleback (<i>Gasterosteus aculeatus williamsoni</i>). 	CA	Capture, handle, and release	Renew and amend.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we

will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Angela Picco,

Regional Endangered Species Program Manager, Sacramento, California.

[FR Doc. 2020-22965 Filed 10-15-20; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service**

[FWS-R1-ES-2020-0101;
FXES11140100000-212-FF01E0000]

**Notice of Intent To Prepare a Draft
Environmental Impact Statement for
the Thurston County Habitat
Conservation Plan in Thurston County,
Washington**

AGENCY: Fish and Wildlife Service,
Interior.

ACTION: Notice of intent to prepare an
environmental impact statement; notice
of virtual public scoping meetings;
request for comments.

SUMMARY: We, the U.S. Fish and
Wildlife Service (Service), provide this
notice to open a public scoping period
and announce public scoping meetings
in accordance with requirements of the
National Environmental Policy Act, and
its implementing regulations. We intend
to prepare an environmental impact
statement (EIS) to evaluate the impacts
on the human environment related to an
application from Thurston County,
Washington (applicant), for an
incidental take permit under the
Endangered Species Act. The Service
previously published a similar notice of
intent to prepare an EIS on March 20,
2013. Thurston County used the public
comments received along with new
information to further develop the draft
Thurston County Habitat Conservation
Plan. This notice opens a new public
scoping period based on a new
application received from Thurston
County on July 30, 2020. Comments
received in writing during the 2013
public comment period were retained,
and do not need be provided again
during this public comment period to be
considered during this review.

DATES: *Submitting Comments:* We will
accept comments received or
postmarked on or before November 16,
2020. Comments submitted online at
<https://www.regulations.gov/> (see
ADDRESSES) must be received by 11:59
p.m. Eastern Time on November 16,
2020.

Public Meetings: The Service will
hold two public scoping meetings
during the scoping period. To help
protect the public and limit the spread
of the COVID-19 virus, the public
meetings will be held virtually at the
following times:

- October 26, 2020, from 6 p.m. to 8
p.m.
- October 28, 2020, from 6 p.m. to 8
p.m.

ADDRESSES:

Submitting Comments: You may
submit comments by one of the
following methods:

- *Internet:* [http://
www.regulations.gov](http://www.regulations.gov). Follow the
instructions for submitting comments
on Docket No. FWS-R1-ES-2020-0101.
- *U.S. mail:* Public Comments
Processing; Attn: Docket No. FWS-R1-
ES-2020-0101; U.S. Fish and Wildlife
Service Headquarters, MS: PRB/3W;
5275 Leesburg Pike, Falls Church, VA
22041-3803.

For additional information about
submitting comments, see Request for
Public Comments and Public
Availability of Comments under
SUPPLEMENTARY INFORMATION.

Public Meetings: A link and access
instructions to the virtual scoping
meetings will be posted to [https://
www.fws.gov/wafwo/](https://www.fws.gov/wafwo/) at least one week
prior to the public meeting dates.

FOR FURTHER INFORMATION CONTACT:
Marty Acker, by telephone at 360-753-
9073, or by email at [Marty_Acker@
fws.gov](mailto:Marty_Acker@fws.gov). Hearing or speech impaired
individuals may call the Federal Relay
Service at 800-877-8339 for TTY
service.

SUPPLEMENTARY INFORMATION: We, the
U.S. Fish and Wildlife Service (Service),
provide this notice to prepare an
environmental impact statement and
open a public scoping period and
announce public scoping meetings in
accordance with requirements of the
National Environmental Policy Act
(NEPA; 42 U.S.C. 4321 *et seq.*) and its
implementing regulations. We intend to
prepare an environmental impact
statement (EIS) to evaluate the impacts
on the human environment related to an
application from Thurston County,
Washington (applicant), for an
incidental take permit (ITP) under the
Endangered Species Act of 1973, as
amended (ESA; 16 U.S.C. 1531 *et seq.*).

The Service previously published a
similar notice of intent to prepare an EIS
on March 20, 2013 (78 FR 17224).
Thurston County used the public
comments received, along with new
information, to further develop the
Thurston HCP. This notice opens a new
public scoping period based on a new
application received from Thurston
County on July 30, 2020. The primary
purpose of the scoping process is for the
public and other parties to assist in
developing the DEIS by identifying
important issues and alternatives that
should be considered. This new scoping
notice was prepared pursuant to the
updated regulations implementing
NEPA, issued by the Council on
Environmental Quality on July 16, 2020
(85 FR 43304).

**Purpose and Need for the Proposed
Action**

In accordance with section 10(a)(2)(A)
of the ESA, Thurston County has
submitted the draft Thurston County
Habitat Conservation Plan (Thurston
HCP) in support of an ITP application
for the threatened Yelm pocket gopher
(*Thomomys mazama yelmensis*),
Olympia pocket gopher (*T. mazama
pugetensis*), Tenino pocket gopher (*T.
mazama tumuli*), and Oregon spotted
frog (*Rana pretiosa*); the endangered
Taylor's checkerspot butterfly
(*Euphydryas editha taylori*); and the
Oregon vesper sparrow (*Pooecetes
gramineus affinis*), which is under
review to determine if Federal listing
under the ESA is warranted. The
requested permit would authorize
incidental take of covered species
caused by the impacts of county-
permitted development activities, as
well as construction and maintenance of
county-owned or county-managed
infrastructure for a period of 30 years,
and includes minimization and
mitigation measures to offset the
impacts of the taking on covered
species.

To meet our requirements under
NEPA, we intend to prepare a draft
environmental impact statement (DEIS)
and, later, a final environmental impact
statement (FEIS), to evaluate the effects
on the human environment of issuing
the requested permit and Thurston
County's implementation of the
Thurston HCP.

The County's goals include providing
long-term certainty for growth and
economic development in Thurston
County, supporting listed and rare
species, protecting and maintaining
working lands and agriculture, and
improving local control over covered
activities. The Service has taken these
goals into account in establishing our
purpose and need for the proposed
action, which are (1) to process the
applicant's request for an ITP, the
issuance of which is necessary to meet
the County's development and
biological goals; and (2) to either grant,
grant with conditions, or deny the ITP
request in compliance with the Service's
authority under applicable law
including, without limitation, section
10(a) of the ESA and applicable ESA
implementing regulations.

**Preliminary Proposed Action and
Alternatives**

Consistent with 40 CFR 1501.9(d)(2),
the preliminary description of the
proposed action is issuance of an ITP
authorizing incidental take of HCP
covered species in association with

covered activities and HCP implementation; the ITP will only be issued if ESA section 10(a) permit issuance criteria and all other legal requirements related to permit issuance are met. We will prepare a FEIS prior to making a decision on whether to issue an ITP.

The DEIS will include a reasonable range of alternatives, including a No Action Alternative, and will likely analyze variations in mitigation approaches and variations in conservation implementation and effectiveness monitoring. One alternative will include providing all mitigation on new reserves, likely providing greater benefits to covered species but with potentially higher implementation costs, and potentially less participation by farmers who may be willing to protect species and habitat through conservation easements. Additionally, a No Action Alternative will be included. Under the No Action Alternative, the Service would not issue an ITP, and Thurston County and its permittees would not obtain ESA take coverage for take of listed species from construction, maintenance, and other activities.

Background

Endangered Species Act

Section 9 of the ESA prohibits “take” of fish and wildlife species listed as endangered under section 4 (16 U.S.C. 1538 and 16 U.S.C. 1533, respectively). The ESA implementing regulations extend, under certain circumstances, the prohibition of take to threatened species (50 CFR 17.31). Under section 3 of the ESA, the term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (16 U.S.C. 1532(19)). The term “harm” is defined by regulation as “an act which actually kills or injures wildlife.” Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering” (50 CFR 17.3). The term “harass” is defined in the regulations as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering” (50 CFR 17.3).

Under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed fish and wildlife species. “Incidental take” is defined by the ESA as take that is

incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;
2. The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicant will ensure that adequate funding for the plan will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

Thurston County Habitat Conservation Plan

Thurston County intends to implement the Thurston HCP to cover a variety of activities for which the County issues permits or approvals, or that it otherwise carries out through the course of its normal business throughout the County. Thurston County issues permits or approvals for residential development, construction of added accessory structures, septic repair or extension and home-heating oil tank removal, commercial and industrial development, and public facility construction. Thurston County carries out construction, transportation and right-of-way maintenance; landfill and solid waste management; water resources management; and county parks, trails, and land management. The Thurston HCP includes measures to minimize and mitigate impacts of the taking on covered species. Thurston County requests a 30-year ITP.

Covered Activities

The applicant is seeking ITP coverage for activities that it conducts, permits, or otherwise authorizes. The proposed covered activities include:

- Planning and permitting of residential and agricultural structures and facilities on existing legal lots;
- Permits for private and new subdivision road construction and maintenance;
- Permits for work in right-of-ways;
- Construction and maintenance of county roads, bridges, and right-of-ways;
- Construction and maintenance of county-owned buildings and other administrative facilities;
- Construction and maintenance of county parks, including roads, trails,

vegetation management, structures, recreational activities, and scientific research;

- Construction and operation of solid waste facilities;
- Permitting and monitoring of septic systems and decommissioning of home oil tanks;
- Maintenance and monitoring of stormwater, water and wastewater resources and associated facilities;
- Construction, installation, extension, and maintenance of surface-water intake facilities, pumping plants, wells, well houses, water treatment facilities, and pipelines;
- Emergency response, cleanup, and restoration associated with natural disasters; and
- Habitat restoration activities on county-owned or controlled land, agricultural activities in habitat areas, and all habitat monitoring, maintenance, and enhancement activities associated with implementation of the HCP.

Covered Species

The species proposed for coverage under the Thurston HCP and ITP include three subspecies of the Mazama pocket gopher (the Yelm pocket gopher, Olympia pocket gopher, and the Tenino pocket gopher), Oregon spotted frog, Taylor's checkerspot butterfly, and the Oregon vesper sparrow.

The draft Thurston HCP includes an analysis of impacts to covered species and proposes limits on impacts resulting from covered activities. As it is not practical to express the anticipated take (or to monitor take-related impacts) in terms of number of individuals, the Thurston HCP uses habitat surrogates, measured as habitat area or as “functional-acre” values, to quantify impacts to each covered species and related conservation outcomes. The functional-acre approach integrates currently available information on covered species' habitat distribution, habitat condition, and landscape position to provide site-specific measures of habitat value. This approach provides greater weighting to both impacts and mitigation occurring in areas that are a priority for conservation of the covered species.

Each of the covered species is known to occur in Thurston County. The Thurston HCP would not require surveys for occupancy prior to the applicant's conducting covered activities. Therefore, the Thurston HCP includes detailed assumptions about habitat criteria and locations for each covered species. Measures to minimize and mitigate impacts on covered species are described for each type of activity to

be covered by the HCP, and these measures would be systematically implemented and monitored for success. Impacts would be offset by permanent mitigation that is legally protected such as through conservation easements, and permanently funded through endowments and other funding mechanisms. Minimization and mitigation measures are subject to adaptive management to ensure their effectiveness, and to ensure achievement of the Thurston HCP's biological goals and objectives.

To mitigate unavoidable impacts to covered species, under the Thurston HCP's conservation program Thurston County proposes to permanently protect and manage covered species-occupied habitat by establishing habitat reserves, acquiring working lands conservation easements, and permanently enhancing habitat quality on existing reserves for each covered species. The addition of new reserves and working land conservation easements, as well as enhancements to existing reserves, would occur incrementally during HCP implementation. Mitigation for the Thurston HCP would be secured and managed to ensure that take is fully mitigated before a covered activity is initiated. The Thurston HCP includes funding assurances, monitoring, adaptive management, and changed circumstance provisions to help ensure conservation outcomes for the covered species. Annual reports would confirm the amount, type, and location of impacts and mitigation, as well as the status of monitoring, adaptive management, changed circumstances, and funding.

Yelm Pocket Gopher, Olympia Pocket Gopher, and Tenino Pocket Gopher

The Yelm pocket gopher, Olympia pocket gopher, and Tenino pocket gopher are the three listed subspecies of the *Mazama* pocket gopher occurring in Thurston County. The Service listed these three subspecies as threatened under the ESA on May 9, 2013 (79 FR 19760), and designated critical habitat for each of these subspecies on the same date (79 FR 19712).

Individuals of each subspecies build and maintain underground burrows in excessively well-drained soils where they forage, shelter, rear young, and maintain individual territories. The species relies on management-dependent grasslands and prairies, which have declined due to development, land use changes, and cessation of historical disturbance processes (e.g., fire). Habitat loss and fragmentation are primary threats to the species. Exposure to other threats, such

as predation by domestic and feral animals, and rodenticide are heightened in the developed landscape.

The three subspecies of the *Mazama* pocket gopher in Thurston County are associated with glacial outwash prairies in western Washington, an ecosystem of conservation concern. Native prairies and grasslands have been severely reduced throughout Thurston County due to conversion of habitat to residential and commercial development and agriculture, rendering soils unsuitable for burrowing. Due to their solitary and territorial nature, many sites occupied by subspecies of the *Mazama* pocket gopher may contain a small number of individuals and occur in a matrix of residential and agricultural development.

Impacts to the Yelm pocket gopher, Olympia pocket gopher, and Tenino pocket gopher would result from the majority of HCP-covered development and maintenance activities in their respective ranges. As there is uncertainty about the number of individuals that would be impacted and it is not practical to express the amount or extent of anticipated take in terms of number of individuals, the Thurston HCP treats impacts to habitat as a surrogate for impacts to individuals. Habitat likely to be impacted is largely already fragmented and degraded in quality, and occupancy by the covered species is currently uncommon. To offset unavoidable impacts under the Thurston HCP's conservation program, Thurston County would secure, stabilize, and expand subspecies strongholds, while also contributing to subspecies recovery by protecting occupied habitat in strategic locations. To accomplish this, Thurston County would establish and permanently maintain a system of:

- New reserves in the ranges of each of the three *Mazama* pocket gopher subspecies;
- Working land conservation easements in the ranges of the Yelm pocket gopher and the Tenino pocket gopher; and
- Habitat enhancement on existing reserves in the range of the Yelm pocket gopher.

A biological goal of the Thurston HCP is to maintain viable populations of the Yelm pocket gopher, Olympia pocket gopher, and the Tenino pocket gopher in Thurston County. Measurable conservation objectives include the permanent protection of over 4,500 functional-acres of *Mazama* pocket gopher habitat distributed among existing and new reserves and working lands easements. Expected effects of HCP implementation on these

subspecies and their designated critical habitats are described in greater detail in the Thurston HCP and will be analyzed in the EIS.

Oregon Spotted Frog

The Service listed the Oregon spotted frog as a threatened species throughout its range on September 29, 2014 (79 FR 51658) and designated critical habitat on June 10, 2016 (81 FR 29336).

Historically, the Oregon spotted frog ranged from British Columbia to northeastern California. In Washington, the Oregon spotted frog was historically found in the Puget Trough from the Canadian border to the Columbia River, and east to the Washington Cascades. Current distribution is limited to four watersheds in the Puget Trough and two watersheds in the southeast Cascades. In the Thurston HCP-covered area, the species occurs in the floodplain and tributaries of the upper Black River drainage in tributaries to Black Lake and the Black River. The full extent of the population's distribution, abundance, and status in the Black River has not been determined.

Oregon spotted frogs require shallow water areas for egg and tadpole survival; perennially deep, moderately vegetated pools for adult and juvenile survival in the dry season; and perennial water for protecting all age classes during cold, wet weather. The Oregon spotted frog primarily inhabits emergent wetland habitats in forested landscapes, although it is not typically found under forest canopy. Individuals are found in or near perennial waterbodies, such as springs, ponds, lakes, sluggish streams, irrigation canals, or roadside ditches, and can make use of a variety of pond types as long as there is sufficient vegetation and seasonal habitat available for egg-laying, tadpole rearing, summer feeding, and overwintering. In the Thurston HCP-covered area, Oregon spotted frogs are also documented to select areas of relatively shallow water with less emergent vegetation and more submergent vegetation than adjacent habitats.

Oregon spotted frogs in the Thurston HCP-covered area have small population sizes; fragmented habitat with low connectivity; and face threats from wetland loss from development and altered hydrology, introduced species including reed canarygrass and bullfrogs, shrub encroachment, loss of beaver dams, and poor water quality.

Impacts to Oregon spotted frogs would be caused by a small number of HCP-covered development and maintenance activities, because habitat for the species is limited to certain portions of the plan area. As there is

uncertainty about the number of individuals that would be impacted and it is not practical to express the amount or extent of anticipated take in terms of number of individuals, the Thurston HCP treats impacts to habitat as a surrogate for impacts to individuals. Habitat likely to be impacted is likely to be already degraded. To offset unavoidable impacts, under the Thurston HCP's conservation program, Thurston County would establish new reserves to secure, stabilize, and expand Oregon spotted frog strongholds. This would provide the ancillary benefit of contributing to species recovery. A biological goal of the Thurston HCP is to maintain viable populations of the Oregon spotted frog in Thurston County. Measurable conservation objectives include the establishment and permanent protection of 618 functional-acres of Oregon spotted frog habitat, strategically located to increase habitat quality, occupancy, and stability. Expected effects of HCP implementation on the species and its designated critical habitat are described in greater detail in the Thurston HCP and will be analyzed in the EIS.

Taylor's Checkerspot Butterfly

The Service listed the Taylor's checkerspot butterfly as an endangered species on November 4, 2013 (78 FR 61452), and designated critical habitat on the same date (78 FR 61506).

The Taylor's checkerspot butterfly was once found throughout native grasslands of the north and south Puget Sound, south Vancouver Island, and the Willamette Valley of Oregon. The historical range and the species' abundance is not precisely known, because exhaustive searches did not occur until recently. Northwest grasslands were formerly more widespread, larger and interconnected—conditions that likely would have supported a greater distribution and abundance of the Taylor's checkerspot butterfly. Before its decline, the Taylor's checkerspot butterfly was documented at more than 70 sites in British Columbia, Washington, and Oregon.

Habitat requirements for the Taylor's checkerspot butterfly consist of open grasslands and native grass/oak woodland sites where abundant food plants are available for larvae and adult feeding. These sites include inland prairies on post-glacial, gravelly outwash, coastal bluffs, and balds (small openings within forested landscapes).

The major limiting factors affecting the Taylor's checkerspot butterfly are related to the significant loss of habitat, largely due to agricultural and urban development, encroachment of trees,

and the spread of invasive plants that threaten the species' native grasslands. Pesticide use and recreational activities may also pose a direct threat to the butterflies themselves. Over time, these pressures have led to smaller and smaller numbers of existing populations. Most of the remaining Taylor's checkerspot butterfly habitat patches are a considerable distance from one another, likely well beyond the normal dispersal distance of the species. Natural recolonization is unlikely as populations disappear, but captive breeding and reintroduction have been shown to be successful for creating new populations for the subspecies, including within the Thurston HCP-covered area.

Impacts to the Taylor's checkerspot butterfly would be caused by a small number of HCP-covered development and maintenance activities taking place within the potential dispersal distance of butterflies from known populations. As there is uncertainty about the number of individuals that would be impacted and it is not practical to express the amount or extent of anticipated take in terms of number of individuals, the Thurston HCP treats impacts to habitat as a surrogate for impacts to individuals. Habitat likely to be impacted is along fragmented edges of managed, occupied habitat, and is not known to be occupied. To offset unavoidable impacts, under the Thurston HCP's conservation program, Thurston County would enhance existing reserves to expand species strongholds, while also implementing other conservation actions to help facilitate species recovery. A biological goal of the Thurston HCP is to maintain viable populations of the Taylor's checkerspot butterfly in Thurston County. Measurable conservation objectives include the enhancement and permanent maintenance of 16 functional-acres of Taylor's checkerspot butterfly habitat, strategically located to increase habitat quality, occupancy, and stability. Expected effects of HCP implementation on the species and its designated critical habitat are described in greater detail in the Thurston HCP and will be analyzed in the EIS.

Oregon Vesper Sparrow

The Service initiated a status review to determine whether Oregon vesper sparrow warrants listing under the ESA on June 27, 2018 (83 FR 30091), in response to a petition to list the species as endangered or threatened with critical habitat, that was received on November 8, 2017.

The Oregon vesper sparrow is a ground-nesting migratory bird. The

Oregon vesper sparrow was considered to be historically abundant, but is currently rare in the south Puget lowlands. Landscape position appears to be an important factor, with most historical observations in the Thurston HCP-covered area occurring in the greater Yelm Prairie area. In the HCP-covered area, the Oregon vesper sparrow uses large patches (over 50 acres) of grassland and prairie for nesting, foraging, and breeding. Habitat occurs in lowland valleys with moderately short grass and forb cover, some patchy bare ground and sparsely vegetated areas, and some shrub cover or low amounts of tree cover. However, sightings remain uncommon in habitat meeting these criteria. The Oregon vesper sparrow overwinters outside the HCP-covered area, mostly in California.

Vesper sparrow habitat in the Thurston HCP-covered area is used during the breeding season, so nest success (*i.e.*, reproductive success) can be limited by land uses. Mowing, intensive grazing, and other ground-disturbing activities during the nesting season risk damage to eggs or injury to nestlings.

Impacts to the Oregon vesper sparrow would be caused by a small number of HCP-covered development and maintenance activities taking place within the potential dispersal distance of vesper sparrows from known populations. As there is uncertainty about the number of individuals that would be impacted, and it is not practical to express the amount or extent of anticipated take in terms of number of individuals, the Thurston HCP treats impacts to habitat within the likely range of the species as a surrogate for impacts to individuals. Habitat likely to be impacted is already degraded in quality and likely to have some history of incompatible land use, and is mostly not known to be occupied. To offset unavoidable impacts under the Thurston HCP's conservation program, Thurston County would establish working land conservation easements to secure, stabilize, and expand Oregon vesper sparrow strongholds, while also implementing other conservation actions to promote the species' recovery. A biological goal of the Thurston HCP is to maintain viable populations of the Oregon vesper sparrow in Thurston County. Measurable conservation objectives include the permanent protection of 25 functional-acres of Oregon vesper sparrow habitat, strategically located to increase habitat quality, occupancy, and stability. Expected effects of HCP implementation on the species are described in greater

detail in the Thurston HCP and will be analyzed in the EIS.

Summary of Expected Impacts

The DEIS will identify and describe the effects of the proposed Federal action on the human environment that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. This includes effects that occur at the same time and place as the proposed action or alternatives and/or effects that are later in time or farther removed in distance from the proposed action or alternatives. Expected impacts include, but are not limited to, positive and negative impacts to the covered species and critical habitat, geology and soils, air quality, water resources, other biological resources, health and safety, land and shoreline use, recreation, aesthetics, historical and cultural resources, transportation, public services and utilities, and socioeconomics. The effects of these expected impact will be analyzed in the EIS.

The analysis will consider the adequacy of each alternative to maintain or enhance the status of the covered species at appropriate scales in light of the expected effects and other best available information. Impacts to air quality, water resources, and other biological resources, such as fish, wildlife, and the prairie and forest ecosystems, are expected to include incremental negative impacts from development that are minimized and or mitigated at the landscape level through application of applicable law, including local and State regulations, and implementation of conservation strategies under each alternative. Under each alternative, significant impacts to water resources, State-protected species, and ecosystems would typically be avoided or minimized by the County's compliance with local and State regulations governing development, and under any alternative individual projects that may significantly impact these resources undergo additional public review under the Washington State Environmental Policy Act (SEPA). The action alternatives' conservation programs may serve to offset or partially offset impacts on air quality, water resources, and other biological resources at the landscape scale, though these actions would be targeted at offsetting impacts to covered species. Localized positive and negative impacts to recreation, aesthetics, historical and cultural resources, and transportation may result from HCP implementation due to the expected changes in land use from development (covered activities) and through expansion of permanently

maintained open spaces (conservation program). Significant effects on public services and utilities are not expected to result from any of the alternatives, because these resources are likely to be developed to meet demand where development does occur under any alternative.

Anticipated Permits and Authorizations

In addition to the requested ITP, Thurston County will manage covered activities to comply with Washington State endangered and protected species regulations; Washington State Growth Management Act, which includes State and local protection of historic and cultural resources implemented through the County's Comprehensive Plan; Washington State Shoreline Management Act; Washington State Hydraulic Code; Thurston County Critical Area Ordinances; State and local requirements for administrative procedures; and other regulations. To implement the HCP, Thurston County will establish participation agreements with their permittees and other implementation partners. Individual projects conducted under the HCP will undergo further public review, as appropriate, through the Washington SEPA.

Schedule for the Decision-Making Process

The Service will conduct an environmental review to analyze the effects of the proposed permit action, along with other alternatives considered and the associated impacts of each alternative for the development of the DEIS. Following completion of the environmental review, the Service will publish a notice of availability and request for public comments on the DEIS, the County's ITP application, and the draft HCP. The Service expects to make the DEIS and draft HCP available to the public in spring 2021. After public review and comment, we will evaluate the permit application, associated documents, and any comments received, to determine whether the permit application meets the requirements of section 10(a)(1)(B) of the ESA. We will also evaluate whether issuance of the requested ITP would comply with section 7 of the ESA. The Service expects to make the FEIS and final HCP available to the public in mid-2021. At least 30 days after the FEIS is available, the record of decision will be completed in accordance with applicable timeframes established in 40 CFR 1506.11.

Public Scoping Process

The issuance of this notice of intent provides an opportunity for public involvement in the scoping process to guide the development of the EIS.

To help protect the public and limit the spread of the COVID-19 virus, the public scoping meetings will be conducted online to accommodate best practices and local guidelines in place at the time this notice was prepared. See **DATES** and **ADDRESSES** for the dates and times of the virtual public scoping meetings. The virtual public scoping meetings will provide Thurston County and the Service an opportunity to present information pertinent to the Thurston HCP and for the public to ask questions on the scope of issues and alternatives we should consider when preparing the EIS. No opportunity for oral comments will be provided. Written comments may be submitted by the methods listed in **ADDRESSES**.

Reasonable Accommodations

Persons needing reasonable accommodations in order to attend and participate in either of the virtual public scoping meetings should contact the Service's Washington Fish and Wildlife Office, using one of the methods listed in **ADDRESSES** as soon as possible. In order to allow sufficient time to process requests, please make contact no later than one week before the desired public meeting. Information regarding this proposed action is available in alternative formats upon request.

Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Actions

We request data, comments, views, arguments, new information, analysis, new alternatives, or suggestions from the public; affected Federal, State, Tribal, and local governments, agencies, and offices; the scientific community; industry; or any other interested party on the proposed action. We will consider these comments in developing the DEIS. Specifically, we seek:

1. Biological information, analysis and relevant data concerning the covered species and other wildlife;
2. Information on Oregon vesper sparrow occurrence in Thurston County;
3. Potential effects that the proposed permit action could have on the covered species, and other endangered or threatened species, and their associated ecological communities or habitats;
4. Potential effects that the proposed permit action could have on other aspects of the human environment, including ecological, aesthetic, historic, cultural, economic, social, environmental justice, or health effects;

5. Other possible reasonable alternatives to the proposed permit action that the Service should consider, including additional or alternative avoidance, minimization, and mitigation measures;

6. The presence of historic properties—including archaeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns—in the proposed permit area, which are required to be considered in project planning by the National Historic Preservation Act;

7. Information on other current or planned activities in, or in the vicinity of, Thurston County and their possible impacts on the covered species, including any connected actions that are closely related and should be discussed in the same DEIS; and

8. Other information relevant to the Thurston HCP and its impacts on the human environment.

Comments received in writing during the 2013 public comment period were retained, and do not need be provided again during this public comment period to be considered during this review. Once the DEIS is prepared, there will be further opportunity for comment on this proposed permit action through an additional public comment period.

Public Availability of Comments

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might 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. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Comments and materials we receive, as well as supporting documentation we use in preparing the DEIS, will be available for public inspection online in Docket No. FWS-R1-ES-2020-0101 at <http://www.regulations.gov/> (see **FOR FURTHER INFORMATION CONTACT**).

Decision Maker and Nature of Decision to Be Made

The Decision Maker is the Service's Regional Director. If after publication of the ROD we determine that all

requirements are met for ITP issuance, the Regional Director will issue a decision on the requested ITP.

Authority

We provide this notice in accordance with the requirements of Section 10(c) of the ESA (16 U.S.C. 1539(c)) and NEPA regulations pertaining to the publication of a notice of intent to issue an EIS (40 CFR 1501.9(d)).

Robyn Thorson,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020-22963 Filed 10-15-20; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

**[FWS-R1-ES-2020-N115;
FXES11140100000-201-FF01E00000]**

Receipt of Enhancement of Survival Permit Applications Developed in Accordance With the Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit; Douglas County, Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received two applications for enhancement of survival permits (permits) pursuant to the Endangered Species Act of 1973, as amended (ESA). The two applications, one from Mr. Ed Preston and one from Mr. Ward Glessner, were developed in accordance with the Template Safe Harbor Agreement (Template SHA) for the Columbia Basin pygmy rabbit. We are requesting comments from the public regarding the proposed issuance of a permit to each of the two applicants.

DATES: Submit written comments no later than November 16, 2020.

ADDRESSES: To request further information or submit written comments, please use one of the following methods:

- *Internet:* You may view or download copies of the Template SHA and environmental assessment and obtain additional information on the internet at <http://www.fws.gov/wafwo/>.
- *Email:* wfwocomments@fws.gov. Include "Template SHA for the Columbia Basin pygmy rabbit" in the subject line of the message.
- *U.S. Mail:* Public Comments Processing, Attn: FWS-R1-ES-2020-

N115; U.S. Fish and Wildlife Service; c/o Jeff Krupka; Central Washington Fish and Wildlife Field Office; 215 Melody Lane, Suite 119, Wenatchee, WA 98801.

- *Facsimile:* 509-665-3509.

FOR FURTHER INFORMATION CONTACT:

Kimberly Veverka (see **ADDRESSES**); telephone: 509-665-3508, ext. 2012; facsimile: 509-665-3509. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have received two applications for enhancement of survival permits (permits) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The two applications, one from Mr. Ed Preston and one from Mr. Ward Glessner, were developed in accordance with the Template Safe Harbor Agreement (Template SHA) for the Columbia Basin pygmy rabbit (*Brachylagus idahoensis*). Mr. Preston's application includes a request to enroll 421.74 acres of land in Douglas County, Washington, under the Template SHA. Mr. Glessner's application includes a request to enroll 2,023.84 acres of land in Douglas County, Washington, under the Template SHA. If approved, the permits would authorize otherwise prohibited take of the endangered Columbia Basin pygmy rabbit that is above the baseline conditions of the properties enrolled under the Template SHA, and that may result from the permittees' otherwise lawful land-use activities. We provide this notice to open a public comment period and invite comments from all interested parties regarding the proposed issuance of a permit to each applicant.

Background

Section 9 of the ESA prohibits the take of fish and wildlife species listed as endangered under section 4 of the ESA. Under the ESA, the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term "harm," as defined in our regulations, includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term "harass" is defined in our regulations as [to carry out] an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal

behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). Under specified circumstances, however, we may issue permits that authorize take of federally listed species, provided the take is incidental to, but not the purpose of, an otherwise lawful activity. Regulations governing permits for endangered species are at 50 CFR 17.22.

Under a safe harbor agreement (SHA), participating landowners voluntarily undertake management activities on their properties to enhance, restore, or maintain habitat benefiting species listed under the ESA. SHAs, and the subsequent enhancement of survival permits that are issued pursuant to section 10(a)(1)(A) of the ESA, encourage private and other non-Federal property owners to implement conservation efforts for listed species. The SHAs provide assurances to property owners that they will not be subjected to increased property use restrictions as a result of their efforts to attract listed species to their property, or to increase the numbers or distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through SHAs are found in 50 CFR 17.22(c). As provided for in the Service's final Safe Harbor Policy (64 FR 32717; June 17, 1999), SHAs provide assurances that allow the property owner to alter or modify their enrolled property, even if such alteration or modification results in the incidental take of a listed species, to such an extent that the property is returned back to the originally agreed-upon baseline conditions.

On March 5, 2003, the Service listed the Columbia Basin pygmy rabbit as an endangered species (68 FR 10388). On September 7, 2006, the Service announced the availability for public review and comment of a draft Template SHA for the Columbia Basin pygmy rabbit, which was jointly developed by the Service and the Washington Department of Fish and Wildlife (WDFW), and a draft environmental assessment (EA), which was developed by the Service pursuant to Federal responsibilities under the National Environmental Policy Act (71 FR 52816). The Service's September 7, 2006, **Federal Register** notice also announced the receipt of three initial permit applications that were developed in accordance with the Template SHA. The final Template SHA, which contained only minor modifications from the draft released for public review, was signed by the Service and WDFW on October 24, 2006. On April 25, 2007, the Service announced the

availability for public review and comment of another 13 permit applications that were developed in accordance with the Template SHA (72 FR 20557). On October 8, 2008, the Service announced the availability for public review and comment of one permit application that was developed in accordance with the Template SHA (73 FR 58975). On June 18, 2015, the Service announced the availability for public review and comment of nine permit applications that were developed in accordance with the Template SHA (80 FR 34928). To date, the Service has issued 26 permits under the Template SHA, which cover 152,849 acres that are within the historic distribution of the Columbia Basin pygmy rabbit.

The objectives of the Template SHA include: (1) Encourage land owners and managers to undertake voluntary conservation measures to benefit the Columbia Basin pygmy rabbit; (2) maintain or increase the amount of habitat available to the Columbia Basin pygmy rabbit within their historic distribution; (3) accomplish the foregoing without negatively affecting existing and proposed future land-use activities by reducing participants' future management liability for incidental take of Columbia Basin pygmy rabbits on their enrolled property; and (4) increase public support for Columbia Basin pygmy rabbit conservation efforts by implementing proactive, cooperative, and flexible management in accordance with the measures prescribed by the ESA.

Proposed Action

We received two applications, one from Mr. Edward Preston and one from Mr. Ward Glessner, requesting permits under the ESA and in accordance with the Template SHA and 50 CFR 13.25(b). If we approve the applications, the implementation of the Template SHA would occur on the following properties:

- *Mr. Edward Preston:* The properties included within the proposed enrollment total 421.74 acres in Douglas County, Washington, and are located within the geographic area covered by the Template SHA. All of the land areas proposed for enrollment by Mr. Preston represent intervening properties (*i.e.*, property outside of Columbia Basin pygmy rabbit recovery emphasis areas) as defined in the Template SHA. WDFW biologists conducted evidence searches for the Columbia Basin pygmy rabbit on Mr. Preston's properties identified for enrollment under the Template SHA. No Columbia Basin pygmy rabbits or evidence of active pygmy rabbit burrows

were detected during these surveys. Therefore, in accordance with the provisions of the Template SHA, the baseline for covered properties is zero (0) active pygmy rabbit burrows.

- *Mr. Ward Glessner:* The properties included within the proposed enrollment total 2,023.84 acres in Douglas County, Washington, and are located within the geographic area covered by the Template SHA. All of the land areas proposed for enrollment by Mr. Glessner represent intervening properties (*i.e.*, property outside of Columbia Basin pygmy rabbit recovery emphasis areas) as defined in the Template SHA. WDFW biologists conducted evidence searches for the Columbia Basin pygmy rabbit on Mr. Glessner's properties identified for enrollment under the Template SHA. No Columbia Basin pygmy rabbits or evidence of active pygmy rabbit burrows were detected during these surveys. Therefore, in accordance with the provisions of the Template SHA, the baseline for covered properties is zero (0) active pygmy rabbit burrows.

The Service has previously determined that implementation of the Template SHA will result in conservation benefits to the Columbia Basin pygmy rabbit and will not result in significant effects to the human environment. The Service will evaluate the permit applications, related documents, and any comments submitted to determine whether the applications are consistent with the measures prescribed by the Template SHA and comply with relevant statutory and regulatory requirements. If it is determined that the requirements are met, a permit authorizing incidental take of the Columbia Basin pygmy rabbit will be issued to each of the applicants. The final determination for each permit will not be completed until after the end of the 30-day comment period, and we will fully consider all comments received.

Public Comments

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on our proposed Federal action. The original Template SHA and EA are available for reference.

Public Availability of Comments

All comments and materials we receive become part of the public record associated with this action. Before

including your address, phone number, email address or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice in accordance with the requirements of section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA (42 U.S.C. 4321 *et seq.*), and their implementing regulations (50 CFR 17.22, and 40 CFR 1506.6, respectively).

Robyn Thorson,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020-22966 Filed 10-15-20; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX20LR000F60100; OMB Control Number 1028-0068]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Ferrous Metals Surveys

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an Information Collection.

DATES: Interested persons are invited to submit comments on or before November 16, 2020.

ADDRESSES: Send your comments on this Information Collection Request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at OIRA_Submission@omb.eop.gov; or via facsimile to (202) 395-5806. Please provide a copy of your comments to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192;

or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028-0068 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Elizabeth S. Sangine by email at escottsangine@usgs.gov, or by telephone at 703-648-7720. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, 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 August 14, 2020, 85 FR 49672. One comment was received from the Bureau of Economic Analysis supporting the collection of this data as nationally important.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

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: Respondents to these forms supply the USGS with domestic production and consumption data for 13

ores, concentrates, metals, and ferroalloys, some of which are considered strategic and critical, to assist in determining National Defense Stockpile goals. These data and derived information will be published as chapters in Minerals Yearbooks, monthly Mineral Industry Surveys, annual Mineral Commodity Summaries, and special publications, for use by Government agencies, industry education programs, and the general public.

Title of Collection: Ferrous Metals Surveys.

OMB Control Number: 1028-0068.

Form Number: Various, 15 forms.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Business or Other-For-Profit Institutions: U.S. nonfuel minerals producers and consumers of ferrous and related metals.

Total Estimated Number of Annual Respondents: 954.

Total Estimated Number of Annual Responses: 2,208.

Estimated Completion Time per Response: For each form, we will include an average burden time ranging from 10 minutes to 1 hour.

Total Estimated Number of Annual Burden Hours: 1,158.

Respondent's Obligation: Voluntary.

Frequency of Collection: Monthly or Annually.

Total Estimated Annual Nonhour Burden Cost: There are no "nonhour cost" burdens associated with this IC.

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 authorities for this action are the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Materials and Minerals Policy, Research and Development Act of 1980 (30 U.S.C. 1601 *et seq.*), the National Mining and Minerals Policy Act of 1970 (30 U.S.C. 21(a)), the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 *et seq.*), and the Defense Production Act (50 U.S.C. 2061 *et seq.*).

Michael Magyar,

Acting Director, National Minerals Information Center, U.S. Geological Survey.

[FR Doc. 2020-22905 Filed 10-15-20; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs**[212D0102DR/DS5A300000/
DR.5A311.1A000118]**Osage County Oil and Gas Final
Environmental Impact Statement,
Osage County, Oklahoma****AGENCY:** Bureau of Indian Affairs,
Interior.**ACTION:** Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, the Bureau of Indian Affairs (BIA) has prepared the Osage County Oil and Gas Final Environmental Impact Statement (FEIS) and, by this notice, is announcing its publication. The FEIS is a programmatic analysis of the potential impacts that future oil and gas development may have on the surface estate and subsurface mineral estate (Osage Mineral Estate) in Osage County, Oklahoma.

DATES: The BIA will issue a Record of Decision (ROD) for the proposed action no earlier than 30 days from the date this Notice of Availability is published in the **Federal Register**.

ADDRESSES: The FEIS is available on the Osage Agency's website at: <https://www.bia.gov/regional-offices/eastern-oklahoma/osage-agency/osage-oil-and-gas-eis>. A paper copy of the FEIS is also available for examination at the BIA Osage Agency, 813 Grandview Avenue, Pawhuska, OK 74056.

FOR FURTHER INFORMATION CONTACT: Mr. Mosby Halterman, Regional Environmental Scientist, telephone: 918-781-4660; email: mosby.halterman@bia.gov; address: BIA Eastern Oklahoma Regional Office, PO Box 8002, Muskogee, OK 74402.

SUPPLEMENTARY INFORMATION: The Osage Allotment Act of 1906 (1906 Act), as amended, reserved all rights to the subsurface mineral estate underlying Osage County, Oklahoma (Osage Mineral Estate) to the Osage Nation. In accordance with the 1906 Act, the Osage Mineral Estate is held in trust by the United States for the benefit of the Osage Nation. All oil and gas leases, applications for permits to drill, and other site-specific permit applications in Osage County are approved under the authority of the 1906 Act, as amended, and 25 Code of Federal Regulations (CFR), part 226, Leasing of Osage Reservation Lands for Oil and Gas Mining.

The purpose of the BIA's action is to administer leasing and development of

the Osage Mineral Estate in the best interest of the Osage Nation, in accordance with the 1906 Act, as amended, balancing resource conservation and maximization of oil and gas production in the long term. The BIA is required, under more generally applicable statutes, to include in the best interest calculation the protection of the environment in Osage County to enhance conservation of resources and protection of the health and safety of the Osage people. Based on these considerations, the BIA's action promotes the maximization of oil and gas production from the Osage Mineral Estate in a manner that is economic, efficient, and safe; prevents pollution; and is consistent with the mandates of Federal law.

The FEIS analyzes the following four alternatives for managing oil and gas development in Osage County:

- Alternative 1, No Action Alternative.
- Alternative 2, Emphasize Oil and Gas Development. Minimize the number of permit Conditions of Approval (COAs) to allow producers wider latitude in determining the methods by which they will comply with applicable laws and regulations, such as the Endangered Species Act of 1973 and Clean Water Act of 1972.
- Alternative 3, Hybrid Development. A hybrid approach, by applying additional protective COAs in sections with low levels of historical oil and gas development minimizing the number of COAs in sections with high levels of historical oil and gas development. The BIA would not approve permits for new ground-disturbing oil and gas development activities in certain sensitive areas.
- Alternative 4, Enhanced Resource Protection. Apply additional protective COAs in all areas and implement well-spacing requirements. The BIA would not approve permits for new ground-disturbing oil and gas development activities in certain sensitive areas.

The alternatives represent the range of reasonable actions that could be taken to satisfy the purpose of and need for the BIA's action. All alternatives incorporate measures necessary to address impacts on air quality, water resources, cultural resources, public health and safety, threatened and endangered species, and socioeconomics among other things. The Osage Draft EIS (DEIS), published on November 22, 2019, did not identify a preferred alternative because the BIA did not have one at that time. The BIA identified Alternative 3, Hybrid Development, as the preferred alternative in the FEIS.

Under all alternatives, the FEIS would serve as the NEPA review for the approval of leases and workover permits that do not require new ground disturbance. Site-specific environmental assessments (EAs) would be required for drilling and workover permits involving new ground disturbance but would be tied to the analysis in the FEIS. Additional site-specific terms and conditions could be required prior to authorization of future oil and gas development activities.

Authority: This notice of availability is published in accordance with Section 1503.1 of the Council on Environmental Quality regulations (40 CFR 1500 *et seq.*) and the Department of the Interior Regulations (43 CFR part 46) implementing the procedural requirements of NEPA (42 U.S.C. 4321 *et seq.*), and in accordance with the authority delegated to the Assistant Secretary, Indian Affairs, in Part 209 of the Departmental Manual.

Tara Sweeney,*Assistant Secretary—Indian Affairs.*

[FR Doc. 2020-22783 Filed 10-15-20; 8:45 am]

BILLING CODE 4337-15-P**DEPARTMENT OF THE INTERIOR****National Park Service**[NPS-WASO-NAGPRA-NPS0030991;
PPWOCRADN0-PCU00RP14.R50000]**Notice of Intent To Repatriate Cultural
Items: University of California
Berkeley, Berkeley, CA****AGENCY:** National Park Service, Interior.**ACTION:** Notice.

SUMMARY: The University of California Berkeley, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of sacred objects and objects of cultural patrimony. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Office of the Vice Chancellor for Research, University of California Berkeley. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with

information in support of the claim to the Office of the Vice Chancellor for Research, University of California Berkeley at the address in this notice by November 16, 2020.

ADDRESSES: Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email t.torma@berkeley.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the University of California Berkeley, Berkeley, CA, that meet the definition of sacred objects and objects of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

In 1906, seven cultural items were removed from the home of Ms. Julia Gates, which was located near Salmon Creek in Humboldt County, CA. The items are one feather head ornament, two pipes, two scabbards, one belt, and one fawn skin casing. They were “picked up” by Alfred Kroeber from Ms. Gates' home when she was an “old, blind woman.” Julia Gates was a well-known healer and a leader in the Wiyot community. The items are part of a set of doctoring regalia used in the practice of traditional healing and in tribal ceremonies. Based on consultation with the Wiyot Tribe, California, these seven sacred objects items are also objects of cultural patrimony.

Sometime before 1907, six cultural items were removed from the home of Julia Gates, which was located near Salmon Creek in Humboldt County, CA. The items are one set of condor feather hair ties, two condor feathers, one pipe, one pipe scabbard, and one belt. They were donated to the University of California Berkeley by Cornelius E. Rumsey. How Rumsey came into possession of the items unclear, but most likely, the items are part of the set of doctoring regalia that Kroeber picked up from Julia Gates in 1906. Based on consultation with the Wiyot Tribe,

California, these six sacred objects items are also objects of cultural patrimony.

In 1929, eight cultural items were removed from a location near Humboldt Bay, in Humboldt County, CA. The items are one bluebird and yellow hammer headdress, three condor feathers, one pipe, one pipe scabbard, one belt, and one deerskin. Their transfer to UC Berkeley was arranged by Ms. Martha Herricks. These items comprise a set of doctoring regalia. Most likely, this set was created by Julia Gates and subsequently was passed on to Winnie Buckley, who was a Wiyot “sucking doctor.” According to oral tradition and cultural practice, such a transfer would have been considered a loan. Based on consultation with the Wiyot Tribe, California, these eight sacred objects items are also objects of cultural patrimony.

The cultural affiliation of the 21 cultural items listed above is to the Wiyot Tribe, California. This affiliation is supported by museum records, ethnographic sources, historical sources and newspapers, oral tradition, and other information provided through consultation with tribal representatives.

Determinations Made by the University of California Berkeley

Officials of the University of California Berkeley have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the 21 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

- Pursuant to 25 U.S.C. 3001(3)(D), the 21 cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and objects of cultural patrimony and the Wiyot Tribe, California (previously listed as Table Bluff Reservation—Wiyot Tribe).

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley,

CA 94720–1500, telephone (510) 672–5388, email t.torma@berkeley.edu, by November 16, 2020. After that date, if no additional claimants have come forward, transfer of control of the sacred objects and objects of cultural patrimony to the Wiyot Tribe, California (previously listed as Table Bluff Reservation—Wiyot Tribe) may proceed.

The University of California, Berkeley is responsible for notifying the Wiyot Tribe, California (previously listed as Table Bluff Reservation—Wiyot Tribe) that this notice has been published.

Dated: September 28, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–22920 Filed 10–15–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0030989; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of California Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of California Berkeley has completed an inventory of human remains in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the University of California Berkeley. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the University of California Berkeley at the address in this notice by November 16, 2020.

ADDRESSES: Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of

California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email t.torma@berkeley.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the University of California Berkeley, Berkeley, CA. The human remains were removed from Marin County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the University of California Berkeley professional staff in consultation with representatives of the Federated Indians of Graton Rancheria, California.

History and Description of the Remains

In November 1938, human remains representing, at minimum, one individual were removed from a shell mound near the Point Reyes Coast Guard Station in Marin County, CA, by Lloyd Travis Jr., a well-known biologist. The human remains were put in the collection of Milton Hildebrand, a graduate student at the University of California Berkeley's Museum of Vertebrate Zoology in the 1940's. When Hildebrand went to the University of California Davis to teach in the Zoology Department, he created his own teaching collection for comparative anatomy. In the 1980's, after he retired, Hildebrand gave his collection to the Museum of Vertebrate Zoology. No known individuals were identified. No associated funerary objects are present.

Determinations Made by the University of California Berkeley

Officials of the University of California Berkeley have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Federated Indians of Graton Rancheria, California.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email t.torma@berkeley.edu, by November 16, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Federated Tribes of Graton Rancheria, California may proceed.

The University of California Berkeley is responsible for notifying the Federated Indians of Graton Rancheria, California that this notice has been published.

Dated: September 28, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–22919 Filed 10–15–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0030911;
PPWOCRADNO–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Portland Art Museum, Portland, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Portland Art Museum, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of objects of cultural patrimony. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Portland Art Museum. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with

information in support of the claim to the Portland Art Museum at the address in this notice by November 16, 2020.

ADDRESSES: Kathleen Ash-Milby, Curator of Native American Art, Portland Art Museum, 1219 SW Park Avenue, Portland, OR 97205, telephone (503) 276–4294, email kathleen.ash-milby@pam.org and Donald Urquhart, Director of Collections and Special Exhibitions, Portland Art Museum, 1219 SW Park Avenue, Portland, OR 97205, telephone (503) 276–4354, email donald.urquhart@pam.org.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Portland Art Museum, Portland, OR, that meet the definition of objects of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

Between 1921 and 1944, Axel Rasmussen, Superintendent of Schools first in Wrangell, AK, and later in Skagway, AK, collected Native American art and cultural items primarily from the Tlingit communities he served and from dealers in the region. After his death in 1945, his collection was transferred to art dealer Earl Stendahl in California. This collection was purchased by the Portland Art Museum in 1948.

In 2002, the nine cultural items listed in this notice were claimed by the Central Council of the Tlingit & Haida Indian Tribes on behalf of the Naanya.aayi clan and the Wrangell Cooperative Association. The cultural items belonged to the Naanya.aayi clan and were kept in their clan house (known as the “Shakes House”) under the custody of the hereditary clan leader, Chief Shakes, over multiple generations. The last Chief Shakes, Chief Shakes VII (aka Charlie Jones, died 1944), was installed in 1940. The cultural items have ongoing historical, traditional, and cultural importance that is central to the Tlingit clan structure. They are necessary for the renewal and continued practice of Tlingit religious ceremonies, rituals, and traditions of

their clans and clan leaders. Ownership of the cultural items is shown by clan crests displayed on eight of the cultural items: The mudshark crest on catalog numbers 48.3.419; 48.3.568; 48.3.569; 48.3.715, and the killer whale crest on catalog numbers 48.3.553; 48.422 a, b; 48.3.528; 48.3.544. As they are collectively owned by the Naanya.aayi clan, these cultural items cannot be alienated by any one individual.

The nine cultural items are described as follows:

Items 1–3: X'átgu S'aaxw/Mudshark Hat (catalog number 48.3.419); X'átgu Koodás'/Mudshark shirt (catalog number 48.3.715); Ditlein X'oow/Killer whale Stranded on a Rock, Robe (catalog number 48.3.553). According to Portland Art Museum records, in 1930, Rasmussen obtained the hat and shirt from a family member of Chief Shakes VI who died in 1915, and in 1934, he obtained the robe from another family member in Wrangell. According to oral traditional information presented by the Central Council of the Tlingit & Haida Indian Tribes, these items were removed by Wrangell police after the death of Mrs. Kunk.

Item 4: Keet S'aaxw/Killer whale Hat (catalog number 48.3.422 A, B). According to museum records, on April 23, 1934, Rasmussen obtained the hat from a family member of Chief Shakes VI.

Item 5: Keet kuwool/Killer whale With a Hole (catalog number 48.3.528). According to museum records, this wooden fin was first obtained by Andrew Wanamaker in 1933, and subsequently sold to Rasmussen.

Item 6: Keet Naaxein/Killer whale Flotilla Chilkat Robe (catalog number 48.3.544). Museum records indicate that in 1936, Rasmussen obtained the robe from Esther Johnson Orcutt. Photographic evidence of clan ownership is provided by a 1913 photograph in the collections of the Anchorage Museum of History and Art entitled "Coonk Shakes, Nephew of a Great Chief of Wrangell," in which the robe appears next to other clan property, and a 1900 photograph showing the clan house panel from which the robe design was adopted.

Item 7: X'átgu Koodás'/Mudshark Shirt (catalog number 48.3.568). Museum records indicate that in 1934, Rasmussen obtained the shirt from William James, of Wrangell. According to the Central Council of the Tlingit & Haida Indian Tribes, Mr. James was the son of L'axdujeek, a "tribal" sister of Charlie Jones, aka Chief Shakes VII, and was not from the Naanya.aayi clan.

Item 8: X'átgu Koodás'/Mudshark Shirt with dentalia shell (catalog

number 48.3.569). Museum records indicate that in 1931, Rasmussen obtained the shirt from Charlie Jones, of Wrangell, AK. The 1931 sale occurred before Jones was installed as Chief Shakes (in 1940).

Item 9: Geet Shakee.at/Storm Headdress (catalog number 48.3.435). According to the Central Council of the Tlingit & Haida Indian Tribes, this headdress was captured from the Tsimshian during a battle near the mouth of the Stikine River. Imbued with the words of "spirit songs," it was worn by the ixt' (shaman) in ceremonial dance. Photographs from ca.1890 and 1913 show the headdress in the clan house together with other clan property. Museum records indicate that in 1931, Charlie Jones sold the headdress to Rasmussen.

Determinations Made by the Portland Art Museum:

Officials of the Portland Art Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(D), the nine cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the objects of cultural patrimony and the Naanya.aayi clan, a constituent of the Central Council of the Tlingit & Haida Indian Tribes.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Kathleen Ash-Milby, Curator of Native American Art, Portland Art Museum, 1219 SW Park Avenue, Portland, OR 97205, telephone (503) 276–4294, email kathleen.ash-milby@pam.org and Donald Urquhart, Director of Collections and Special Exhibitions, Portland Art Museum, 1219 SW Park Avenue, Portland, OR 97205, telephone (503) 276–4354, email donald.urquhart@pam.org, by November 16, 2020. After that date, if no additional claimants have come forward, transfer of control of the objects of cultural patrimony to the Central Council of the Tlingit & Haida Indian Tribes may proceed.

The Portland Art Museum is responsible for notifying the Central Council of the Tlingit & Haida Indian Tribes and the Wrangell Cooperative

Association that this notice has been published.

Dated: September 16, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–22921 Filed 10–15–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0030988; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of California Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of California Berkeley has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Office of the Vice Chancellor for Research, University of California Berkeley. If no additional requestors come forward, transfer of control of the human remains to the Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Office of the Vice Chancellor for Research, University of California Berkeley November 16, 2020.

ADDRESSES: Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email t.torma@berkeley.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the

University of California Berkeley, Berkeley, CA. The human remains were removed from a burial cave on the island of Hawaii, HI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the University of California Berkeley NAGPRA Advisory Committee staff in consultation with representatives of the Office of Hawaiian Affairs (OHA). The OHA was established in 1978, through amendments to the Hawaii State Constitution, to achieve self-governance and to represent the lawful interests of Native Hawaiians. Under NAGPRA, the OHA is a Native Hawaiian Organization (NHO).

History and Description of the Remains

In 1905, human remains representing, at minimum, one individual were removed from a burial cave on the island of Hawaii by Annie M. Alexander. The individual is represented by a mandible. Ms. Alexander, who founded the University of California, Berkeley Museum of Vertebrate Zoology, donated the mandible to the museum, where it comprises part of a larger legacy collection. No known individuals were identified. No associated funerary objects are present.

Determinations Made by the University of California Berkeley

Officials of the University of California Berkeley have determined that:

- Pursuant to 25 U.S.C. 3001(10), the human remains described in this notice represent the physical remains of one individual of Native Hawaiian ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native Hawaiian human remains and the Office of Hawaiian Affairs.

Additional Requesters and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and should submit a written request with

information in support of the request to Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720-1500, telephone (510) 672-5388, email t.torma@berkeley.edu, by November 16, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Office of Hawaiian Affairs may proceed.

The University of California Berkeley is responsible for notifying the Office of Hawaiian Affairs that this notice has been published.

Dated: September 28, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020-22918 Filed 10-15-20; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-502 and 731-TA-1227 (Review)]

Steel Concrete Reinforcing Bar From Mexico and Turkey

Determination

On the basis of the record¹ developed in the subject five-year reviews, the United States International Trade Commission ("Commission") determines, pursuant to the Tariff Act of 1930 ("the Act"), that revocation of the countervailing duty order on steel concrete reinforcing bar from Turkey and the antidumping duty order on steel concrete reinforcing bar from Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on October 1, 2019 (84 FR 52126) and determined on January 6, 2020 that it would conduct full reviews (85 FR 5036, January 28, 2020). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 16, 2020 (85 FR 21266). In light of the restrictions on access to the Commission building due to the COVID-19

pandemic, the Commission conducted its hearing through written testimony and video conference on August 6, 2020. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on October 7, 2020. The views of the Commission are contained in USITC Publication 5122 (October 2020), entitled *Steel Concrete Reinforcing Bar from Mexico and Turkey: Investigation Nos. 701-TA-502 and 731-TA-1227 (Review)*.

By order of the Commission.

Dated: October 8, 2020.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2020-22898 Filed 10-15-20; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Justice Programs Office

[OMB Number 1121-0240]

Agency Information Collection Activities; Proposed Collection Comments Requested; Revision of a Currently Approved Collection: 2020 Law Enforcement Administrative and Management Statistics (LEMAS) Survey

AGENCY: Bureau of Justice Statistics, Justice Programs Office, Department of Justice.

ACTION: 30-Day Notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until November 16, 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

¹ The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

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 Bureau of Justice Statistics, 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:* Revision of a currently approved collection: The Law Enforcement Management and Administrative Statistics (LEMAS).

(2) *The Title of the Form/Collection:* 2020 Law Enforcement Management and Administrative Statistics Survey.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number for the questionnaire is CJ-44. The applicable component within the Department of Justice is the Bureau of Justice Statistics, in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Respondents will be general purpose state, county and local law enforcement agencies (LEAs), including local and county police departments, sheriff's offices, and primary state law enforcement agencies. Since 1987, BJS has collected information about the personnel, policies, and practices of law enforcement agencies via the Law Enforcement Management and Administrative Statistics (LEMAS) survey. This core survey, which has been administered every 4 to 6 years, has been used to produce nationally representative estimates on the demographic characteristics of sworn personnel, hiring practices, operations, equipment, technology, and agency

policies and procedures. Items were added since the last 30-day notice (**Federal Register**, Volume 85, Number 102, page 31809, on Wednesday, May 27, 2020) to capture staffing counts and operating budget for 2019 in addition to 2020. Policies and procedures pertaining to Coronavirus (COVID-19) have also been added.

BJS plans to publish this information in reports and reference it when responding to queries from the U.S. Congress, Executive Office of the President, the U.S. Supreme Court, state officials, international organizations, researchers, students, the media, and others interested in criminal justice statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An agency-level survey will be sent to approximately 3,500 LEA respondents. The expected burden placed on these respondents is about 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 8,750 total burden hours associated with this collection.

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 6, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020-22452 Filed 10-15-20; 8:45 am]

BILLING CODE 4410-30-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Longshore and Harbor Workers' Compensation Act Pre-Hearing Statement

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995

(PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before November 16, 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: Anthony May by telephone at 202-693-4129 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

The Office of Workers' Compensation Programs administers the Longshore and Harbor Workers' Compensation Act. The Act provides benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. In addition, several acts extend the Longshore Act's coverage to certain other employees. Title 20, CFR 702.317 provides for the referral of claims under the Longshore Act for formal hearings. This Section provides that before a case is transferred to the Office of Administrative Law Judges the district director shall furnish each of the parties or their representatives with a copy of a prehearing statement form. The form LS-18 is used to refer the case for formal hearing under the Act. Each party shall, within 21 days after receipt of each form, complete it and return it to the district director. Upon receipt of the forms, the district director, after checking them for completeness and after any further conferences that, in his/her opinion, are warranted, shall

transmit them to the Office of the Chief Administrative Law Judge with all available evidence which the parties intend to submit at the hearing. Legal authority for this information collection is found at 33 U.S.C. 939. Regulatory authority is found at 20 CFR 702.317. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 1, 2020 (85 FR 33201).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-OWCP.

Title of Collection: Longshore and Harbor Workers' Compensation Act Pre-Hearing Statement.

OMB Control Number: 1240-0036.

Affected Public: Individuals and households.

Total Estimated Number of Respondents: 3,800.

Total Estimated Number of Responses: 3,800.

Total Estimated Annual Time Burden: 646 hours.

Total Estimated Annual Other Costs Burden: \$1,102.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: October 9, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020-22937 Filed 10-15-20; 8:45 am]

BILLING CODE 4510-CN-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Claim for Continuance of Compensation

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before November 16, 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:

Anthony May by telephone at 202-693-4129 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

The Office of Workers' Compensation Programs administers the Federal Employees' Compensation Act, 5 U.S.C. 8133. Under the Act, eligible dependents of deceased employees receive compensation benefits on account of the employee's death. OWCP has to monitor death benefits for current marital status, potential for dual benefits, and other criteria for qualifying as a dependent under the law. The CA-12 form is sent annually to beneficiaries in death cases to ensure that their status has not changed and that they remain entitled to benefits. The information collected is used by OWCP claims examiners to ensure that death benefits being paid are correct, and that payments are not made to ineligible survivors. For additional substantive information about this ICR, see the

related notice published in the **Federal Register** on May 28, 2020 (85 FR 32054).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-OWCP.

Title of Collection: Claim for Continuance of Compensation.

OMB Control Number: 1240-0015.

Affected Public: Individuals and households.

Total Estimated Number of Respondents: 2,866.

Total Estimated Number of Responses: 2,866.

Total Estimated Annual Time Burden: 239 hours.

Total Estimated Annual Other Costs Burden: \$1,562.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: October 9, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020-22935 Filed 10-15-20; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Rock Burst Control Plan, (Pertains to Underground Metal/Nonmetal Mines)

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995

(PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before November 16, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Anthony May by telephone at 202-693-4129 (this is not a toll-free number), or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Section 101(a), 30 U.S.C. 811(a), allows MSHA to promulgate standards that would require operators to make and retain records from which MSHA would then collect information. Section 103(h), 30 U.S.C. 813(h), of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Title 30 CFR 57.3461 requires operators of underground metal and nonmetal mines to develop and implement a rock burst control plan within 90 days after a rock burst has been experienced. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 12, 2020 (85 FR 28038).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of

law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-MSHA.

Title of Collection: Rock Burst Control Plan, (Pertains to Underground Metal/Nonmetal Mines).

OMB Control Number: 1219-0097.

Affected Public: Private Sector:

Businesses or other for-profits.

Total Estimated Number of Respondents: 1.

Total Estimated Number of Responses: 1.

Total Estimated Annual Time Burden: 12.

Total Estimated Annual Other Costs Burden: \$0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: October 9, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020-22936 Filed 10-15-20; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2011-0062]

Powered Industrial Trucks Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Powered Industrial Trucks Standard. The information collection requirements address truck design, construction and modification, as well as certification of training and evaluation for truck operators.

DATES: Comments must be submitted (postmarked, sent, or received) by December 15, 2020.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2011-0062, U.S. Department of Labor, Occupational Safety and Health Administration, Room N-3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET. Please note: While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID-19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA-2011-0062) for the Information Collection Request (ICR). All comments, including any personal information you provide, such as social security number and date of birth, are placed in the public docket without change, and may be made available online at <http://www.regulations.gov>. For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance,

OSHA, U.S. Department of Labor; telephone (202) 693-2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Paragraph (a)(4) of the Powered Industrial Trucks Standard requires employers to obtain the manufacturer's written approval before modifying a truck in a manner that affects the capacity and safe operation; if the manufacturer grants such approval, the employer must revise capacity, operation, and maintenance instruction plates, tags, and decals accordingly. For front-end attachments not installed by the manufacturer, paragraph (a)(5) mandates that employers provide a marker on the trucks that identifies the attachment, as well as the weight of both the truck and the attachment when the attachment is at maximum elevation with a laterally centered load. Paragraph (a)(6) specifies that employers must ensure that the markers required by paragraphs (a)(3) through (a)(5) remain affixed to the trucks and are legible.

Paragraphs (1)(4) and (1)(6) of the Standard contain the paperwork requirements necessary to certify the evaluation and training provided to powered industrial truck operators. Accordingly, these paragraphs specify the following requirements for employers.

- Paragraph (1)(4)(iii)—evaluate each operator's performance at least once every three years.

- Paragraph (1)(6)—Certify that each operator meets the training and evaluation requirements specified by paragraph (1). This certification must include the operator's name, the training date, the evaluation date, and the identity of the individual(s) who performed the training and evaluation.

Requiring labels (markings) on modified equipment notifies workers of the conditions under which they can safely operate powered industrial trucks, thereby preventing such hazards as fires and explosions caused by poorly designed electrical systems, rollovers/tipovers that result from exceeding a truck's stability characteristics, and falling loads that occur when loads exceed the lifting capacities of attachments. Certification of worker training and evaluation provides a means of informing employers that their workers received the training and demonstrated the performance necessary to operate a truck within the capacity and control limitations. By ensuring that workers operate only trucks that are in proper working order, and do so safely, employers prevent possible severe injury or death of truck operators and other workers who are in the vicinity of the trucks. Finally, these paperwork requirements are the most efficient means for an OSHA compliance officer to determine that an employer properly notified workers about the design and construction of, and modifications made to, the trucks they are operating, and that an employer provided them with the required training.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is proposing to increase the existing burden hour estimate of the

collection of information requirements specified by the Standard. In this regard, the agency is proposing to increase the current burden hour estimate from 427,866 hours to 450,023 hours, a total increase of 22,257 hours. An increase in the number of powered industrial truck operators from 1,210,679 to 1,276,055 resulted in this increase. The agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Powered Industrial Trucks (29 CFR 1910.178).

OMB Control Number: 1218-0242.

Affected Public: Business or other for-profits.

Number of Respondents: 1,276,055.

Number of Responses: 2,526,588.

Frequency of Responses: On occasion; annually; triennially.

Average Time per Response: Ranges from two minutes to mark an approved truck to 30 minutes to perform an evaluation.

Estimated Total Burden Hours: 450,023.

Estimated Cost (Operation and Maintenance): \$256,626.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other materials must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA-2011-0062). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so that the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627).

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on October 9, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020–22884 Filed 10–15–20; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Request: Evaluation of the Reopening Archives, Libraries, and Museums (REALM) Project

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork

Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this notice is to solicit comments concerning a plan to conduct a research study entitled "Evaluation of the Reopening Archives, Libraries, and Museums (REALM) Project". A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before December 11, 2020.

ADDRESSES: Send comments to Connie Bodner, Ph.D., Director, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, by email at cbodner@imls.gov, or by teletype (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

FOR FURTHER INFORMATION CONTACT: Marvin Carr, Ph.D., Senior Advisor, Office of Digital and Information Strategy, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Dr. Carr can be reached by telephone at 202–653–4752, by email at mcarr@imls.gov, or by teletype (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; 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 submissions of responses.

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit www.imls.gov.

II. Current Actions

The Institute of Museum and Library Services (IMLS) is proposing an evaluation of the Reopening Archives, Libraries, and Museums (REALM) Project. The REALM Project convenes individuals from Institute of Museum and Library Services (IMLS), OCLC Inc. (OCLC), Battelle, and several key actors in the libraries, archives, and museums (LAM) field to bring their expertise and on-the-ground experience together to develop science-based information about how materials can be handled to mitigate COVID–19 exposure to staff and visitors of LAM institutions as COVID–19 restrictions begin lifting across the country. This project extends the guidance available from the Centers for Disease Control and Prevention (CDC) by providing information that is specifically relevant to LAM institutions.

Given that LAM institutions work with physical materials that are often circulated among the public, LAM institutions have unique concerns about how they can optimize their operations while minimizing the potential for spreading the Coronavirus. This evaluation will be focused on understanding the extent to which the professionals from LAM institutions have found that the REALM Project's research test results and toolkit resources have met their needs. Data will be collected through a survey of organizations that have used the test results and toolkit developed by the REALM project.

Agency: Institute of Museum and Library Services.

Title: Evaluation of the Reopening Archives, Libraries, and Museums Project.

OMB Number: 3137–NEW.

Agency Number: 3137.

Respondents/Affected Public: Staff from library, archive, and museum sectors.

Total Estimated Number of Respondents: TBD.

Frequency of Response: Once.
Average Minutes per Response: TBD.
Total Estimated Number of Annual Burden Hours: TBD.

Total Annualized Capital/Startup Costs: n/a.

Cost Burden: TBD.

Public Comments Invited: Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: October 13, 2020.

Kim Miller,

*Senior Grants Management Specialist,
 Institute of Museum and Library Services.*

[FR Doc. 2020-22957 Filed 10-15-20; 8:45 am]

BILLING CODE 7036-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2020-0210]

Information Collection: NRC Form 64, "Travel Voucher" (Part 1); NRC Form 64A, "Travel Voucher" (Part 2)

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, NRC Form 64, "Travel Voucher" (Part 1); NRC Form 64A, "Travel Voucher" (Part 2).

DATES: Submit comments by December 15, 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-2020-0210. 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-2020-0210 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-2020-0210. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC-2020-0210 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. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML20261H559. The supporting statement is available in ADAMS under Accession No. ML20253A173.

- *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-2020-0210 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 64, "Travel Voucher" (Part 1); NRC Form 64A, "Travel Voucher" (Part 2).
2. *OMB approval number:* 3150-0192.
3. *Type of submission:* Revision.
4. *The form number, if applicable:* NRC Form 64 and 64A.
5. *How often the collection is required or requested:* On occasion, to apply for reimbursement for travel.
6. *Who will be required or asked to respond:* Agreement State personnel, State Liaison Officers, and Tribal representatives traveling in the course of conducting business with the NRC. Travelers conduct reviews and inspections and attend NRC-sponsored training.
7. *The estimated number of annual responses:* 500.
8. *The estimated number of annual respondents:* 500.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 500.

10. *Abstract:* Agreement State personnel traveling to participate in NRC-sponsored training, participate with the NRC Integrated Materials Performance Evaluation Program, and other business with the NRC, must file travel vouchers on NRC Form 64 and 64A in order to be reimbursed for their travel expenses. The information collected includes the name, address, the amount to be reimbursed and the traveler's signature. Travel expenses that are reimbursed are confined to those expenses essential to the

transaction of official business for an approved trip.

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 9, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020-22896 Filed 10-15-20; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-454, 50-455, 50-298, 50-275, 50-323, 50-237, 50-249, 50-341, 50-166, 50-277, 50-278, 50-440, 50-280, 50-281, 50-387, 50-388; NRC-2020-0110]

Issuance of Multiple Exemptions in Response to COVID-19 Public Health Emergency

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemptions; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued 10 exemptions in response to requests from 8 licensees. The exemptions afford these licensees temporary relief from certain requirements under NRC regulations. The exemptions are in response to the licensees' requests for relief due to the coronavirus disease 2019 (COVID-19) public health emergency (PHE). The NRC is issuing a single notice to announce the issuance of the exemptions.

DATES: During the period from September 3, 2020, to September 28, 2020, the NRC granted ten exemptions in response to requests submitted by licensees from June 16, 2020, to September 14, 2020.

ADDRESSES: Please refer to Docket ID NRC-2020-0110 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-2020-0110. Address questions about NRC Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: Jennifer.Borges@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov.

For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section.

FOR FURTHER INFORMATION CONTACT:

James Danna, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-7422, email: James.Danna@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

During the period from September 3, 2020, to September 28, 2020, the NRC granted 10 exemptions in response to requests submitted by licensees from June 16, 2020, to September 14, 2020. These exemptions temporarily allow the licensees to deviate from certain requirements (as cited below) of various parts of chapter I of title 10 of the *Code of Federal Regulations* (10 CFR Ch. I).

The exemptions from certain requirements of 10 CFR part 26, "Fitness for Duty Programs," for Exelon Generation Company, LLC (for Byron Station, Unit Nos. 1 and 2; Dresden Nuclear Power Station, Units 2 and 3; and Peach Bottom Atomic Power Station, Units 2 and 3), afford the licensee temporary relief from the work-hour controls under 10 CFR 26.205(d)(1) through (d)(7). The exemptions from 10 CFR 26.205(d)(1) through (d)(7) ensure that the control of work hours and management of worker fatigue do not unduly limit licensee flexibility in using personnel resources to most effectively manage the impacts of the COVID-19 PHE on maintaining the safe operation of these facilities. Specifically, the

licensee stated that its staffing levels are affected or are expected to be affected by the COVID-19 PHE, and it can no longer meet or likely will not meet the work-hour controls of 10 CFR 26.205(d)(1) through (d)(7). The licensee has committed to effecting site-specific administrative controls for COVID-19 PHE fatigue-management for personnel specified in 10 CFR 26.4(a).

The exemptions from certain requirements of 10 CFR part 50, appendix E, "Emergency Planning and Preparedness for Production and Utilization Facilities," section IV.F., "Training," for Energy Harbor Nuclear Corp. (for Perry Nuclear Power Plant, Unit No. 1); Pacific Gas and Electric Company (for Diablo Canyon Nuclear Power Plant, Units 1 and 2); and Nebraska Public Power District (for Cooper Nuclear Station) to grant temporary exemptions from the biennial emergency preparedness (EP) exercise requirement. The exemptions allow a temporary exemption from the requirements of 10 CFR part 50, appendix E, regarding the conduct of the biennial emergency preparedness exercise. These exemptions will not adversely affect the emergency response capability of the facilities because affected licensee personnel are currently qualified, and the licensees' proposed compensatory measures will enable their staff to maintain their knowledge, skills, and abilities without the conduct of the biennial emergency preparedness exercise during the exemption term.

The exemption from certain requirements of 10 CFR part 55, "Operators' Licenses," for University of Maryland (for Maryland University Training Reactor) affords the licensee a temporary exemption from requirements related to completion of biennial medical examinations of licensing operators and senior operators (under 10 CFR 55.21 and 10 CFR 55.53(i)). This licensee has committed to compensatory measures to address the delay in receipt of recommendations from a licensed physician concerning its licensed operator's health.

The exemptions from certain requirements of 10 CFR part 73 for DTE Electric Company (for Fermi-2), Susquehanna Nuclear, LLC (for Susquehanna Steam Electric Station, Units 1 and 2), and Virginia Electric and Power Company (for Surry Power Station, Unit Nos. 1 and 2), afford these licensees temporary exemptions from certain requirements of 10 CFR part 73, appendix B, "General Criteria for Security Personnel," section VI. The exemptions will help to ensure that these regulatory requirements do not unduly limit licensee flexibility in using

personnel resources in a manner that most effectively manages the impacts of the COVID-19 PHE on maintaining the safe and secure operation of these facilities and the implementation of the licensees' NRC-approved security plans, protective strategy, and implementing procedures. These licensees have committed to certain security measures to ensure response readiness and for their security personnel to maintain performance capability.

The NRC is providing compiled tables of exemptions using a single **Federal**

Register notice for COVID-19-related exemptions instead of issuing individual **Federal Register** notices for each exemption. The compiled tables below provide transparency regarding the number and type of exemptions the NRC has issued. Additionally, the NRC publishes tables of approved regulatory actions related to the COVID-19 PHE on its public website at <https://www.nrc.gov/about-nrc/covid-19/reactors/licensing-actions.html>.

II. Availability of Documents

The tables below provide the facility name, docket number, document description, and ADAMS accession number for each exemption issued. Additional details on each exemption issued, including the exemption request submitted by the respective licensee and the NRC's decision, are provided in each exemption approval listed in the tables below. For additional directions on accessing information in ADAMS, see the **ADDRESSES** section of this document.

Document description	ADAMS Accession No.
Byron Station, Unit Nos. 1 and 2 Docket Nos. 50-454 and 50-455	
Byron Station, Unit Nos. 1 and 2—COVID-19 related request for exemption from 10 CFR part 26 work hours requirements, dated September 3, 2020.	ML20248H361.
Byron Station, Unit Nos. 1 and 2—exemption from select requirements of 10 CFR part 26 (EPID L-2020-LLE-0139 [COVID-19]), dated September 16, 2020.	ML20253A062.
Cooper Nuclear Station Docket No. 50-298	
Cooper Nuclear Station—temporary exemption request from 10 CFR part 50, appendix E, biennial emergency preparedness exercise requirements due to COVID-19 pandemic, dated June 16, 2020.	ML20191A276.
Cooper Nuclear Station—exemption from biennial emergency preparedness exercise requirements of 10 CFR part 50, appendix E, "Emergency Planning and Preparedness for Production and Utilization Facilities," section IV.F (EPID L-2020-LLE-0102 [COVID-19]), dated September 3, 2020.	ML20203M129.
Diablo Canyon Nuclear Power Plant, Units 1 and 2 Docket Nos. 50-275 and 50-323	
Diablo Canyon Nuclear Power Plant, Units 1 and 2—temporary exemption request from 10 CFR part 50, appendix E, biennial emergency preparedness exercise requirements due to COVID-19 pandemic, dated July 9, 2020.	ML20191A204.
Diablo Canyon Nuclear Power Plant, Units 1 and 2—temporary exemption from biennial emergency preparedness exercise frequency requirements of 10 CFR part 50, appendix E, sections IV.F.2.b and IV.F.2.c (EPID L-2020-LLE-0111 [COVID-19]), dated September 18, 2020.	ML20247J651.
Dresden Nuclear Power Station, Units 2 and 3 Docket Nos. 50-237 and 50-249	
Dresden Nuclear Power Station, Units 2 and 3—COVID-19 related request for exemption from 10 CFR part 26 work hours requirements, dated September 14, 2020.	ML20259A116.
Dresden Nuclear Power Station, Units 2 and 3—exemption from select requirements of 10 CFR part 26 (EPID L-2020-LLE-0143 [COVID-19]), dated September 28, 2020.	ML20259A492.
Fermi-2 Docket No. 50-341	
Fermi-2—request for exemption from the annual force-on-force training requirements of 10 CFR part 73, appendix B, section VI, due to the COVID-19 PHE, dated August 6, 2020.	non-public, withheld pursuant to 10 CFR 2.390.
Fermi-2—temporary exemption from the annual force-on-force training requirements of 10 CFR part 73, appendix B, "General Criteria for Security Personnel," section VI (EPID L-2020-LLE-0128) [COVID-19], dated September 10, 2020.	ML20226A116.
Maryland University Training Reactor Docket No. 50-166	
Maryland University Training Reactor (R-070)—request for exemption from the medical examination requirements of 10 CFR 55.21 and 10 CFR 55.53(i) for a reactor operator—REDACTED, dated August 24, 2020.	ML20241A176.
Maryland University Training Reactor (R-070)—additional information regarding the request for exemption from the medical examination requirements of 10 CFR 55.21 and 10 CFR 55.53(i) for a reactor operator submitted on August 24, 2020, dated September 2, 2020.	ML20247J390.
University of Maryland—approval of exemption from select requirements of 10 CFR part 55, "Operators' Licenses," dated September 15, 2020.	ML20241A179.

Document description	ADAMS Accession No.
Peach Bottom Atomic Power Station, Units 2 and 3 Docket Nos. 50–277 and 50–278	
Peach Bottom Atomic Power Station, Units 2 and 3—COVID–19 related request for exemption from 10 CFR part 26 work hours requirements, dated August 28, 2020.	ML20241A078.
Peach Bottom Atomic Power Station, Units 2 and 3—exemption from select requirements of 10 CFR part 26 (EPID L–2020–LLE–0138), dated September 10, 2020.	ML20247J620.
Perry Nuclear Power Plant, Unit No. 1 Docket No. 50–440	
Perry Nuclear Power Plant, Unit No. 1—request for one-time exemption from 10 CFR part 50, appendix E, biennial emergency preparedness exercise requirements due to COVID–19 pandemic, dated August 3, 2020.	ML20216A258.
Perry Nuclear Power Plant, Unit No. 1—one-time exemption from biennial emergency preparedness exercise requirements of 10 CFR part 50, appendix E, “Emergency Planning and Preparedness for Production and Utilization Facilities,” section IV.F (EPID L–2020–LLE–0125 [COVID 19]), dated September 11, 2020.	ML20246G054.
Surry Power Station, Unit Nos. 1 and 2 Docket Nos. 50–280 and 50–281	
Surry Power Station, Unit Nos. 1 and 2—request for exemption from select requirements of 10 CFR part 73, appendix B, section VI, dated August 20, 2020.	non-public, withheld pursuant to 10 CFR 2.390.
Surry Power Station, Unit Nos. 1 and 2—temporary exemption from certain requirements of 10 CFR part 73, appendix B, “General Criteria for Security Personnel,” section VI (EPID L–2020–LLE–0137 [COVID–19]), dated September 16, 2020.	ML20241A000.
Susquehanna Steam Electric Station, Units 1 and 2 Docket No. 50–387 and 50–388	
Susquehanna Steam Electric Station, Units 1 and 2—request for exemption from 10 CFR part 73, appendix B, section VI, during the COVID–19 PHE, dated August 18, 2020.	non-public, withheld pursuant to 10 CFR 2.390.
Susquehanna Steam Electric Station, Units 1 and 2—exemption request from certain requirements of 10 CFR part 73, appendix B, “General Criteria for Security Personnel” (EPID L–2020–LLE–0094 [COVID–19]), dated September 22, 2020.	ML20232C272.

Dated: October 13, 2020.

For the Nuclear Regulatory Commission.

James G. Danna,

*Chief, Plant Licensing Branch I, Division of
Operating Reactor Licensing, Office of
Nuclear Reactor Regulation.*

[FR Doc. 2020–22970 Filed 10–15–20; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90141; File No. SR–LTSE–
2020–19]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Continue Suspending the Application of Order Price Collars in Rule 11.190(f)(1) Until December 8, 2020

October 8, 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 October 7, 2020, Long-Term Stock Exchange,

Inc. (“LTSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

LTSE proposes to continue suspending until December 8, 2020, the provisions of Rule 11.190(f)(1) pending further systems development work.

The text of the proposed rule change is available at the Exchange’s website at <https://longtermstockexchange.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement on the Purpose of, and the Statutory Basis for, the Proposed Rule Change³

1. Purpose

LTSE Rule 11.190(f)(1) prevents an incoming order or order resting on the Order Book, including those marked ISO, from executing at a price outside the Order Collar price range (*i.e.*, prevents buy orders from trading at prices above the collar and prevents sell orders from trading at prices below the collar). The Order Collar price range is calculated using the numerical guidelines for clearly erroneous executions (“CEE”).⁴ Under Rule 11.190(f)(1), executions are permitted at

³ Unless otherwise defined, capitalized terms are used herein as defined in the LTSE Rulebook.

⁴ See LTSE Rule 11.270(f)(1)(D).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

prices within the Order Collar price range, inclusive of the boundaries. Thus, Rule 11.190(f)(1) seeks to prevent an execution that would otherwise be handled under the CEE procedures.

The Exchange became operational on August 28, 2020.⁵ However, the automated processes to set the Order Collar price range pursuant to Rule 11.190(f)(1) were not yet fully operational at that time, and the Exchange temporarily suspended Rule 11.190(f)(1) until October 8, 2020.⁶ It is anticipated that the automated processes will still not be fully operational on October 8, 2020. Therefore, to ensure the Exchange operates in conformity with its Rule Book, the Exchange proposes to continue suspending Rule 11.190(f)(1) until December 8, 2020, pending further systems development work. The Exchange will continue to work diligently to finalize the implementation of the Order Collar price range as described in Rule 11.190(f)(1). The Exchange previously issued a Regulatory Information Circular alerting its Members of the prior delay until October 8, 2020,⁷ and will promptly issue a new Regulatory Information Circular regarding the continued suspension of Rule 11.190(f)(1).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system

and, in general, to protect investors and the public interest.

The Order Collar provisions of Rule 11.190(f)(1) are a prophylactic measure to prevent trade executions outside of certain price bands. The Exchange has in effect other provisions to address trade executions at prices outside of these price bands, such as Rule 11.270 (Clearly Erroneous Executions). Additionally, Rule 11.281 (Limit-Up Limit-Down) prevents trades in NMS Stocks from occurring outside specified price bands.¹⁰ The Exchange further notes that other national securities exchanges operate without order price collars during their regular, continuous market trading sessions.¹¹

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue, but rather would provide the public and market participants with clarity and certainty regarding the operations of the Exchange. Additionally, the proposed rule change would not be an inappropriate burden on intramarket competition as it would be applied equally to all Members. It also is not a burden on intermarket competition as other exchange similarly operate without order price collars.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁴ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹⁵ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. According to the Exchange, waiver of the 30-day operative delay will allow the suspension to remain in effect while the Exchange continues to pursue the necessary systems development work. The Exchange notes that operations of the Exchange will not change and Members are aware¹⁶ and will continue to be aware that the Order Collar functionality is currently not being deployed. The Exchange believes that the proposed rule change does not significantly affect the protection of investors or the public interest or impose a significant burden on competition because it is designed to continue the suspension of a prophylactic rule and that the proposed rule change does not impose any burden on Members or market participants. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as doing so will ensure that the rule change becomes operative before the date that the existing temporary suspension of Rule 11.190(f)(1) expires. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.¹⁷

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

⁵ See *LTSE Production Securities Phase-In Set for Friday, August 28*, LTSE (August 24, 2020), available at https://assets.ctfassets.net/cchj2z2dcfyd/4U13ygPsrihSz4lPqNBThu/56a54c087891a5aa20152398bdb51cea/MA-2020-022_Reminder_Production_Securities_Launching_August_28_-_Google_Docs.pdf.

⁶ See Securities Exchange Act Release No. 89766 (September 3, 2020), 85 FR 55872 (September 10, 2020) (File No. SR-LTSE-2020-15). LTSE previously suspended Rule 11.190(f)(1) until September 8, 2020. See Securities Exchange Act Release No. 89710, (August 28, 2020), 85 FR 55052 (September 3, 2020) (File No. SR-LTSE-2020-14).

⁷ See *Notice of Rule Filing to Continue Suspending the Application of Rule 11.190(f)(1) Until October 8, 2020*, LTSE (September 8, 2020), available at https://assets.ctfassets.net/cchj2z2dcfyd/m7BwE3CzkQ0CdjFe6VNq/0dd30317270d951116253a4d301036cf/RIC-2020-08_.pdf.

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ Rule 11.281 was adopted under the LULD Plan, see Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019), and is designed to prevent trades in NMS Stocks from occurring outside specified price bands, which are set at a percentage level above and below the average reference price of a security over the preceding five-minute period.

¹¹ See, e.g., MEMX Rulebook (8.17.20), available at <https://info.memxtrading.com/wp-content/uploads/2020/08/MEMX-Rulebook-8.17.20.pdf>; Rulebook—The Nasdaq Stock Market, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules> (last accessed September 3, 2020).

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five business day notification requirement for this proposed rule change.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ See *supra* note 6.

¹⁷ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-LTSE-2020-19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-LTSE-2020-19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-LTSE-2020-19 and should be submitted on or before November 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-22734 Filed 10-15-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90142; File No. SR-CboeEDGX-2020-046]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

October 8, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 1, 2020, Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") 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

Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to amend the fee schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule applicable to its equities trading platform ("EDGX Equities"), effective October 1, 2020.

The Exchange first notes that it operates 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 is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,³ no single registered equities exchange has more than 19% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a "Maker-Taker" model whereby it pays credits to members that provide liquidity and assesses fees to those that remove liquidity. The Exchange's fee schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders priced at or above \$1.00, the Exchange provides a standard rebate of \$0.0017 per share for orders that add liquidity and assesses a fee of \$0.0027 per share for orders that remove liquidity. For orders priced below \$1.00, the Exchange a standard rebate of \$0.00003 [sic] per

¹⁸ 17 CFR 200.30-3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (September 28, 2020), available at https://markets.cboe.com/us/equities/market_statistics/.

share for orders that add liquidity and assesses a fee of 0.30% of Dollar Value for orders that remove liquidity.

With respect to Displayed orders priced at or above \$1.00 that add liquidity, the Exchange proposes to reduce the standard per share rebate from \$0.0017 to \$0.0016 per share and proposes to reflect this change in the Fee Codes and Associated Fee where applicable (*i.e.*, corresponding to fee codes 3, 4, B, V, and Y). The Exchange notes that although this proposed standard rebate for liquidity adding orders is lower than the current standard rebate for such orders, the proposed rebate is in line with similar rebates for liquidity adding orders in place on other exchanges.⁴

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,⁵ in general, and furthers the objectives of Section 6(b)(4),⁶ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members, issuers and other persons using its facilities. The Exchange operates 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 proposed rule changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

The Exchange believes the proposal to reduce the rebate for displayed orders that add liquidity is reasonable, equitable and not unfairly discriminatory because Members will still receive a rebate for such orders, albeit at a slightly lower amount. Moreover, the Exchange notes that the proposed standard rebate is still in line with rebates provided by other equities exchanges on orders that add liquidity and are priced at or above \$1.00.⁷ Additionally, as noted above, the Exchange operates in highly competitive market. The Exchange is only one of several equity venues to which market

participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange lastly believes the proposed change is equitable and not unfairly discriminatory because it applies equally to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies to all displayed liquidity adding orders in securities at or above \$1.00 equally, and thus applies to all Members equally. Additionally, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purpose of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other equities exchanges and off-exchange venues and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 19% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies." The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of

where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . .". Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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) of the Act⁸ and paragraph (f) of Rule 19b-4⁹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2020-046 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.

⁴ See NYSE Price List 2020, "Transactions in stocks with a per share stock price of \$1.00" or more, which provides a standard rebate of \$0.0012 per share for displayed liquidity adding orders.

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4).

⁷ See NYSE Price List 2020, "Transactions in stocks with a per share stock price of \$1.00" or more, which provides a standard credit of \$0.0012 per share for displayed liquidity adding orders.

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR–CboeEDGX–2020–046. 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–CboeEDGX–2020–046, and should be submitted on or before November 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020–22735 Filed 10–15–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90139; File No. SR–OCC–2020–012]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Concerning The Options Clearing Corporation's Synthetic Futures Model

October 8, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),¹ and Rule

19b–4 thereunder,² notice is hereby given that on September 30, 2020, the Options Clearing Corporation (“OCC”) 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 primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)³ of the Exchange Act and Rule 19b–4(f)(4)(ii)⁴ thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

OCC is filing a proposed rule change to expand the use of an existing OCC margin model. The proposed changes to OCC's Margins Methodology are contained in confidential Exhibit 5 of filing SR–OCC–2020–012. Material proposed to be added to the Margins Methodology as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.⁵

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Background

On May 15, 2019, the Commission issued a Notice of No Objection to an advance notice filing by OCC to adopt an enhanced model for Volatility Index

Futures.⁶ On May 16, 2019, the Commission approved a proposed rule change by OCC concerning the same changes.⁷ The model enhancements included: (1) The daily re-estimation of prices and correlations using “synthetic” futures;⁸ (2) an enhanced statistical distribution for modeling price returns for synthetic futures (*i.e.*, an asymmetric Normal Reciprocal Inverse Gaussian (or “NRIG”) distribution); and (3) a new anti-procyclical floor for variance estimates. The main feature of the enhanced model was the replacement of the use of the underlying index itself as a risk factor⁹ (*e.g.*, the VIX) with risk factors that are based on observed futures prices (*i.e.*, the “synthetic” futures contracts). These risk factors are then used in the generation of Monte Carlo scenarios for the futures by using volatility and correlations obtained from the existing simulation models in OCC's proprietary margin system, the System for Theoretical Analysis and Numerical Simulations (“STANS”).¹⁰ Additionally, the model has the ability to accommodate negative prices and interest rates.

On July 10, 2020, OCC filed a proposed rule change to expand the use of the model, currently known as the “Synthetic Futures Model,” to Cboe's AMERIBOR Futures.¹¹ OCC now proposes to expand the use of the Synthetic Futures Model to certain

⁶ See Securities Exchange Act Release No. 85870 (May 15, 2019), 84 FR 23096 (May 21, 2019) (SR–OCC–2019–801). Certain indices are designed to measure the volatility implied by the prices of options on a particular reference index or asset (“Volatility Indexes”). For example, the Cboe Volatility Index (“VIX”) is designed to measure the 30-day expected volatility of the Standard & Poor's 500 index (“SPX”). OCC clears futures contracts on Volatility Indexes. These futures contracts are referred to herein as “Volatility Index Futures.”

⁷ See Securities Exchange Act Release No. 85873 (May 16, 2019), 84 FR 23620 (May 16, 2019) (SR–OCC–2019–002).

⁸ A “synthetic” futures time series, for the intended purposes of OCC, relates to a uniform substitute for a time series of daily settlement prices for actual futures contracts, which persists over many expiration cycles and thus can be used as a basis for econometric analysis.

⁹ A “risk factor” within OCC's margin system may be defined as a product or attribute whose historical data is used to estimate and simulate the risk for an associated product.

¹⁰ See Securities Exchange Act Release No. 53322 (February 15, 2006), 71 FR 9403 (February 23, 2006) (SR–OCC–2004–20). A detailed description of the STANS methodology is available at <http://optionsclearing.com/risk-management/margins/>.

¹¹ See Securities Exchange Act Release No. 89392 (July 24, 2020), 85 FR 45938 (July 30, 2020) (SR–OCC–2020–007). AMERIBOR Futures are futures on the American Interbank Offered Rate disseminated by the American Financial Exchange, LLC, which is a transactions-based interest rate benchmark that represents market-based borrowing costs (<http://www.cboe.com/products/futures/ameribor-futures>).

¹⁰ 17 CFR 200.30–3(a)(12).

¹¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b–4(f)(4)(ii).

⁵ OCC's By-Laws and Rules can be found on OCC's public website: <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

products planned to be listed by Small Exchange Inc. ("Small").

Proposed Changes

On December 6, 2019, OCC filed a proposed rule change to execute an Agreement for Clearing and Settlement Services between OCC and Small in connection with Small's intention to operate as a designated contract market regulated by the Commodity Futures Trading Commission.¹² Small plans to launch new futures products linked to indexes comprised of continuous yields based on the most recently issued (*i.e.*, "on-the-run") U.S. Treasury notes ("Small Treasury Yield Index Futures").¹³ OCC proposes to extend the use of its Synthetic Futures Model to these Small Treasury Yield Index Futures.

The Synthetic Futures model maps the price risk factor of a traded futures product to a synthetic time series constructed from the traded prices of similar tenor futures in history. This allows the model to capture differences in volatility of futures across the term structure. Such differences in volatility are exhibited for futures products whose underlying deliverable is linked to a different tenor of a market observable risk factor such as interest rates or volatility. The initial Small Treasury Yield Futures will be based on the underlying yield of the on-the-run 10 year U.S. Treasury notes and hence the volatility of the future will depend on the volatility of the forward value of the on-the-run treasury yield at future expiry. As a result, OCC believes that the Synthetic Futures Model would provide more appropriate margin coverage for Small Treasury Yield Index Futures than other models in OCC's inventory.¹⁴

OCC proposes to make certain modifications to its Margins Methodology to implement the proposed change. Specifically, the Margins Methodology would be revised to clarify that certain products with limited price history, such as the Small Treasury Yield Index Futures, may use proxy data to generate price scenarios for the synthetic futures. In addition, OCC would revise the Margins Methodology to note that for Small

Treasury Yield Index Futures, OCC would use a fixed NRIg asymmetry parameter, which OCC believes is better suited to the risk profile of the product as the asymmetry of returns is primarily on the left-tail (or negative returns) and already captured by the GARCH model specifications. Consistent with the original implementation of the Synthetic Futures Model, the Small Treasury Yield Index Futures will also use proportional returns in the calibration. Finally, the Margins Methodology would also be revised to note that OCC would initially use a fixed scale factor for purposes of determining the long-run variance floor until sufficient data for the Small Treasury Yield Index Futures is available for this scale factor to be calibrated on a regular basis. The scale factor setting will be reviewed periodically based on the futures data and adjusted, if appropriate.

(2) Statutory Basis

OCC believes the proposed rule change is consistent with Section 17A of the Act¹⁵ and the rules thereunder applicable to OCC. Section 17A(b)(3)(F) of the Act¹⁶ requires, in part, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of derivative agreements, contracts, and transactions. The proposed rule change would make minor changes to OCC's Margins Methodology so that the Synthetic Futures Model can be used to model Small Treasury Yield Index Futures. OCC believes the Synthetic Futures Model may provide better margin coverage for these products than other margin models maintained by OCC. OCC uses the margin it collects from a defaulting Clearing Member to protect other Clearing Members from losses as a result of the default and ensure that OCC is able to continue the prompt and accurate clearance and settlement of its cleared products. OCC therefore believes that the proposed rule change is designed to promote the prompt and accurate clearance and settlement derivatives transactions in accordance with Section 17A(b)(3)(F) of the Act.¹⁷

Exchange Act Rules 17Ad-22(e)(6)(i), (iii), and (v)¹⁸ further require that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system

that, among other things: (1) Considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market; (2) calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default; and (3) uses an appropriate method for measuring credit exposure that accounts for relevant product risk factors and portfolio effects across products. OCC believes that using the Synthetic Futures Model for Small Treasury Yield Index Futures would produce margin levels commensurate with the risks and particular attributes of product in question, generate margin requirements to cover OCC's potential future exposure to its participants, and appropriately take into account relevant product risk factors for Small Treasury Yield Index Futures.¹⁹ In this way, OCC believes the proposed rule change is consistent with the requirements of Rules 17Ad-22(e)(6)(i), (iii), and (v).²⁰

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act²¹ requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. The Synthetic Futures Model would be used for Small Treasury Yield Index Futures for all Clearing Members upon the launch of the new products. OCC does not believe that the proposed rule change would unfairly inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another user. Accordingly, OCC does not believe that the proposed rule change would have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

¹² See Securities Exchange Act Release No. 87774 (December 17, 2019), 84 FR 70602 (December 23, 2019) (SR-OCC-2019-011).

¹³ See <https://smallexchange.com/products/s10y>.

¹⁴ For example, OCC also maintains a "Generic Futures Model," which is a simple model based on the cost of carry that is primarily used to margin equity-like futures such as SPX futures and can be used to model certain interest rates futures. This model has certain limitations (*e.g.*, the model cannot currently accommodate negative prices and rates).

¹⁵ 15 U.S.C. 78q-1.

¹⁶ 15 U.S.C. 78q-1(b)(3)(F).

¹⁷ *Id.*

¹⁸ 17 CFR 240.17Ad-22(e)(6)(i), (iii), and (v).

¹⁹ OCC has provided backtesting analysis for the proposed change in confidential Exhibit 3 to filing SR-OCC-2020-012.

²⁰ 17 CFR 240.17Ad-22(e)(6)(i), (iii), and (v).

²¹ 15 U.S.C. 78q-1(b)(3)(I).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act,²² and Rule 19b-4(f)(4)(ii) thereunder,²³ the proposed rule change is filed for immediate effectiveness because it effects a change in an existing service of OCC that (i) primarily affects the clearing operations of OCC with respect to products that are not securities and (ii) does not significantly affect any securities clearing operations of OCC or any rights or obligations of OCC with respect to securities clearing or persons using such securities clearing services.

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.²⁴

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 Exchange 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-OCC-2020-012 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-OCC-2020-012. 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 such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/about/publications/bylaws.jsp>.

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-OCC-2020-012 and should be submitted on or before November 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-22740 Filed 10-15-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90140; File No. SR-NYSECHX-2020-30]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 7.12

October 8, 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 October 6, 2020, the NYSE Chicago, Inc. ("NYSE Chicago" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory

organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot related to the market-wide circuit breaker in Rule 7.12. 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

Rule 7.12 provides a methodology for determining when to halt trading in all stocks due to extraordinary market volatility (i.e., market-wide circuit breakers). The market-wide circuit breaker ("MWC") mechanism, originally under Article 20, Rule 2, was approved by the Commission to operate on a pilot basis,⁴ the term of which was to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the "LULD Plan"),⁵ including any extensions to the pilot period for the LULD Plan.⁶ In April

⁴ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-CHX-2011-30).

⁵ See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

⁶ See Securities Exchange Act Release Nos. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-CHX-2011-30) (Approval Order); and 68777 (January 31, 2013), 78 FR 8673 (February 6, 2013) (SR-CHX-2013) (Notice of Filing of Immediate Effectiveness of Proposed Rule Change Delaying the Operative Date of a Rule Change to CHX Article 20, Rule 2).

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(4)(ii).

²⁴ Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Rule 40.6.

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.⁷ In light of the proposal to make the LULD Plan permanent, the Exchange amended Article 20, Rule 2 to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.⁸ After the Commission approved the Exchange's proposal to transition to trading on Pillar,⁹ the Exchange subsequently amended the corresponding Pillar rule—Rule 7.12—to extend the pilot's effectiveness for an additional year to the close of business on October 18, 2020.¹⁰

The Exchange now proposes to amend Rule 7.12 to extend the pilot to the close of business on October 18, 2021. This filing does not propose any substantive or additional changes to Rule 7.12.

The market-wide circuit breaker under Rule 7.12 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA adopted uniform rules on a pilot basis relating to market-wide circuit breakers in 2012 ("MWCB Rules"), which are designed to slow the effects of extreme price movement through coordinated trading halts across securities markets when severe price declines reach levels that may exhaust market liquidity.¹¹ Market-wide circuit breakers provide for trading halts in all equities and options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index.

Pursuant to Rule 7.12, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker

thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. A market decline that triggers a Level 3 halt, at any time during the trading day, would halt market-wide trading for the remainder of the trading day.

Since the MWCB pilot was last extended in October 2019, the MWCB mechanism has proven itself to be an effective tool for protecting markets through turbulent times. In the Spring of 2020, at the outset of the worldwide COVID-19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, the previously-convened MWCB Taskforce ("Taskforce") reviewed the March 2020 halts and considered whether any immediate changes to the MWCB mechanism should be made. The Taskforce, consisting of representatives from equities exchanges, futures exchanges, FINRA, broker-dealers, and other market participants, had been assembled in early 2020 to consider more generally potential changes to the MWCB mechanism. The Taskforce held ten meetings in the Spring and Summer of 2020 that were attended by Commission staff to consider, among other things: (1) Whether to retain the S&P 500 Index as the standard for measuring market declines; (2) whether halts that occur shortly after the 9:30 a.m. market open cause more harm than good; and (3) what additional testing of the MWCB mechanism should be done.

After considering data and anecdotal reports of market participants' experiences during the March 2020 MWCB events, the Taskforce did not recommend immediate changes be made to the use of the S&P 500 Index as the reference price against which market declines are measured, or to the current MWCB mechanism which permits halts even shortly after the 9:30 a.m. market open. The Taskforce recommended creating a process for a backup reference price in the event that the S&P 500 Index becomes unavailable, and enhancing functional MWCB testing. The Taskforce also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%.

On September 17, 2020, the Director of the Division of Trading and Markets requested that the equities exchanges and FINRA prepare a more complete study of the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. Based on the results of that study, the Exchange expects to work with the Commission, FINRA, the other exchanges, and market participants to determine if any additional changes to the MWCB mechanism should be made, including consideration of rules and procedures for the periodic testing of the MWCB mechanism with industry participants.

In addition to the work of the Taskforce, the equities exchanges also moved forward in 2019 and 2020 with a plan to normalize their Day 2 opening procedures after a Level 3 MWCB halt, such that all exchanges would reopen on Day 2 with a standard opening auction. The Exchange and its Affiliate SROs¹² filed rule changes to that effect in March 2020,¹³ and successfully tested the implementation of those changes on September 12, 2020.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular, in that it 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. The market-wide circuit breaker mechanism under Rule 7.12 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional year would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and

⁷ See Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

⁸ See Securities Exchange Act Release No. 85565 (April 9, 2019), 84 FR 15239 (April 15, 2019) (SR-NYSECHX-2019-05).

⁹ See Securities Exchange Act Release No. 87264 (October 9, 2019), 84 FR 55345 (October 16, 2019) (SR-NYSECHX-2019-08).

¹⁰ See Securities Exchange Act Release No. 87027 (September 19, 2019), 84 FR 50484 (September 25, 2019) (SR-NYSECHX-2019-09).

¹¹ See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129) ("MWCB Approval Order").

¹² The "Affiliate SROs" are the Exchange's affiliates NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

¹³ See Securities Exchange Act Release Nos. 88402 (March 17, 2020), 85 FR 16436 (March 23, 2020) (SR-NYSE-2020-20); 88407 (March 18, 2020), 85 FR 16690 (March 24, 2020) (SR-NYSEAMER-2020-20); 88414 (March 18, 2020), 85 FR 16707 (March 24, 2020) (SR-NYSEArca-2020-23); 88410 (March 18, 2020), 85 FR 16693 (March 24, 2020) (SR-NYSECHX-2020-08); 88411 (March 18, 2020), 85 FR 16710 (March 24, 2020) (SR-NYSEArca-2020-11).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

the other SROs study the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. Based on the results of that study, the Exchange expects to work with the Commission, FINRA, the other exchanges, and market participants to determine if any additional changes to the MWCB mechanism should be made, including consideration of rules and procedures for the periodic testing of the MWCB mechanism with industry participants.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from the MWCB under Rule 7.12 should continue on a pilot basis because the MWCB will promote fair and orderly markets, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs study the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020.

Further, the Exchange understands that FINRA and other national securities exchanges will file proposals to extend their rules regarding the market-wide circuit breaker pilot. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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 designated this rule filing as non-controversial under

Section 19(b)(3)(A)¹⁶ of the Act and Rule 19b-4(f)(6)¹⁷ thereunder. 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.¹⁸

A proposed rule change filed under Rule 19b-4(f)(6)¹⁹ normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. Extending the pilot for an additional year will allow the uninterrupted operation of the existing pilot while the Exchange, FINRA, and the other exchanges conduct a study of the MWCB mechanism in consultation with market participants and determine if any additional changes to the MWCB mechanism should be made, including consideration of rules and procedures for the periodic testing of the MWCB mechanism with industry participants. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission hereby designates the proposed rule change to be operative upon filing.²¹

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

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6).

¹⁸ In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁹ *Id.*

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

²¹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSECHX-2020-30 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSECHX-2020-30. 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 20549-1090, 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 Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NYSECHX-2020-30 and should be submitted on or before November 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020–22736 Filed 10–15–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Wednesday, October 21, 2020.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.sec.gov>.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topic:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: October 14, 2020.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2020–23085 Filed 10–14–20; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90138; File No. SR–ICC–2020–011]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to the ICC Clearing Rules

October 8, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,¹ and Rule 19b–4,² notice is hereby given that on September 30, 2020, ICE Clear Credit LLC (“ICC”) filed with the Securities and Exchange Commission the proposed rule change, security-based swap submission, or advance notice as described in Items I, II and III below, which Items have been prepared by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change, security-based swap submission, or advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

The principal purpose of the proposed rule change is to revise ICC's Clearing Rules (the “Rules”)³ to incorporate credit default index swaptions (“Index Swaptions”) into its summary assessment approach.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B),

and (C) below, of the most significant aspects of these statements.

(A) *Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice*

(a) Purpose

ICC proposes revisions to the Rules to incorporate Index Swaptions into the summary assessment approach described in Rule 702(e) and Schedule 702 of the Rules. ICC proposes to make such changes to the Rules effective following Commission approval of the proposed rule change and completion of the ICC governance process surrounding the Index Swaptions product expansion. ICC has previously filed with the Commission changes to certain other policies and procedures related to clearing Index Swaptions (the “Swaption Rule Filings”).⁴ As discussed in the Swaption Rule Filings, pursuant to an Index Swaption, one party (the “Swaption Buyer”) has the right (but not the obligation) to cause the other party (the “Swaption Seller”) to enter into an index credit default swap transaction at a pre-determined strike price on a specified expiration date on specified terms. In the case of Index Swaptions that would be cleared by ICC, the underlying index credit default swap would be limited to certain CDX and iTraxx Europe index credit default swaps that are accepted for clearing by ICC, and which would be automatically cleared by ICC upon exercise of the Index Swaption by the Swaption Buyer in accordance with its terms. The proposed amendments to incorporate Index Swaptions into the summary assessment approach in Rule 702(e) and Schedule 702 of the Rules are described in detail as follows.

As part of ICC's end-of-day price discovery process, ICC Clearing Participants (“CPs”) are required to submit end-of-day prices in accordance with the ICC Procedures, and the failure of a CP to provide submissions in accordance with the ICC Procedures constitutes a Missed Submission pursuant to Rules 404(b) and 702(b) and (e). In order to provide incentive against

⁴ As set out in the Swaption Rule Filings, ICC intends to implement the changes described in the Swaption Rule Filings following completion of the ICC governance process surrounding the Index Swaptions product expansion. SEC Release No. 34–87297 (October 15, 2019) (approval), 84 FR 56270 (October 21, 2019) (SR–ICC–2019–007); SEC Release No. 34–89142 (June 24, 2020) (approval), 85 FR 39226 (June 30, 2020) (SR–ICC–2020–002); SEC Release No. 34–89436 (July 31, 2020) (approval), 85 FR 47827 (August 6, 2020) (SR–ICC–2020–008); SEC Release No. 34–89948 (September 22, 2020) (approval), 85 FR 60845 (September 28, 2020) (SR–ICC–2020–010).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Capitalized terms used but not defined herein have the meanings specified in the Rules.

²² 17 CFR 200.30–3(a)(12).

Missed Submissions, ICC has adopted a summary assessment approach described in Rule 702(e) and Schedule 702 of the Rules.

The proposed amendments incorporate Index Swaptions in Rule 702(e). Under current Rule 702(e)(i)(2), CPs are required to submit end-of-day prices for each Contract in which they hold a cleared interest in accordance with the ICC Procedures and each price not submitted as required is a Missed Submission. The proposed changes to Rule 702(e)(i)(2) would specify that CPs that hold a cleared interest in one or more Index Swaption Contracts sharing the same underlying index and expiration date are required to provide prices for all Index Swaption Contracts sharing the same underlying index and expiration date. Additionally, under current Rule 702(e)(ii)(2), a CP is eligible for one waiver per calendar year for single name Missed Submissions and one waiver per calendar year for index Missed Submissions caused by technical failures. Under amended Rule 702(e)(ii)(2), a CP would also be eligible for one waiver per calendar year for Index Swaption Missed Submissions caused by technical failures. The process for requesting and reviewing waivers for Missed Submissions remains unchanged. Moreover, amended Rule 702(e)(ii)(4) includes Index Swaption, along with single name and index, as a type of Missed Submission that may satisfy the requirements of Rule 702(e)(ii)(2).

Additionally, ICC proposes updates to Schedule 702 to the Rules, which sets forth an assessment schedule, to include an assessment amount for Index Swaption Missed Submissions and correct a typographical error. Current Schedule 702 sets out assessment amounts (per missed price) in respect of index and single names. With respect to Index Swaptions, the proposed revisions would establish an assessment amount for each Missed Submission (\$250) as well as a maximum assessment per day for Missed Submissions on Index Swaption instruments sharing the same underlying index (\$10,000) and for all Index Swaption instruments during one day (\$50,000). ICC also proposes to correct a typographical error with respect to single names in the assessment schedule and replace "Submissions" with "Submission" in the phrase "For each Missed Submissions."

(b) Statutory Basis

ICC believes that the proposed rule change is consistent with the

requirements of Section 17A of the Act⁵ and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad-22.⁶ Section 17A(b)(3)(F) of the Act⁷ requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable, derivative agreements, contracts and transactions, to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, in general, to protect investors and the public interest, and to comply with the provisions of the Act and the rules and regulations thereunder. The proposed rule change would amend ICC's summary assessment approach described in Rule 702(e) and Schedule 702 of the Rules to incorporate Index Swaptions as an incentive against Index Swaption Missed Submissions. The amendments also provide one waiver per calendar year for Index Swaption Missed Submissions caused by technical failures, which is analogous to the current provision in Rule 702(e) for single name and index Missed Submissions and is appropriately designed to maintain the integrity and effectiveness of ICC's price discovery process. Moreover, the clean-up change to Schedule 702 of the Rules to correct a typographical error ensures that the assessment schedule and the Rules remain effective, clear, and transparent to serve their intended purpose. Accordingly, in ICC's view, the proposed rule change would promote ICC's price discovery process by ensuring a clear, fair, and equitable assessment structure and is thus consistent with the prompt and accurate clearing and settlement of the contracts cleared by ICC, including Index Swaptions, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.⁸

Further, Section 17A(b)(3)(G) of the Act⁹ requires that the rules of the clearing agency provide that its participants shall be appropriately disciplined for violation of any provision of the rules of the clearing agency, including by fine or other fitting sanction. The proposed changes are

designed to ensure that CPs are appropriately disciplined for violations of the Rules, namely Missed Submissions, and set out an appropriate fining structure in Schedule 702 to the Rules that includes an assessment amount for each Index Swaption Missed Submission as well as a maximum assessment per day for Missed Submissions on Index Swaption instruments sharing the same underlying index and for all Index Swaption instruments during one day. Similar to ICC's approach for single name and index Missed Submissions, ICC proposes one waiver per calendar year for Index Missed Submissions caused by technical failures. In ICC's view, the amendments to Rule 702 and Schedule 702 to the Rules provide an appropriate assessment approach given the role of submissions in ICC's price discovery process and are thus consistent with the requirements of Section 17A(b)(3)(G) of the Act.¹⁰

Additionally, Section 17A(b)(3)(H) of the Act¹¹ requires, among other things, that the rules of the clearing agency, in general, provide a fair procedure with respect to the disciplining of participants. The process for requesting and reviewing waivers for Missed Submissions remains unchanged in Rule 702(e) and continues to provide a fair procedure with respect to disciplining CPs for Missed Submissions, consistent with Section 17A(b)(3)(H) of the Act.¹²

The amendments would also satisfy relevant requirements of Rule 17Ad-22.¹³ Rule 17Ad-22(e)(2)(i) and (v)¹⁴ requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. The ICC Procedures and the Rules clearly assign and document responsibility and accountability for risk, default management, and other key clearing house decisions and require consultation or approval from relevant parties. ICC determined to make the proposed changes in accordance with its governance process, which included review by the Risk Committee and review and approval by the Board of the proposed changes. ICC thus continues to maintain policies and procedures that are reasonably designed to provide for clear and transparent governance

⁵ 15 U.S.C. 78q-1.

⁶ 17 CFR 240.17Ad-22.

⁷ 15 U.S.C. 78q-1(b)(3)(F).

⁸ *Id.*

⁹ 15 U.S.C. 78q-1(b)(3)(G).

¹⁰ *Id.*

¹¹ 15 U.S.C. 78q-1(b)(3)(H).

¹² *Id.*

¹³ 17 CFR 240.17Ad-22.

¹⁴ 17 CFR 240.17Ad-22(e)(2)(i) and (v).

arrangements and specify clear and direct lines of responsibility, consistent with Rule 17Ad-22(e)(2)(i) and (v).¹⁵

Rule 17Ad-22(e)(6)(iv)¹⁶ requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. As discussed above, the proposed changes provide incentive against Index Swaption Missed Submissions by incorporating Index Swaptions into ICC's summary assessment approach in the Rules and also provide one waiver per calendar year for Index Swaption Missed Submissions caused by technical failures. In ICC's view, the proposed changes ensure a fair and equitable assessment structure with respect to Index Swaptions and thus are appropriately designed to support and maintain the integrity and effectiveness of ICC's price discovery process that provides reliable prices, consistent with the requirements of Rule 17Ad-22(e)(6)(iv).¹⁷

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The proposed rule change amends Rule 702(e) and Schedule 702 of the Rules to incorporate Index Swaptions and will apply uniformly across all market participants.

Accordingly, ICC does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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, security-based swap submission, or advance notice 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-ICC-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. All submissions should refer to File Number SR-ICC-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, security-based swap submission, or advance notice that are filed with the Commission, and all written communications relating to the proposed rule change, security-based swap submission, or advance notice 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 such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at <https://www.theice.com/clear-credit/regulation>. 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-ICC-2020-011 and should be submitted on or before November 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-22739 Filed 10-15-20; 8:45 am]

BILLING CODE 8011-01-P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA-2020-0055]

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104-13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes one revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers. (OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202-395-6974, Email address: OIRA_Submission@omb.eop.gov. (SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235,

¹⁵ *Id.*

¹⁶ 17 CFR 240.17Ad-22(e)(6)(iv).

¹⁷ *Id.*

¹⁸ 17 CFR 200.30-3(a)(12).

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-2020-0055].

SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than November 16, 2020. Individuals can obtain copies of this OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov*.

Work Activity Report (Self-Employment)—20 CFR 404.1520(b),

404.1571-404.1576, 404.1584-404.1593, and 416.971-416.976—0960-0598. SSA uses Form SSA-820-BK to determine initial or continuing eligibility for: (1) Title II Social Security disability benefits (SSDI); or (2) Title XVI Supplemental Security Income (SSI) payments. Under Titles II and XVI of the Social Security Act, recipients receive disability benefits and SSI payments based on their inability to engage in substantial gainful activity (SGA) due to a physical or mental condition. Therefore, when the recipients resume work, they must report their work so SSA can evaluate and determine by law whether they continue to meet the disability requirements. SSA uses Form SSA-820-BK to obtain information on self-employment activities of Social

Security Title II and XVI disability applicants and recipients. We use the data we obtain to evaluate disability claims, and to help us determine if the claimant meets current disability provisions under Titles II and XVI. Since applicants for disability benefits or payments must prove an inability to perform any kind of SGA generally available in the national economy for which we expect them to qualify based on age, education, and work experience, any work an applicant performed until, or subsequent to, the date the disability allegedly began, affects our disability determination. The respondents are applicants and claimants for SSI payments or SSDI benefits.

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-820-BK	100,000	1	30	50,000	*\$10.73	** 24	***\$965,700

*We based this figure on average DI payments based on SSA's current FY 2020 data (<https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf>).

** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: October 13, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020-22972 Filed 10-15-20; 8:45 am]

BILLING CODE 4191-02-P

DEPARTMENT OF STATE

[Public Notice 11220]

30-Day Notice of Proposed Information Collection: Improving Customer Experience

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has under OMB review the following proposed Information Collection Request “Improving Customer Experience (OMB Circular A-11, Section 280 Implementation)” for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*)

DATES: Submit comments up to November 16, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to [Pamela Watkins, who may be reached on 202-485-2159 or at watkinspk@state.gov.

SUPPLEMENTARY INFORMATION: *Title:* Improving Customer Experience (OMB Circular A-11, Section 280 Implementation)

Abstract: A modern, streamlined and responsive customer experience means: raising government-wide customer experience to the average of the private sector service industry; developing indicators for high-impact Federal programs to monitor progress towards excellent customer experience and mature digital services; and providing the structure (including increasing transparency) and resources to ensure customer experience is a focal point for agency leadership.

This proposed information collection activity provides a means to garner

customer and stakeholder feedback in an efficient, timely manner in accordance with the Administration's commitment to improving customer service delivery as discussed in Section 280 of OMB Circular A-11 at <https://www.performance.gov/cx/a11-280.pdf>. As discussed in OMB guidance, agencies should identify their highest-impact customer journeys (using customer volume, annual program cost, and/or knowledge of customer priority as weighting factors) and select touchpoints/transactions within those journeys to collect feedback.

These results will be used to improve the delivery of Federal services and programs. It will also provide government-wide data on customer experience that can be displayed on www.performance.gov to help build transparency and accountability of Federal programs to the customers they serve.

As a general matter, these information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Department of State will only submit collections if they meet the following criteria.

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered is intended to be used for general service improvement and program management purposes
- Upon agreement between OMB and the agency all or a subset of information may be released as part of A-11, Section 280 requirements only on *performance.gov*. Summaries of customer research and user testing activities may be included in public-facing customer journey maps or summaries.
- Additional release of data must be done coordinated with OMB.

These collections will allow for ongoing, collaborative and actionable communications between the Agency, its customers and stakeholders, and OMB as it monitors agency compliance on Section 280. These responses will inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on services will be unavailable.

Current Action: New Collection of Information.

Type of Review: New.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Estimated Number of Respondents: Below is a preliminary estimate of the aggregate burden hours for this new collection. Department of State will provide refined estimates of burden in subsequent notices.

Average Expected Annual Number of Activities: Approximately five types of customer experience activities such as feedback surveys, focus groups, user testing, and interviews.

Average Number of Respondents per Activity: 1 response per respondent per activity.

Annual Responses: 2,001,550.

Average Minutes per Response: 2 minutes—60 minutes, dependent upon activity.

Burden Hours: Department of State requests approximately 101,125 burden hours.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

All written comments will be available for public inspection *Regulations.gov*.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Zachary Parker,

Director.

[FR Doc. 2020-22961 Filed 10-15-20; 8:45 am]

BILLING CODE 4710-24-P

DEPARTMENT OF STATE

[Public Notice:11227]

Defense Trade Advisory Group (DTAG): Revised RSVP Date for the DTAG Open Session on Thursday, October 22

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: This notice corrects an erroneous RSVP date provided in an earlier notice for the Defense Trade Advisory Group (DTAG) open session on October 22, 2020.

DATES: Applicable on October 9, 2020

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Eisenbeiss, DDTC, SA-1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522-0112; telephone (202) 663-2835 or email DTAG@state.gov (<mailto:DTAG@state.gov>).

SUPPLEMENTARY INFORMATION: The revised RSVP date for the DTAG Open Meeting is COB October 20, 2020. Because the DTAG October 22 meeting is virtual, the normal two-week RSVP is not required. The original **Federal Register** Notice for the meeting (85 FR 57921) listed an earlier RSVP date of October 5, which was erroneous.

Neal F. Kringel,

Designated Federal Officer, Defense Trade Advisory Group, Department of State.

[FR Doc. 2020-22902 Filed 10-15-20; 8:45 am]

BILLING CODE 4710-25-P

SURFACE TRANSPORTATION BOARD

Release of Waybill Data

The Surface Transportation Board has received a request from Neville Peterson LLP on behalf of Trinity Industries, Inc. (WB20-50—10/13/20) for permission to use select data from the Board's 2019 Masked Carload Waybill Sample. A copy of this request may be obtained from the Board's website under docket no. WB20-50.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Alexander Dusenberry, (202) 245-0319

Tammy Lowery,
Clearance Clerk.

[FR Doc. 2020-22962 Filed 10-15-20; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36440]

OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, and Jaguar Rail Holdings, LLC—Acquisition of Control Exemption—Cimarron Valley Railroad, L.C.; Southwestern Railroad, Inc.; Texas & Eastern Railroad, LLC; Washington Eastern Railroad, LLC; and Wyoming and Colorado Railroad, Inc.

OPSEU Pension Plan Trust Fund (OP Trust), Jaguar Transport Holdings, LLC (JTH), and Jaguar Rail Holdings, LLC (JRH) (collectively, Jaguar), all noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to acquire control of Cimarron Valley Railroad, L.C. (CVRR); Southwestern Railroad, Inc. (SWRR); Texas & Eastern Railroad, LLC (TERR); Washington Eastern Railroad, LLC (WERR); and Wyoming and Colorado Railroad, Inc. (WYCO) (collectively, Western Railroads)¹ each a Class III rail carrier.

The verified notice states that OP Trust invests and manages one of Canada's largest pension funds and indirectly controls JRH and JTH, which in turn controls West Memphis Base Railroad, L.L.C (WMBR), a Class III rail carrier located in Arkansas. According to the verified notice, pursuant to an as-yet unexecuted Stock and Membership Interest Purchase Agreement among Snowy Range Cattle Company, Inc., and David L. Durbano on behalf of the sellers and JRH as the buyer, JRH will acquire direct control of SWRR, TERR, and WYCO and, through JRH's acquisition of control of WYCO, indirect control of CVRR and WERR.²

¹ Jaguar states that CVRR is located in Kansas, Colorado, and Oklahoma; SWRR is located in New Mexico, Texas, and Oklahoma; TERR is located in Texas; WERR is located in Washington; and WYCO is located in Oregon. On October 6, 2020, Jaguar supplemented its verified notice of exemption with a map depicting SWRR's Shattuck Subdivision. According to Jaguar, it learned that SWRR sought and obtained abandonment authority for the Shattuck Subdivision but did not give timely notice of consummation under the Board's regulations, although that trackage has been removed and the corridor sold. (See Verified Notice of Exemption 4 n.2.) Accordingly, Jaguar acknowledges that SWRR maintains a common carrier obligation over the Shattuck Subdivision. *Id.*

² Concurrently with its verified notice, Jaguar filed a motion for protective order under 49 CFR

The earliest the transaction may be consummated is October 30, 2020, the effective date of the exemption (30 days after the verified notice was filed).³

The verified notice states that: (1) WMBR would not connect with any of the Western Railroads, and none of the Western Railroads connect with each other; (2) the subject acquisition of control is not intended to connect the Western Railroads to one another or with WMBR; and (3) the proposed transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. See 49 CFR 1180.2(d)(2).

Jaguar states that the proposed transaction will promote Jaguar's investment objectives and sustain the Western Railroads' efficiency, financial strength, and ability to meet the needs of shippers.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here because all of the carriers involved are Class III carriers.

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 to stay must be filed no later than October 23, 2020 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36440, 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 Jaguar's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606-3208.

According to Jaguar, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic review under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

1104.14(b), which will be addressed in a separate decision.

³ Jaguar states that it intends to consummate the proposed transaction on November 1, 2020.

Decided: October 13, 2020.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,
Clearance Clerk.

[FR Doc. 2020-22967 Filed 10-15-20; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0097]

Hours of Service (HOS) of Drivers: Small Business in Transportation Coalition (SBTC) Application for Exemption From ELD and Certain HOS Requirements

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; denial of application for exemption.

SUMMARY: FMCSA announces its decision to deny the Small Business in Transportation Coalition's (SBTC) request for an exemption from the electronic logging device (ELD) requirements for commercial motor vehicle (CMV) drivers traveling with domestic animals in interstate commerce. Additionally, FMCSA denies SBTC's request for an exemption from the hours-of-service (HOS) requirements to allow these drivers to drive up to 13 hours during a work shift and to operate within a 16-hour window within which all driving tasks would be completed. FMCSA has analyzed the exemption application and public comments and has determined that it cannot ensure that granting the requested exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved absent such exemptions.

DATES: FMCSA denies this application for exemption effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. La Tonya Mimms, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: (202) 366-9220 Email: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (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)).

When the Agency denies a request for an exemption, the applicant may be allowed to resubmit the application if the applicant can reasonably address the basis for denial (49 U.S.C. 31315(b)(3)).

II. Background

Generally, individuals may not drive a property-carrying CMV more than 11 hours during a work shift, following 10 consecutive hours off duty. Under the current regulations all driving must be completed within 14 hours of the beginning of the work shift, with certain alternatives for drivers who use sleeper berths. Most drivers who are required to prepare and maintain records of duty status (RODS) to document their HOS are subject to the Electronic Logging Devices (ELD) Rule and must use an ELD.

III. Request for Exemptions

SBTC requests that drivers of property-carrying CMVs, when accompanied by any domestic animal, be exempt from the requirement to use an ELD for their RODS and be allowed to prepare and maintain paper RODS as an alternative.

SBTC also requests that drivers of property-carrying vehicles accompanied by any domestic animal be granted an exemption from 49 CFR 395.3(a)(2) and (3)(i), allowing them to drive up to 13 hours during a work shift, following 10 consecutive hours off-duty. The requested exemption would allow them

a 16-hour driving window within which to use the 13 hours of driving time.

IV. Methodology To Ensure Safety

To ensure a level of safety that is equivalent to or greater than the level that would be achieved absent such exemptions, SBTC offers the use of paper RODS in lieu of ELDs. SBTC asserts that paper logs provide the level of safety already assured by the pre-existing HOS rule as opposed to using an ELD. SBTC compares the two-hour extension of driving time to the two driving hours allotted for adverse driving conditions. Lastly, SBTC believes its exemption request is no different than the other ELD exemptions FMCSA has granted.

V. Public Comments

On March 11, 2020, FMCSA published notice of this application and requested public comments (85 FR 14289). The Agency received more than 165 comments, approximately 130 of which favored the exemption. Mr. Jeffrey Anderson said, "I agree with being exempt because I also have a pet onboard and it should be fair for [all]." Ms. Deborah Carly wrote: "I am in favor of this exemption Pets are family. There needs to be consideration for their needs; and currently there is nothing. Pets are, sometimes, the only family drivers have. There needs to be rules in place to make sure their needs are met." Many of the commenters simply wrote, "I support this exemption." Some comments focused more on the HOS rules than the exemption application; a few comments were not germane.

A total of 35 commenters opposed the exemption application, including the American Trucking Associations (ATA), the Commercial Motor Vehicle Safety Alliance (CVSA), and the Truckload Carriers Association (TCA). Ms. Suzanne Pehl wrote the following:

Drivers traveling with pets should [not] be exempt from ELDs or any other regulation. If such an exemption is allowed, drivers will get a pet just to be exempt from regulations. That would create numerous problems for pets as well as safety problems for other drivers on the road. If you keep creating exemptions, there will be no regulations.

ATA wrote the following:

SBTC's application asks FMCSA to extend driver hours-of-service for up to 13 hours during the duty day following ten consecutive hours off duty, and exempt drivers traveling with domestic animals from the ELD mandate. FMCSA approval of this application would, in essence, apply an overbroad category of exempted individuals to an insufficiently defined class of exemption. Despite some research that shows how domestic animals can improve driver feelings of companionship, and, anecdotally,

safety, SBTC's application does not support the agency's obligation of ensuring an equivalent or greater level of safety than exists under the current regulation.

CVSA wrote the following:

In their application, SBTC requests that drivers traveling with pets be exempt from the electronic logging device (ELD) requirement and that they be allowed to extend the 14-hour period to 16 hours and the maximum allowed driving time from 11 hours to 13 hours. If granted, the requested additional driving and on-duty time will expose drivers to a greater risk of fatigue, putting themselves and the public at risk and the ELD exemption would make adherence to the hours-of-service rules much more difficult to verify. The hours-of-service framework is put in place to prevent this type of excessive driving that causes fatigue.

TCA wrote as follows:

We appreciate the immense value these beloved 'family members' bring to those drivers, and we see individual carriers' pet policies as a significant way for them to differentiate themselves and recruit talent which may find that benefit attractive. However, while we are supportive of the driver's right to have a pet in the truck, TCA opposes both exemptions requested by SBTC.

V. Safety Analysis

When FMCSA published the rule mandating ELDs, it relied upon research indicating that the rule improves CMV safety by improving compliance with the HOS rules. The rule also reduces the overall paperwork burden for both motor carriers and drivers. When the FMCSA established the HOS rules, it relied upon research indicating that the rules improve CMV safety. These regulations put limits in place for when and how long an individual may drive to ensure that drivers stay awake and alert while driving and to help reduce the possibility of driver fatigue. The Agency reaffirmed the "core" HOS provisions in the HOS final rule published on June 1, 2020 [85 FR 33396]. The revisions adopted in that rule do not allow truck drivers any additional driving time beyond the current 11-hour limit, and subject to a limited exception concerning adverse driving conditions, the 14-hour duty day. None of the final rule provisions increases the maximum allowable driving time, as the available data does not support any additional driving time. Based on the current scientific information and its own experience with HOS regulations, the Agency concluded that the changes made by the final rule are safety- and health-neutral.

VI. FMCSA Decision

FMCSA denies SBTC's application because it does not meet the regulatory standards for an exemption. SBTC failed

to identify an individual or motor carrier that would be responsible for the use or operation of CMVs under the exemptions, as required by 49 CFR 381.310(b)(2). SBTC failed to provide an estimate of the total number of drivers and CMVs that would be operated under the terms and conditions of the exemptions, as required by section 381.310(c)(3). Lastly, SBTC proposed no countermeasures to ensure an equivalent or greater level of safety than would be achieved under compliance with the current rules, as required by section 381.310(c)(5).

James W. Deck,

Deputy Administrator.

[FR Doc. 2020-22890 Filed 10-15-20; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0150]

Owner-Operator Independent Drivers Association, Small Business in Transportation Coalition Petitions for Rulemaking; Transparency in Property Broker Transactions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; extension of comment period.

SUMMARY: The Federal Motor Carrier Safety Administration extends the comment period for its August 19, 2020, notice requesting comments on the petitions by the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC) for rulemaking to amend certain requirements for property brokers. The Agency believes it is appropriate to extend the October 19, 2020, deadline for public comments to provide interested parties additional time to submit their responses to the docket. Therefore, the Agency extends the deadline for the submission of comments until November 18, 2020.

DATES: Comments must be submitted by November 18, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA-2020-0150 by any of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. See the *Public Participation and Request for Comments* section below for further information.

- *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:* Docket Operations, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

- *Fax:* (202) 493-2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Docket Operations, 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.

FOR FURTHER INFORMATION CONTACT: Ms. La Tonya Mimms, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; (202) 366-4001; MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number FMCSA-2020-150, indicate the specific section of the notice 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-2020-0150, 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. Extension of the comment period will ensure a full opportunity for public participation.

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 the notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as "PROPIN" to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket for this notice. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Any comments FMCSA receives which are not specifically designated as CBI will be placed in the public docket for this notice.

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-2020-0150 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 20590-0001, 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 edits, 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

On August 19, 2020 (85 FR 51145), FMCSA published a notice requesting public comments on the petitions for rulemaking to amend certain requirements for property brokers submitted by the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC). OOIDA requests that FMCSA require property brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed, and prohibit explicitly brokers from including any provision in their contracts that requires a motor carrier to waive its rights to access the transaction records. SBTC requests that FMCSA prohibit brokers from coercing or otherwise requiring parties to brokers' transactions to waive their right to review the record of the transaction as a condition for doing business. SBTC also requests that FMCSA adopt regulatory language indicating that brokers' contracts may not include a stipulation or clause exempting the broker from having to comply with the transparency requirement. The notice set October 19, 2020 as the deadline by which comments should be submitted to the public docket.

III. Extension of the Public Comment Period

On October 13, 2020, FMCSA published a notice in the **Federal Register** announcing that it will host a listening session pertaining to property carrier brokers on October 28, 2020. Specifically, the Agency indicated that it would like to hear from members of the public on their views on the regulation of property carrier brokers in general, and on three separate petitions for rulemaking from OOIDA, SBTC and the Transportation Intermediaries Association concerning specific

property carrier broker regulation issues.

The Agency believes it is appropriate to extend the comment period to provide interested parties additional time to submit their responses to the notice seeking public comment on the OOIDA and SBTC petitions. Therefore, the Agency extends the deadline for the submission of comments until November 18, 2020.

James W. Deck,
Deputy Administrator.

[FR Doc. 2020-22903 Filed 10-15-20; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2020-0027-N-24]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before December 15, 2020.

ADDRESSES: Submit comments and recommendations for the proposed ICR to Ms. Hodan Wells, Information Collection Clearance Officer at email: hodan.wells@dot.gov or telephone: (202) 493-0440. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501-3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites

interested parties to comment on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) Reduce reporting burdens; (2) organize information collection requirements in a "user-friendly" format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Safety and Health Requirements Related to Camp Cars.

OMB Control Number: 2130-0595.

Abstract: Subparts C and E of 49 CFR part 228 address the construction of railroad-provided sleeping quarters (camp cars) and set certain safety and health requirements for such camp cars. Specifically, subpart E of part 228 prescribes minimum safety and health requirements for camp cars that a railroad provides as sleeping quarters to any of its train employees, signal employees, and dispatching service employees (covered-service employees) and individuals employed to maintain its right-of-way. Subpart E requires railroad-provided camp cars to be clean, safe, and sanitary, and be equipped with indoor toilets, potable water, and other features to protect the health of car occupants. Subpart C of part 228 prohibits a railroad from positioning a camp car intended for occupancy by individuals employed to maintain the railroad's right-of-way in the immediate vicinity of a switching or humping yard that handles railcars containing hazardous material. Generally, the requirements of subparts C and E to part 228 are intended to provide covered-

service employees an opportunity for rest free from the interruptions caused by noise under the control of the railroad.

The information collected under this rule is used by FRA to ensure railroads operating camp cars comply with all the

requirements mandated in this regulation to protect the health and safety of camp car occupants.

Type of Request: Extension with change (estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 1 railroad.

Frequency of Submission: On occasion.

REPORTING BURDEN

CFR Section ¹	Respondent universe	Total annual responses ²	Average time per responses	Total annual burden hours	Total cost equivalent ³
228.323(b)(4)—Water hydrants—Records of inspection.	1 railroad	740 inspection records.	2 minutes	25	\$1,475
—Copy of records at central location ...	1 railroad	740 record copies.	10 seconds ...	2	118
—(b)(6) Certification from State or local health authority.	1 railroad	666 certificates ...	1 hour	666	51,282
—Certification by laboratory	1 railroad	74 certificates	20 minutes	25	1,925
—Certification copies at central location	1 railroad	740 certificate copies.	10 seconds ...	2	118
—(c)(4) Storage and distribution system—Flushing and draining—Records.	1 railroad	111 records	30 minutes	56	3,304
—(c)(6) Lab report copies	1 railroad	10 lab report copies.	2 minutes .....	.33	20
—(d) Signage (for non-potable water) ..	1 railroad	740 signs	2.5 minutes ...	31	1,817
228.331(d)—First Aid and Life Safety—Modified Emergency Preparedness Plan.	1 railroad	740 modified plans.	15 minutes	185	14,245
—Modified Emergency Preparedness Plan copies.	1 railroad	1,560 plan copies	3 seconds	1 hour	77
228.333—Remedial action—A good faith notice of needed repair.	4 car occupants/employee labor organizations.	4 good faith notices.	15 minutes	1 hour	59
Total	1 railroad	6,125 responses	N/A	994	74,440

¹ **Note:** The current inventory exhibits a total burden of 1,043 hours while the total burden of this requesting notice is 994 hours. FRA determined some of the estimates were not derived from PRA requirements, thus leading to the increased figures in the current inventory, which were decreased accordingly in this notice. Also, totals may not add due to rounding.

² There is currently only one Class 1 railroad that presently uses camp cars, operating approximately 292 camp cars. The total annual response estimates for 228.323(b)(4), 228.323(d) and 228.331(d) are derived from an estimated 292 camp cars, operating as in large, medium, and small groups. Most groups are medium-sized in which approximately 37 camp cars are set up and broken down for 10 months each year. Each camp car group moves approximately 20 times each year (37 × 20 = 740 connections, records, etc.).

³ The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes a 75-percent overhead charge.

Total Estimated Annual Responses: 6,125.

Total Estimated Annual Burden: 994 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: \$74,440.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2020–22738 Filed 10–15–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice To Rescind Notice of Intent To Prepare an Environmental Impact Statement for Expansion of Light Rail Transit Service From Glassboro, NJ to Camden, NJ

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Rescind Notice of Intent to prepare an environmental impact statement.

SUMMARY: The FTA in cooperation with the Delaware River Port Authority (DRPA) is issuing this notice to advise the public that the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for the proposed public transportation improvement project in Camden County, New Jersey is being rescinded.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy Lidiak, Community Planner, Federal Transit Administration Region III, 1835 Market Street, Suite 1910, Philadelphia, PA 19103, phone: 215–656–7084, email: timothy.lidiak@dot.gov.

SUPPLEMENTARY INFORMATION: The FTA, as lead federal agency, and DRPA published a NOI on April 19, 2010 (75 FR20421) to prepare an EIS for the expansion of light rail passenger service along an 18-mile-long corridor operating between the Borough of Glassboro in Gloucester County and the City of Camden in Camden County along, and primarily within, the existing Conrail railroad right-of-way.

The DRPA is no longer seeking federal funding from FTA, and FTA is rescinding the April 19, 2010 NOI. DRPA will fund the project through state and local sources of funding.

Comments and questions concerning the proposed action should be directed to FTA at the address provided above.

Authority: 49 U.S.C. 5323(c); 40 CFR 1501.7.

Theresa Garcia Crews,

Regional Administrator, FTA Region III.

[FR Doc. 2020-22949 Filed 10-15-20; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Departmental Offices; Debt Management Advisory Committee Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, 10(a)(2), that a meeting will take place via conference call on November 3, 2020 at 9:30 a.m. of the following debt management advisory committee: Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

At this meeting, the Treasury is seeking advice from the Committee on topics related to the economy, financial markets, Treasury financing, and debt management. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, 10(d) and Public Law 103-202, § 202(c)(1)(B) (31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, 10(d) and vested in me by Treasury Department Order No. 101-05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Public Law 103-202, § 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an

advisory committee under 5 U.S.C. App. 2, 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Director for Office of Debt Management (202) 622-1876.

Dated: October 12, 2020.

Frederick E. Pietrangeli,

Director (for Office of Debt Management).

[FR Doc. 2020-22909 Filed 10-15-20; 8:45 am]

BILLING CODE 4810-25-P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meeting Notice; Unified Carrier Registration Plan Board Subcommittee Meeting

TIME AND DATE: October 15, 2020, from Noon to 2:00 p.m., Eastern time.

PLACE: This meeting will be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1-929-205-6099 (US Toll) or 1-669-900-6833 (US Toll) or (ii) 1-877-853-5247 (US Toll Free) or 1-888-788-0099 (US Toll Free), Meeting ID: 977 7025 1485, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is <https://kellen.zoom.us/j/97770251485>.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Education and Training Subcommittee (the "Subcommittee") will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of this meeting will include:

Proposed Agenda

I. Call to Order—Subcommittee Chair

The Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—Subcommittee Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Agenda will be reviewed, and the Subcommittee will consider adoption.

Ground Rules

➤ Subcommittee action only to be taken in designated areas on agenda

IV. Review and Approval of Minutes from the September 17, 2020 Meeting—UCR Operations Manager

For Discussion and Possible Subcommittee Action

Draft minutes from the September 17, 2020 Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

V. Audit Module Development Discussion with the Education and Training Subcommittee—UCR Operations Director

The Subcommittee will discuss and provide updates on development of the Audit Module.

VI. Other Items—Subcommittee Chair

The Subcommittee Chair will call for any other items the committee members would like to discuss.

VII. Adjournment—Subcommittee Chair

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, October 8, 2020 at: <https://plan.ucr.gov>.

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of

Directors, (617) 305-3783, eleaman@board.ucr.gov.

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2020-23018 Filed 10-14-20; 11:15 am]

BILLING CODE 4910-YL-P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials, Notice of Meeting, Amended

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act 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 be held as follows:

Date	Time
Wednesday, October 21, 2020.	1:00 p.m. to 5:00 p.m. EDT.
Thursday, 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 13, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020-22952 Filed 10-15-20; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0859]

Agency Information Collection Activity: Request for Restoration of Educational Assistance

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VBA), 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 15, 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. 2900-0859" 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: Public Law 115-48.

Title: Request for Restoration of Educational Assistance.

OMB Control Number: 2900-0859.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 22-0989 will allow students to apply for restoration of entitlement for VA education benefits used at a school that closed, suspended, or had its approval to receive VA benefits withdrawn. Education Service requests approval of this information collection in order to carry out the implementation of the law which requires VA to immediately accept applications to restore education benefits for school closures and disapprovals beginning after January 1, 2015.

Affected Public: Individuals.

Estimated Annual Burden: 955 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once on occasion.

Estimated Number of Respondents: 3,821.

By direction of the Secretary.

Danny S. Green,

VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020-22929 Filed 10-15-20; 8:45 am]

BILLING CODE 8320-01-P



FEDERAL REGISTER

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Part II

Department of the Interior

Bureau of Safety and Environmental Enforcement
Bureau of Ocean Energy Management

30 CFR Parts 250, 290, 550 et al.

Risk Management, Financial Assurance and Loss Prevention; Proposed Rule

DEPARTMENT OF THE INTERIOR**Bureau of Safety and Environmental Enforcement****30 CFR Parts 250 and 290****Bureau of Ocean Energy Management****30 CFR Parts 550 and 556**

[Docket ID: BOEM–2018–0033]

RIN 1082–AA02

Risk Management, Financial Assurance and Loss Prevention

AGENCY: Bureau of Ocean Energy Management (BOEM), Bureau of Safety and Environmental Enforcement (BSEE), Interior.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Department of the Interior (the Department), acting through BOEM and BSEE, proposes to streamline its evaluation criteria for determining whether oil, gas and sulfur lessees, right-of-use and easement (RUE) grant holders, and pipeline right-of-way grant holders may be required to provide bonds or other security above the prescribed amounts for base bonds to ensure compliance with their Outer Continental Shelf (OCS) obligations. BOEM's portion of the proposed rule would also remove restrictive provisions for third-party guarantees and decommissioning accounts, and would add new criteria under which additional bonds and third-party guarantees may be cancelled. Based on the proposed framework, BOEM estimates its amount of financial assurance would decrease from \$3.3 billion to \$3.1 billion, although it would provide greater protection as the financial assurance would be focused on the riskiest properties. BSEE's portion of this proposed rule would establish the order in which BSEE could order predecessor lessees, owners of operating rights, or grant holders, who have accrued decommissioning obligations, to perform those obligations when the current owners of a lease or grant fail to do so. BSEE's proposed provisions would also clarify decommissioning responsibilities for RUE grant holders and require that any party appealing any final decommissioning order provide a surety bond to ensure that funding for decommissioning is available if the order is affirmed on appeal and the liable party subsequently defaults.

DATES: Submit comments on the substance of this rulemaking on or before December 15, 2020. BOEM and

BSEE may not consider comments received after this date. You may submit comments to the Office of Management and Budget (OMB) on the information collection (IC) burden in this rulemaking on or before November 16, 2020. This does not affect the deadline for the public to comment to BOEM and BSEE on the proposed regulations.

ADDRESSES: You may submit comments on the rulemaking by any of the following methods. Please reference "Risk Management, Financial Assurance and Loss Prevention, RIN 1082–AA02." Please include your name, return address, and phone number or email address, so we can contact you if we have questions regarding your submission.

- *Federal rulemaking portal:* <http://www.regulations.gov>. In the entry entitled, "Enter Keyword or ID," enter BOEM–2018–0033 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this rulemaking. BOEM and BSEE may post all submitted comments.

- *Mail or delivery service:* Send comments on the BOEM portions of the proposed rule to the Department of the Interior, Bureau of Ocean Energy Management, Office of Policy, Regulation and Analysis, Attention: Peter Meffert, 1849 C Street NW, Mailstop DM5238, Washington, DC 20240. Send comments on the BSEE portions of the proposed rule to Department of the Interior, BSEE, Office of Offshore Regulatory Programs (OORP), Regulations and Standards Branch, Attention: Kelly Odom, 45600 Woodland Rd, (Mail code VAE–ORP), Sterling, VA 20166.

- Send comments on the IC in this proposed rule to: Interior Desk Officer, Office of Management and Budget; 202–395–5806 (fax); or via the www.reginfo.gov/public/do/PRAMain. Find the information collection by selecting "Currently under 30-day Review—Open for Public Comments or by using the search function. Please also send a copy of comments on the BOEM IC to BOEM, Office of Policy, Regulation and Analysis, Attention: Anna Atkinson, 45600 Woodland Road, Sterling, VA 20166. Please send a copy of any comments on the BSEE IC to BSEE, OORP, Regulations and Standards Branch, Attention: Nicole Mason, 45600 Woodland Road, (Mail code VAE–ORP), Sterling, VA 20166.

Public Availability of Comments: Before including your name, return address, phone number, email address, or other personally identifiable information in your comment, you

should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. In order for BOEM or BSEE to withhold from disclosure your personally identifiable information, you must identify any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: For questions on any BOEM issues, contact Deanna Meyer-Pietruszka, Chief, Office of Policy, Regulation and Analysis, Bureau of Ocean Energy Management (BOEM), at deanna.meyer-pietruszka@boem.gov or at (202) 208–6352. For questions on any BSEE issues, contact Amy White, Bureau of Safety and Environmental Enforcement (BSEE), at amy.white@bsee.gov or at (703) 787–1665.

To see a copy of either IC request submitted to OMB, go to <http://www.reginfo.gov> (select Information Collection Review, Currently Under Review). You may obtain a copy of the supporting statement for BOEM's new collection of information by contacting BOEM, Office of Policy, Regulation and Analysis, Attention: Anna Atkinson, at 45600 Woodland Road, Sterling, VA 20166. You may obtain a copy of the supporting statement for BSEE's new collection of information by contacting BSEE, OORP, Regulations and Standards Branch, Attention: Nicole Mason, 45600 Woodland Road, (Mail code VAE–ORP), Sterling, VA 20166.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Background of BOEM Regulations
 - A. BOEM Statutory and Regulatory Authority and Responsibilities
 - B. History of Bonding Regulations and Guidance
 - C. Regulatory Reform—New Executive and Secretary's Orders
 - D. Purpose of BOEM's Portion of the Proposed Rulemaking
- II. Background of BSEE Regulations
 - A. BSEE Statutory and Regulatory Authority and Responsibilities
 - B. BSEE's Decommissioning Regulations and Guidance
 - C. Regulatory Reform
 - D. Stakeholder Engagement
 - E. Purpose of BSEE's Portion of the Proposed Rulemaking

- III. Proposed Revisions to BOEM Bond and Other Security Requirements
 - A. Leases
 - B. Right-of-Use and Easement Grants
 - C. Pipeline Right-of-Way Grants
- IV. Proposed Revisions to Other BOEM Security Requirements
 - A. Third-party Guarantees
 - B. Lease-specific Abandonment Accounts
 - C. Cancellation of Additional Bonds
- V. BOEM Evaluation Methodology
 - A. Credit Ratings
 - B. Valuing Proved Oil and Gas Reserves
- VI. Proposed Revisions to BOEM Definitions
- VII. Proposed Revisions to BSEE Decommissioning Regulations
 - A. Decommissioning by Predecessors
 - B. Decommissioning of Rights-of-Use and Easement
 - C. Bonding Requirement for Appeals of Decommissioning Decisions and Orders
- VIII. Section-by-Section Analysis
 - A. Regulations Proposed by BSEE
 - B. Regulations Proposed by BOEM
- IX. Additional Comments Solicited by BOEM and BSEE
- X. Procedural Matters
 - A. Regulatory Planning and Review (E.O. 12866, 13563 and 13771)
 - B. Regulatory Flexibility Act
 - C. Small Business Regulatory Enforcement Fairness Act
 - D. Unfunded Mandates Reform Act of 1995
 - E. Takings Implication Assessment (E.O. 12630)
 - F. Federalism (E.O. 13132)
 - G. Civil Justice Reform (E.O. 12988)
 - H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)
 - I. Paperwork Reduction Act
 - J. National Environmental Policy Act
 - K. Data Quality Act
 - L. Effects on the Nation's Energy Supply (E.O. 13211)
 - M. Clarity of This Regulation

I. Background of BOEM Regulations

A. BOEM Statutory and Regulatory Authority and Responsibilities

BOEM derives its authority primarily from the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331–1356b, which authorizes the Secretary of the Interior (Secretary) to lease the OCS for mineral development, and to regulate oil and gas exploration, development, and production operations on the OCS. Section 5(a) of OCSLA (43 U.S.C. 1334(a)) authorizes the Secretary to “prescribe such rules and regulations as may be necessary to carry out” the “provisions of [OCSLA] relating to the leasing of the” OCS and “to provide for the prevention of waste and conservation of the natural resources of the [OCS] and the protection of correlative rights therein,” and provides that “such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under” OCSLA. Section 5(b) of OCSLA provides that “compliance with regulations issued

under” OCSLA shall be a condition of “[t]he issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of” OCSLA.

BOEM is responsible for managing development of the nation’s offshore resources in an environmentally and economically responsible way. The Secretary, in Secretary’s Order 3299, delegated the authority to BOEM to carry out conventional (e.g., oil and gas) and renewable energy-related functions including, but not limited to, activities involving resource evaluation, planning, and leasing. Secretary’s Order 3299 also assigned authority to BSEE, including, but not limited to, enforcement of the obligation to perform decommissioning. BSEE provides estimates of decommissioning costs to BOEM so that the financial assurance required by BOEM will be sufficient to cover the cost to perform decommissioning, thereby protecting the government from incurring financial loss to the maximum extent practicable. While BOEM has program oversight for the financial assurance requirements set forth in 30 CFR parts 550, 551, 556, 581, 582 and 585, this proposed rule pertains only to the financial assurance requirements for oil and gas or sulfur leases under Part 556, and associated right-of-use and easement grants and pipeline right-of-way grants under Part 550.

B. History of Bonding Regulations and Guidance

BOEM’s existing bonding regulations for leases (30 CFR 556.900–907) and pipeline right-of-way grants (30 CFR 550.1011) published by BOEM’s predecessor, the Minerals Management Service (MMS) on May 22, 1997 (62 FR 27948), provide the authority for the Regional Director to require bonding for leases and pipeline right-of-way grants. Section 556.900(a) and § 556.901(a) and (b) require lease-specific base bonds or areawide base bonds in prescribed amounts, depending on the level of activity on a lease or leases. Section 556.901(d) authorizes the Regional Director to require additional security for leases above the prescribed amounts for lease and areawide base bonds. Similarly, § 550.1011 authorizes the Regional Director to require an areawide base bond in a prescribed amount and additional security above the prescribed amount for pipeline right-of-way grants.

BOEM’s existing bonding regulations for right-of-use and easement grants (30 CFR 550.160 and 550.166), published by the MMS on December 28, 1999 (64 FR 72756), provide the authority for the Regional Director to require bonds or other security for right-of-use and

easement grants. Section 550.160, which applies only to an applicant for a right-of-use and easement that serves an OCS lease, provides that the applicant “must meet bonding requirements.” While there is no requirement for an applicant for a right-of-use and easement that serves an OCS lease to provide a base bond in a prescribed amount, § 550.160 authorizes the Regional Director to require bonding if the Regional Director determines it is necessary.

Section 550.166 requires an applicant for a right-of-use and easement that serves a State lease to provide a base bond of \$500,000. Section 550.166 also provides that BOEM may require additional security above the prescribed \$500,000 base bond from the holder of a right-of-use and easement that serves a State lease to cover additional costs and liabilities.

MMS, and now BOEM, has employed the criteria for determining whether additional security should be required for leases to also determine whether additional security should be required for right-of-use and easement grants or pipeline right-of-way grants, since there are no criteria specified in the existing Part 550 for these purposes. The existing lease bonding regulations under § 556.901(d) provide five criteria the bureau uses to determine whether a lessee’s potential inability to carry out present and future financial obligations warrants a demand for additional security. However, these regulations do not specifically describe how the agency weighs those criteria. To provide guidance, MMS issued Notice to Lessees (NTL) No. 98–18N, effective December 28, 1998, which provided details on how it would apply these regulations and the five criteria. This NTL was replaced by NTL No. 2003–N06, effective June 17, 2003, which was later replaced by NTL No. 2008–N07, effective August 28, 2008.

Pursuant to BOEM’s standard, historical practice under NTL No. 2008–N07, a lessee or grant holder that passed established financial thresholds was waived from providing additional security to cover its decommissioning liabilities. Additionally, co-lessees (regardless of their own financial strength), were not required to provide additional security for the decommissioning liability for that lease if one lessee was waived. The decommissioning liability on a lease, on which there were two waived lessees, was not attributed to either lessee in calculating whether a lessee’s cumulative potential decommissioning liability was less than 50% of the lessee’s net worth, which was the standard for a lessee to qualify for a

supplemental bonding waiver. The policy was based on the assumption that the chances were very remote that both lessees would become financially distressed and not be able to meet their obligations. While NTL No. 2008–N07 was the most recent, fully implemented NTL, BOEM did not fully enforce it during the oil price collapse of 2014–2016. BOEM was concerned that fully enforcing NTL No. 2008–N07 would have led to an increase of bond demands that, in turn, would have contributed to an increase in bankruptcy filings.

Since 2009, there have been 30 corporate bankruptcies of offshore oil and gas lessees involving owned or partially owned offshore decommissioning liability of approximately \$7.5 billion in total. This figure includes properties with co-lessees and predecessors, and properties held by companies that successfully emerged from a Chapter 11 reorganization bankruptcy. While BOEM cannot predict the outcomes of bankruptcy proceedings, the actual financial risk is significantly less than the total offshore decommissioning liability associated with offshore corporate bankruptcies. Several of these companies experienced financial distress when oil prices fell sharply at the end of 2014. Further, the fact that a company entered bankruptcy does not necessarily suggest that there would be no private party responsible for decommissioning costs, as company assets may be sold, and predecessors would retain their pre-existing obligation to fund or perform the decommissioning.

The fact that recent bankruptcies and reorganizations have involved unbonded decommissioning liabilities demonstrates that BOEM's regulations and the waiver criteria in NTL No. 2008–N07 were inadequate to protect the public from potential responsibility for OCS decommissioning liabilities, especially during periods of low hydrocarbon prices. Specifically, ATP Oil & Gas was a mid-sized company with a financial assurance waiver when it filed for bankruptcy in 2012. Similarly, Bennu Oil & Gas was waived at the time of its bankruptcy filing, and Energy XXI and Stone Energy did not lose their waivers until less than 12 months prior to filing bankruptcy. While most affected OCS properties were ultimately sold or the companies reorganized under Chapter 11 of the U.S. Bankruptcy Code, several bankruptcies, including those of ATP and Bennu, demonstrated the weaknesses in BOEM's financial assurance program. These weaknesses

were apparent because the unsecured decommissioning liabilities exceeded the value of the leases to potential purchasers or investors. BOEM cannot forecast the outcome of bankruptcy proceedings, which may lead to the restructuring or liquidation of an insolvent company, in addition to other potential outcomes. If BOEM has insufficient financial assurance at the time of bankruptcy, BOEM may seek legal avenues for obtaining funds in bankruptcy proceedings, but outcomes are not assured and there may be no recourse for obtaining additional funds, resulting in the Department of the Interior's needing to perform the decommissioning with the cost coming from the American taxpayer.

In 2009, MMS issued a proposed rule (74 FR 25177) to rewrite the entirety of the leasing provisions of Part 256 (now designated as Part 556). However, because of uncertainty associated with revising the bonding requirements, BOEM deferred revision of the bonding regulations to a separate rulemaking. This separate rulemaking commenced August 14, 2014, with an advance notice of proposed rulemaking (79 FR 49027) to solicit ideas for improving the bonding regulations.

In December 2015, the Government Accountability Office (GAO) reviewed BOEM's financial assurance procedures (see GAO–16–40, <https://www.gao.gov/products/GAO-16-40>) (the GAO Report). While acknowledging BOEM's ongoing efforts to update its policies, the GAO Report recommended, *inter alia*, that “BOEM complete its plan to revise its financial assurance procedures, including the use of alternative measures of financial strength.” GAO–16–40 at 34. Following further analysis and a series of stakeholder meetings in 2015 and 2016 to solicit industry input, BOEM attempted to remedy the weaknesses in its financial assurance program as administered under NTL No. 2008–N07 with new NTL No. 2016–N01, *Requiring Additional Security*, which became effective September 12, 2016. NTL No. 2016–N01 sought to clarify the procedures and explain how BOEM would use the regulatory criteria to determine if, and when, additional security may be required for OCS leases, right-of-use and easement grants, and pipeline right-of-way grants. The NTL continued to use net worth of a lessee as a measure of financial strength because this measure was required by the regulations. The NTL also detailed several changes in policy and refined the criteria used to determine a lessee's or grant holder's financial ability to carry out its obligations. On August 29, 2016, BOEM requested GAO to close the

above stated recommendation in the GAO Report, stating that BOEM had implemented the recommendation by issuance of the NTL. GAO found that the recommendation had been implemented and closed the audit recommendation later in fiscal year 2016. BOEM acknowledges that NTL No. 2016–N01 was never fully implemented. This proposed rulemaking is another effort (in addition to the partially implemented NTL) to revise BOEM's financial assurance procedures, including the proposal to use alternative measures to evaluate financial strength.

In December 2016, BOEM began implementing the NTL and issued numerous orders to lessees and grant holders to provide additional security for “sole liability properties,” *i.e.*, leases, right-of-use and easement grants, and pipeline right-of-way grants for which the lessee or grant holder is the only party liable for meeting the lease or grant obligations.

On January 6, 2017, BOEM issued a Note to Stakeholders extending implementation of NTL No. 2016–N01 for six months. The extension applied to leases, right-of-use and easement grants, and pipeline right-of-way grants for which there were co-lessees, predecessors in interest, or both, except where BOEM determined there was a substantial risk of nonperformance of the interest holder's decommissioning obligation. The extension of the implementation timeline allowed BOEM an opportunity to evaluate whether certain leases and grants were considered to be sole liability properties. Upon closer examination and upon receiving feedback from notified stakeholders regarding inaccuracies in BOEM's assessment of sole liabilities, BOEM issued a second Note to Stakeholders on February 17, 2017, announcing that it would withdraw the December 2016 orders issued on sole liability properties to allow time for the new Administration to review BOEM's financial assurance program.

C. Regulatory Reform—New Executive and Secretary's Orders

On March 28, 2017, the President issued Executive Order (E.O.) 13783—*Promoting Energy Independence and Economic Growth*. Section 2 of the E.O. directed Federal agencies to: Review all existing regulations and other agency actions that potentially burden the development of domestic energy resources; provide recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic

energy production; and pursue processes for implementing such recommendations, as appropriate and consistent with law. While section 2 of the E.O. directed Federal agencies to review regulations, section 2 did not direct any particular changes or outcomes.

On April 28, 2017, the President issued E.O. 13795, *Implementing an America-First Offshore Energy Strategy*, which ordered the Secretary of the Interior to direct the BOEM Director to take all necessary steps consistent with law to review BOEM's NTL No. 2016–N01 and determine whether modifications are necessary, and if so, to what extent, to ensure operator compliance with lease terms while minimizing unnecessary regulatory burdens. This E.O. also required the Secretary of the Interior to review BOEM's financial assurance regulatory policy to determine the extent to which additional regulation is necessary.

Secretary's Order No. 3350 of May 1, 2017, *America-First Offshore Energy Strategy*, followed on E.O. 13795 and directed BOEM to promptly complete its previously announced review of NTL No. 2016–N01 and to “provide to the Assistant Secretary—Land and Minerals Management (ASLM), the Deputy Secretary, and the Counselor to the Secretary for Energy Policy, a report describing the results of the review and options for revising or rescinding NTL No. 2016–N01.” Secretary's Order No. 3350 further specified that BOEM's previously announced extension of the implementation timelines for NTL No. 2016–N01 would remain in effect pending completion of the review.

On June 22, 2017, BOEM issued a third Note to Stakeholders announcing that it was in the final stages of its review of NTL No. 2016–N01, but had determined that “more time was necessary to work with industry and other interested parties,” and therefore, that it would be appropriate to extend the implementation timeline beyond June 30, “except in circumstances where there would be a substantial risk of nonperformance of the interest holder's decommissioning liabilities.”

BOEM continued to review the provisions of NTL No. 2016–N01 and examine options for revising or rescinding the NTL. BOEM also continued to review its financial assurance regulatory policy to determine the extent to which regulatory revision is necessary. As a result, BOEM recognized the need to develop a comprehensive program to assist in identifying, prioritizing, and managing the risks associated with industry activities on the OCS.

In October 2019, the President issued E.O. 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, which, in recognition that Americans deserve an open and fair regulatory process, defines “significant guidance documents” as having an effect of \$100 million or more, sets a policy that guidance documents should be non-binding, and encourages legally binding requirements to be enacted through notice and comment rulemaking under the Administrative Procedure Act. Because the NTL was issued rather than moving forward with the 2014 ANPRM, BOEM believes that compliance with E.O. 13891 is best achieved by rulemaking, which provides for notice and comment.

D. Purpose of BOEM's Portion of the Proposed Rulemaking

BOEM's goal for its financial assurance program continues to be the protection of the American taxpayers from exposure to financial loss associated with OCS development, while ensuring that the financial assurance program does not detrimentally affect offshore investment or position American offshore exploration and production companies at a competitive disadvantage. After carefully considering the recommendations of the GAO report, as well as feedback received during the review of NTL No. 2016–N01 indicating that the policy changes identified in the NTL could result in significant economic hardships for companies operating on the OCS, particularly during times of low oil prices, BOEM reconsidered its approach for identifying, prioritizing, and managing the risks associated with industry activities on the OCS.

The proposed rule would implement the recommendation of the GAO report that BOEM look to alternative measures of financial strength. Under the proposed rule, instead of relying primarily on net worth to determine whether a lessee must provide additional security, BOEM would primarily consider a lessee's or its predecessor's credit rating. Credit rating agencies take many factors into account when evaluating a company, particularly those that emphasize cash flow, such as debt-to-earnings ratios and debt-to-funds from operations. A credit rating would consider forward-looking factors, including the income statement and cash flow statement, which provide a broader picture of how well a company can meet its future liabilities. On the other hand, a net worth analysis tends to be backward-looking, because it is calculated from a company's balance

sheet, which shows the current amount of its assets and liabilities. A lessee's financial deterioration can occur quickly. Relying on the more forward-looking credit rating analysis, both to determine whether additional security may be necessary and to determine whether a company can be a guarantor on the OCS, would allow BOEM to foresee a lessee's possible financial distress sufficiently ahead of time to take appropriate action.

Further, the proposed rule's new approach would be rooted in the joint and several liability of all lessees, co-lessees, and predecessor lessees for all non-monetary obligations on a lease. In most cases of default by a current lessee, a predecessor lessee can be called upon to perform decommissioning. This proposed rule would rely on the combined responsibility of all current and predecessor lessees to perform required decommissioning. Regardless of the proposed rule, even in cases where a predecessor divested its full interest in a lease to another company by assignment after accruing an obligation to decommission certain infrastructure (*i.e.*, well, platform, pipeline), the predecessor remains jointly and severally liable for decommissioning that infrastructure. The proposed rule would acknowledge the larger universe of companies to whom BSEE can look for performance under the law, and so would reduce the circumstances under which BOEM would need to require additional security.

BOEM's proposed regulatory changes would allow the bureau to more effectively address a number of complex financial and legal issues (*e.g.*, joint and several liability and economic viability of offshore assets) associated with decommissioning liability on the OCS. By addressing the issues through rulemaking, BOEM will afford all interested and potentially affected parties the opportunity to provide additional substantive comments to the agency. This rulemaking need not be concerned with general bond amounts, nor is BOEM requesting comments on the general bond amounts, because any potential shortfall could be addressed using the flexibility of the additional security provisions.

In summary, BOEM is proposing this rulemaking to clarify and simplify its financial assurance requirements with the ultimate goal of providing regulatory changes that would continue to protect taxpayers while providing certainty and needed flexibility for OCS operators.

II. Background of BSEE Regulations

A. BSEE Statutory and Regulatory Authority and Responsibilities

Like BOEM, BSEE derives its authority primarily from OCSLA, which authorizes the Secretary, as discussed in part I.A, to regulate oil and gas exploration, development, and production operations on the OCS. As previously stated, Secretary's Order 3299 delegated authority to perform certain of these regulatory functions to BSEE. To carry out its responsibilities, BSEE regulates offshore oil and gas operations to enhance the safety of exploration for and development of oil and gas on the OCS, to ensure that those operations protect the environment, to conserve the natural resources of the OCS, and to implement advancements in technology. BSEE's regulatory program covers a wide range of facilities and activities, including decommissioning requirements, which are the primary focus of this rulemaking. Detailed information concerning BSEE's regulations and guidance to the offshore oil and gas industry may be found on BSEE's website at: <http://www.bsee.gov/Regulations-and-Guidance/index>.

B. BSEE's Decommissioning Regulations and Guidance

On May 17, 2002, MMS issued regulations that amended requirements for plugging wells, decommissioning platforms and pipelines, and clearing sites. (See 67 FR 35398.) In 2011, Secretary's Order 3299 assigned responsibility for certain MMS programs and regulations, including the decommissioning regulations, to BSEE. On October 18, 2011, BSEE revised the decommissioning regulations to reflect BSEE's role. (See 76 FR 64432.) On August 22, 2012, BSEE amended the decommissioning regulations to implement certain safety recommendations arising out of various *Deepwater Horizon* reports and moved the regulations to 30 CFR part 250 subpart Q. (See 77 FR 50856.)

The Subpart Q regulations generally require that lessees and owners of operating rights and pipeline right-of-way (ROW) grant holders decommission wells, platforms and other facilities, and pipelines when they are no longer useful for operations, but no later than one year after a lease or ROW terminates.¹ Failure to do so within this

one-year period, absent BSEE's approval, will typically result in the issuance of a Notice of Incident of Noncompliance (INC)—the initial stage of enforcement. Subpart Q also provides BSEE with the authority to require the decommissioning of wells, platforms and other facilities, and pipelines when no longer useful for operations on active leases.

BSEE's regulation, at 30 CFR 250.1701, also provides that lessees and owners of operating rights are jointly and severally liable for meeting decommissioning obligations for facilities on leases, including the obligations related to lease term pipelines, as the obligations accrue and until each obligation is met.² Likewise, all holders of a ROW grant are jointly and severally liable for meeting decommissioning obligations for facilities on their right-of-way, including ROW pipelines, as the obligations accrue and until each obligation is met. (See *id.* at 250.1701(b)). Section 250.1702 explains when lessees, operating rights owners, and pipeline ROW grant holders accrue decommissioning obligations. Section 250.1703 describes general requirements for decommissioning of wells, platforms and other facilities, and pipelines. In particular, paragraph (g) of § 250.1703 requires that responsible parties conduct all decommissioning activities “in a manner that is safe, does not unreasonably interfere with other uses of the OCS, and does not cause undue or serious harm or damage to the . . . environment.”

BOEM regulations at 30 CFR 556.710 and 556.805 provide that lessees and owners of operating rights, who assign their interests, remain liable post-assignment for all obligations they accrued during the period in which they owned their interest. Those regulations also provide that BOEM and BSEE can require such assignor predecessors to perform those obligations if a subsequent assignee fails to perform. *Id.*

In accordance with the joint and several liability provisions of 30 CFR part 250: Subpart Q and the residual liability provisions of part 556, when current lessees, operating rights owners, or ROW holders fail to perform

decommissioning obligations, BSEE typically orders all predecessors that have accrued the defaulted obligation to perform any required decommissioning. If a right-of-use and easement (RUE) grant holder fails to perform (when obligated by the terms of the grant), BSEE typically orders any lessees or owners of operating rights that accrued the relevant obligation prior to issuance of the RUE to perform required decommissioning. BSEE may issue such orders without regard to whether a predecessor's ownership of interests in a lease or grant was in recent years or several decades before. For example, if a predecessor divests its full interest in a lease to another company by assignment after accruing the obligation, BSEE would still have the authority to order the predecessor to perform accrued obligations upon default by a subsequent assignee, regardless of the regulatory revisions in this proposed rulemaking.

To provide guidance and additional detail on the decommissioning requirements, MMS issued NTL No. 2004-G06, *Structure Removal Operations* (effective April 5, 2004). MMS replaced this NTL in 2010 with NTL No. 2010-G05, *Decommissioning Guidance for Wells and Platforms*, which BSEE in turn replaced in December 2018 with NTL No. 2018-G03, *Idle Iron Decommissioning Guidance for Wells and Platforms*. The 2018 NTL states that BSEE may issue orders to lessees and ROW grant holders who fail to meet deadlines to decommission, as specified in the NTL, for wells and facilities on active leases that are no longer useful for operations. It also states that BSEE will typically issue INCs if decommissioning does not occur within one year after a lease or ROW grant expires, terminates, or is relinquished, to prompt the owners and their operator to address problems that occur when decommissioning is not carried out in a timely manner. The 2018 NTL also states that, pursuant to 30 CFR 250.1711(a), BSEE will issue orders to permanently plug any wells that pose hazards to safety or the environment.

C. Regulatory Reform

On February 24, 2017, the President issued E.O. 13777, *Enforcing the Regulatory Reform Agenda*, which establishes two main goals for Federal agencies in alleviating unnecessary burdens placed on the American people:

(1) To improve implementation of the regulatory reform initiatives and policies specified in E.O. 13771 (*Reducing Regulation and Controlling Regulatory Costs*), E.O. 12866, and E.O.

¹ Existing § 250.1703 generally requires lessees and ROW grant holders to permanently plug all wells, remove platforms and other facilities, and decommission all pipelines when they are no longer useful for operations and to clear the seafloor of all obstructions created by the lease or a pipeline

right-of-way. Existing § 250.1710 requires that wells be permanently plugged within one year after a lease terminates, while § 250.1725 requires that platforms and other facilities be removed within one year after the lease or a pipeline right-of-way terminates (unless BSEE approves maintaining the structure for other uses). Sections 250.1750 and 250.1751 allow lessees and ROW grant holders to decommission pipelines in place (*i.e.*, without removal) under certain conditions.

² A similar requirement is imposed under existing § 250.146.

13563 (*Improving Regulation and Regulatory Review*); and

(2) To identify regulations for repeal, replacement, or modification, that, among other things, are outdated, unnecessary, or ineffective; impose costs that exceed benefits; or create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies.

D. Stakeholder Engagement

On June 22, 2017, the Office of the Secretary issued a Request for Comments to solicit public input on how the Department can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification (see 82 FR 28429). As a result, the Department received several written comments, some of which pertained to BOEM's financial assurance regulatory requirements, including financial assurance for decommissioning, and some of which addressed BSEE's procedures for requiring performance of decommissioning obligations by predecessors when the current lessees or grant holders fail to do so. The commenters that addressed BSEE's procedures urged BSEE to focus responsibility for decommissioning liabilities on current lessees, regardless of predecessors in title, inasmuch as predecessors are not held responsible for liabilities created after their ownership terminates; and, in cases of a default by current owners, to pursue performance by predecessors in reverse chronological order starting with the most recent predecessor.

BSEE has considered the comments from stakeholders and determined that BSEE's decommissioning regulations could be revised to support the goals of the Administration's regulatory reform initiatives, while also ensuring safety and environmental protection. Accordingly, BSEE proposes to revise existing 30 CFR part 250: Subpart Q regulations to address the order in which predecessors will be ordered to perform decommissioning if the current lessees or grant holders fail to do so. In addition, BSEE proposes to revise the decommissioning regulations to expressly include holders of RUE grants among the parties who can accrue obligations for decommissioning. Finally, BSEE proposes to require parties who file administrative appeals of decommissioning decisions or orders to post a surety bond in order to seek to obtain a stay of that decision or order pending the appeal, and thus minimize any possibility that resources for the performance of decommissioning will

be unavailable following exhaustion of appeals, such as if no other predecessors exist to perform the decommissioning activities.

E. Purpose of BSEE's Portion of the Proposed Rulemaking

Timely decommissioning of oil and gas wells, platforms and other facilities, and pipelines and related infrastructure is a critical requirement for OCS operators to adhere to, and when necessary, for BSEE to enforce. If not properly decommissioned, such infrastructure could cause safety hazards or environmental harm, or become obstructions by interfering with navigation or other uses of the OCS (such as fishing and future resource development). Under some conditions, however, lessees or grant holders may transfer platforms to artificial reef sites maintained by coastal states, or ROW grant holders may decommission pipelines in place, in lieu of removal. This proposed rule would not change regulations governing the operational aspects of decommissioning.

Under existing regulations, BSEE can require a predecessor to bring a lease into compliance if its assignee or any subsequent assignee has failed to perform an obligation that accrued prior to assignment. BSEE's proposed rule would create a new procedure under Subpart Q for establishing the sequence in which BSEE will order predecessors to carry out their accrued decommissioning obligations when current lessees or grant holders (or other predecessors) fail to do so. Specifically, after the current lessees or grant holders have defaulted, BSEE would pursue liable predecessors in reverse chronological order through the chain-of-title to perform their accrued decommissioning obligations. Under this approach, the most recent predecessors would receive orders to conduct decommissioning first, before BSEE turns to predecessors more remote in time.

This proposed change may provide additional transparency and clarity for BSEE and BOEM, as well as for the public and the oil and gas industry, in ensuring that decommissioning requirements will be met. In light of the proposed approach, lessees and grant holders wanting to sell their leases or grants may choose to consider financially stronger companies as potential purchasers or assignees. Under the proposal, both parties to such transactions would know in advance that BSEE would turn first to the most recent assignor to perform decommissioning if the current lessee or grant holder fails to perform its

decommissioning obligation; in that case, the seller may well want some assurance that the purchasing company has the means to perform. Accordingly, this additional transparency may result in limiting the universe of potential purchasers to more financially capable companies that present a reduced risk of default or are able to provide financial assurances to the seller, thus assuring that decommissioning can be performed.

In addition, since the more recent owners are more familiar with the current state of the facilities than previous owners, the proposed approach would further ensure safer and more efficient decommissioning. Also, the more recent prior owners often accrue liabilities for wells, pipelines, or platform improvements for which earlier owners have no liability because these wells, pipelines, or platform improvements were added after the earlier owners had assigned their interests. The more recent prior owners are, therefore, the most likely predecessor(s) who can be required to fully decommission all facilities. In summary, as proposed, it is reasonable and efficient for BSEE to turn first to the most recent owners when the current owners do not perform all the decommissioning obligations.

BSEE's proposal would not exempt any current lessees or grant holders, or predecessors, from liability; each party remains liable for its own accrued obligations. The proposal would simply establish a procedure through which BSEE would prioritize its efforts toward the groups of jointly and severally liable predecessors by looking first to the most recent in time, rather than looking initially to all jointly and severally liable predecessors. Details of the proposal are found in part VII.A of this proposed rule.

The proposed rule, if adopted, could increase confidence that the cost of decommissioning will be borne by the more recent owners while still ensuring that decommissioning is carried out in a safe and environmentally responsible manner. While there is no amount of time which reduces or eliminates joint and several liability of predecessors for their accrued liabilities, defining an order of recourse among predecessors would eliminate some of the unpredictability perceived in the past. In addition, the proposed rule would help BSEE to better address maintenance and monitoring of facilities in cases where all current owners' default.

The proposed rule would also address the decommissioning of OCS facilities located on RUE grants. These grants

authorize a RUE holder to use a portion of the seabed at an OCS site not leased by the RUE holder, in order to construct, modify, or maintain platforms, artificial islands, facilities, installations, and other devices that support the exploration, development, or production of oil and gas from a RUE holder's nearby lease. BOEM's financial assurance regulations encompass RUEs as a defined category of interest in OCS lands, and provide that RUE grant holders must comply with the same bonding obligations as other lessees. However, as a result of numerous revisions of the regulations specific to decommissioning, those regulations no longer clearly address decommissioning by RUE grant holders, so BSEE now proposes to add RUE holders to the parties that accrue obligations for decommissioning. This is consistent with BOEM's existing process of including the decommissioning obligation in the terms of the RUE grant, as well as the general understanding typically captured in agreements between RUE holders and facility owners by which RUE holders secure title to or rights to use existing facilities originally installed when the tract was subject to a lease. This proposed amendment to the existing BSEE regulations is discussed more completely at part VII.B.

In addition, BSEE's existing regulations (at 30 CFR part 290) allow parties adversely affected by a final BSEE order or decision—including a decommissioning-related decision or order—to administratively appeal that decision to the Interior Board of Land Appeals (IBLA). Existing § 290.7(a)(2) requires a party appealing a civil penalty order issued by BSEE to post a surety bond, in accordance with 30 CFR 250.1409, pending the appeal. There has previously been no such bonding requirement for appeals of decommissioning orders.

Inasmuch as income generation from a lease typically ceases well before decommissioning orders are issued, an appeal poses a risk to BSEE that, where financial assurance was not already in place, a lessee appealing a decommissioning order may not have the wherewithal to decommission after a lengthy appeal has run its course and the Board affirms BSEE's order. Moreover, the delay occasioned by the appeal process may create a risk that some or all other predecessors may have deteriorated financial health by the time BSEE turns to them for performance.

Thus, in order to avoid the possibility of undue delays, and to ensure that funds are available to meet the decommissioning requirements in a safe

and environmentally sound manner when an unsuccessful appellant subsequently defaults, BSEE proposes to amend the 30 CFR part 250: Subpart Q and Part 290 regulations as described in part VII.C. Specifically, BSEE proposes to require any party appealing a decommissioning decision or order to post a surety bond in order to seek to obtain a stay of that decision or order pending the appeal to ensure that the necessary decommissioning activities can be performed in a timely manner if the appeal is denied and the appellant(s) subsequently fail to perform the required decommissioning activities.

III. Proposed Revisions to BOEM Bonds and Other Security Requirements

BOEM's existing bonding and other security regulatory framework has two main components: (1) Base bonds, generally required in amounts prescribed by regulation, and (2) bonds or other security above the prescribed amounts that may be required by order of the Regional Director upon determination that an increased amount is necessary to ensure compliance with OCS obligations. BOEM's objective is to ensure that taxpayers never have to bear the cost of meeting the obligations of lessees and grant holders on the OCS. At the same time, BOEM must balance this objective against the costs and disincentives to additional exploration, development and production that are imposed on lessees and grant holders by increased amounts of surety bonds and other security requirements. To maintain a balanced framework, BOEM proposes to: (1) Modify the evaluation process for requiring additional security; (2) streamline the evaluation criteria; and (3) remove restrictive provisions for third-party guarantees and decommissioning accounts. The proposed rule would allow the Regional Director to require additional security only when: (1) A lessee or grant holder poses a substantial risk of becoming financially unable to carry out its obligations under the lease or grant; (2) there is no co-lessee, co-grant holder, or predecessor that is liable for those obligations and that has sufficient financial capacity to carry out the obligations; and (3) the property is at or near the end of its productive life, and thus, may not have sufficient value to be sold to another company that would assume these obligations.

A. Leases

Each current lessee is jointly and severally liable for the lease decommissioning obligations, which means that each lessee is liable up to the

full amount of the relevant obligation and that BOEM may pursue compliance with the obligations from any one lessee. As such, each lessee is liable for all decommissioning obligations that accrue during its ownership, as well as those that accrued prior to its ownership. In addition, a lessee that transfers its interest to another party continues to be liable for any unperformed decommissioning obligations that accrued prior to, or during, the time that lessee owned an interest in the lease.

BOEM's additional security evaluation process, contained in 30 CFR 556.901(d), is based on the current lessee's ability to carry out present and future obligations. BOEM proposes to expand this evaluation process to include an evaluation of the ability of a co-lessee, or a predecessor lessee, to carry out present and future obligations. This change recognizes the mitigation of the risk occasioned by the joint and several liability of all current and predecessor lessees, which allows BSEE to require co-lessees or predecessor lessees, or both, to perform decommissioning when a current lessee is unable to perform. While the liability for obligations between current and predecessor lessees has always been joint and several, this would be the first time BOEM has explicitly considered the ability of predecessor lessees to carry out the present and future obligations of current lessees when determining the additional security requirements for current lessees.

Under BOEM's existing regulations, the Regional Director's evaluation of a lessee's potential need for additional security for a lease is based on the following five criteria: Financial capacity; projected financial strength; business stability; reliability in meeting obligations based upon credit rating or trade references; and record of compliance with laws, regulations, and lease terms. BOEM is proposing to streamline its evaluation process by using only two criteria to determine whether additional security on a lease may be required: (1) A credit rating, either a credit rating from a Nationally Recognized Statistical Rating Organization (NRSRO), as identified by the United States Securities and Exchange Commission (SEC) pursuant to its grant of authority under the Credit Rating Agency Reform Act of 2006 and its implementing regulations at 17 CFR parts 240 and 249(b), or a proxy credit rating determined by BOEM using audited financial statements; and (2) the value of proved oil and gas reserves. These two criteria better align BOEM's evaluation process with accepted

financial risk evaluation methods used by the banking and finance industry. Eliminating reliance on less relevant information, such as length of time in operation to determine business stability, or trade references to determine reliability in meeting obligations, will simplify the process and remove criteria that may not accurately or consistently predict potential financial distress.

BOEM proposes to eliminate the “business stability” criterion found in existing § 556.901(d)(1)(iii). The existing regulation bases business stability on five years of continuous operation and production of oil and gas, but BOEM determined that there is little correlation between being in business for five or more years and a company’s ability to carry out its present and future obligations. BOEM met with S&P credit analysts about their process for considering business stability. S&P credit analysts confirmed that business stability is a factor in credit ratings, however, S&P does not measure a company’s business stability by merely noting how long it has been since the company was incorporated. BOEM conducted an analysis of offshore bankruptcies, including an assessment of the number of years incorporated prior to bankruptcy, and determined that whether a company was in business for five or more years had no relationship to its likelihood to declare bankruptcy.

BOEM also proposes to eliminate the existing “record of compliance” criterion found in existing § 556.901(d)(1)(v). BOEM reviewed BSEE’s INCs and Increased Oversight List. BOEM’s review of these lists confirmed the feedback BOEM received in response to the NTL, which was that companies with a large number of properties and components tended to receive a large number of INCs and had a larger number of individual properties on the Increased Oversight List.³ BOEM has determined that the primary predictor of the number of INCs a company receives is not its financial health, but the number of OCS properties that it owns. BOEM determined that a company’s record of compliance did not correlate to its overall financial health and, therefore, is not an accurate indicator of the need for financial assurance to assure that the company carries out its present and future OCS obligations. Offshore companies with a large portfolio of offshore assets inspected by BSEE accumulated a far greater number of

BSEE-issued Incidents of Non-Compliance than offshore companies with fewer offshore assets inspected by BSEE, irrespective of the company’s overall financial health. The “record of compliance” criterion was also difficult to fairly apply since not all noncompliance is considered equal evidence of a lack of commitment to observe regulatory requirements.

BOEM proposes to replace the existing “financial capacity” and “reliability” criteria in § 556.901(d)(1) with issuer credit rating or proxy credit rating. BOEM has found credit rating, which had been a part of the reliability criterion, to be the most reliable indicator of financial ability. Credit ratings provided by a NRSRO incorporate a broad range of qualitative and quantitative factors, and a business entity’s credit rating represents its overall credit risk, or its ability to meet its financial commitments.

If a lessee does not have a credit rating from a NRSRO, the lessee may instead submit audited financial statements, and BOEM will determine a proxy credit rating using the S&P Credit Analytics Credit Model, or a similar widely accepted credit rating model. Such audited financial information is currently the basis of one of the five criteria—the “financial capacity” criterion. In the proposed rule, this information will be just one of the considerations used for proxy credit ratings, following credit rating agency models.”

BOEM has concluded that audited financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP) and accompanied by an auditor’s certificate, provide a level of certainty that the financial statements accurately represent the company’s economic position and operational performance. Using this audited financial information to generate a proxy credit rating would allow BOEM to accurately determine if additional security is needed.

The proposed rule would allow the Regional Director to require a lessee to provide additional security if the lessee does not have a credit rating from a NRSRO that is greater than or equal to either BB – from S&P Global Ratings (S&P) or Ba3 from Moody’s Investor Service (Moody’s); or a proxy credit rating greater than or equal to either BB – or Ba3 as determined by the Regional Director based on audited financial information including an income statement, balance sheet, and statement of cash flows, with an accompanying auditor’s certificate.

Under existing BOEM regulations, co-lessees and predecessors are jointly and

severally liable for accrued decommissioning obligations, and the risk that the government will be responsible for the decommissioning cost is reduced when those entities are financially viable. Hence, BOEM may determine not to require additional security for properties with financially viable co-lessees and predecessors. To be considered financially viable, the co-lessee or predecessor would have to meet the same credit rating or proxy credit rating criteria as a lessee.

If the lessee does not meet the credit rating or proxy credit rating criteria, BOEM would review the lessee’s obligations at the lease level and determine whether to require additional security for each lease owned by that lessee. BOEM may require the lessee to provide additional security on a lease-by-lease basis if a co-lessee does not meet the credit rating or proxy credit rating criteria.

If the co-lessee does not meet the credit rating or proxy credit rating criteria, BOEM would review the proved oil and gas reserves on the lease. The Regional Director may require the lessee to provide additional security for that lease if the net present value of those proved reserves is less than or equal to three times the cost of the decommissioning (as estimated by BSEE) associated with the production of the reserves. As described in more detail below, BOEM determined that properties with a net present value of proved oil and gas reserves exceeding three times the decommissioning costs associated with production of those reserves pose minimal risk that the government will be required to bear the cost of decommissioning, because these properties are more likely than other properties to be purchased by another company. That company would then become liable for existing decommissioning obligations, reducing the risk that those costs would be borne by the government. Consequently, BOEM is proposing to use (and is requesting comments on) this test—net present value of proved oil and gas reserves on the lease exceeding three times the decommissioning costs (decommissioning costs as estimated by BSEE) associated with production of those reserves—as the criterion to replace the existing generalized “projected financial strength” criterion, which considered whether the estimated value of a lessee’s existing lease production and proven reserves was significantly in excess of the lessee’s existing and future lease obligations.

If neither the lessee nor any co-lessee meets the credit rating or proxy credit

³ Most recent data available at <https://www.data.bsee.gov/Company/INC/Default.aspx>

rating criteria and there are not sufficient oil and gas reserves on the lease, BOEM would look to the credit ratings of prior lessees. If no predecessor lessee liable for decommissioning any facilities on the lease meets the credit rating or proxy credit rating criteria, the Regional Director may require the lessee to provide additional security. Moreover, even if a predecessor meets the credit rating or proxy credit rating criteria, the Regional Director may require the lessee to provide additional security for decommissioning obligations for which such a predecessor is not liable.

B. Right-of-Use and Easement Grants

BOEM's regulations concerning right-of-use and easement grants for an OCS lessee and a State lessee are found in 30 CFR 550.160 through 550.166. Section 550.160 provides that an applicant for a right-of-use and easement that serves an OCS lease "must meet bonding requirements," but the regulation does not prescribe a base bond amount. The proposed rule would replace this vague requirement with a cross-reference to the specific criteria governing bond demands in § 550.166(d).

BOEM is proposing to revise the bonding regulations to clarify that any right-of-use and easement grant holder, whether the right-of-use and easement serves a State lease or serves an OCS lease, may be required to provide additional security for the right-of-use and easement if the grant holder does not meet the credit rating or proxy credit rating criteria proposed to be used for lessees. The value of proved oil and gas reserves will not be considered because a right-of-use and easement grant does not entitle the holder to any interest in oil and gas reserves. However, this proposal would allow consideration of the credit rating of a predecessor right-of-use and easement grant holder and a predecessor lessee, *i.e.*, a lessee that held interests in the lease on which the right-of-use and easement is now located and is liable for accrued obligations for the facilities thereon, which better aligns BOEM's evaluation process with accepted financial risk evaluation methods used by the banking and finance industry.

C. Pipeline Right-of-Way Grants

BOEM's bonding requirements for pipeline right-of-way grants, contained in 30 CFR 550.1011, prescribe a \$300,000 area-wide base bond that guarantees compliance with all the terms and conditions of the pipeline right-of-way grants held by a company in an OCS area. BOEM may require a pipeline right-of-way grant holder to

provide additional security if the Regional Director determines that a bond in excess of \$300,000 is needed. BOEM is proposing to revise the bonding regulations to provide the criteria under which the Regional Director could demand a pipeline right-of-way grant holder to provide additional security and that criteria is similar to that proposed for lessees, *i.e.*, when the grant holder does not meet the credit rating or proxy credit rating criteria proposed to be used for lessees. BOEM would not consider proved reserves because right-of-way grants do not authorize holders to produce hydrocarbon reserves. Another change proposed by the rule—to allow consideration of the credit rating or proxy credit rating of a co-grant holder—would better align BOEM's evaluation process with accepted financial risk evaluation methods used by the banking and finance industry. BOEM also proposes to expand this evaluation to include consideration of the credit rating or proxy credit rating of predecessor right-of-way grant holders because they remain liable for accrued decommissioning obligations for facilities and pipelines on their right-of-way until each obligation is met.

IV. Proposed Revisions to Other BOEM Security Requirements

A. Third-party Guarantees

BOEM is proposing to evaluate a potential guarantor using the same credit rating or proxy credit rating criteria proposed for lessees. The value of proved oil and gas reserves will not be considered because the value of proved reserves quantify only the marketability of the lease interest being covered by the guarantee, in which the guarantor would not have an interest, and is not used to describe the guarantor's overall financial strength.

The criteria to evaluate a guarantor provided in the existing regulations have proven difficult to apply. For example, § 556.905(a)(3) provides that the guarantor's total outstanding and proposed guarantees are not allowed to exceed 25 percent of its unencumbered net worth in the United States. A company's total outstanding and proposed guarantees depends on accurate information provided by the guarantor, and BOEM has no way to confirm whether the 25 percent threshold has been exceeded at the time of the application or afterward. The same provision requires BOEM to consider the unencumbered net worth of the company in the United States, while another provision,

§ 556.905(c)(2)(iv), requires BOEM to consider the guarantor's unencumbered fixed assets in the United States. Both of these criteria are difficult to apply when the company being evaluated has domestic and international assets that must be separated. Utilizing the same financial evaluation criteria, *i.e.*, issuer credit rating or proxy credit rating, to assess both guarantors and lessees as the most relevant measure of future capacity would provide consistency in evaluations and avoid overreliance on net worth, which was GAO's concern.

To allow more flexibility in the use of third-party guarantees, this proposed rule would remove the requirement for a third-party guarantee to ensure compliance with the obligations of all lessees, operating rights owners, and operators on the lease. Additionally, the proposed rule would allow a third-party guarantee to be used as additional security for a right-of-use and easement grant and/or a right-of-way grant, as well as a lease. Potential guarantors are reluctant to provide a guarantee if they cannot choose the entity for which they are guaranteeing compliance or limit the amount of their guarantee. This change would allow a guarantor to limit its guarantee to a subset of lease or grant obligations, *e.g.*, an amount sufficient to cover a percentage of the decommissioning liability in proportion to the ownership percentage of a particular lessee or grant holder, a specific dollar amount, or a specific facility.

By allowing a third-party guarantor to guarantee only the obligations it wishes to cover, BOEM would provide industry with the flexibility to use the guarantee to satisfy financial assurance requirements without the burden of forcing the guarantor to cover all the risks associated with all parties on the lease or grant or operations in which the party they wish to guarantee has no interest and over which this party may have no control. Moreover, the proposal to allow BOEM to accept a third-party guarantee that is limited to specific obligations does not reduce BOEM's protection because the combination of all bonds and guarantees still would have to ensure that all lease and grant obligations are fully secured.

The proposed rule would also allow BOEM to cancel a third-party guarantee under the same terms and conditions that apply to cancellation of additional bonds and return of pledged security, as provided in proposed § 556.906(d)(2).

Lastly, the existing regulation somewhat confusedly refers to both a "guarantee" and an "indemnity agreement" (which meant the same thing), and the proposed rule clarifies

that there is only one agreement contemplated—the guarantee agreement.

B. Lease-specific Abandonment Accounts

Section 556.904 currently allows lessees to establish a lease-specific abandonment account in lieu of the bond required in § 556.901(d). BOEM proposes to rename these accounts “Decommissioning Accounts,” which is the current terminology used in industry, to remove any perceived limitation to a single lease, and to allow these accounts to be used to ensure compliance with additional security requirements for a right-of-use and easement grant or a pipeline right-of-way grant as well as a lease. To make these accounts more attractive to lessees who may need to use this method, BOEM also proposes to remove the requirements to pledge Treasury securities to fund the account before the amount of funds in the account equals the maximum amount insurable by the Federal Deposit Insurance Corporation (FDIC), which is currently \$250,000. BOEM notes that due to this current requirement, lessees may have been unwilling to use decommissioning accounts since the vast majority of decommissioning moneys would be in the form of low-yield Treasury securities. BOEM has determined that the risk of loss through a bank failure is minimal, so, as a practical matter, the government’s security does not depend on FDIC insurance.

C. Cancellation of Additional Bonds

BOEM proposes to revise § 556.906(d) to add three additional circumstances when BOEM may cancel an additional bond, as discussed below in the analysis of § 556.906.

V. BOEM Evaluation Methodology

A. Credit Ratings

In this rulemaking, BOEM proposes to use an “issuer credit rating” when referring to “credit rating” to evaluate the financial health of lessees and grant holders doing business or offering guarantees on the OCS. An evaluation of S&P’s and Moody’s rating methodologies revealed that the analyses they perform to determine an issuer credit rating are wide-ranging and include factors beyond corporate financials (such as history, senior management, and commodity price outlook). An issuer credit rating provides the rating agencies’ opinions of the entity’s ability to honor senior unsecured debt and debt-like obligations. It is common for lessees to

have both an issuer credit rating and a bond issuance rating. However, bond issuance ratings are opinions of the credit quality of a specific debt obligation only, which can vary based on the priority of a creditor’s claim in bankruptcy or the extent to which assets are pledged as collateral. Due to the priority of claims associated with debt and the limited purpose of bond issuance ratings, BOEM proposes to accept only issuer credit ratings from a NRSRO, and references to credit rating in this rulemaking refer only to an issuer credit rating. BOEM proposes to add “Issuer credit rating,” as defined by S&P, as a newly defined term in Parts 550 and 556.

If an entity does not have an issuer credit rating, BOEM proposes to determine a proxy credit rating based on audited financial information, including an income statement, balance sheet, statement of cash flows, and the auditor’s certificate.

BOEM proposes to use S&P’s Credit Analytics Credit Model to calculate proxy credit ratings. This model would allow BOEM to compare the company with similar public companies in the same industry segment. BOEM invites comments on the appropriateness of relying on this model, or other similar, widely accepted credit rating models, to generate proxy credit ratings.

In establishing the issuer credit rating threshold of BB – (S&P) or Ba3 (Moody’s), an equivalent credit rating provided by an SEC-recognized NRSRO, or a proxy credit rating determined by the Regional Director, BOEM seeks to balance the financial risk to the government and the taxpayer with minimizing unnecessary regulatory burdens as directed by Executive Order 13795. BOEM compared the historical default rates for Moody’s credit ratings and found the Ba3 credit rating was equivalent to the S&P BB – credit rating. BOEM reviewed historical default rates across the entire credit rating spectrum, as well as the credit profile of oil and gas sector bankruptcies arising from the commodity price downturn in 2014, to determine an appropriate level of risk. The average S&P one-year default rate for BB – rated companies from 1981 to 2017 was 1.00%. The average S&P historical one-year default rates of BB – rated companies are significantly better than average default rates for B rated companies (ranging from 2.08% to 7.15%) and C rated companies (26.82%). On the higher end of BB ratings at BB+, the average one-year default rate (0.34%) is similar to the average one-year default rate (0.25%) for the lowest investment-grade rating of BBB –.

BOEM believes that one-year default rates are an appropriate measure of risk, given BOEM’s policy of reviewing the financial status of lessees/ROW holders/RUE holders at a minimum on an annual basis, the review typically corresponding with the release of audited annual financial statements. In addition, BOEM continually monitors company credit rating changes, market reports, trade press, articles in major news outlets, and quarterly financial reports to review the financial status of lessees/ROW holders/RUE holders throughout the year and can demand supplemental financial assurance through the Regional Director’s regulatory authority as a result of mid-year changes in financial status.

BOEM invites comments on the appropriateness of this approach of relying on lessee and grant holder credit ratings, including whether BOEM has proposed an appropriate credit rating threshold, and if not, what threshold or set of thresholds would best protect taxpayer interests while minimizing unnecessary industry burdens. BOEM also invites comments on the IRIA generally, including the analytical assumptions and the regulatory alternatives analyzed. Specifically, the IRIA analyzed a BBB – credit rating alternative threshold and a no-action alternative.

B. Valuing Proved Oil and Gas Reserves

Under the proposed rule, if a lessee requests BOEM to take into account the proved reserves on a particular lease to determine whether additional security is required, BOEM would require the lessee to submit a reserve report for the proved oil and gas reserves (as defined by the SEC regulations at 17 CFR 210.4–10(a)(22)) for the lease associated with the asset to be decommissioned. The reserve report should contain the projected future production quantities of proved oil and gas reserves, the production cost for those reserves, and the discounted future cash flows from production. The reserve report would be required to provide the net present value of the proved oil and gas reserves determined in accordance with the accounting and reporting standards set forth in SEC Regulation S–X at 17 CFR 210.4–10 and SEC Regulation S–K at 17 CFR 229.1200. BOEM would use the net present value when determining whether the value of the reserves exceeds three times the cost of the decommissioning (as estimated by BSEE) associated with the production of those reserves.

BOEM believes that a property with a high enough “reserves-to-decommissioning cost” ratio would

likely be purchased by another lessee if a current lessee defaults on its obligations, thereby reducing the risk that decommissioning costs would be borne by the government, and consequently reducing the need for additional security.

A reserves-to-decommissioning cost ratio of one-to-one would mean that the estimated value of remaining oil and gas reserves on a lease is equal to the cost of decommissioning. BOEM does not expect any new lessee to purchase a property with a ratio of one-to-one as the new lessee would not receive any return on its investment once it bears the cost of decommissioning. A reserves-to-decommissioning cost ratio below three-to-one might be considered adequate to compensate a new lessee for the cost of purchasing the lease and assuming liability for all of the existing decommissioning obligations. Based on past experience, BOEM, however, considers that a lease with a ratio below three-to-one is often too risky to find a new lessee that is willing to purchase it.

BOEM believes that a reserves-to-decommissioning cost ratio that exceeds three-to-one may provide enough risk reduction that the Regional Director may determine the lessee is not required to provide additional security for that lease. Three-to-one may be considered an adequate ratio to provide time for the lessee to provide bonds or another form of financial assurance prior to the property falling into a range where it may not attract a purchaser.

Establishing an appropriate reserves-to-decommissioning cost ratio is one approach toward protecting the taxpayer during periods of commodity price volatility. Should commodity prices decline in a manner similar to late 2014 through early 2016, BOEM believes a 3-to-1 ratio means the property would most likely retain its economic viability and financial attractiveness to potential buyers. BOEM requests comment on whether this is in fact an appropriate threshold, or if there are better approaches and/or data sets available for analysis that would allow BOEM to provide better certainty that taxpayer interests will ultimately be protected.

VI. Proposed Revisions to BOEM Definitions

To implement the changes proposed above, BOEM proposes to add or revise several definitions in 30 CFR part 550 and Part 556. For proposed Part 550, BOEM proposes to add new terms and definitions for “Issuer credit rating,” “Predecessor,” and “Security,” and to revise the definition of “You.” BOEM proposes to add a new term and definition for “Right-of-Use and

Easement” and remove the separate definitions of “Right-of-use” and “Easement” in Part 550 because those terms are not used in the existing regulatory text. Similarly, for Part 556, BOEM proposes to add new terms and definitions for “Issuer credit rating” and “Predecessor,” remove the existing term and definition of “Security or securities” and add a new term and definition for “Security,” and revise the definitions of “Right-of-Use and Easement (RUE)” and “You,” all of which will match those in proposed Part 550.

VII. Proposed Revisions to BSEE Decommissioning Regulations

A. Decommissioning by Predecessors

Most of the decommissioning provisions now located in 30 CFR part 250: Subpart Q became effective in 2002. Since that time, BSEE has become aware that some industry stakeholders believe that certain provisions can cause uncertainty—and thus create planning problems and potentially unnecessary financial burdens—for lessees or grant holders that long ago assigned their interests. Specifically, some industry stakeholders have expressed concern that, when current lessees or grant holders default or otherwise fail to perform their decommissioning obligations, simultaneous pursuit by BSEE of any or all predecessors (consistent with their joint and several liability), without focusing first on the most recent predecessors, may result in confusion and inefficiency among the parties. Those stakeholders also assert that the current process may reduce incentives for current and recent lessees or grant holders to prepare to finance decommissioning. Such outcomes, according to those stakeholders, could make it harder for BSEE to achieve the safety and environmental goals of the decommissioning regulations.

In particular, some stakeholders have asserted that—since many leases have been owned or operated by numerous entities over many years—the immediate predecessors of the current lessees or grant holders are more likely to be familiar with all of the facilities and equipment on that lease that require decommissioning than the earlier predecessors whose connections with operations are more remote. Thus, those stakeholders suggested that the closer in time predecessors are to current operational conditions (*e.g.*, status of repair, maintenance and monitoring of equipment), the more those predecessors will know about any existing or potential safety, environmental, or other risks related to

the decommissioning operations, and the better able they will be to address those risks.

Similarly, some stakeholders have suggested that the most immediate predecessors in the chain-of-title are in a better position to understand the financial security necessary for decommissioning at a particular site, and are more likely to have maintained or obtained such security (*e.g.*, through private security arrangements with later lessees or grant holders), in the event that the current lessee or grant holder defaults.

Accordingly, these stakeholders recommended that, when the current lessee or grant holder defaults, BSEE should enforce predecessor decommissioning obligations in a reverse chronological sequence. Under this approach, after a default, BSEE would issue decommissioning orders to the most recent predecessor(s) first before turning to predecessors more remote in time. The stakeholders suggest that such an approach would better ensure safety and environmental protection, as well as provide greater predictability and transparency as to how BSEE enforces decommissioning obligations, compared to the current approach.

Although BSEE does not necessarily agree with all of those stakeholders’ assertions, following such a reverse chronological sequence among predecessors may be a reasonable approach to ensuring that the goals of the decommissioning regulations are met in a transparent manner—provided that the regulations include appropriate exceptions, under certain scenarios, in order to ensure timely decommissioning in a safe and environmentally responsible manner. Accordingly, without affecting the existing requirement for joint and several liability, proposed new § 250.1708, *How will BSEE enforce accrued decommissioning obligations against predecessors?*, would create a reverse chronological order of recourse among predecessors, organized according to periods of time during which a particular designated operator(s)⁴ approved by BOEM was in control of operations. Under the proposed rule, BSEE would identify the predecessor lessees or grant holders who held their interests during the designated operator(s)’ tenure. After default by the current lessees or grant holders (or a prior group of predecessors), BSEE

⁴ By definition, the term “operator” means the person “the lessee(s) designates as having control or management of operations on the leased area or a portion thereof during a given time period.” (See 30 CFR 250.105.)

would issue orders to a 'group' of temporally related predecessors to perform their remaining accrued decommissioning obligations. In addition to the predecessors in the relevant designated operator-based time period, proposed § 250.1708 would make clear that BSEE will issue orders to other predecessors who assigned interests to a defaulted lessee. The proposed rule would also add a new definition of "predecessor" to existing § 250.1700 to clarify the meaning of that term as used in the other proposed revisions to Subpart Q.

However, the proposed rule also would provide that BSEE may deviate from the reverse chronological order (*i.e.*, may issue decommissioning orders to any or all other liable predecessors) where previously ordered parties fail to obtain approval of a decommissioning plan, or fail to timely execute the decommissioning according to the approved decommissioning plan, as required under proposed §§ 250.1704(b) and 250.1708. When predecessors fail to perform, unacceptable delays in decommissioning are likely to occur. Such delays could, in some cases, lead to leaking wells or corrosion-laden structures that may pose safety or environmental risks, or other concerns (as determined by a Regional Supervisor), making it essential that BSEE be able to deviate from a strict chronological sequence.

Under the proposed rule, BSEE would also be able to deviate from a strict reverse chronological framework when emergency conditions⁵ or safety or environmental threats arise (*e.g.*, when facilities are not properly maintained or monitored) or when BSEE determines that an unreasonable delay would otherwise occur. The ability to address exigent circumstances posed by facilities and equipment awaiting decommissioning is critical to the accomplishment of the purposes of Subpart Q. The exceptions proposed in § 250.1708(d) would confirm that BSEE retains the authority to make demands on the most capable predecessors when risks associated with delay raise concern about safety and environmental protection or unobstructed use of the OCS, while in the majority of situations focusing demands on current owners and the most recent predecessors.

Finally, proposed § 250.1708(b) would require predecessors to identify an entity to begin maintaining and monitoring any facility identified in the

BSEE decommissioning order within 30 days of receiving the order. The proposed rule would also require predecessors to identify a designated operator for decommissioning within 60 days of receiving an order, and to submit a decommissioning plan that includes the scope of work and projected decommissioning schedule for all wells, platforms, other facilities within 90 days of receiving an order. These proposed provisions would ensure that the ordered decommissioning proceeds in a timely and structured fashion that ensures safety and environmental protection.

B. Decommissioning of Rights-of-Use and Easement

BSEE also proposes to revise the decommissioning regulations with respect to OCS facilities used under RUE grants. These grants are similar to ROW grants for pipelines, but allow the holder to construct, modify, or maintain platforms, artificial islands, facilities, installations, and other devices on parcels for which it does not hold a lease authorizing development of that parcel's minerals. BOEM's existing regulations, at 30 CFR 550.105, recognize "State lessees granted a right-of-use and easement" within BOEM's definition of "You" and provide that RUE grant holders must comply with bonding obligations (*see* § 550.160(c)).⁶ BSEE's existing Subpart Q definition of "You" (*see* proposed § 250.1701 paragraph (d)) does not expressly reference RUE grant holders. BSEE proposes to add such language to that definition and to expressly include RUE grant holders as parties that can accrue decommissioning obligations.

These proposed changes to BSEE's regulations would be consistent with BOEM's current practice of requiring applicants to accept decommissioning obligations as a term of RUE grants. RUE grant holders are familiar with the facilities and equipment on their RUEs; and should be able to decommission such infrastructure in a safe and environmentally sound manner. Most have expressly agreed to accept those responsibilities in the RUE grant and in agreements with those who owned the infrastructure when the location was leased. While the proposed revisions would expressly extend decommissioning obligations to RUE grant holders, lessees that have also accrued such obligations for facilities and equipment on the RUE would retain

their joint and several liability for satisfying those obligations under § 250.1701.

Accordingly, BSEE proposes to amend §§ 250.1700 and 250.1701 in Subpart Q to state that RUE grant holders will accrue decommissioning obligations in the same way as lessees, operating rights holders, and ROW grant holders. The proposed amendments would enhance the completeness and transparency of Subpart Q and would better ensure that decommissioning of facilities located on a RUE actually takes place in a timely manner.

C. Bonding Requirement for Appeals of Decommissioning Decisions and Orders

Part 290 of BSEE's regulations allows parties adversely affected by a final BSEE order or decision, including a decommissioning order or decision, to administratively appeal that decision to the IBLA. Part 290 also lays out certain procedures for filing and pursuing such appeals. While existing § 250.1409(b)(1) requires a party filing an appeal of a civil penalty order issued by BSEE to post a surety bond pending the appeal, there is currently no such bonding requirement for appeals of decommissioning orders. In the past, the absence of an express bonding requirement for decommissioning appeals was of little or no practical consequence because, when a current lessee or grant holder failed to perform its decommissioning obligations, BSEE usually issued decommissioning orders to all jointly and severally liable predecessors at the same time. Thus, even if one or more of the predecessors appealed such an order, it was probable that other predecessors would perform the decommissioning on a timely basis.

However, under the proposed reverse chronological approach toward predecessors, it is likely that each temporally related group of lessees or grant holders ordered to perform decommissioning at any given point will be smaller in number than the entire set of "any or all predecessors" ordered to decommission under BSEE's current approach. The smaller number of entities in any chronological group could increase the probability that performance of decommissioning could be delayed by appeals from a predecessor or predecessors in that group, or by a succession of appeals by later groups of predecessors (assuming that the IBLA grants a requested stay of the decommissioning order pending the appeal).⁷ The reduced pool of lessees or

⁵ BSEE has noted that the cost and time to permanently plug wells and remove infrastructure damaged by storms is significantly higher than the cost and time to decommission assets that have not been damaged. (*See* NTL No. 2018-G03 at p. 1.)

⁶ BOEM is also proposing to replace its existing definitions of "easement" and "right of use" in § 550.105 with a single definition of "right-of-use and easement."

⁷ Under existing § 290.7, a challenged order remains in effect pending the appeal, unless the

grant holders in the designated group of predecessors, and the potential for such resulting delays, could exacerbate the possibility that the ultimately responsible party(ies) might default or otherwise be unavailable or unable to perform decommissioning if the appeal is ultimately unsuccessful. In such a case, BSEE might have difficulty ensuring that decommissioning will actually be performed on a timely basis, and without reliance on taxpayer funds, absent the additional financial assurance provided by the proposed requirement to post a surety bond in order to obtain a stay of a decision or order pending appeal.

For example, by the time an appeal has been filed and heard, and the decommissioning order subsequently affirmed by the IBLA (and potentially thereafter by a Federal court), several years may have passed. During this time the appealing party may have lost its financial capacity to fund or perform decommissioning. The proposed bond, however, would provide up-front assurance that the appealing party will nevertheless meet its financial decommissioning obligations if the appeal is denied. In the event that the appeal is denied and the appealing party defaults, and no other viable predecessors exist at that point, BSEE could use the proceeds of the forfeited bond to arrange for decommissioning without shifting that financial burden to the public.

Further, even in cases where other predecessors do exist, the passage of time during the appeal may create circumstances (e.g., deteriorating infrastructure) that require decommissioning on an expedited basis to prevent adverse environmental or safety impacts or to avoid interference with other uses of the OCS. The immediate availability of a forfeited bond from an appellant that defaults after its appeal is denied would facilitate BSEE's ability to ensure the timely performance of decommissioning activities. In this manner, the proposed rule would allow BSEE to use funds from forfeited bonds to arrange for immediate decommissioning without having to re-start the process for holding additional parties responsible, which potentially could be subject to similar risks of additional defaults and delays. In addition, the proposed bonding requirement could deter a predecessor from filing an appeal that is frivolous, or designed solely to delay performance.

Accordingly, to ensure that the decommissioning regulations fulfill all

goals related to Subpart Q without unnecessary cost to taxpayers, and to reduce the risks of deteriorating financial capacity during the pendency of the appeal together with potential delays associated with postponing pursuit of predecessors, BSEE proposes to amend its regulations to require any predecessor who appeals a decommissioning order or decision to post a surety bond in order to obtain a stay of that decision or order pending the appeal. The bond would be in an amount deemed sufficient by BSEE to ensure that necessary decommissioning activities can be timely performed if the appellant loses the appeal and defaults on its obligations.

VIII. Section-by-Section Analysis

A. Regulations Proposed by BSEE

BSEE proposes to revise the following regulations:

Part 250—Oil and Gas and Sulfur Operations in the Outer Continental Shelf

§ 250.105 Definitions

This proposed rule would amend § 250.105 by removing the terms and definitions for “Easement” and “Right-of-use” and replacing them with a new term and definition for “Right-of-Use and Easement.” The revision would make BSEE's regulations consistent with BOEM's, providing a clear definition for the regulatory concept of a RUE as an authorization to use a portion of the seabed not encompassed by the holder's lease site in order to construct, modify, or maintain platforms, artificial islands, facilities, installations, and other devices established to support the exploration, development, or production of oil and gas, mineral, or energy resources on the OCS or a State submerged lands lease.

§ 250.1700 What do the terms “decommissioning,” “obstructions,” and “facility” mean?

This proposed rule would revise the title of this section to include the term “predecessor,” and would revise paragraph (a)(2) to include the area of an RUE, in addition to areas of a lease and a pipeline ROW, among the areas that must be returned through decommissioning to a condition that meets the requirements of BSEE and other agencies that have jurisdiction over decommissioning activities. This revision aligns with the other proposed revisions to the decommissioning obligations associated with RUEs. The proposed rule would also add a new paragraph (d) defining the term “predecessor” to mean a prior lessee or

owner of operating rights, or a prior holder of a RUE grant or a pipeline ROW grant, that is liable for accrued obligations on that lease or grant. This definition is designed to capture those entities, including assignees, that remain liable for the decommissioning obligations that accrued during their prior ownership of an interest in a lease, an RUE grant, or a pipeline ROW grant for purposes of the proposed provisions establishing BSEE's modified approach toward enforcement of such obligations.

§ 250.1701 Who must meet the decommissioning obligations in this subpart?

This proposed rule would add a new paragraph (c) to this section and re-designate the existing paragraph (c) as paragraph (d). The new paragraph (c) would clarify that all holders of a RUE grant are jointly and severally liable, along with other liable parties, for meeting decommissioning obligations on their RUE, including those pertaining to a well, pipeline, platform, or other facility, or an obstruction, as the obligations accrue and until each obligation is met. BSEE would also revise the current definition of the term “you” in existing paragraph (c), which would become paragraph (d) under the proposed rule, to include RUE grant holders and predecessors among the list of parties categorized as “you” or “I” for purposes of the Subpart Q decommissioning regulations. These revisions are designed to ensure alignment between § 250.1701 and the other proposed revisions to Subpart Q.

§ 250.1702 When do I accrue decommissioning obligations?

This proposed rule would revise paragraph (e) to clarify that all holders of a ROW accrue the obligation to decommission; re-designate paragraph (f) as paragraph (g); and add a new paragraph (f) to provide that an entity accrues decommissioning obligations when it is or becomes the holder of a RUE grant on which there is a well, pipeline, platform or other facility, or an obstruction. These proposed changes are designed to implement the RUE decommissioning principles discussed previously and to reflect BSEE practice related to multiple ROW holders.

§ 250.1703 What are the general requirements for decommissioning?

This proposed rule would revise paragraph (e) to expand the current provision for clearing obstructions to require that a RUE grant holder clear the seafloor of all obstructions created by its RUE grant operations. This revision is designed to ensure alignment between

IBLA, in its discretion, grants a stay, or BSEE agrees to a stay.

§ 250.1703 and the other proposed revisions to Subpart Q, including the RUE decommissioning principles discussed previously.

§ 250.1704 What decommissioning applications and reports must I submit and when must I submit them?

This proposed rule would add a new paragraph (b) in the Table to provide that predecessors must submit for BSEE approval, within 90 days of receiving a decommissioning order under proposed § 250.1708, a decommissioning plan with a scope of work and schedule to address wells, pipelines, and platforms. This proposed revision is designed to reflect the proposed changes to § 250.1708 regarding decommissioning plans, discussed further below.

§ 250.1708 How will BSEE enforce accrued decommissioning obligations against predecessors?

The proposed rule would add a new § 250.1708 (in place of the currently reserved § 250.1708). Paragraph (a) of this section would provide that, when holding predecessors responsible for performing accrued decommissioning obligations, BSEE will issue decommissioning orders to such predecessors in reverse chronological order through the chain-of-title. BSEE would issue such orders to groups of predecessors organized according to changes in the designated operator over time, as well as to any predecessor who assigned interests to a party that has defaulted.

Proposed paragraph (b) would require predecessors to identify a single entity to begin maintaining and monitoring any facility identified in the BSEE decommissioning order within 30 days of receiving the order. It would also require predecessors, within 60 days of receiving the order, to designate a single entity as the operator for decommissioning operations. Further, within 90 days of receiving the order, the predecessors must submit a decommissioning plan that includes the scope of work and projected decommissioning schedule for all wells, platforms and other facilities, pipelines, and site clearance, as identified in the order. Finally, proposed paragraph (b) would require the predecessor to perform the required decommissioning in the time and manner specified by BSEE in its decommissioning plan approval.

Proposed paragraph (c) would specify that failure by a predecessor to comply with an order to maintain and monitor a facility or to submit a decommissioning plan, as required in paragraph (b), may result in various

enforcement actions, including civil penalties and disqualification as an operator.

Proposed paragraph (d) would allow BSEE to depart from the reverse chronological order sequence, and to issue orders to any or all other predecessors for the performance of their respective accrued decommissioning obligations, when: (1) None of the predecessors who had been ordered to perform obtains approval of the decommissioning plan or executes the decommissioning according to the approved decommissioning plan; (2) the Regional Supervisor determines that there is an emergency condition, safety concern, or environmental threat, such as improperly maintained and monitored facilities, leaking wells or vessels, sustained casing pressure on wells, or lack of required valve testing; or (3) the Regional Supervisor determines that applying the reverse chronological sequence would unreasonably delay decommissioning.

Proposed paragraph (e) would clarify that BSEE's issuance of orders to additional predecessors will not relieve any current lessee or grant holder, or any other predecessor, of its obligations to comply with any prior decommissioning order or to satisfy its accrued decommissioning obligations. Proposed paragraph (f) would provide that the appeal of any decommissioning order does not prevent BSEE from proceeding against other predecessors pursuant to proposed paragraph (d).

§ 250.1709 What must I do to appeal a BSEE final decommissioning decision or order issued under this subpart?

BSEE's proposed rule would replace existing § 250.1709 of Subpart Q (which is currently reserved) with a new section that confirms the right of a lessee or grant holder to appeal a final decommissioning order or decision issued under Subpart Q to the IBLA, in accordance with the appeal procedures in existing part 290 of BSEE's regulations. Proposed § 250.1709 would require, in combination with proposed revisions to existing § 290.7(a)(2), that a lessee or grant holder appealing a decommissioning decision or order must post a surety bond in an amount deemed by BSEE to be adequate to ensure completion of decommissioning if the lessee or grant holder loses its appeal and subsequently defaults on its obligation.

§ 250.1725 When do I have to remove platforms and other facilities?

This proposed rule would expand the first sentence of paragraph (a) to provide that a RUE grant holder must remove all

platforms and other facilities within 1 year after the RUE grant terminates, unless the grant holder receives approval to maintain the structure to conduct other activities. This proposed revision is designed to ensure alignment between § 250.1725 and the other proposed revisions to Subpart Q regarding the RUE decommissioning principles discussed previously.

Part 290—Appeal Procedures

§ 290.7 Do I have to comply with the decision or order while my appeal is pending?

The proposed rule would amend paragraph (a)(2) to provide that any person that appeals a decommissioning decision or order must post a surety bond in order to seek to obtain a stay of that decision or order, in accordance with proposed § 250.1709. This proposed revision is designed to ensure alignment between § 290.7 and the proposed revision adding new § 250.1709 to Subpart Q.

B. Regulations Proposed by BOEM

BOEM is proposing to revise the following regulations:

Part 550—Oil and Gas and Sulfur Operations in the Outer Continental Shelf

Subpart A—General

§ 550.105 Definitions

The proposed rule would add a definition of “Issuer credit rating,” which is a newly defined term in this part, for the reasons set forth above.

The proposed rule would also add a definition of “Predecessor,” which is another newly defined term in this part. The definition would include those entities, including assignees, that remain liable for the obligations that accrued during their prior ownership of an interest in a lease (including the area now subject to a right-of-use and easement grant), a right-of-use and easement grant, or a pipeline right-of-way grant. Those entities will be considered in BOEM's evaluation of a current grant holder's ability to carry out accrued obligations.

BOEM would remove the terms “Easement,” and “Right-of-use,” neither of which is used separately or applies to any approved activities on the OCS. In lieu of these two terms, and consistent with the terms used in Part 550, BOEM would add the term and a corresponding definition for “Right-of-Use and Easement.”

This proposed rule would also add a new term and definition for “Security” to list the various methods that may be

used to ensure compliance with OCS obligations.

BOEM would also revise the definition of the term “You” to include, depending on the context of the regulations, a bidder, a lessee (record title owner), a sublessee (operating rights owner), a right-of-use and easement grant holder, a pipeline right-of-way grant holder, a predecessor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

§ 550.160 When will BOEM grant me a right-of-use and easement, and what requirements must I meet?

The proposed rule would revise the introductory text of this section to clarify that a right-of-use and easement does not have to cover both leased and unleased lands, but rather, BOEM may grant a right-of-use and easement on leased or unleased lands, or both. The paragraph (a) introductory text would also be revised by substituting “or” for “and” to clarify that the right-of-use and easement may be needed to construct or maintain facilities, but not necessarily both, because the grant holder often uses a facility constructed by another, including either a predecessor lessee or a predecessor grant holder.

BOEM also proposes to revise paragraph (b) to provide that a right-of-use and easement grant holder must exercise the grant according to the terms of the grant and the applicable regulations of part 550, as well as the requirements of Part 250, subpart Q of this title.

BOEM also proposes to revise paragraph (c) to update the citation to BOEM’s lessee qualification requirements, §§ 556.400 through 556.402, and to replace the authority that is cited in this paragraph for requiring a bond with a cross reference to § 550.166(d), which BOEM also proposes to revise to add specific criteria for such demands, as provided below.

§ 550.166 If BOEM grants me a right-of-use and easement, what surety bond or other security must I provide?

The proposed rule would revise the section heading to read, “If BOEM grants me a right-of-use and easement, what surety bond or other security must I provide?” so that the bonding and additional security requirements of this section would apply, where specified, to both a right-of-use and easement granted to serve a State lease and one serving an OCS lease.

Notwithstanding the change in the section heading to cover all rights-of-use and easement, the requirement to

furnish a \$500,000 bond still applies only to right-of-use and easement grants that serve State leases. Therefore, BOEM proposes to revise paragraph (a) of this section to make clear it applies only to those grants.

BOEM also proposes to revise paragraph (b) of this section to add that the requirement to provide a \$500,000 surety bond may be satisfied if the operator of the right-of-use and easement provides a surety bond in the required amount.

BOEM proposes to add paragraph (c) of this section to ensure that the general administrative requirements for lease bonds also apply to the \$500,000 surety bond required in paragraph (a) of this section.

BOEM would also add paragraph (d) introductory text in this section to provide that, if BOEM grants a right-of-use and easement that serves either an OCS lease or a State lease, BOEM may require the grant holder to provide additional security to ensure compliance with the obligations under any right-of-use and easement. For a right-of-use and easement grant that serves a State lease, the required additional security would be any amount required above the \$500,000 base bond. Since BOEM does not require a standard base bond for a right-of-use and easement grant that serves an OCS lease, the proposed additional security provisions would authorize BOEM to require security.

BOEM proposes to add paragraph (d)(1) in this section to set forth the criteria BOEM would use to evaluate the ability of a right-of-use and easement grant holder to carry out present and future obligations and to determine whether BOEM should require additional security. BOEM would use the same issuer credit rating or proxy credit rating criteria to evaluate a right-of-use and easement grant holder as BOEM proposes to apply to lessees, *i.e.*, that the Regional Director may require a grant holder to provide additional security if the right-of-use and easement grant holder does not have an issuer credit rating or a proxy credit rating that meets the criteria set forth in § 556.901(d)(1). Similar to lessees, the vast majority of right-of-use and easement holders are oil and gas companies and, therefore, BOEM would use the same financial criteria to provide consistency in its analysis.

If the right-of-use and easement grant holder does not meet the criteria set forth in proposed (d)(1) of this section, BOEM would review the obligations on each right-of-use and easement grant held by that grant holder and determine whether to require additional security

for each grant. BOEM proposes to add paragraph (d)(2) to this section to provide that the Regional Director may require a grant holder to provide additional security on a grant-by-grant basis if a predecessor right-of-use and easement grant holder or a predecessor lessee liable for decommissioning any facilities on the right-of-use and easement does not meet the issuer credit rating or proxy credit rating criteria described above. Moreover, even if a predecessor meets the credit rating or proxy credit rating criteria, the Regional Director may require the grant holder to provide additional security for decommissioning obligations for which such a predecessor is not liable.

BOEM also proposes to update the regulatory citation in existing § 550.166 (b)(1) and incorporate that paragraph and citation into new paragraph (e)(1) to provide that the additional security must meet the requirements for lease bonds or other security provided for in § 556.900(d) through (g) and § 556.902.

The proposed rule would also revise the provisions of existing 550.166 (b)(2) and incorporate them into a new paragraph (e)(2) to ensure that any additional security would cover costs and liabilities for decommissioning the facilities on the right-of-use and easement in accordance with the regulations set forth in part 250, subpart Q of this title that apply to leases.

The proposed rule would also add new paragraph (f) to provide that if a right-of-use and easement grant holder fails to replace a deficient bond or fails to provide additional security upon demand, BOEM may assess penalties, request BSEE to suspend operations on the right-of-use and easement, and initiate action for cancellation of the right-of-use and easement grant.

Subpart J—Pipelines and Pipeline Rights-of-Way

§ 550.1011 Bond or Other Security Requirements for Pipeline Right-of-Way Grant Holders

The proposed rule would revise this section in its entirety. The section heading would be revised to read, “Bond or other security requirements for pipeline right-of-way grant holders,” to clarify that a pipeline right-of-way grant holder may meet the requirements of this section by providing either a bond, mentioned in the existing regulation, or another form of security.

The proposed rule would also revise paragraph (a) to remove the reference to 30 CFR part 256, which has no bonding requirements, to add the word “pipeline” before “right-of-way,” and add “grant” after “right-of-way” for

clarification, and to provide that the areawide bond required in paragraph (a) is to guarantee compliance with all the terms and conditions of all of the pipeline right-of-way grants held in an OCS area, as defined in § 556.900(b). The proposed rule would also remove the language, which states that the requirement to provide an areawide bond for a pipeline right-of-way grant would be in addition to the bond coverage required in 30 CFR part 556, as unnecessary because it is clear that an areawide bond provided for under Part 556 applies only to leases, not pipeline right-of-way grants. The provisions in Part 550 are freestanding provisions that must be satisfied by a bond furnished under Part 550 instead of by a bond furnished under Part 556. Existing paragraph (a)(2) would be removed because additional security requirements would be covered by new paragraph (d). BOEM would also remove paragraph (b), which defines the three recognized OCS areas, because it is made redundant by the reference to § 556.900(b) in revised paragraph (a).

BOEM also proposes to add new paragraph (b) to provide that the requirement under paragraph (a) to furnish and maintain an areawide bond may be satisfied if the operator or a co-grant holder provides an areawide bond in the required amount.

BOEM also proposes to replace paragraph (c) with a provision stating that the requirements for lease bonds in § 556.900(d) through (g) and § 556.902 apply to the areawide bond required in paragraph (a) of this section. BOEM would remove existing paragraph (d), which would be made redundant by this new paragraph (c).

BOEM would add paragraph (d) introductory text to provide that BOEM may determine that additional security is necessary to ensure compliance with the obligations under a pipeline right-of-way grant. BOEM would also add new paragraph (d)(1) to set forth the criteria BOEM would use to evaluate the ability of a pipeline right-of-way grant holder to carry out present and future obligations in order to determine whether BOEM should require additional security. No criteria are specified in the existing regulations. Pursuant to this proposed rule, BOEM would use the same issuer credit rating or proxy credit rating criteria to evaluate a pipeline right-of-way grant holder as BOEM proposes to apply to lessees in § 556.901(d). BOEM would use the same financial criteria to provide consistency in its analysis.

Paragraphs (d)(2)(i) and (ii) would provide that, if the pipeline right-of-way grant holder does not meet the criteria

in paragraph (d)(1), the Regional Director may require the grant holder to provide additional security on a grant-by-grant basis if there is no co-grant holder with an issuer credit rating or a proxy credit rating that meets the criteria set forth in § 556.901(d)(1) nor predecessor pipeline right-of-way grant holder liable for decommissioning any facilities on the pipeline right-of-way that has an issuer credit rating or a proxy credit rating that meets the criteria set forth in § 556.901(d)(1). Moreover, even if a predecessor meets the credit rating or proxy credit rating criteria, the Regional Director may require the grant holder to provide additional security for decommissioning obligations for which such a predecessor is not liable.

BOEM also proposes to provide, in new paragraph (e)(1), that the additional security must meet the general requirements for lease bonds or other security provided in § 556.900(d) through (g) and § 556.902.

The proposed rule would also provide, in new paragraph (e)(2), that any additional security for a pipeline right-of-way would cover liabilities for regulatory compliance and decommissioning, in accordance with the regulations set forth in part 250, subpart Q of this title.

The proposed rule would also add new paragraph (f) to provide that if a pipeline right-of-way grant holder fails to replace a deficient bond or fails to provide additional security upon demand, BOEM may assess penalties, request BSEE to suspend operations on the pipeline, and initiate action for forfeiture of the pipeline right-of-way grant in accordance with 30 CFR 250.1013.

Part 556—Leasing of Sulfur or Oil and Gas and Bonding Requirements in the Outer Continental Shelf

The proposed rule would make a technical correction to the authority citation for part 556 by removing the citation of 43 U.S.C. 1801–1802, which is erroneous because neither of these two sections contains authority allowing BOEM to issue or amend regulations.

The proposed rule would also remove the citation to 43 U.S.C. 1331 note, which is where the Gulf of Mexico Energy Security Act of 2006 is set forth. While this statute required BOEM to issue regulations concerning the availability of bonus or royalty credits for exchanging eligible leases, the deadline for applying for such a bonus or royalty credit was October 14, 2010; therefore, lessees may no longer apply for such credits. BOEM no longer needs the authority to issue regulations under

this statute and has removed all regulations on this topic from Part 556, except for § 556.1000, which provides that lessees may no longer apply for such credits.

Subpart A—General Provisions

§ 556.105 Acronyms and Definitions

The proposed rule would add a definition of “Issuer credit rating,” which is a newly defined term in this part, for the reasons set forth above.

This proposed rule would add a new term and definition for “Predecessor.” This definition would include those entities, including assignees, that, because of their prior ownership of an interest in a lease, including record title and operating rights interests, remain liable for obligations that accrued during their ownership. Those entities would be considered in BOEM’s evaluation of a current lessee’s ability to carry out accrued obligations. This definition would be the same as the definition of “Predecessor” proposed for § 550.105.

The proposed rule would also revise the definition of “Right-of-Use and Easement (RUE)” to remove the acronym “(RUE)” and to include the words “to construct, modify or maintain platforms.” This definition would be the same as the definition of “Right-of-Use and Easement” proposed for § 550.105.

The proposed rule would also replace the definition for “Security or securities” with a definition for “Security” to clarify the various methods that can be used to ensure compliance with OCS obligations. This definition would be the same as the definition of “Security” proposed for § 550.105.

The proposed rule would also revise the definition of the term “You” to include, depending on the context of the regulations, a bidder, a lessee (record title owner), a sublessee (operating rights owner), a right-of-use and easement grant holder, a pipeline right-of-way grant holder, a predecessor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

Subpart I—Bonding or Other Financial Assurance

§ 556.900 Bond or Other Security Requirements for an Oil and Gas or Sulfur Lease

The proposed rule would revise the section heading to read, “Bond or other security requirements for an oil and gas or sulfur lease.”

The proposed rule would revise paragraph (a) introductory text to add the words “or sublease” after the word

“assignment” to reflect that the transfer of operating rights from a record title owner creates a sublease. The proposed rule would also add the words “interest in an” before the words “existing lease” because an assignment or transfer under Subparts G and H of this part may include less than the entire lease. The proposed rule would also revise paragraph (a) introductory text to clarify that record title owners and operating rights owners for the lease are equally obligated to maintain a bond in the required amount.

BOEM also proposes to revise paragraphs (a)(2) and (3) to change the spelling of “area-wide” to “areawide” for consistency with the spelling of this word in other sections of this part.

The proposed rule would also revise paragraph (g) introductory text to add the word “surety” before “bond” in two places to clarify that the regulation is referring to a “surety bond.”

The proposed rule would revise paragraph (h) introductory text to replace the words “bond coverage” with “security” for consistency in terminology. The proposed rule would also revise paragraph (h)(2) to clarify that BSEE, rather than BOEM, is the agency with authority to suspend production or other operations on a lease.

§ 556.901 Bonds and Additional Security

The proposed rule would revise the section heading to read, “Bonds and additional security,” because this section covers both base bond and additional security requirements.

The proposed rule would also revise paragraph (a)(1)(i) introductory text to insert the words “lease exploration” before “bond” for consistency with the terminology used in paragraph (a)(1)(ii).

The proposed rule would also revise paragraph (c) to remove the words “authorized officer” and replace them with “Regional Director,” and remove the words “lease bond coverage” and “a lease surety bond” and replace them in each instance with “security” to clarify that the Regional Director can review whether BOEM would be adequately secured by a surety bond, or another type of security, for an amount less than the amount prescribed in paragraph (b)(1), but not less than the estimated cost for decommissioning.

BOEM proposes to revise paragraph (d) introductory text to combine the provisions of the existing paragraph (d) introductory text and the existing introductory paragraph (d)(1) to provide that the Regional Director may determine that additional security is necessary to ensure compliance with the

obligations under a lease based on an evaluation of the lessee’s ability to carry out present and future obligations on the lease and that the Regional Director may require a lessee to provide additional security if the lessee does not meet at least one of the criteria provided below.

BOEM proposes to add new paragraph (d)(1) to set forth the criteria BOEM would use to evaluate the ability of a lessee to carry out present and future obligations. BOEM would use an issuer credit rating from a nationally recognized statistical rating organization (NRSRO), as defined by the United States Securities and Exchange Commission (SEC), greater than or equal to either BB – from Standard & Poor’s Ratings Service or Ba3 from Moody’s Investor Service, or a proxy credit rating determined by the Regional Director based on audited financial information (including an income statement, balance sheet, statement of cash flows, and the auditor’s certificate) greater than or equal to either BB – from Standard & Poor’s Ratings Service or Ba3 from Moody’s Investor Service.

BOEM proposes to add new paragraph (d)(2) to set forth the criteria BOEM would use if the lessee does not meet the criteria in paragraph (d)(1). The Regional Director may require a lessee to provide additional security on a lease-by-lease basis if no co-lessee has an issuer credit rating or proxy credit rating criteria that meets the criteria set forth in paragraph (d)(1); there are no proved oil and gas reserves on the lease, as defined by the SEC at 17 CFR 210.4–10(a)(22), the net present value of which exceeds three times the cost of the decommissioning (as estimated by BSEE) associated with the production of those reserves; and no predecessor lessee liable for decommissioning any facilities on the lease has an issuer credit rating or a proxy credit rating that meets the criteria set forth in paragraph (d)(1). Moreover, even if a predecessor meets the credit rating or proxy credit rating criteria, the Regional Director may require the lessee to provide additional security for decommissioning obligations for which such a predecessor is not liable.

BOEM proposes to redesignate existing paragraph (d)(2) as paragraph (e) and revise it to provide that a lessee may satisfy the Regional Director’s demand for additional security either by increasing the amount of its existing bond or by providing additional bonds or other security.

BOEM proposes to redesignate existing paragraphs (e) and (f) as paragraphs (f) and (g), respectively, and revise them to remove the word “bond”

and replace it with “security,” a term that includes a surety bond or another type of security.

§ 556.902 General Requirements for Bonds or Other Security

The proposed rule would revise the section heading to read, “General requirements for bonds or other security,” to recognize that other types of security, such as a pledge of Treasury securities, may be provided under part 556.

The proposed rule would also revise paragraph (a) to include “grant holder” and to include bonds provided under 30 CFR part 550. These revisions clarify that the same general requirements for bonds provided by lessees, operating rights owners, or operators of leases, also apply to bonds provided by right-of-use and easement grant and pipeline right-of-way grant holders.

The proposed rule would also revise paragraph (e)(2) to clarify that the use of Treasury securities, instead of a bond, requires a pledge of Treasury securities, as provided in § 556.900(f).

§ 556.903 Lapse of Bond

The proposed rule would revise paragraph (a) to reference a new bond “or other security” consistent with the terminology used throughout this subpart and to include references to the bond and other security regulations for right-of-use and easement grants and pipeline right-of-way grants to ensure that these grants are covered by the provisions of this section. The proposed rule would also revise paragraph (a) by removing the words “terminates immediately” and substituting “must be replaced.”

BOEM also proposes to revise the first sentence of paragraph (b) by inserting “or financial institution” after “guarantor.” BOEM also proposes to revise the third sentence of paragraph (b) for consistency in terminology by inserting the words “or other security” after the word “bonds” and inserting the words “guarantor or financial institution” after the word “surety” so that this section would apply to a third-party guarantor and a financial institution where a decommissioning account is held.

§ 556.904 Decommissioning Accounts

The proposed rule would revise the section heading to read, “Decommissioning accounts,” in accordance with BOEM policy and accepted terminology used in the industry. The words “lease-specific” would be removed throughout this section so that a decommissioning account could be used in lieu of a bond

for a lease or several leases, a right-of-use and easement grant or a pipeline right-of-way grant, or a combination thereof.

BOEM proposes to revise paragraph (a) to remove the term “lease-specific” and replace it with “decommissioning,” and to add references to the bonding and other security regulations for right-of-use and easement grants and pipeline right-of-way grants, consistent with the changes above. The paragraph (a) introductory text would also be revised to provide that BOEM would authorize a lessee or grant holder to establish a decommissioning account at a federally insured financial institution. The proposed rule would also delete the reference to paragraph (a)(3), which is being revised and is no longer relevant to withdrawal of funds from a decommissioning account.

The proposed rule would revise paragraph (a)(1) to remove the words “and pledged” and to provide that funds in the account must be payable to BOEM if BOEM determines the lessee or grant holder has failed to meet its decommissioning obligations.

The proposed rule would also revise paragraph (a)(2) to remove the words “as estimated by BOEM” to clarify that BOEM does not estimate decommissioning costs, but rather uses the estimates of decommissioning costs determined by BSEE. The proposed rule would also revise paragraph (a)(2) to require funding of a decommissioning account pursuant to the schedule that the Regional Director prescribes.

The proposed rule would revise paragraph (a)(3) to remove the requirement to provide binding instructions to purchase Treasury securities for a decommissioning account, which is currently BOEM’s policy. The proposed rule would replace the existing language with a new provision providing that if you fail to make the initial payment or any scheduled payment into the decommissioning account, you must immediately submit, and subsequently maintain, a bond or other security in an amount equal to the remaining unsecured portion of your estimated decommissioning liability. This change reflects BOEM’s current policy to order bond or other security in the event the payments into the decommissioning account are not timely made.

The proposed rule would revise paragraph (b) by removing “lease-specific” and substituting “decommissioning.”

The proposed rule would also remove paragraphs (c) and (d), which concern the use of pledged Treasury securities to fund a decommissioning account.

Because of this revision, existing paragraph (e) would be redesignated as paragraph (c), which BOEM proposes to revise to remove the word “pledged” and to provide that BOEM may require a lessee to create an overriding royalty or production payment obligation for the benefit of an account established as security for the decommissioning of a lease.

§ 556.905 Third-Party Guarantees

The proposed rule would revise the section heading to read, “Third-party guarantees.” BOEM also proposes to revise paragraph (a) to add the words “or other security” after the words “additional bond” and to reference §§ 550.166(d) and 550.1011(d) to clarify that a third-party guarantee may be used instead of an additional bond or other security required under § 550.166(d) for right-of-use and easement grants, § 550.1011(d) for pipeline right-of-way grants, or § 556.901(d) for leases.

BOEM would also revise paragraph (a)(1) to clarify that the guarantor, not the guarantee, must meet the criteria in paragraph (c) and would revise paragraph (a)(2) to require the guarantor to submit a third-party guarantee agreement containing each of the provisions in paragraph (d) of this section. As discussed below, paragraph (d) is being revised to provide that the terms previously required for indemnity agreements must be included in a third-party guarantee agreement. This terminology is changed to avoid any inference that the government must incur the expenses of decommissioning before being indemnified by the guarantor. The proposed rule would also remove paragraphs (a)(3) and (4), which have been superseded by other revisions to this section.

The proposed rule would revise paragraph (b) introductory text to remove references to paragraphs (a)(3) and (c)(3) of this section because the criteria in these two paragraphs have been superseded. The proposed rule would replace these references with a reference to paragraph (c) as proposed to be revised. Because the cessation of production is neither desirable nor easily accomplished by an operator, the proposed rule would also revise paragraph (b)(2) to remove the requirement that, when a guarantor becomes unqualified, you must “cease production until you comply with the bond coverage requirements of this subpart.” Instead, the language would be revised to provide that you must “immediately submit and maintain a bond or other security covering those obligations previously secured by the third-party guarantee.”

The proposed rule would revise paragraph (c) to clarify that BOEM will use an issuer credit rating or proxy credit rating to evaluate a third-party guarantor, and would remove the requirement that a third-party guarantee ensure compliance with all the obligations of all lessees, all operating rights owners, and operators on the lease.

The proposed rule would revise paragraph (d)(1) introductory text to read “if you fail to comply with the terms of any lease or grant covered by the guarantee, or any applicable regulation, your guarantor must either:” To be consistent with the revision of paragraph (a) to allow the use of a third-party guarantee for a right-of-use and easement grant or a pipeline right-of-way grant and to be consistent with the revision to remove language from paragraph (c) to allow a guarantor to limit the obligations covered by a guarantee.

The proposed rule would remove subparagraph (d)(2) to be consistent with the revision to remove language from paragraph (c) to allow a guarantor to limit the obligations covered by a guarantee. As a result, existing paragraph (d)(3) would be redesignated as paragraph (d)(2) and paragraph (d)(4) would be redesignated as paragraph (d)(3).

The proposed rule would revise redesignated subparagraphs (d)(2)(ii) and (iii) to remove the words “your guarantor’s” and replace them with the word “the” to clarify that redesignated paragraph (d)(2) applies to the guarantee itself.

The proposed rule would revise new paragraph (d)(3) to replace the term “a suitable replacement security” with “acceptable replacement security” for clarity.

The proposed rule would also add a new paragraph (d)(4) to provide that BOEM may cancel a third-party guarantee under the same terms and conditions as those proposed for cancellation of additional bonds and return of pledged security in § 556.906(d)(2) and (e).

BOEM also proposes to add new paragraphs (d)(5) through (10) to revise and incorporate all of the provisions of existing paragraph (e), which would be removed.

§ 556.906 Termination of the Period of Liability and Cancellation of a Bond

The proposed rule would revise the wording in paragraphs (b) and (d) of this section to cite the bonding regulations for right-of-use and easement grants and pipeline right-of-way grants to ensure

that they are covered under the terms of this section.

The proposed rule would revise paragraph (b)(1) to remove the word “terminated” in two instances and replace it with “cancelled” to be consistent with paragraph (b) introductory text, which provides that the Regional Director will cancel your previous bond when you provide a replacement bond, subject to the conditions provided in paragraphs (b)(1) through (3). BOEM would also remove the word “for” before “by the bond” in paragraph (b)(1) for grammatical reasons.

The proposed rule would revise paragraph (b)(2) to reference §§ 550.166(a) and 550.1011(a) and would revise paragraph (b)(3) to reference §§ 550.166(d) and 556.1011(d). BOEM also proposes to revise paragraph (b)(3) to clarify that the notification required under this section is to the surety providing the new additional bond.

The proposed rule would revise the paragraph (d) introductory text to cover bond cancellations and return of pledged security, and would remove the middle column of the table entitled, “The period of liability will end,” because it is redundant with provisions of paragraphs (a), (b) and (c).

In paragraph (d)(1), in the column in the table entitled, “For the following type of bond,” BOEM proposes to remove the words “type of bond” at the top of the table so that this paragraph would apply to bonds or other security, as applicable. Paragraph (d)(1) would also be revised to include a reference to base bonds submitted under §§ 550.166(a) and 550.1011(a). BOEM would also revise paragraph (d)(2) in the same column to include a reference to bonds submitted under §§ 550.166(d) and 550.1011(d).

The proposed rule would revise paragraph (d)(2) in the column entitled, “Your bond will be cancelled,” to read, “Your bond will be reduced or cancelled or your pledged security will be returned,” to clarify that the bonds may be reduced or cancelled and a pledged security, or a portion thereof, may be returned, and to specify other circumstances under which the Regional Director may cancel additional bonds or return a pledged security. While the existing criteria identify most instances when cancellation of a bond is appropriate, occasionally there are other circumstances where cancellation would be warranted. The proposed rule would allow bond cancellation, at any time, when BOEM determines, using the criteria set forth in § 556.901(d), or § 550.166(d) or § 550.1011(d), as

applicable, that a lessee or grant holder no longer needs to provide the additional bond for its lease, right-of-use and easement grant, or pipeline right-of-way grant; when the operations for which the bond was provided ceased prior to accrual of any decommissioning obligation; and when cancellation of the bond is appropriate because BOEM determines such bond never should have been required under the regulations.

The proposed rule would revise introductory paragraph (e) to remove the words “or release” because the term “release” is undefined and not used in practice. Likewise, the proposed rule would remove the words “or released” from paragraph (e)(2).

The proposed rule would also revise paragraph (e) to reference right-of-use and easement grants and pipeline right-of-way grants to provide that the Regional Director may reinstate the bonds on the same grounds as currently provided for reinstatement of lease bonds.

§ 556.907 Forfeiture of Bonds or Other Securities

The proposed rule would revise the section heading to read, “Forfeiture of bonds or other securities” because the use of “and/or” may be ambiguous. The proposed rule would revise paragraph (a)(1) to include bonds or other security for right-of-use and easement grants and pipeline right-of-way grants, in addition to leases, in the forfeiture provisions of this section. BOEM also proposes to clarify that the Regional Director may call for forfeiture of all or part of a bond or other form of security, or demand performance from a guarantor, if the party who provided the bond refuses or is unable to comply with any term or condition of a lease, a right-of-use and easement grant, or a pipeline right-of-way grant, as well as “any applicable regulation.” Throughout this section, BOEM proposes to add references to a grant, a grant holder, and grant obligations to implement the revisions in paragraph (a)(1).

BOEM proposes to revise paragraph (b) to include bonds or other security so that BOEM may pursue forfeiture of a bond or other security.

BOEM proposes to revise paragraph (c)(1) to include “financial institution holding your decommissioning account” as one of the parties the Regional Director would notify of a determination to call for forfeiture of a bond, security, or guarantee because a bank or other financial institution may hold funds subject to forfeiture.

The proposed rule would revise the wording of paragraph (c)(1)(ii) and paragraph (d) for clarity.

BOEM proposes to revise paragraph (c)(2)(ii) to add the words “even if the cost of compliance exceeds the limit of the guarantee” after the word “prescribes” to be consistent with the revisions to § 556.905, which would allow a guarantor to guarantee less than all obligations of all lessees, grant holders or operators.

BOEM proposes to revise paragraph (f)(1) to include “grant” as well as lease. BOEM also proposes to revise paragraph (f)(2) to clarify that BOEM may recover additional costs from a third-party guarantor only to the extent covered by the guarantee. This would be consistent with the changes made to § 556.905 to allow the use of limited third-party guarantees.

This rulemaking would also reword paragraph (g) for clarity.

IX. Additional Comments Solicited by BOEM and BSEE

BOEM requests comments on how the proposed rule would affect existing contracts and agreements with respect to responsibility for decommissioning liabilities and other lease obligations.

BSEE requests comments on whether, as some stakeholders have asserted, issuing decommissioning orders first to the predecessors nearest in time to the current lessees or grant holders would have positive safety and environmental impacts because the most recent predecessors should be more familiar with the current circumstances at a decommissioning site than more remote predecessors. BSEE also requests comments on any other potential effects of the proposed changes on the timely and effective completion of decommissioning.

X. Procedural Matters

A. Regulatory Planning and Review (E.O. 12866, 13563 and 13771)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has reviewed this proposed rule and determined that it is a significant action E.O. 12866.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and

freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. BOEM has developed this rule in a manner consistent with these requirements.

E.O. 13771 requires Federal agencies to take proactive measures to reduce the costs associated with complying with Federal regulations. BOEM and BSEE have evaluated this rulemaking based on the requirements of E.O. 13771.

BOEM's proposed changes are estimated to reduce the private cost to lessees in the form of bonding premiums. BSEE's proposed cost changes are not estimated; but are expected to provide regular and continuous benefits and infrequent costs. Each agency has drafted an Initial Regulatory Impact Analysis (IRIA) detailing the estimated impacts of its respective provisions of this joint proposed rule. These reflect both monetized and non-monetized impacts, the costs and benefits of which are discussed qualitatively in each document. Both BOEM and BSEE's IRIs are available in the public docket for this rulemaking. Overall, important

aspects of this rule (e.g., regulatory clarifications, refined procedures and reduced bonding requirements) make this rulemaking an E.O. 13771 deregulatory action.

BOEM expects this proposed rule to reduce the private cost to lessees through lower bonding premiums. The table below summarizes BOEM's estimate of the decrease in bonding premiums paid by lessees over a 10-year and 20-year time horizon. Additional information on the estimated transfers, costs, and benefits can be found in the IRIA posted in the public docket for this proposed rule.

TOTAL ESTIMATED DECREASE IN BONDING PREMIUMS ASSOCIATED WITH BOEM'S PROPOSED AMENDMENTS
[2018\$]

Year	Discounted at 3%	Discounted at 7%
10 Year Annualized	\$16,584,362	\$16,473,168
10 Year NPV	141,467,969	115,700,639
20 Year Annualized	17,191,929	16,988,417
20 Year NPV	255,772,485	179,975,527

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires agencies to analyze the economic impact of regulations when a significant economic impact on a substantial number of small entities is likely and to consider regulatory alternatives that will achieve the agency's goals while minimizing the burden on small entities. BOEM and BSEE each provide an Initial Regulatory Flexibility Analysis (IRFA), which assesses the impact of this proposed rule on small entities. Each of these are in their respective IRIs available in the public docket for this rule.

As defined by the Small Business Administration (SBA), a small entity is one that is "independently owned and operated and which is not dominant in its field of operation." What characterizes a small business varies from industry to industry. The proposed rule would affect OCS lessees and right-of-use and easement grant and pipeline right-of-way grant holders on the OCS. The analysis shows that this includes roughly 555 companies with ownership interests in OCS leases and grants. Entities that would operate under this

proposed rule are classified primarily under North American Industry Classification System (NAICS) codes 211120 (Crude Petroleum Extraction), 211130 (Natural Gas Extraction) and 486110 Pipeline Transportation of Crude Oil and Natural Gas. For NAICS classifications 211120 and 211130, the Small Business Administration (SBA) defines a small business as one with fewer than 1,250 employees; for NAICS code 486110, it is a business with fewer than 1,500 employees. Based on this criterion, approximately 386 (70 percent) of the businesses operating on the OCS, subject to this proposed rule, are considered small; the remaining businesses are considered large entities.

The analysis shows that there are about 386 small companies with active operations or ownership interests on the OCS. All of the operating businesses meeting the SBA classification are potentially impacted; therefore, BOEM and BSEE expect that the proposed rule would affect a substantial number of small entities.

The BOEM portion of this proposed rule is a deregulatory action. BOEM has estimated the annualized decrease in

private cost to lessees and allocated those savings to small and large entities based on their decommissioning liabilities. BOEM's analysis concludes small companies would realize 23 percent (\$3.3 million) of the decrease in private costs to lessees from its proposed changes and large companies 77 percent (\$10.7 million). The agencies recognize that there may be incremental cost burdens to some affected small entities, but the proprietary data is not available for the agencies to estimate those costs. The agencies are seeking specific comment and feedback from affected small entities on the costs associated with this rulemaking.

BSEE concludes its proposed changes would not result in any incremental change to the existing burdens of small entities because, if they accrued decommissioning liability, they remain liable for decommissioning under both current regulations and these proposed regulations, given that the joint and several liability would remain the same. Additional information about these conclusions can be found in each bureau's respective IRFA for this proposed rule.

ESTIMATED ANNUAL DECREASE IN PRIVATE COST FOR SMALL AND LARGE LESSEES
[2018, \$thousands]

Credit rating	Large co.	Small co.	Grand total
BB– and above	\$10,665	\$1,631	\$12,296
B+ and below	40	1,652	1,691
Grand Total:	10,705	3,283	13,987

The proposed changes are designed to balance the risk of non-performance with the costs and disincentives to production that are associated with the requirement to provide additional security. BOEM and BSEE believe the proposed action would strongly protect the public from incurring decommissioning costs and minimize the financial assurance burden on small entities.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule would revise the financial assurance requirements for OCS lessees and grant holders, and would reduce the number of circumstances in which financial assurance will be required. The changes would not have any negative impact on the economy or any economic sector, productivity, jobs, the environment, or other units of government. BOEM's proposed changes would (1) modify the evaluation process for requiring additional security, (2) streamline the evaluation criteria, and (3) remove restrictive provisions for third-party guarantees and decommissioning accounts. BSEE's proposed changes would (1) clarify interested parties' decommissioning liabilities, and (2) provide industry with more explicit decommissioning compliance expectations. These changes reflect the risk mitigation provided by BOEM's and BSEE's joint and several liability regulation, better align the evaluation criteria with industry practices, reduce bonding cost for industry, and provide greater certainty to industry on fulfilling accrued decommissioning obligations while continuing to protect the public from exposure to financial obligations and liabilities arising from noncompliant OCS exploration and development.

Accordingly, this proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, because implementation of this rule will not:

- (a) Have an annual effect on the economy of \$100 million or more;
- (b) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (c) result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Moreover, the proposed rule would not have disproportionate budgetary effects on these governments. BOEM and BSEE have also determined that this proposed rule would not impose costs on the private sector of more than \$100 million in a single year. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required and BOEM and BSEE have chosen not to prepare such a statement.

E. Takings Implication Assessment (E.O. 12630)

This proposed rule does not affect a taking of private property or otherwise have takings implications under E.O. 12630. Therefore, a takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. Therefore, a federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy) (OEP To Advise)

BOEM and BSEE strive to strengthen their government-to-government relationships with American Indian and Alaska Native Tribes through a commitment to consultation with the tribes and recognition of their right to self-governance and tribal sovereignty. We are also respectful of our responsibilities for consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations. We have evaluated the proposed rule under the Department of the Interior's

consultation policy, under Departmental Manual Part 512, Chapters 4 and 5, and under the criteria in E.O. 13175 and determined that, while there are no substantial direct effects on environmental or cultural resources, there may be economic impacts to one Indian tribe and one ANCSA Corporation. BOEM has invited consultation with the Indian tribe and the ANCSA Corporation to discuss possible impacts and to solicit and fully consider their views on the proposed rulemaking.

I. Paperwork Reduction Act (PRA)

This proposed rule contains existing and new information collection (IC) requirements for both BSEE and BOEM regulations, and a submission to the OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Therefore, an IC request for each Bureau is being submitted to OMB for review and approval. BSEE and BOEM are seeking to renew and extend IC requests for each OMB control number listed below for three years from approved date. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB has reviewed and approved the information collection requirements associated with risk management, financial assurances, and loss prevention and assigned the following OMB control numbers:

- 1014-0010 (BSEE), "30 CFR 250, Subpart Q—Decommissioning Activities" (expires 04/30/2023, and in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the submission is pending at OMB),
- 1010-0006 (BOEM), "Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf (30 CFR parts 550, Subpart J; 556, Subparts A through I, and K; and 560, Subparts B and E) (expires 01/31/2023), and
- 1010-0114 (BOEM), "30 CFR 550, Subpart A, General, and Subpart K, Oil and Gas Production Requirements (expires 02/28/2023).

The IC aspects affecting each Bureau are discussed separately. Instructions on how to comment follow those discussions.

BSEE Information Collection—30 CFR Parts 250 and 290

This proposed rule would add new collections of information under regulations at 30 CFR part 250, subpart Q, concerning the decommissioning

regulatory requirements related to oil, gas, and sulphur operations in the OCS. These regulatory requirements are the subject of this collection.

The new information collection requirements identified below require approval by OMB. BSEE uses the information collected under the Subpart Q regulations to ensure that operations on the OCS are carried out in a safe and environmentally protective manner, do not interfere with the rights of other users on the OCS, and balance the conservation and development of OCS resources. The following proposed regulatory changes would affect the annual burden hours; however, they would not impact non-hour cost burdens.

The proposed rule would clarify decommissioning responsibilities, including those requirements for RUE grants, and would establish an order in which predecessor lessees or grant holders would be ordered to decommission OCS facilities when the current owner of the lease or grant fails to do so. When holding predecessors responsible for the performance of accrued decommissioning obligations, BSEE proposes to issue

decommissioning orders to predecessors in reverse chronological order through the chain-of-title, organized in groups by designated operator(s).

This proposed rule would require predecessors to submit a work plan and schedule as directed under proposed §§ 250.1704(b) and 250.1708. Given the potentially lengthy process of holding predecessors responsible, BSEE would establish a step early in the process for the predecessors to submit decommissioning plans. BSEE considers this necessary to protect the public from incurring future decommissioning costs and to prevent safety and environmental risks posed by delayed performance of decommissioning. Within 90 days of receiving an order to perform decommissioning under proposed § 250.1708(a), the predecessor would be required to submit a work plan and projected decommissioning schedule that addresses all wells, platforms and other facilities, pipelines, and site clearance. This proposed requirement would add an estimated 4,320 annual burden hours to the existing OMB control number (+4,320 annual burden hours).

Title of Collection: Revisions to Regulations under 30 CFR part 250, subpart Q—Decommissioning.

OMB Control Number: 1014–0010.

Form Number: None.

Type of Review: Revision of a currently approved collection of information.

Respondents/Affected Public: Currently there are approximately 60 Oil and Gas Drilling and Production Operators in the OCS. Not all the potential respondents would submit information at any given time, and some may submit multiple times.

Total Estimated Number of Annual Respondents: Not all of the potential respondents will submit information in any given year and some may submit multiple times.

Total Estimated Number of Annual Responses: 3,248 responses.

Total Estimated Number of Annual Burden Hours: 15,997 hours.

Respondent's Obligation: Mandatory.

Frequency of Collection: Submissions are generally on occasion.

Total Estimated Annual Nonhour Burden Cost: \$1,143,556.

BURDEN TABLE—BURDEN BREAKDOWN

[New requirements due to the proposed rule shown in bold; *Changes to existing requirements due to the proposed rule are italicized.*]

Citation 30 CFR part 250 subpart Q	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours (rounded)
Non-hour cost burdens				
General				
1704(h); 1706(a), (f); 1712; 1715; 1716; 1721(a),(d), (f)–(g); 1722(a), (b), (d); 1723(b); 1743(a); Sub G.	These sections contain references to information, approvals, requests, payments, etc., which are submitted with an APM, the burdens for which are covered under its own information collection.	APM burden covered under 1014–0026.	.....
1700 thru 1754	General departure and alternative compliance requests not specifically covered elsewhere in Subpart Q regulations.	Burden covered under Subpart A 1014–0022.		0
1703; 1704	Request approval for decommissioning	Burden included below.		0
1704(b); 1708	Submit work plan & schedule under § 250.1708(b) that addresses all wells, platforms and other facilities, pipelines, and site clearance upon receiving an order to perform decommissioning; additional information as requested by BSEE.	1,440	3 submittals	4,320
1704(j), (k)	Submit to BSEE, within 120 days after completion of each decommissioning activity (including pipelines), a summary of expenditures incurred; any additional information that will support and/or verify the summary.	1	1,320 summaries (including pipelines)/additional information.	1,320
1704(j); NTL	Request and obtain approval for extension of 120-day reporting period; including justification.	15 min	75 requests	19
1704(j)	Submit certified statement attesting to accuracy of the summary for expenditures incurred.	Exempt from the PRA under 5 CFR 1320.3(i)(1).		0

BURDEN TABLE—BURDEN BREAKDOWN—Continued

[New requirements due to the proposed rule shown in bold; *Changes to existing requirements due to the proposed rule are italicized.*]

Citation 30 CFR part 250 subpart Q	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours (rounded)
1712	Required data if permanently plugging a well	Requirement not considered Information Collection under 5 CFR 1320.3(h)(9).		0
1713	Notify BSEE 48 hours before beginning operations to permanently plug a well.	0.5	725 notices	363
1721(f)	Install a protector structure designed according to 30 CFR part 250, Subpart I, and equipped with aids to navigation. (These requests are processed via the appropriate Platform Application, 30 CFR part 250 Subpart I by the OSTs.).	Burden covered under Subpart I 1014–0011.		0
1721(e); 1722(e), (h)(1); 1741(c).	Identify and report subsea wellheads, casing stubs, or other obstructions; mark wells protected by a dome; mark location to be cleared as navigation hazard.	U.S. Coast Guard requirements.		0
1722(c), (g)(2); 1704(i)	Notify BSEE within 5 days if trawl does not pass over protective device or causes damages to it; or if inspection reveals casing stub or mud line suspension is no longer protected.	1	11 notices	11
1722(f), (g)(3)	Submit annual report on plans for re-entry to complete or permanently abandon the well and inspection report.	2.5	98 reports	245
1722(h)	Request waiver of trawling test	1.5	4 requests	6
1725(a)	Requests to maintain the structure to conduct other activities are processed, evaluated and permitted by the OSTs via the appropriate Platform Application process, 30 CFR part 250 Subpart I. (Other activities include but are not limited to activities conducted under the grants of right-of-ways (ROWs), rights-of-use and easement (RUEs), and alternate rights-of-use and easement authority issued under 30 CFR part 250 Subpart J, 30 CFR 550.160, and/or 30 CFR part 585, etc.).	Burden covered under Subpart I 1014–0011.		0
1725(e)	Notify BSEE 48 hours before beginning removal of platform and other facilities.	0.5	133 notices	67
1726; 1704(a)	Submit initial decommissioning application in the Pacific and Alaska OCS Regions.	20	2 application	40
1727; 1728; 1730; 1703; 1704(c); 1725(b).	Submit final application and appropriate data to remove platform or other subsea facility structures (This included alternate depth departures and/or approvals of partial removal or toppling for conversion to an artificial reef.).	28	153 applications	4,284
\$4,684 fee × 153 = \$716,652.				
1729; 1704(d)	Submit post platform or other facility removal report; supporting documentation; signed statements, etc.	9.5	133 reports	1,264
1740; 1741(g)	Request approval to use alternative methods of well site, platform, or other facility clearance; contact pipeline owner/operator before trawling to determine its condition.	12.75	30 requests/contacts.	383
1743(b); 1704(g), (i)	Verify permanently plugged well, platform, or other facility removal site cleared of obstructions; supporting documentation; and submit certification letter.	5	117 certifications ...	585
1750; 1751; 1752; 1754; 1704(e).	Submit application to decommission pipeline in place or remove pipeline (L/T or ROW).	10	142 L/T applications.	1,420

BURDEN TABLE—BURDEN BREAKDOWN—Continued

[New requirements due to the proposed rule shown in bold; *Changes to existing requirements due to the proposed rule are italicized.*]

Citation 30 CFR part 250 subpart Q	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours (rounded)
		\$1,142 L/T decommission fee × 142 = \$162,164.		
		10	122 ROW applications.	1,220
		\$2,170 ROW decommissioning fees × 122 = \$264,740.		
1753; 1704(f)	Submit post pipeline decommissioning report	2.5	180 reports	450
Total Burden .....	.....	.....	3,248 responses ..	15,997
			\$1,143,556 Non-Hour Cost Burdens.	

L/T = Lease Term.
ROW = Right of Way.

In addition, the PRA requires agencies to estimate the total annual reporting and recordkeeping non-hour cost burden resulting from the collection of information, and we solicit your comments on this item. For reporting and recordkeeping only, your response should split the cost estimate into two components: (1) Total capital and startup cost component and (2) annual operation, maintenance, and purchase of service component. Your estimates should consider the cost to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Generally, your estimates should not include equipment or services purchased: (1) Before October 1, 1995; (2) to comply with requirements not associated with the information collection; (3) for reasons other than to provide information or keep records for the Government; or (4) as part of customary and usual business or private practices.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this 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.

Send your comments and suggestions on this information collection by the date indicated in the **DATES** section to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or via at the www.reginfo.gov portal (online). You may view the information collection request(s) at <http://www.reginfo.gov/public/do/PRAMain>. Please provide a copy of your comments to the BSEE Information Collection Clearance Officer (see the **ADDRESSES** section). You may contact Kye Mason, BSEE Information Collection Clearance Officer at (703) 787–1607 with any questions. Please reference Risk Management, Financial Assurance and Loss Prevention (OMB Control No. 1014–0010), in your comments.

BOEM Information Collection—Parts 550 and 556

This proposed rule would modify collections of information under 30 CFR part 550, subparts A and J, and 30 CFR part 556, subpart I, concerning bonding and security requirements for leases, pipeline right-of-way grants, and right-of-use easement grants. OMB has reviewed and approved the information collection requirements associated with bonding and additional security regulations for leases (30 CFR 556.900–907), pipeline right-of-way grants (30 CFR 550.1011), and right-of-use easement grants (30 CFR 550.160 and 550.166).

BOEM recognized the need to develop a comprehensive program to help identify, prioritize, and manage the financial risks associated with oil and gas activities on the OCS. BOEM's goal for this program is to protect American taxpayers from exposure to financial or environmental risks from nonperformance of obligations associated with OCS leases and grants while also assuring that its financial assurance program does not negatively impact offshore investment or operations.

By moving forward with the proposed regulations for the financial assurance program, BOEM would be able to more effectively address a number of complex financial issues. The proposed regulations would establish new criteria that will reduce regulatory burdens and compliance costs on Federal OCS oil, gas, and sulfur lessees, grant holders and operators. New criteria would help determine whether OCS oil, gas and sulfur lessees, and right-of-use and easement grant and pipeline right-of-way grant holders would be required to provide additional bonds or other security (above prescribed amounts) to ensure compliance with their contractual and regulatory obligations to BOEM. The proposed regulations would streamline the evaluation criteria and would allow BOEM to consider the financial strength and reliability of a lessee, a co-lessee, a co-holder of a grant, and/or a predecessor, to determine whether a lessee or grant holder must provide additional security. The regulations would also remove overly restrictive provisions for third-party guarantees and decommissioning accounts.

BOEM intends to modify OMB Control Number 1010–0006 (expiration January 31, 2023; 19,054 hours; \$766,053 non-hour costs), Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf (30 CFR part 550, subpart J; 556, Subparts A through I, and K; and 560, Subparts B and E)); and OMB Control Number 1010–0114 (expiration February 28, 2023; 18,323 hours; \$165,492 non-hour costs), 30 CFR part 550, subpart A, General, and Subpart K, Oil and Gas Production Requirements. If this proposed rule becomes final and effective, the new and changed provisions would reduce the overall annual burden hours for OMB Control Number 1010–0006 by 13 hours. The changed provisions for OMB Control Number 1010–0114 would add new and revise requirements in 30 CFR part 550, subpart A, but would not impact the overall burden hours for this control number. However, the new and modified requirements would be significant enough to update the OMB control number.

Title of Collection: 30 CFR parts 550 and 556, Risk Management, Financial Assurance and Loss Prevention.

OMB Control Number: 1010–0006 and 1010–0114.

Form Number: None.

Type of Review: Revision of currently approved collections.

Respondents/Affected Public: Federal OCS oil, gas, and sulfur operators and lessees, and right-of-use and easement grant and pipeline right-of-way grant holders.

Total Estimated Number of Annual Responses: 10,305 responses for 1010–0006, and 5,302 responses for 1010–0114.

Total Estimated Number of Annual Burden Hours: 19,041 hours for 1010–0006, and 18,323 hours for 1010–0114.

Respondent's Obligation: Responses to this collection of information are mandatory, or are required to obtain or retain a benefit.

Frequency of Collection: The frequency of response varies, but is primarily on the occasion or as per the requirement.

Total Estimated Annual Nonhour Burden Cost: \$766,053 for 1010–0006, and \$165,492 for 1010–0114.

The following is a brief explanation of how the proposed regulatory changes would affect the various subparts' hour and non-hour cost burdens:

30 CFR Part 550, Subpart A (OMB Control Number 1010–0114)

Proposed § 550.160(b) would be revised to clarify that a right-of-use and easement grant holder must exercise the grant according to the terms of the grant

and the applicable regulations of part 550, as well as the requirements of part 250, subpart Q. The annual burden hour would not change based on this clarification.

Proposed § 550.160(c) would be revised to update the lessee qualification requirements previously provided in § 556.35 (now obsolete), with associated burden hours “to establish a regional Company File as required by BOEM,” to reflect the requirements in BOEM's existing regulations at §§ 556.400 through 556.402, which requires a lessee to demonstrate qualifications to hold a lease on the OCS and to obtain a BOEM qualification number. The burden is currently identified in OMB Control Number 1010–0114, and although the description of the lessee qualification requirements has changed slightly, the annual burden would not change.

Proposed § 550.160(c) would also clarify that the criteria to determine when the holder of a right-of-use and easement grant that serves an OCS lease may be required to provide security by replacing a vague reference to “bonding requirements” with a cross-reference to § 550.166(d) and its criteria. The annual burden hour would not change based on this clarification.

Proposed § 550.166 (d)(1) relates to BOEM's determination of whether additional security is necessary to ensure compliance with the obligations under a right-of-use and easement grant. This determination will be based on whether a right-of-use and easement grant holder has the ability to carry out present and future financial obligations. The criteria proposed for the financial determination include an issuer credit rating, or a proxy credit rating based on audited financial information. The issuer credit rating and the audited financial information on which BOEM determines a proxy credit rating already exist. The burden of determining a proxy credit rating falls on BOEM. The annual burdens placed on the grant holder would be minimal and would be included in the burden estimates for 30 CFR 556.901(d) found in OMB Control Number 1010–0006.

New § 550.166(d)(2) would allow BOEM to consider the issuer credit rating or proxy credit rating of a predecessor right-of-use and easement grant holder or a predecessor lessee. This is a new provision that may slightly increase annual burden hours. Burden change would be reflected in the burden estimate for 30 CFR 556.901(d)(2) found in OMB Control Number 1010–0006.

30 CFR Part 550, Subpart J (OMB Control Number 1010–0006)

Proposed § 550.1011(d)(1) relates to BOEM's determination of whether additional security is necessary to ensure compliance with the obligations under a pipeline right-of-way grant. This determination would be based on whether a pipeline right-of-way grant holder has the ability to carry out present and future financial obligations. The criteria proposed for the financial determination include an issuer credit rating or a proxy credit rating. The issuer credit rating and the audited financial information on which BOEM determines a proxy credit rating already exist. The burden of determining a proxy credit rating falls on BOEM. The annual burdens placed on the grant holder would be minimal and would be included in the burden estimates for 30 CFR 556.901(d).

Proposed § 550.1011(d)(2)(i) would allow BOEM to consider the issuer credit rating or proxy credit rating of a co-grant holder. This is a new provision that may slightly increase annual burden hours. Burden change would be reflected in the burden estimates for 30 CFR 556.901(d)(2).

Proposed § 550.1011(d)(2)(ii) would allow BOEM to consider the issuer credit rating or proxy credit rating of a predecessor pipeline right-of-way grant holder. This is a new provision that may slightly increase annual burden hours. Burden change would be reflected in the burden estimates for 30 CFR 556.901(d)(2).

30 CFR Part 556, Subpart I (OMB Control Number 1010–0006)

Proposed § 556.901(d)(1) relates to BOEM's determination of whether additional security is necessary to ensure compliance with the obligations under a lease. This determination would be based on the lessee's ability to carry out present and future financial obligations as demonstrated by an issuer credit rating or a proxy credit rating determined by BOEM based on audited financial information.

New § 556.901(d)(2)(i) would allow BOEM to consider the issuer credit rating or proxy credit rating of a co-lessee, and new § 556.901(d)(2)(ii) would allow BOEM to consider the net present value of proved oil and gas reserves on the lease. There would be no need to submit proved reserve information if the lessee is not required to provide additional bonding based on its issuer credit rating, or proxy credit rating, or those of its co-lessees or predecessors. Under the existing regulations, the Regional Director was to

take this “financial strength” information into account in every case when determining whether additional security is necessary.

New § 556.901(d)(2)(iii) would allow BOEM to consider the issuer credit rating or proxy credit rating of a predecessor lessee. This would not change existing burden hour estimates. This proposed requirement would likely increase the number of respondents due to additional companies’ preparing and submitting an issuer credit rating or audited financials so that BOEM can determine proxy credit ratings.

The existing OMB approved hour burden for each respondent to prepare and submit the information for the existing evaluation criteria requirements is 3.5 hours. In this proposed rule, the evaluation criteria would be streamlined and would likely require less time for the respondents to prepare and submit the information, particularly for an issuer credit rating or audited financials. However, the time necessary for companies to prepare and submit information on the proved oil and gas reserves would likely be greater than 3.5 hours. Therefore, BOEM proposes to retain the 3.5 hour burden to reflect the decrease in time required to prepare and submit issuer credit ratings and audited financials and the increase in time required for preparing and submitting information on proved reserves. When the final rule becomes effective, the related burden hours for all respondents (a lessee, co-lessee, a co-grant holder, and/or a predecessor) would be included in OMB Control Number 1010–0006.

The OMB approved number of respondents who currently submit financial information under the existing provisions is 166 respondents. Recently, BOEM has seen the number of leases decrease in the Gulf of Mexico. Therefore, BOEM expects the overall number of respondents, even with the increase of new respondents related to § 556.901(d)(2), to be less than the current 166 respondents. BOEM estimates the new number of respondents would be approximately between 150 and 160 respondents. When the final rule becomes effective, BOEM will include the new number of respondents in OMB Control Number 1010–0006.

The existing OMB approved annual burden hours for § 556.901 related to demonstrating financial worth/ability to carry out present and future financial obligations is 581 hours. With the changes provided in the proposed rule and described above, BOEM estimates that the annual hour burden would decrease by approximately 21 annual

burden hours. This decrease in annual burden hours would be reflected in OMB Control Number 1010–0006 when the final rule becomes effective.

Proposed revisions to § 556.904 would allow the Regional Director to authorize a right-of-use and easement grant holder and a pipeline right-of-way grant holder, as well as a lessee, to establish a decommissioning account as additional security required under § 556.901(d), or § 550.166(d) or § 550.1011(d). BOEM also proposes to remove the requirement to provide instructions for the institution managing the account to purchase Treasury securities pledged to BOEM and to actually use such Treasuries to fund the account before the account equals the maximum insurable amount determined by the Federal Deposit Insurance Corporation, currently \$250,000. A new provision is proposed under § 556.904(a)(3), which would require immediate submission of a bond or other security in the amount equal to the remaining unsecured portion of the estimated decommissioning liability amount if the initial payment or any scheduled payment into the decommissioning account is not timely made. This provision may increase the annual burden hours slightly, and would be reflected in OMB Control Number 1010–0006.

Proposed § 556.905(b)(2) would be revised to eliminate the requirement that, when a guarantor becomes unqualified, a lessee must cease production, until bond coverage requirements are met. The regulatory provision would be replaced with a requirement to immediately submit and maintain a substitute bond or other security. Both the existing and proposed provisions require the lessee to provide bond coverage; however, BOEM’s current OMB Control Number 1010–0006 does not quantify the burdens associated with either situation. Therefore, BOEM would add approximately 8 annual burden hours to OMB Control Number 1010–0006 for any lessee whose guarantor became unqualified.

Proposed § 556.905(c) relates to the guarantor’s ability to carry out present and future financial obligations, which would be evaluated using an issuer credit rating, or a proxy credit rating based on audited financial information, both of which exist independent of the requirement for submitting them to BOEM. Since BOEM would evaluate the financial ability of the guarantor, the burden would fall on BOEM. The annual burdens placed on the guarantor would be minimal and would be

included in the burden estimates for OMB Control Number 1010–0006.

Proposed § 556.905(c) would remove the requirement that a guarantee ensure compliance with all lessees’ or grant holders’ obligations and the obligations of all operators on the lease or grant. This revision would allow a third-party guarantor to limit the obligations covered by the third-party guarantee. In some situations, this change could result in additional paperwork burden due to additional bonds or other security that must be provided to BOEM to cover obligations previously covered by a third-party guarantee. BOEM estimates these occurrences to be low and the annual burdens would be included in the burden estimates for OMB Control Number 1010–0006.

Proposed § 556.905(d) also replaces the indemnity agreement with a third-party guarantee agreement with comparable provisions. This change would not impact annual burden hours.

Proposed § 556.905(d)(4) would provide that a lessee or grant holder and the guarantor under a third-party guarantee may request BOEM to cancel a third-party guarantee. BOEM would cancel a third-party guarantee under the same terms and conditions provided for cancellation of additional bonds in proposed § 556.906(d)(2). The existing OMB burden under § 556.905 and § 556.906 would be expanded to include this new provision. The current burden for OMB Control Number 1010–0006 is overestimated at ½ hour time by 378 responses. Therefore, the burden added by the new provision for these types of requests would be included in the existing burden.

Proposed § 556.906(d)(2) would be revised to add three additional circumstances when BOEM may cancel an additional bond or other security. Proposed paragraphs 556.906(d)(2)(ii)(A) through (C) would require a cancellation request from the lessee or grant holder, or the surety, based on assertions that one of these three circumstances is present. BOEM already receives these types of requests and has approved the requests, where warranted, on the basis of a departure from the regulations. Therefore, the existing OMB burden estimate for OMB Control Number 1010–0006 includes these requests.

Overall, this proposed rule would result in the following adjustments in hour burden, which would lead to an overall reduction of 13 annual burden hours:

- The hours per response for all respondents (*i.e.*, a lessee, a co-lessee, a co-grant holder, and/or a predecessor) who demonstrate financial worth/ability

to carry out present and future financial obligations, request approval of another form of security, or request reduction in amount of supplemental bond required, along with the monitoring and submission of required information, will remain at 3.5 hours as approved by OMB in OMB Control Number 1010–0006. The number of responses for the provisions related to §§ 550.160, 550.166, 550.1011, and 556.900 through 902 would decrease to 160 respondents from 166 respondents due to program changes as explained above. The related existing and new provisions would result in a decrease of 21 burden hours from 581 to 560 annual burden hours, which would be reflected in OMB Control Number 1010–0006.

- The hours per response for proposed § 556.905(b)(2) would be an increase from 0 to 2 hours. The number of responses for this provision would increase from 0 to 4. Therefore, this new provision would add 8 annual burden hours to OMB Control Number 1010–0006.

If this proposed rule becomes effective, BOEM would use the existing OMB control numbers for the affected subparts discussed above and would adjust their IC burdens accordingly.

The IC does not include questions of a sensitive nature. BOEM will protect proprietary information according to the Freedom of Information Act (5 U.S.C. 552) and DOI implementing regulations (43 CFR part 2), 30 CFR 556.104, *Information collection and proprietary information*, and 30 CFR 550.197, *Data and information to be made available to the public or for limited inspection*.

In addition, the PRA requires agencies to estimate the total annual reporting and recordkeeping non-hour cost burden resulting from the collection of information, and we solicit your comments on this item. For reporting and recordkeeping only, your response should split the cost estimate into two components: (1) Total capital and startup cost component and (2) annual operation, maintenance, and purchase of service component. Your estimates should consider the cost to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Generally, your estimates should not include equipment or services purchased: (1) Before October 1, 1995; (2) to comply with requirements not associated with the information collection; (3) for reasons other than to provide information or

keep records for the Government; or (4) as part of customary and usual business or private practices.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

- (1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

- (2) The accuracy of our estimate of the burden for this 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.

Send your comments and suggestions on this information collection by the date indicated in the **DATES** section to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or via the www.reginfo.gov portal (online). You may view the information collection request(s) at <http://www.reginfo.gov/public/do/PRAMain>. Please provide a copy of your comments to the BOEM Information Collection Clearance Officer (see the **ADDRESSES** section). You may contact Anna Atkinson, BOEM Information Collection Clearance Officer at (703) 787–1025 with any questions. Please reference Risk Management, Financial Assurance and Loss Prevention (OMB Control No. 1010–0006), in your comments.

J. National Environmental Policy Act

A detailed environmental analysis under the National Environmental Policy Act of 1969 (NEPA) is not required if the proposed rule is covered by a categorical exclusion (see 43 CFR 46.205). This proposed rule meets the criteria set forth at 43 CFR 46.210(i) for a Departmental Categorical Exclusion in that this proposed rule is “. . . of an administrative, financial, legal, technical, or procedural nature” We have also determined that the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Data Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554, app. C, sec. 515, 114 Stat. 2763, 2763A–153–154).

L. Effects on the Nation's Energy Supply (E.O. 13211)

Under E.O. 13211, agencies are required to prepare and submit to OMB a Statement of Energy Effects for “significant energy actions.” This should include a detailed statement of any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) expected to result from the action and a discussion of reasonable alternatives and their effects.

The proposed rule is an E.O. 13771 deregulatory action and does not add new regulatory compliance requirements that would lead to adverse effects on the nation's energy supply, distribution, or use. Rather, in accordance with E.O. 13783, the proposed regulatory changes will help to reduce compliance burdens on the oil and gas industry that may hinder the continued development or use of domestically produced energy resources.

The BOEM regulatory changes are expected to provide the oil and gas industry with direct annualized compliance cost savings of \$17.0 million (7% discounting) over the proposed rule's 20-year analysis of the rule's effects. The compliance cost savings experienced by the offshore oil and gas industry under this proposed rule will reduce the overall costs of OCS operating companies. BSEE's proposals result in no cost impacts. Moreover, since BSEE's proposed regulatory changes apply only to facilities that occur after exploration, development and production activities have ended, those changes would not affect the nation's energy supply, distribution and use. Reduced regulatory burdens do not adversely affect productivity, competition, or prices within the energy sector. This proposed rule is not a significant energy action under the definition in E.O. 13211. Therefore, a Statement of Energy Effects is not required.

M. Clarity of This Regulation

BOEM is required by E.O. 12866, E.O. 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule BOEM publishes must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that BOEM or BSEE have not met these requirements, send comments by one of the methods listed in the **ADDRESSES** section. To better help BOEM and BSEE revise the proposed rule, your comments should be as specific as possible. For example, you should specify the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects

30 CFR Part 250

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Investigations, Oil and gas exploration, Penalties, Pipelines, Public lands—mineral resources, Public lands—rights of-way, Reporting and recordkeeping requirements, Sulfur.

30 CFR Part 290

Administrative practice and procedure.

30 CFR Part 550

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Federal lands, Government contracts, Investigations, Mineral resources, Oil and gas exploration, Outer continental shelf, Penalties, Pipelines, Reporting and recordkeeping requirements, Rights-of-way, Sulfur.

30 CFR Part 556

Administrative practice and procedure, Continental shelf, Environmental protection, Federal lands, Government contracts, Intergovernmental relations, Oil and gas exploration, Outer continental shelf, Mineral resources, Reporting and recordkeeping requirements.

Casey Hammond,

Principal Deputy Assistant Secretary, Exercising the Authority of the Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, BOEM and BSEE propose to amend 30 CFR parts 250, 290, 550, and 556 as follows:

TITLE 30—MINERAL RESOURCES

CHAPTER II—BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—OFFSHORE

PART 250—OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

- 1. The authority citation for part 250 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701; 33 U.S.C. 1321(j)(1)(C); 43 U.S.C. 1334.

- 2. Amend § 250.105 by removing the definitions of “Easement” and “Right-of-use” and adding in their place in alphabetical order the definition for “Right-of-Use and Easement” to read as follows:

§ 250.105 Definitions.

* * * * *

Right-of-Use and Easement means a right to use a portion of the seabed at an OCS site, other than on a lease you own, to construct, modify, or maintain platforms, artificial islands, facilities, installations, and other devices, established to support the exploration, development, or production of oil and gas, mineral, or energy resources from an OCS or State submerged lands lease.

* * * * *

- 3. Amend § 250.1700 by revising the section heading and paragraph (a)(2), and adding paragraph (d), to read as follows:

§ 250.1700 What do the terms “decommissioning,” “obstructions,” “facility,” and “predecessor” mean?

(a) * * *

(2) Returning the lease, pipeline right-of-way, or the area of a right-of-use and easement to a condition that meets the requirements of BSEE and other agencies that have jurisdiction over decommissioning activities.

* * * * *

(d) *Predecessor* means a prior lessee or owner of operating rights, or a prior holder of a right-of-use and easement grant, or a pipeline right-of-way grant, that is liable for accrued obligations on that lease or grant.

- 4. Revise § 250.1701 to read as follows:

§ 250.1701 Who must meet the decommissioning obligations in this subpart?

(a) Lessees, owners of operating rights, and their predecessors, are jointly and severally liable for meeting decommissioning obligations for facilities on leases, including the obligations related to lease-term

pipelines, as the obligations accrue and until each obligation is met.

(b) All holders of a right-of-way grant and their predecessors are jointly and severally liable for meeting decommissioning obligations for facilities on their right-of-way, including right-of-way pipelines, as the obligations accrue and until each obligation is met.

(c) All right-of-use and easement grant holders and prior lessees of the parcel on whose leases there existed facilities or obstructions that remain on the right-of-use and easement grant are jointly and severally liable for meeting decommissioning obligations, including obligations for any well, pipeline, platform or other facility, or an obstruction, on their right-of-use and easement, as the obligations accrue and until each obligation is met.

(d) In this subpart, the terms “you” or “I” refer to lessees and owners of operating rights, including their predecessors, as to facilities installed under the authority of a lease; to pipeline right-of-way grant holders, including their predecessors, as to facilities installed under the authority of a pipeline right-of-way grant; and to right-of-use and easement grant holders, including their predecessors, such as former lessees of the parcel, as to facilities constructed, modified, or maintained under the authority of the right-of-use and easement grant.

- 5. Amend § 250.1702 by revising paragraph (e), re-designating paragraph (f) as paragraph (g), and adding new paragraph (f), to read as follows:

§ 250.1702 When do I accrue decommissioning obligations?

* * * * *

(e) Are or become a holder of a pipeline right-of-way on which there is a pipeline, platform, or other facility, or an obstruction;

(f) Are or become the holder of a right-of-use and easement grant on which there is a well, pipeline, platform, or other facility, or an obstruction; or

* * * * *

- 6. Amend § 250.1703 by revising paragraph (e) to read as follows:

§ 250.1703 What are the general requirements for decommissioning?

* * * * *

(e) Clear the seafloor of all obstructions created by your lease, pipeline right-way, or right-of-use and easement operations;

* * * * *

- 7. Amend § 250.1704 by redesignating paragraphs (b) through (j) as paragraphs (c) through (k) respectively, and adding new paragraph (b) to read as follows:

§ 250.1704 What decommissioning applications and reports must I submit and when must I submit them?

* * * * *

DECOMMISSIONING APPLICATIONS AND REPORTS TABLE

Decommissioning applications and reports	When to submit	Instructions
(b) Submit decommissioning plan per § 250.1708(b)(3) that addresses all wells, platforms and other facilities, pipelines, and site clearance upon receiving an order to perform decommissioning.	Within 90 days of receiving an order to perform decommissioning under § 250.1708(a).	Include information required under § 250.1708(b)(2) and (3).
* * * * *	* * * * *	* * * * *

■ 8. Add § 250.1708 to read as follows:

§ 250.1708 How will BSEE enforce accrued decommissioning obligations against predecessors?

(a) Except as provided in paragraph (d) of this section, when holding predecessors responsible for performing accrued decommissioning obligations, BSEE will issue decommissioning orders to groups of predecessors who held interests in the lease or grant within the same general timeframe in reverse chronological order. BSEE will issue such orders to predecessors in groups organized by the following:

(1) Changes in designated operator(s) over time (*i.e.*, all predecessors who held relevant lease or grant interests during the tenure of a particular designated operator or during the tenure of contemporaneous designated operators); and

(2) Predecessors who assigned interests to a lessee, owner of operating rights, or grant holder that subsequently defaulted.

(b) When BSEE issues an order to predecessors to perform accrued decommissioning obligations, the predecessors must:

(1) Within 30 days of receiving the order, begin maintaining and monitoring, through a single entity identified to BSEE, any facility, including wells and pipelines as identified by BSEE in the order, in accordance with applicable requirements under this part (including, but not limited to, testing safety valves and sensors, draining vessels, and performing pollution inspections); and

(2) Within 60 days of receiving the order, designate a single entity to serve as operator for the decommissioning operations;

(3) Within 90 days of receiving the order, the entity identified in paragraph (b)(2) of this section must submit a decommissioning plan for approval by

the Regional Supervisor that includes the scope of work and a reasonable decommissioning schedule for all wells, platforms and other facilities, pipelines, and site clearance, as identified in the order; and

(4) Perform the required decommissioning in the time and manner specified by BSEE in its decommissioning plan approval.

(c) Failure to comply with the obligations under paragraph (b) of this section to maintain and monitor a facility or to submit a decommissioning plan may result in a Notice of Incident of Noncompliance and potentially other enforcement actions, including civil penalties and disqualification as an operator.

(d) Under certain circumstances, BSEE may depart from the order of recourse prescribed in paragraph (a) of this section and issue orders to any or all predecessors for the performance of their respective accrued decommissioning obligations. Those circumstances include, but are not limited to:

(1) Failure to obtain approval of a decommissioning plan under paragraph (b)(3) of this section or to execute decommissioning according to the approved decommissioning plan;

(2) Determination by the Regional Supervisor that there is an emergency condition, safety concern, or environmental threat, including but not limited to facilities not being properly maintained and monitored in accordance with applicable requirements under this part; or

(3) Determination by the Regional Supervisor that proceeding pursuant to paragraph (a) of this section would unreasonably delay decommissioning.

(e) BSEE's issuance of orders to any predecessors will not relieve any current lessee or grant holder, or any other predecessor, of its obligations to comply with any prior

decommissioning order or to satisfy any accrued decommissioning obligations.

(f) A pending appeal, pursuant to 30 CFR part 290, of any decommissioning order does not preclude BSEE from proceeding against any or all predecessors other than the appellant in accordance with paragraph (d) of this section.

■ 9. Add § 250.1709 to read as follows:

§ 250.1709 What must I do to appeal a BSEE final decommissioning decision or order issued under this subpart?

If you file an appeal, pursuant to 30 CFR part 290, of a BSEE decision or order to perform any decommissioning activity under subpart Q of this part, in order to seek to obtain a stay of that decision or order, you must post a surety bond in an amount that BSEE determines will be adequate to ensure completion of the specified decommissioning activities in the event that your appeal is denied and you thereafter fail to perform any of your decommissioning obligations.

■ 10. Amend § 250.1725 by revising the first sentence of paragraph (a) to read as follows:

§ 250.1725 When do I have to remove platforms and other facilities?

(a) You must remove all platforms and other facilities within 1 year after the lease, pipeline right-of-way, or right-of-use and easement terminates, unless you receive approval to maintain the structure to conduct other activities.

* * *

SUBCHAPTER C—APPEALS

PART 290—APPEAL PROCEDURES

■ 11. The authority citation for part 290 continues to read as follows:

Authority: 5 U.S.C. 305; 43 U.S.C. 1334.

■ 12. Amend § 290.7 by revising paragraph (a)(2) to read as follows:

§ 290.7 Do I have to comply with the decision or order while my appeal is pending?

(a) * * *

(2) You post a surety bond under 30 CFR 250.1409 pending the appeal challenging an order to pay a civil penalty or under 30 CFR 250.1709 pending the appeal challenging a decommissioning decision or order.

* * * * *

CHAPTER V—BUREAU OF OCEAN ENERGY MANAGEMENT, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—OFFSHORE

PART 550—OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 13. The authority citation for part 550 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701; 43 U.S.C. 1334.

Subpart A—General

■ 14. Amend § 550.105 by:

■ a. Removing the definition of “Easement”;

■ b. Adding definitions in alphabetical order for “Issuer credit rating” and “Predecessor”;

■ c. Removing the definition of “Right-of-use”;

■ d. Adding definitions in alphabetical order for “Right-of-Use and Easement” and “Security”; and

■ e. Revising the definition of “You”.

The additions and revision read as follows:

§ 550.105 Definitions.

* * * * *

Issuer credit rating means a forward-looking opinion about an obligor’s overall creditworthiness. This opinion focuses on the obligor’s capacity and willingness to meet its financial commitments as they come due. It does not apply to any specific financial obligation, as it does not take into account the nature of and provisions of the obligation, its standing in bankruptcy or liquidation, statutory preferences, or the legality and enforceability of the obligation.

* * * * *

Predecessor means a prior lessee or owner of operating rights, or a prior holder of a right-of-use and easement grant or a pipeline right-of-way grant, that is liable for accrued obligations on that lease or grant.

* * * * *

Right-of-Use and Easement means a right to use a portion of the seabed at an OCS site other than on a lease you own, to construct, modify or maintain

platforms, artificial islands, facilities, installations, and other devices, established to support the exploration, development, or production of oil and gas, mineral, or energy resources from an OCS or State submerged lands lease.

* * * * *

Security means a surety bond, a pledge of Treasury securities, a decommissioning account, a third-party guarantee or any other form of financial assurance provided to BOEM to ensure compliance with obligations under a lease, a right-of-use and easement grant, or a pipeline right-of-way grant.

* * * * *

You, depending on the context of the regulations, means a bidder, a lessee (record title owner), a sublessee (operating rights owner), a right-of-use and easement grant holder, a pipeline right-of-way grant holder, a predecessor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

■ 15. Amend § 550.160 by revising the introductory text and paragraphs (a) introductory text, (b) and (c) to read as follows:

§ 550.160 When will BOEM grant me a right-of-use and easement, and what requirements must I meet?

BOEM may grant you a right-of-use and easement on leased or unleased lands or both on the OCS, if you meet these requirements:

(a) You must need the right-of-use and easement to construct or maintain platforms, artificial islands, facilities, installations, and other devices at an OCS site other than an OCS lease you own, that are:

* * * * *

(b) You must exercise the right-of-use and easement according to the terms of the grant and the applicable regulations of this part, as well as the requirements of part 250, subpart Q of this title.

(c) You must meet the qualification requirements at §§ 556.400 through 556.402 of this chapter and the bonding requirements in § 550.166(d).

* * * * *

■ 16. Revise § 550.166 to read as follows:

§ 550.166 If BOEM grants me a right-of-use and easement, what surety bond or other security must I provide?

(a) Before BOEM grants you a right-of-use and easement on the OCS that serves your State lease, you must furnish the Regional Director a surety bond for \$500,000.

(b) The requirement to furnish a surety bond under paragraph (a) of this section may be satisfied if your operator provides a surety bond in the required

amount that guarantees compliance with all the terms and conditions of the right-of-use and easement grant.

(c) The requirements for lease bonds in § 556.900(d) through (g) and § 556.902 of this chapter apply to the \$500,000 surety bond required if BOEM grants you a right-of-use and easement to serve your State lease.

(d) If BOEM grants you a right-of-use and easement that serves either an OCS lease or a State lease, the Regional Director may determine that additional security (*i.e.*, security above the amount prescribed in paragraph (a) of this section) is necessary to ensure compliance with the obligations under your right-of-use and easement grant based on an evaluation of your ability to carry out present and future obligations on the right-of-use and easement. The Regional Director may require you to provide additional security if you do not meet at least one of the criteria provided in paragraphs (d)(1) or (2) of this section:

(1) You have an issuer credit rating or a proxy credit rating that meets the criteria in § 556.901(d)(1) of this chapter; or

(2) If you do not meet the criteria in paragraph (d)(1) of this section, a predecessor right-of-use and easement grant holder or a predecessor lessee liable for decommissioning any facilities on your right-of-use and easement has an issuer credit rating or a proxy credit rating that meets the criteria set forth in § 556.901(d)(1) of this chapter. However, the Regional Director may require you to provide additional security for decommissioning obligations for which such a predecessor is not liable.

(e) This additional security must:

(1) Meet the requirements of § 556.900(d) through (g) and § 556.902 of this chapter; and

(2) Cover costs and liabilities for regulatory compliance, well abandonment, platform and structure removal, and site clearance of the seafloor of the right-of-use and easement, in accordance with the standards set forth in part 250, subpart Q of this title.

(f) If you fail to replace a deficient bond or fail to provide additional security upon demand, the Regional Director may:

(1) Assess penalties under subpart N of this part;

(2) Request BSEE to suspend operations on your right-of-use and easement; and

(3) Initiate action for cancellation of your right-of-use and easement grant.

Subpart J—Pipelines and Pipeline Rights-of-Way

■ 17. Revise § 550.1011 to read as follows:

§ 550.1011 Bond or other security requirements for pipeline right-of-way grant holders.

(a) When you apply for or are the holder of a pipeline right-of-way grant, you must furnish and maintain a \$300,000 areawide bond that guarantees compliance with all the terms and conditions of all of the pipeline right-of-way grants you hold in an OCS area as defined in § 556.900(b) of this chapter.

(b) The requirement to furnish and maintain an areawide pipeline right-of-way bond under paragraph (a) of this section may be satisfied if your operator or a co-grant holder provides an areawide pipeline right-of-way bond in the required amount that guarantees compliance with all the terms and conditions of the grant.

(c) The requirements for lease bonds in § 556.900(d) through (g) and § 556.902 of this chapter apply to the areawide bond required in paragraph (a) of this section.

(d) The Regional Director may determine that additional security (*i.e.*, security above the amount prescribed in paragraph (a) of this section) is necessary to ensure compliance with the obligations under your pipeline right-of-way grant based on an evaluation of your ability to carry out present and future obligations on the pipeline right-of-way. The Regional Director may require you to provide additional security if you do not meet at least one of the criteria provided in paragraphs (d)(1) or (2) of this section:

(1) You have an issuer credit rating or a proxy credit rating that meets the criteria in § 556.901(d)(1) of this chapter; or

(2) If you do not meet the criteria in paragraph (d)(1) of this section:

(i) Your co-grant holder has an issuer credit rating or a proxy credit rating that meets the criteria in § 556.901(d)(1) of this chapter; or

(ii) A predecessor pipeline right-of-way grant holder liable for decommissioning any facilities on your pipeline right-of-way has an issuer credit rating or a proxy credit rating that meets the criteria in § 556.901(d)(1) of this chapter. However, the Regional Director may require you to provide additional security for decommissioning obligations for which such a predecessor is not liable.

(e) This additional security must:

(1) Meet the requirements of § 556.900(d) through (g) and § 556.902 of this chapter, and

(2) Cover additional costs and liabilities for regulatory compliance, decommissioning of all pipelines, and site clearance from the seafloor of all obstructions created by your pipeline right-of-way operations in accordance with the standards set forth in part 250, subpart Q of this title.

(f) If you fail to replace a deficient bond or fail to provide additional security upon demand, the Regional Director may:

(1) Assess penalties under subpart N of this part;

(2) Request BSEE to suspend operations on your pipeline; and

(3) Initiate action for forfeiture of your pipeline right-of-way grant in accordance with § 250.1013 of this title.

PART 556—LEASING OF SULFUR OR OIL AND GAS AND BONDING REQUIREMENTS IN THE OUTER CONTINENTAL SHELF

■ 18. Revise the authority citation for part 556 to read as follows:

Authority: 30 U.S.C. 1701 note; 30 U.S.C. 1711; 31 U.S.C. 9701; 42 U.S.C. 6213; 43 U.S.C. 1334.

Subpart A—General Provisions

■ 19. Amend § 556.105 paragraph (b) by:

■ a. Adding definitions in alphabetical order for “Issuer credit rating” and “Predecessor”;

■ b. Revising the definition of “Right-of-Use and Easement (RUE)”;

■ c. Adding a definition in alphabetical order for “Security”;

■ d. Removing the definition of “Security or securities”; and

■ e. Revising the definition of “You”.

The additions and revisions read as follows:

§ 556.105 Acronyms and definitions.

* * * * *

(b) * * *

* * * * *

Issuer credit rating means a forward-looking opinion about an obligor's overall creditworthiness. This opinion focuses on the obligor's capacity and willingness to meet its financial commitments as they come due. It does not apply to any specific financial obligation, as it does not take into account the nature of and provisions of the obligation, its standing in bankruptcy or liquidation, statutory preferences, or the legality and enforceability of the obligation.

* * * * *

Predecessor means a prior lessee or owner of operating rights, or a prior holder of a right-of-use and easement grant or a pipeline right-of-way grant,

that is liable for accrued obligations on that lease or grant.

* * * * *

Right-of-Use and Easement means a right to use a portion of the seabed at an OCS site other than on a lease you own, to construct, modify or maintain platforms, artificial islands, facilities, installations, and other devices, established to support the exploration, development, or production of oil and gas, mineral, or energy resources from an OCS or State submerged lands lease.

* * * * *

Security means a surety bond, a pledge of Treasury securities, a decommissioning account, a third-party guarantee or any other form of financial assurance provided to BOEM to ensure compliance with obligations under a lease, a right-of-use and easement grant or a pipeline right-of-way grant.

* * * * *

You, depending on the context of the regulations, means a bidder, a lessee (record title owner), a sublessee (operating rights owner), a right-of-use and easement grant holder, a pipeline right-of-way grant holder, a predecessor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

Subpart I—Bonding or Other Financial Assurance

■ 20. Amend § 556.900 by revising the section heading and paragraphs (a) introductory text, (a)(2) and (3), (g) introductory text, and (h) to read as follows:

§ 556.900 Bond or other security requirements for an oil and gas or sulfur lease.

* * * * *

(a) Before BOEM will issue a new lease or approve the assignment or sublease of an interest in an existing lease, you or another record title or operating rights owner of the lease must:

* * * * *

(2) Maintain a \$300,000 areawide bond that guarantees compliance with all the terms and conditions of all your oil and gas and sulfur leases in the area where the lease is located; or

(3) Maintain a lease or areawide bond in the amount required in § 556.901(a) or (b).

* * * * *

(g) You may pledge alternative types of security instruments instead of providing a surety bond if the Regional Director determines that the alternative security protects the interests of the United States to the same extent as the required surety bond.

* * * * *

(h) If you fail to replace a deficient bond or to provide additional security upon demand, the Regional Director may:

- (1) Assess penalties under part 550, subpart N of this chapter;
 - (2) Request BSEE to suspend production and other operations on your lease in accordance with § 250.173 of this title; and
 - (3) Initiate action to cancel your lease.
- 21. Amend § 556.901 by revising the section heading and paragraphs (a)(1)(i) introductory text and (c) through (f), and adding paragraph (g) to read as follows:

§ 556.901 Bonds and additional security.

(a) * * *

(1)(i) You must furnish the Regional Director a \$200,000 lease exploration bond that guarantees compliance with all the terms and conditions of the lease by the earliest of:

* * * * *

(c) If you can demonstrate to the satisfaction of the Regional Director that you can satisfy your decommissioning obligations for less than the amount of security required under paragraph (a)(1) or (b)(1) of this section, the Regional Director may accept security in an amount less than the prescribed amount, but not less than the estimated cost for decommissioning.

(d) The Regional Director may determine that additional security (*i.e.*, security above the amounts prescribed in § 556.900(a) and paragraphs (a) and (b) of this section) is necessary to ensure compliance with the obligations under your lease, the regulations in this chapter, and the regulations in 30 CFR chapters II and XII, based on an evaluation of your ability to carry out present and future obligations on the lease. The Regional Director may require you to provide additional security if you do not meet at least one of the criteria provided paragraphs (d)(1) or (2) of this section:

(1) You have an issuer credit rating from a nationally recognized statistical rating organization (NRSRO), as defined by the United States Securities and Exchange Commission (SEC), greater than or equal to either BB – from S&P Global Ratings or Ba3 from Moody's Investor Service, or an equivalent credit rating provided by an SEC-recognized NRSRO, or a proxy credit rating determined by the Regional Director based on audited financial information (including an income statement, balance sheet, statement of cash flows, and the auditor's certificate) greater than or equal to either BB – from S&P Global Ratings or Ba3 from Moody's Investor Service or an equivalent credit rating

provided by an SEC-recognized NRSRO; or

(2) If you do not meet the criteria in paragraph (d)(1) of this section:

(i) Your co-lessee has an issuer credit rating or a proxy credit rating that meets the criteria set forth in paragraph (d)(1) of this section;

(ii) There are proved oil and gas reserves on the lease, as defined by the SEC at 17 CFR 210.4–10(a)(22), the net present value of which exceeds three times the cost of the decommissioning associated with the production of those reserves; or

(iii) A predecessor lessee liable for decommissioning any facilities on your lease has an issuer credit rating or a proxy credit rating that meets the criteria set forth in paragraph (d)(1) of this section. However, the Regional Director may require you to provide additional security for decommissioning obligations for which such a predecessor is not liable.

(e) You may satisfy the Regional Director's demand for additional security by increasing the amount of your existing bond or by providing additional bonds or other security.

(f) The Regional Director will determine the amount of additional security required to guarantee compliance. The Regional Director will consider potential underpayment of royalty and cumulative decommissioning obligations.

(g) If your cumulative potential obligations and liabilities either increase or decrease, the Regional Director may adjust the amount of additional security required.

(1) If the Regional Director proposes an adjustment, the Regional Director will:

(i) Notify you and the surety of any proposed adjustment to the amount of security required; and

(ii) Give you an opportunity to submit written or oral comment on the adjustment.

(2) If you request a reduction of the amount of additional security required, you must submit evidence to the Regional Director demonstrating that the projected amount of royalties due the Government and the estimated costs of decommissioning are less than the required security amount. If the Regional Director finds that the evidence you submit is convincing, the Regional Director will reduce the amount of security required.

■ 22. Amend § 556.902 by revising the section heading and paragraphs (a) introductory text and (e)(2) to read as follows:

§ 556.902 General requirements for bonds or other security.

(a) Any bond or other security that you, as lessee, operating rights owner, grant holder, or operator, provide under this part, or under part 550 of this chapter, must:

* * * * *

(e) * * *

(2) A pledge of Treasury securities as provided in § 556.900(f);

* * * * *

■ 23. Revise § 556.903 to read as follows:

§ 556.903 Lapse of bond.

(a) If your surety becomes bankrupt, insolvent, or has its charter or license suspended or revoked, any bond coverage from that surety must be replaced. In that event, you must notify the Regional Director of the lapse of your bond and promptly provide a new bond or other security in the amount required under §§ 556.900 and 556.901, or § 550.166 or § 550.1011 of this chapter.

(b) You must notify the Regional Director of any action filed alleging that you, your surety, guarantor or financial institution are insolvent or bankrupt. You must notify the Regional Director within 72 hours of learning of such an action. All bonds or other security must require the surety, guarantor or financial institution to provide this information to you and directly to BOEM.

■ 24. Revise § 556.904 to read as follows:

§ 556.904 Decommissioning accounts.

(a) The Regional Director may authorize you to establish a decommissioning account in a federally insured financial institution in lieu of the bond required under § 556.901(d), or § 550.166(d) or § 550.1011(d) of this chapter. The decommissioning account must provide that funds may not be withdrawn without the written approval of the Regional Director.

(1) Funds in the account must be payable upon demand to BOEM if BOEM determines you have failed to meet your decommissioning obligations.

(2) You must fully fund the account to cover all decommissioning costs pursuant to the schedule the Regional Director prescribes.

(3) If you fail to make the initial payment or any scheduled payment into the decommissioning account, you must immediately submit, and subsequently maintain, a bond or other security in an amount equal to the remaining unsecured portion of your estimated decommissioning liability.

(b) Any interest paid on funds in a decommissioning account will be

treated as other funds in the account unless the Regional Director authorizes in writing the payment of interest to the party who deposits the funds.

(c) The Regional Director may require you to create an overriding royalty or production payment obligation for the benefit of an account established as security for the decommissioning of a lease. The required obligation may be associated with oil and gas or sulfur production from a lease other than the lease secured through the decommissioning account.

■ 25. Revise § 556.905 to read as follows:

§ 556.905 Third-party guarantees.

(a) *When the Regional Director may accept a third-party guarantee.* The Regional Director may accept a third-party guarantee instead of an additional bond or other security under § 556.901(d), or § 550.166(d) or § 550.1011(d) of this chapter, if:

(1) The guarantor meets the criteria in paragraph (c) of this section; and

(2) The guarantor submits a third-party guarantee agreement containing each of the provisions in paragraph (d) of this section.

(b) *What to do if your guarantor becomes unqualified.* If, during the life of your third-party guarantee, your guarantor no longer meets the criteria of paragraph (c) of this section, you must:

(1) Notify the Regional Director immediately; and

(2) Immediately submit, and subsequently maintain, a bond or other security covering those obligations previously secured by the third-party guarantee.

(c) *Criteria for acceptable guarantees.* The Regional Director will accept your third-party guarantee if the guarantor has an issuer credit rating or a proxy credit rating that meets the criteria in § 556.901(d)(1).

(d) *Provisions required in all third-party guarantees.* Your third-party guarantee must contain each of the following provisions:

(1) If you fail to comply with the terms of any lease or grant covered by the guarantee, or any applicable regulation, your guarantor must either:

(i) Take corrective action that complies with the terms of such lease or grant, or any applicable regulation, to the extent covered by the guarantee; or,

(ii) Be liable under the third-party guarantee agreement, to the extent covered by the guarantee, to provide, within 7 calendar days, sufficient funds for the Regional Director to complete such corrective action.

(2) If your guarantor wishes to terminate the period of liability under its guarantee, it must:

(i) Notify you and the Regional Director at least 90 days before the proposed termination date;

(ii) Obtain the Regional Director's approval for the termination of the period of liability for all or a specified portion of the guarantee; and

(iii) Remain liable for all work and workmanship performed during the period that the guarantee is in effect.

(3) You must provide acceptable replacement security before the termination of the period of liability under your third-party guarantee.

(4) If you or your guarantor request BOEM to cancel your third-party guarantee, BOEM will cancel the guarantee under the same terms and conditions provided for cancellation of additional bonds and return of pledged security in § 556.906(d)(2) and (e).

(5) The guarantor must submit a third-party guarantee agreement that meets the following criteria:

(i) The third-party guarantee agreement must be executed by your guarantor and all persons and parties bound by the agreement.

(ii) The third-party guarantee agreement must bind, jointly and severally, each person and party executing the agreement.

(iii) When your guarantor is a corporate entity, two corporate officers who are authorized to bind the corporation must sign the third-party guarantee agreement.

(6) Your guarantor and the other corporate entities bound by the third-party guarantee agreement must provide the Regional Director copies of:

(i) The authorization of the signatory corporate officials to bind their respective corporations;

(ii) An affidavit certifying that the agreement is valid under all applicable laws; and

(iii) Each corporation's corporate authorization to execute the third-party guarantee agreement.

(7) If your third-party guarantor or another party bound by the third-party guarantee agreement is a partnership, joint venture, or syndicate, the third-party guarantee agreement must:

(i) Bind each partner or party who has a beneficial interest in your guarantor; and

(ii) Provide that, upon demand by the Regional Director under your third-party guarantee, each partner is jointly and severally liable for those obligations secured by the guarantee.

(8) When forfeiture is called for under § 556.907, the third-party guarantee agreement must provide that your guarantor will either:

(i) Bring your lease or grant into compliance; or

(ii) Provide sufficient funds within 7 calendar days, to the extent covered by the guarantee, to permit the Regional Director to complete corrective action.

(9) The third-party guarantee agreement must contain a confession of judgment. It must provide that, if the Regional Director determines that you are in default of the lease or grant covered by the guarantee or any regulation applicable to such lease or grant, the guarantor:

(i) Will not challenge the determination; and

(ii) Will remedy the default to the extent covered by the guarantee.

(10) Each third-party guarantee agreement is deemed to contain all terms and conditions contained in this paragraph (d), even if the guarantor has omitted these terms in the third-party guarantee agreement.

■ 26. Amend § 556.906 by revising paragraphs (b)(1) through (3), (d) and (e) to read as follows:

§ 556.906 Termination of the period of liability and cancellation of a bond.

* * * * *

(b) * * *

(1) The new bond is equal to or greater than the bond that was cancelled, or you provide an alternative form of security, and the Regional Director determines that the alternative form of security provides a level of security equal to or greater than that provided by the bond that was cancelled;

(2) For a base bond submitted under § 556.900(a) or § 556.901(a) or (b), or § 550.166(a) or § 550.1011(a) of this chapter, the surety issuing the new bond agrees to assume all outstanding obligations that accrued during the period of liability that was terminated; and

(3) For additional bonds submitted under § 556.901(d), or § 550.166(d) or § 550.1011(d) of this chapter, the surety issuing the new additional bond agrees to assume that portion of the outstanding obligations that accrued during the period of liability that was terminated and that the Regional Director determines may exceed the coverage of the base bond, and of which the Regional Director notifies the surety providing the new additional bond.

* * * * *

(d) BOEM will cancel the bond for your lease or grant, the surety that issued the bond will continue to be responsible, and the Regional Director may return any pledged security, as shown in the following table:

For the following	Your bond will be reduced or cancelled or your pledged security will be returned
(1) Base bonds submitted under § 556.900(a) or § 556.901(a) or (b), or § 550.166(a) or § 550.1011(a) of this chapter.	Seven years after the lease or grant expires or is terminated, six years after the Regional Director determines that you have completed all bonded obligations, or at the conclusion of any appeals or litigation related to your bonded obligations, whichever is the latest. The Regional Director will reduce the amount of your bond or return a portion of your security if the Regional Director determines that you need less than the full amount of the base bond to meet any potential obligations.
(2) Additional bonds submitted under § 556.901(d), or § 550.166(d) or § 550.1011(d) of this chapter.	<p>(i) When the lease or grant expires or is terminated and the Regional Director determines you have met your bonded obligations, unless the Regional Director:</p> <p>(A) Determines that the future potential liability resulting from any undetected problem is greater than the amount of the base bond; and (B) Notifies the provider of the bond that the Regional Director will wait seven years before canceling all or a part of the additional bond (or longer period as necessary to complete any appeals or judicial litigation related to your bonded obligations).</p> <p>(ii) At any time when:</p> <p>(A) BOEM has determined, using the criteria set forth in § 556.901(d), or § 550.166(d) or § 550.1011(d) of this chapter, as applicable, that you no longer need to provide the additional bond for your lease, right-of-use and easement grant, or pipeline right-of-way grant.</p> <p>(B) The operations for which the bond was provided ceased prior to accrual of any decommissioning obligation; or</p> <p>(C) Cancellation of the bond is appropriate because, under the regulations, BOEM determines such bond never should have been required.</p>

(e) For all bonds, the Regional Director may reinstate your bond as if no cancellation had occurred if:

(1) A person makes a payment under the lease, right-of-use and easement grant, or pipeline right-of-way grant, and the payment is rescinded or must be repaid by the recipient because the person making the payment is insolvent, bankrupt, subject to reorganization, or placed in receivership; or

(2) The responsible party represents to BOEM that it has discharged its obligations under the lease, right-of-use and easement grant, or pipeline right-of-way grant and the representation was materially false when the bond was cancelled.

■ 27. Amend § 556.907 by revising the section heading and paragraphs (a)(1), (b), (c)(1), (c)(1)(ii), (c)(2)(i) through (iii), (d), (e)(2), (f)(1) and (2), and (g) to read as follows:

§ 556.907 Forfeiture of bonds or other securities.

* * * * *

(a) * * *

(1) You (the party who provided the bond or other security) refuse, or the Regional Director determines that you are unable, to comply with any term or condition of your lease, right-of-use and easement grant, pipeline right-of-way grant, or any applicable regulation; or

* * * * *

(b) The Regional Director may pursue forfeiture of your bond or other security

without first making demands for performance against any lessee, operating rights owner, grant holder, or other person authorized to perform lease or grant obligations.

(c) * * *

(1) Notify you, your surety, guarantor, or financial institution holding your decommissioning account, of a determination to call for forfeiture of the bond, security, guarantee, or funds.

* * * * *

(ii) The Regional Director will determine the amount to be forfeited based upon an estimate of the total cost of corrective action to bring your lease or grant into compliance.

(2) * * *

(i) You agree to and demonstrate that you will bring your lease or grant into compliance within the timeframe that the Regional Director prescribes;

(ii) Your third-party guarantor agrees to and demonstrates that it will complete the corrective action to bring your lease or grant into compliance within the timeframe that the Regional Director prescribes, even if the cost of compliance exceeds the limit of the guarantee; or

(iii) Your surety agrees to and demonstrates that it will bring your lease or grant into compliance within the timeframe that the Regional Director prescribes, even if the cost of compliance exceeds the face amount of the bond or other surety instrument.

(d) If the Regional Director finds you are in default, he/she may cause the forfeiture of any bonds and other security provided to ensure your compliance with the terms and conditions of your lease or grant and the regulations in this chapter and 30 CFR chapters II and XII.

(e) * * *

(2) Use the funds collected to bring your lease or grant into compliance and to correct any default.

(f) * * *

(1) Take or direct action to obtain full compliance with your lease or grant and the regulations in this chapter; and

(2) Recover from you, any co-lessee, operating rights owner, grant holder or, to the extent covered by the guarantee, any third-party guarantor responsible under this subpart, all costs in excess of the amount the Regional Director collects under your forfeited bond and other security.

(g) If the amount that the Regional Director collects under your forfeited bond and other security exceeds the costs of taking the corrective actions required to obtain full compliance with the terms and conditions of your lease or grant and the regulations in this chapter and 30 CFR chapters II and XII, the Regional Director will return the excess funds to the party from whom they were collected.

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Part III

Office of Personnel Management

5 CFR Parts 315, 432 and 752

Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions;
Final Rule

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Parts 315, 432 and 752**

RIN 3206-AN60

**Probation on Initial Appointment to a
Competitive Position, Performance-
Based Reduction in Grade and
Removal Actions and Adverse Actions****AGENCY:** Office of Personnel
Management.**ACTION:** Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The final rule will effect a revision of OPM's regulations to make procedures relating to these subjects more efficient and effective. The final rule also amends the regulations to incorporate statutory changes and technical revisions.

DATES: Effective November 16, 2020.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at employee_accountability@opm.gov or by telephone at (202) 606-2930.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing revised regulations governing probation on initial appointment to a competitive position; performance-based reduction in grade and removal actions; and adverse actions under statutory authority vested in it by Congress in 5 U.S.C. 3321, 4305, 4315, 7504, 7514 and 7543. The regulations assist agencies in carrying out, consistent with law, certain of the President's directives to the Executive Branch pursuant to Executive Order 13839 that were not subject to judicially-imposed limitations at the time of the proposed rule, and update current procedures to make them more efficient and effective. The revised regulations update current regulatory language, commensurate with statutory changes. They also clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction-in-grade, removal actions and adverse actions while recognizing employee rights and protections. The revised regulations support agencies in implementing their plans to maximize employee performance, as required by Office of Management and Budget (OMB) M-17-22 (April 12, 2017), and to fulfill elements of the President's

Management Agenda relating to the Workforce for the 21st Century.

At the time revisions to these regulations were proposed, there were judicially imposed limitations on implementing certain other portions of Executive Order 13839. These revised regulations were not intended to implement portions of the Executive Order that were previously enjoined when OPM initially proposed them. As the previously enjoined portions of the Executive Order are now fully effective and binding on executive agencies, OPM anticipates proposing additional revisions to regulations, pursuant to the Administrative Procedures Act's notice-and-comment process, consistent with the President's expressed policy goals.

The Case for Action

With the issuance of Executive Order (E.O.) 13839 on May 25, 2018, President Trump set a new direction for promoting efficient and effective use of the Federal workforce—reinforcing that Federal employees should be both rewarded and held accountable for performance and conduct. Merit system principles provide a framework for employee conduct that is aligned with the broader responsibility Federal government employees assume when they take the oath to preserve and defend the Constitution and accept the duties and obligations of their positions. In keeping with merit system principles, the President's Management Agenda (PMA) recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. The Federal personnel system needs to keep pace with changing workplace needs and carry out its core functions in a manner that more effectively upholds the public trust. Finally, the PMA calls for agencies to establish processes that help agencies retain top employees and efficiently terminate or remove those who fail to perform or to uphold the public's trust.

Prior to establishment of the current PMA, the Office of Management and Budget (OMB) issued a memorandum to agencies on April 12, 2017 entitled "M-17-22—Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce." M-17-22 called on agencies to take near-term actions to ensure that the workforce they hire and retain is as effective as possible. OMB called on agencies to determine whether aspects of their current policies and practices present barriers to hiring and retaining the workforce necessary to execute their missions as well as appropriately managing the workforce

and, if necessary, removing poor performers and employees who commit misconduct. Notably, M-17-22 directed agencies to ensure that managers have the tools and support they need to manage performance and conduct effectively to achieve high-quality results for the American people. Agencies were recently reminded of these important requirements in OPM guidance issued on September 25, 2019 and entitled: Maximization of Employee Performance Management and Engagement by Streamlining Agency Performance and Dismissal Policies and Procedures.

E.O. 13839's purpose is based on the merit system principles' call for holding Federal employees accountable for performance and conduct. The applicable merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. 5 U.S.C. 2301(b)(4)—(b)(6). The merit system principles further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. *Id.* E.O. 13839 states that implementation of America's civil service laws has fallen far short of these ideals. It cited the Federal Employee Viewpoint Survey which has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. E.O. 13839 also finds that failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies to accomplish their missions.

On September 17, 2019, OPM issued proposed regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions (84 FR 48794, September 17, 2019). The proposed regulations were revising OPM's regulations to make procedures relating to these subjects more efficient and effective. The proposed regulations were also amending the regulations to incorporate other statutory changes and technical revisions. After consideration of public comments on the proposed regulations, OPM is now issuing these revised regulations to implement certain requirements of E.O. 13839 as well as to fulfill the vision of the PMA and the

objectives of M-17-22. These revisions not only will support agency efforts in implementing E.O. 13839 and M-17-22, and pursuing the PMA, but also will facilitate the ability of agencies to deliver on their mission and provide good service to the American people. Ultimately, these changes support President Trump's goal of effective stewardship of taxpayers' money by our government.

Data Collection of Adverse Actions

Section 6 of E.O. 13839 outlines certain types of data for agencies to collect and report to OPM as of fiscal year 2018. To enhance public accountability of agencies, OPM will collect and, consistent with applicable law, publish the information received from agencies aggregated at a level necessary to protect personal privacy. OPM may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information. Section 6 requires annual reporting of various categories of data, including: (1) The number of civilian employees in a probationary period or otherwise employed for a specific term whose employment was terminated during that period or term; (2) the number of civilian employees reprimanded in writing by the agency; (3) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days; (4) the number of adverse actions taken against civilian employees by the agency, broken down by type of adverse action, including reduction in grade or pay (or equivalent), suspension, and removal; (5) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period; (6) the number of adverse actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code; (7) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse actions; and (8) the resolutions or outcomes of litigation about adverse actions involving civilian employees reached by the agency.

On July 5, 2018, OPM issued guidance for implementation of E.O. 13839. This guidance included instructions for each department or agency head to coordinate the collection of data from

their components and compile one consolidated report for submission to OPM using the form attached to the guidance memo. Forms must be submitted electronically to OPM via email at employeeaccountability@opm.gov generally no later than 60 days following the conclusion of each fiscal year. In lieu of outlining the data collection requirements in OPM regulations, OPM will issue reminders of this requirement annually and provide periodic guidance consistent with the requirements of E.O. 13839.

Public Comments

In response to the proposed rule, OPM received 1,198 comments during the 30-day public comment period from a wide variety of individuals, including current and retired Federal employees, labor organizations, Federal agencies, management associations, law firms, and the general public. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from categorical rejection of the proposed regulations to enthusiastic support. Many comments focused on issues relating to fairness, the opportunity to demonstrate acceptable performance, and the protection of employee rights.

Several Federal agencies, organizations, and commenters agreed with many aspects of the proposed regulations. Those in support of the regulatory changes cited the benefit of streamlined processes and the benefits to management of the Federal workforce associated with increases in efficiency and accountability. An agency commented that the use of progressive discipline has led to many delays in removal and hardship for supervisors. The agency highlighted that this rule will give more discretion to supervisors to remove problematic employees and shorten the years-long process for getting rid of poor performers and those with misconduct issues, thus increasing the efficiency of the service. In addition, some organizations commended OPM for reiterating that progressive discipline is not a requirement. One of these organizations further noted that progressive discipline has grown within most agencies to the point of being a roadblock in many instances to removals or suspensions that would promote the efficiency of the service because there was no prior discipline. Also, with reference to tables of penalties, this organization stated that the rule is "right on point" in its reference to tables of penalties as contrary to the efficiency of the service. Some agencies and organizations

expressed support for providing notifications to supervisors about probationary periods ending but requested clarification on how the process should be implemented. Additionally, included among the comments of Federal agencies were concerns regarding: The consequence of supervisors not taking affirmative steps to retain employees before the end of a probation period; the non-delegation from the head of the agency to adjudicate retaliation claims, as well as whether such "decisions could be perceived to be politically motivated resulting in claims of whistleblower retaliation"; and whether agencies may satisfy the requirement to provide assistance before or during the opportunity period without placing agencies at risk of acting contrary to statute or other OPM regulations.

Many of the comments were from national labor organizations and their members, including many which were seemingly submitted using text from a template. This widely utilized letter expressed general opposition to the proposed regulations. Specific concerns expressed included: Commenters' confusion about probationary period notifications, the lack of required utilization of progressive discipline and the discouraged use of tables of penalties, the existence of adequate assistance for employees with unacceptable performance to demonstrate improvement, and the loss of ability to modify personnel records through settlement agreements. Other commenters had similar concerns in addition to concerns regarding whether the revised regulations were consistent with existing statutes, other regulations, case law, and merit principles. OPM reviewed and carefully considered all comments and arguments made in support of and in opposition to the proposed changes. The comments are summarized below, together with a discussion of the changes made as a result of the comments. Also summarized are the suggestions for revisions that we considered and did not adopt. In addition to substantive comments, we received several editorial suggestions, one of which was adopted. Finally, we received a number of comments that were not addressed below because they were beyond the scope of the proposed changes to regulations or were vague or incomplete.

In the first section below, we address general or overarching comments. In the sections that follow, we address comments related to specific portions of the regulations.

General Comments

Federal agencies, management associations, some Federal employees and some members of the public expressed strong support for the changes. An agency concurred with the proposed rule as written and other individual commenters and management associations asserted that the rule changes are prudent and long overdue. Some commenters stated that they had observed Federal employees who do not perform their jobs acceptably, expressed the belief that the burden on managers in handling underperforming employees is too onerous, and welcomed the regulation changes as a means of addressing these issues. Commenters stated that the current rules protect “bad” employees and this change would make it easier for employers to remove “bad” employees and focus more time on the “stellar” employees including rewarding them. Another commenter referred to these changes as common-sense reforms that will aid in holding all Federal employees more accountable. Another commenter stated that it is time to hold all Federal employees accountable, including management. One commenter, who did not identify whether he or she is a member of a union, stated that although the national union may encourage its members to voice disagreement, the commenter agrees with the rule. This commenter also asserted that for far too long Federal government unions have protected poor performers. Some commenters asserted that Federal employees should not expect to be treated differently than private sector workers and voiced their support of the rule changes. A commenter fully supported the rule and believed it is long overdue for the Federal government to get in sync with the private sector when addressing both employee performance and conduct. The commenter added that the proposed changes will assist in retaining appropriate employee safeguards while promoting the public trust in government. Another commenter supported the proposed rule because high performing employees will now be able to be rewarded and subpar employees removed from an agency. A commenter also expressed full support and stated that supervisors should be held equally responsible as rank and file employees. A management association expressed that overall it was in favor of the proposed rule, although some members of this management association “expressed concern in the area of subjectivity if someone has a boss that is ‘out to get them.’”

Two management associations, while offering their support of the rule, emphasized the importance of training. One management association urged OPM to act with all haste to process the comments it receives, issue a final rule, and ensure managers are educated and trained about the changes. This management association asserted that ultimately, OPM proposes much needed and reasonable reforms that give management clearer control over their workforce from the initial hiring process through the individual’s tenure in the Federal service. However, the management association stated that the most important determinant of these rules’ success will be not how they are written but how the managers and supervisors are trained on their implementation. The management association stated that managers and supervisors must be given the tools and support to institute these reforms within their offices. Further, the management association stated that performance appraisals for managers should be tied to their adherence to these rules. This management association asserted that, in order to create a culture that values accountability and efficiency, leaders in the Federal government must be efficient and accountable in inaugurating the changes. Another management association stated that when finalized and implemented, the rule will provide much needed simplicity and clarity for federal leaders who are responsible for managing an accountable workforce.

OPM acknowledges the support for the rule received from commenters. In regard to tools and support to assist managers and supervisors, one of the requirements of E.O. 13839 is that the OPM Director and the Chief Human Capital Officers Council undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules, and that this undertaking begins within a reasonable time after the adoption of any final rule issued to effectuate the principles of accountability in the Federal workforce in Section 2 of E.O. 13839.

Other commenters expressed numerous other concerns about the proposed rule. National unions, organizations and many other commenters urged OPM to withdraw the proposed rule and consider what they believe to be more reasoned and equitable approaches to addressing employee probation, and employee performance and conduct concerns. Some commenters stated that the changes to the regulations are invalid,

and others stated that they are unnecessary. One national union and a commenter voiced opposition to all proposed changes except the whistleblower provisions. In expressing their opposition, other commenters remarked that the rule purports to accomplish the goal of “assist[ing] agencies in streamlining and clarifying procedures and requirements to better support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction in grade and removal actions as well as adverse actions,” but does not actually do so. A national union stated that contrary to what the proposed rule states, these regulations will not reward good workers or promote public trust in the Federal government. A commenter asserted that because civil servants are dedicated to Government service and work with pride regardless of the conditions, the performance management system should reciprocate the same tolerance and adaptability when agencies are administering disciplinary action against Federal employees, which, the commenter observes, would not be the case if these changes are adopted.

One commenter stated that, on its face, the proposed changes seem reasonable. The commenter asserted, however, that it appears as though the goal is to reduce Government rules, regulations, agencies and employees. The commenter disagreed with these reductions as agencies and employees keep our country moving forward and serving people. Another commenter asserted that adoption of the proposed rule would demonstrate poor judgement and a blatant disregard for the Federal government’s most valuable asset, its employees.

OPM disagrees with those commenters who challenge the underlying validity of and necessity for these regulations. Congress has conferred upon OPM general authority to regulate in these areas; see, e.g., 5 U.S.C. 3321, 4305, 7504, 7514 and 7543. OPM is also promulgating these rule changes to implement the requirements of E.O. 13839 and M–17–22, as well as to fulfill administration policy priorities laid out in the PMA. Furthermore, these rules are being promulgated under the President’s authority provided in 5 U.S.C. 3301, 3302 and 3303 and which he delegated to OPM. These changes not only support agency efforts to implement E.O. 13839 and M–17–22, and to pursue PMA goals, but also will facilitate the ability of agencies to deliver on their missions and provide service to the American people. To carry

out E.O. 13839, the rule facilitates a Federal supervisor's ability to promote civil servant accountability while simultaneously preserving employee's rights and protections. We also disagree with the commenters' contention that the proposed rule does not streamline and clarify procedures and requirements to better support managers in addressing unacceptable performance and pursuing adverse actions. We decline to make changes based on these comments because the proposed rule effectuates changes that, in fact, make procedures more efficient and effective. The proposed rule was published to facilitate the ability of agencies to deliver on their mission and on providing service to the American people. For example, the requirement of the proposed rule for timely notifications to supervisors regarding probationary periods will assist agencies in making more effective use of the probationary period. Additionally, the proposed rule establishes limits on the opportunity to demonstrate acceptable performance by precluding additional opportunity periods beyond what is required by law, which encourages efficient use of the procedures under chapter 43. As another illustration of streamlining and clarifying performance-related procedures and requirements, the proposed rule makes clear that an agency is not required to use progressive discipline under subpart 752.202. Specifically, the proposed rule adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness. Further, the proposed amendments emphasize that the penalty for an instance of misconduct should be tailored to the facts and circumstances, in lieu of the type of formulaic and rigid penalty determination that frequently results from agency publication of tables of penalties. Thus, OPM believes the rule does make procedures more efficient and effective and is consistent with E.O. 13839's policy goals and requirements.

Many commenters and organizations asserted that OPM did not have the authority to promulgate this rule because employee procedural rights are governed by statute and should be modified only through congressional action. Some commenters said the rule would be unconstitutional if effected. An organization stated that the proposed regulations are contrary to statutory authority and established case law, and directly undermine the due process protections afforded to Federal employees. Another organization stated that OPM should dispense with these

regulations as written or substantially revise them to conform to due process, fundamental fairness, Federal statute and Federal court precedent.

We disagree with the general assertions contesting OPM's authority and challenging the legality and constitutionality of the revised regulations. OPM is promulgating these regulations under its congressionally granted authority to regulate. Not all existing provisions were constitutionally or statutorily mandated, and to the extent they were not, OPM has authority to revise them to make the process work more effectively. In so doing, OPM has been mindful of the President's expressed policy direction. Further, this rule will not eliminate any employee rights provided under statute. Federal employees will continue to enjoy all core civil service protections provided by statute, including merit system principles, procedural rights, and appeal rights.

An agency pointed out that when the proposed regulations were drafted, there were judicially imposed limitations on implementing portions of E.O. 13839 precluding inclusion of these subjects in the proposed regulation. The agency recommended that, due to the court injunction being lifted, any matter that would have been included in the regulation, but for the injunction, be added so that agencies can benefit from those matters as well.

The agency is correct that various sections of E.O. 13839 were subject to judicially imposed limitations when these regulations were proposed and that the proposed regulations did not seek to incorporate enjoined sections of the E.O. For the same reason, however, these sections were not subject to notice-and-comment rulemaking requirements. As a result, such changes will not be included in the final rule with respect to the current rule-making process.

As the previously enjoined portions of the Executive Order are now fully effective and binding on executive agencies, OPM anticipates proposing additional revisions to regulations, pursuant to the Administrative Procedures Act's notice-and-comment process, consistent with the President's expressed policy goals, at a future date.

One national union noted that "the proposed regulations will diminish employees' right to collectively bargain by limiting the topics that are negotiable. They noted the regulations are contrary to the vision and spirit of the Federal Service Labor-Management Relations Statute (the Statute), which allows Federal employees to collectively bargain and participate in decisions

affecting their working conditions." This national union further noted that "while OPM has the authority to issue regulations in the area of federal labor relations, it may not dilute the value of employees' statutory right to collectively bargain." They further state "OPM does not consider how its proposed regulations will severely impede the right to collectively bargain. The regulations should not be implemented because they would diminish the core elements of collective bargaining by reducing negotiations over primary conditions of employment including discipline, improvement opportunities, and settlements."

In response to these comments, OPM notes that there are numerous ways in which the proposed rule does not impact collective bargaining at all. Generally, in fact, the regulations simply provide direction to agency officials exercising the discretion afforded to them by law, including the right to discipline employees and the right to hire. Legally negotiated agreements, for instance, could not force agency officials to select a specific penalty based on employee misconduct, require them to enter into settlement agreements that provide employees clean records, or preclude them from utilizing probationary periods when making decisions regarding the nature of an appointment. These decisions remain at the discretion of the agency's authority as to discipline, settlement, and hiring and employment. In other cases, the proposed rule provides only aspirational goals that constitute guides for agency officials rather than absolute mandates that would preclude bargaining over these subjects. An example is the provision providing that agencies should limit to the required 30 days the advance notice of adverse action *when practicable*. Similarly, the provision explaining that agencies are not required to use progressive discipline is a guide, not a mandate.

Although the proposed revisions to these Government-wide regulations may result in limiting collective bargaining on certain topics, we disagree with the view that these changes are contrary to the vision and spirit of the Statute (5 U.S.C. chapter 71). They are in accord not only with both of these concepts but also, and most importantly, with the letter of the law, including 5 U.S.C. 7117. Further, 5 U.S.C. 7101(b) states in its entirety that "[i]t is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements of Government. The provisions of this chapter should be

interpreted in a manner consistent with the requirement of an effective and efficient Government.” These provisions include significant limitations on collective bargaining relating to matters that are the subject of Federal law or Government-wide rule or regulation; see 5 U.S.C. 7117(a)(1). And while commenters may disagree, as a matter of policy, with the subjects the President has determined are sufficiently important for inclusion in an Executive Order and federal regulation, it is well established that the President has the authority to make this determination and that OPM regulations issued pursuant to this authority constitute Government-wide rules under section 7117(a)(1) for the purpose of foreclosing bargaining. See *NTEU v. FLRA*, 30 F.3d 1510, 1514–16 (D.C. Cir. 1994).

We would also note that certain exceptions to collective bargaining are set forth in the Statute itself, including a prohibition on substantively bargaining over management rights as outlined in 5 U.S.C. 7106(a). This includes management’s statutory rights to suspend, remove, reduce in grade or pay, or otherwise discipline employees. Bargaining proposals that would, for instance, mandate a particular penalty determination, and mandate the use of progressive discipline and/or tables of penalties would impermissibly interfere with the exercise of a statutory management right to discipline employees and thereby not appropriately be subject to bargaining.

One commenter also suggested that the “article” should be open for dialogue from the union. Because this comment is not clear, we are unable to respond to it. We note, however, that what we published is not a proposed article intended for inclusion in collective bargaining agreements between agencies and labor organizations. These provisions are proposed revisions to Government-wide regulations issued by OPM. We provided a copy of the proposed rule to labor organizations which have been granted consultation rights with OPM on Government-wide rules or regulations effecting any substantive change in any condition of employment in accordance with 5 U.S.C. 7117(d) and provided an opportunity to make comments and recommendations. Additionally, all unions were able to submit comments and recommendations through the rulemaking process and we have considered and responded to all comments that were within the scope of the rule.

Some commenters asserted that the timing of this notice is suspicious, and appears to coincide with alleged

administration efforts to circumvent Congress on Federal agency appropriations and authorizations, cripple unions, remove Federal employees via proposing drastic agency budget cuts, and impose “absurd” new Federal workplace policies such as restricting telework.

The proposed regulations simply implement the requirements of E.O. 13839, along with the PMA and the objectives of M–17–22. There is no correlation between the timing of the notice and any budget or other administrative process.

Some commenters stated that reform to the civil service system has long been necessary, but that this proposed rulemaking is the wrong approach. A commenter stated while reform is needed, the approach must be fair. Further, an organization asserted that loosening adverse action standards, as demonstrated by a recent non-title 5 statute for Federal employees and “simply making it procedurally easier to fire employees does not in practice improve the overall efficiency of the Federal service.”

Commenters including labor organizations generally expressed concern that these changes, separately and together, would weaken or vitiate the procedural rights or protections of Federal employees. One commenter asserted that, at a time when protections for Federal workers should be strengthened, this proposed rule weakens protections. Many national unions, organizations and individual commenters expressed a desire to remain under the current system with its existing protections, citing too much power being given to managers and supervisors with no corresponding accountability, at the cost of destroying a properly functioning workforce. They argued that the changes would substantially make the Federal government an “at will” employer.

Another commenter observed that checks and balances are at the core of a functioning democracy and requested that we not tear down those attributes by implementing this “archaic” rule. Moreover, an organization stated that removing protections that ensure that such actions are warranted does not promote an efficient, professional and productive Federal workforce. It instead, they argue, takes the Federal civil service steps closer back to the spoils system, and thus is a “big step in the wrong direction.” Further, an organization opined that this administration’s approach of undermining due process protections is the wrong path to reforming government if the goal is to improve the performance

of services to the American people. This organization posited that if the goal is to dismantle the civil service, reduce the number of Federal employees by violating due process rights, and increase discrimination, harassment, and retaliation in the workplace, these changes will have the desired effect. A commenter remarked that OPM should not forget that procedures were set in place to protect an employee from retaliation or from being removed for arbitrary reasons.

Citing specifically the Civil Service Reform Act of 1978 (CSRA), a national union intimated that the proposed rule would permit agencies to act without meaningful review and that Federal employees would receive only lip-service to due process and stated that it was not the purpose of the CSRA to bring about such results. This national union asserted that instead the heart of the CSRA was the desire to balance the needs of an efficient government with due process and fundamental fairness for Federal employees. The national union stated that the proposed regulations upset this balance and stated that they should therefore be abandoned. A commenter also stated that the proposed regulations seem “anti-union” and “just unfair” and that the proposal “is an attack on Federal Employees.” Another commenter endorsed the importance of unions and stated that these regulations are another attempt to take union rights away.

An organization declared that one of the fundamental principles of this civil service system is due process for Federal employees and the “for cause” standard for termination. This organization further observed that due process protections in the civil service system are the most significant difference between most non-unionized private employees, who are at will, and most Federal employees, who can only be removed for cause. The organization additionally stated that the basic principle of due process is derived from hundreds of years of our nation’s civil service experience, which has shown that the best way to avoid nepotism, discrimination, and prohibited personnel practices is to ensure that Federal employees can be removed only for cause. National unions and commenters further stated that Congress created a comprehensive scheme to rectify past issues of arbitrary and discriminatory punishments against Federal workers and asserted that the proposed regulations weaken those protections. The organization further stated that preserving the rights of Federal employees is essential to furthering the principles of the civil

service, merits system and continuous service, and it does not believe that the proposed regulations accomplish the goals of a fair and merit-based civil service.

Another commenter stated that OPM should understand that there is a foundation for the appeals process and requested that OPM not create a different problem by solely focusing on what could be summarized as opening up punishment without the process, review, or oversight that is due. One commenter stated that it is important for OPM to understand that anything that limits due process for employees is “a dangerous, slippery slope.” The commenter stated that it is imperative that we have a strong due process system for Federal employees and a check-and-balances system so that supervisors with perverse incentives cannot act unilaterally. Another commenter expressed that the proposed rule was poorly drafted and an affront to the Federal workforce, citing that it does not meet the standards of due process.

We disagree with commenters’ assertions that the regulation is not consistent with the rights and duties that the CSRA prescribes and removes procedural rights. Consistent with E.O. 13839, the rule streamlines adverse actions and appeal procedures, but without compromising constitutional Due Process rights. The remaining statutory and regulatory procedures for the Federal workforce meet and exceed constitutional requirements. Employees will still receive notice of a proposed adverse action, the right to reply, a final decision and a post-decision review of any appealable action, that is, what the Constitution requires. But further, they retain their right to a full-blown evidentiary post-action hearing as well as judicial review. In fact, they retain a host of choices of avenues of redress. Further, we disagree with the many national unions, organizations and individual commenters who expressed that the regulation changes would substantially make the Federal government an “at will” employer. As discussed above, the rule does not remove constitutional Due Process rights or statutory or regulatory procedures. Thus, Federal employees are not deemed at will as a result of the rule. Further, the rule promotes fair and equitable treatment of employees through its provisions. The proposed regulations encourage managers to think carefully about when and how to impose discipline and to consider all relevant circumstances including the best interests of all employees, the agency’s mission, and how best to

achieve an effective and efficient workplace when making decisions. The rule is intended to clarify the requirements in chapter 43 and chapter 75 of title 5 of the United States Code and to make sure that employee conduct and performance that are inconsistent with a well-functioning merit-based system are addressed promptly and resolutely. Therefore, the proposed rule will not “upset” the balance between efficient Government and employee protection as one commenter stated; it will restore it.

We also disagree that the proposed regulations take away union rights. Although the proposed regulations may result in limiting collective bargaining on certain matters of elevated importance to the President and OPM, similar to the impact any other Government-wide rule may have under 5 U.S.C. 7117, the regulations do not change the rights and duties afforded to labor organizations in 5 U.S.C. chapter 71. The President has determined that these limitations are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective and has directed OPM to issue a Government-wide rule consistent with this imperative.

Additional commenters contended the rule removes protections against retaliation. National unions and other commenters voiced concerns that the proposed rule can have the impact of employees being disciplined or removed for whistleblower activity. A national union stated that Federal employment is deeply engrained with policies that promote efficiency and high-quality performance, while also protecting employees from arbitrary and discriminatory actions by supervisory and managerial personnel. The national union, citing a Merit Systems Protection Board (Board) study, stated that Congress has implemented safeguards to ensure Federal employees are “protect[ed] from the harmful effects of management acting for improper reasons such as discrimination or retaliation for whistleblowing.” This union stated that the proposed regulations will weaken protections for Federal employees and create a system that gives wide discretion to agencies to take punitive action against employees, regardless of whether that action is inequitable or discriminatory. Another commenter asked what the recourse is for someone who is harassed or mistreated and cannot report it to someone.

We disagree with the commenters’ suggestions that the proposed regulation will have the impact of employees being disciplined or removed for

whistleblower activity. OPM is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including continuing prohibitions of reprisal for whistleblowing or unlawful discrimination. The regulations therefore do not modify these protections in any way. The commenters’ apprehensions about the rule diminishing or removing protections against retaliatory action are not supported by the language of the rule itself. In fact, the rule reinforces the responsibility of agencies to protect whistleblowers from retaliation. These requirements are significant because of the essential protections they provide. OPM’s rule incorporates new requirements pursuant to 5 U.S.C. 7515 and assists agencies in understanding how to meet the additional requirements in connection with whistleblower protections. The rule helps to undergird and support agencies in meeting their requirements to take action against any supervisor who retaliates against whistleblowers.

An organization asserted that current statutes and regulations, if appropriately applied by agencies, provide more than adequate means to regulate the civil service in meritorious cases where disciplinary or performance action is warranted. This organization stated that the revisions in the proposed rule are based on the erroneous stereotype that it is difficult to fire Federal employees and asserted that this is not the case. The organization pointed to the Government Accountability Office report, “GAO-18-48, FEDERAL EMPLOYEE MISCONDUCT: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct and noted that (based on OPM’s statistics) almost 1% of the Federal workforce is subject to adverse actions every year.

Arguments against the proposed changes based on alleged erroneous stereotypes concerning the challenges of removing employees disregard the objectives of E.O. 13839. OPM proposed these revised regulations, as required by E.O. 13839, in order to promote more effective and efficient functioning of the Executive Branch and to provide a more straightforward process to address misconduct and unacceptable performance, which will serve to minimize the burden on supervisors. Potential misconceptions regarding removal of Federal employees do not eliminate OPM’s need to implement the Executive Order by proposing changes that support the Order’s goals.

Commenters, including a national union, stated that the proposed changes

will allow for unchecked supervisory conduct and favoritism. A national union asserted that it is unacceptable for OPM to put forth proposed regulations that, in the union's view, prioritize such arbitrary conduct under "the phony guise of government efficiency and effectiveness to eviscerate the protected rights of employees." Commenters and national unions voiced concerns that the regulations will likely cause significant harm to employees. A commenter also stated that employees would have a constant fear of being removed over minor infractions. In another instance, a commenter observed that creating a "nebulous employee concern by threatening discipline and salary decreases," as the commenter asserts this proposal does, has a negative impact on good employees. Further, the national union argued that the proposed changes will not achieve any of the supposed benefits for the Government; instead, these regulations will allow good employees to be terminated and create a high turnover rate among Federal employees and will cost the Government extra money as Federal employees are exposed to the arbitrary whims of supervisory personnel.

Other commenters stated that the proposed streamlining effort places the power in the hands of agencies and leaves employees to be at the will of their agencies or at the very least opens the door to abuse of power, authority and the threat of coercion in the workplace. These commenters expressed the view that, currently, inherent checks and balances through established practices, peer review, and multistage discipline expose decisions to "ridicule" if improper. Furthermore, commenters asserted that, given what they believe to be the vagueness of this rule, there is not enough limitation on the power of supervisors, and dedicated public servants can be removed for any reason, including politics. Commenters stated that the proposed rule "skews the rights towards management and away from employees who will have little recourse." Asserting that unions were created to ensure employees are treated fairly and management follows the rules, a commenter questioned what will prevent the abuse of the new rule and who the new rule will protect. The commenter stated that because of the rule changes, unfairness will perpetuate, if not increase, alleged management ineptness. The results, they argue, will be that employees will leave Federal service or be removed without due process. One commenter stated that while changes to discipline and

removals can be beneficial, the rule gives management more power to remove someone without just cause. Moreover, another commenter observed that any change to the current regulation will only foster the negative feelings that the commenter believes already exists between management and employees. This commenter expressed the viewpoint that these matters are compounded if one is a person of color and that "inclusion of all should be the goal not exclusion due to a difference no matter how perceived [which] is, in my opinion, another form of discrimination." Further, another commenter voiced concern that it will be easier to remove Federal employees and that procedures that provide fair and equitable treatment will be stripped away, which will sow further distrust between employees and management and will unnecessarily create unforeseen problems.

In response to commenters that expressed concern about negative impact on good employees, OPM notes that addressing misconduct or poor performance in this fashion will enhance the experience of well-performing employees, because poor performing employees place a resource strain on more productive employees and damage morale generally. OPM further believes that the positive impact associated with more effectively and expeditiously addressing poorly performing employees outweighs any negative impacts.

Further, national unions and other commenters voiced concern that the rule would give rise to nepotism. National unions and other commenters stated that the proposed rule changes are based on an Executive Order issued by an administration that, in the view of these commenters, has openly stated its anti-union animus and disregard for the laws that govern and protect Federal workers. The commenters asserted that these laws were designed to put a halt to nepotism, discrimination and unfairness at all levels of Federal employment. This proposed rule, they conclude, conflicts with the letter and spirit of those laws.

Notwithstanding these assertions, the regulation does not permit unchecked supervisory behavior and favoritism, remove employee protections, or permit nepotism. The final regulation streamlines and simplifies performance-based actions and adverse actions without compromising employees' statutory rights and protections. The statutory protections for Federal employees remain in force and are not affected by the rule. Thus, the concern of many commenters that managers will

abuse their authority as a result of the rule is unfounded. While commenters advocated for remaining with the current system, the proposed rule carries out the requirements of E.O. 13839.

Importantly, agencies continue to be responsible for holding managers accountable for proper use of their authority. Regarding the comments that the proposed rule impacts employees' rights and the role of unions, we believe the changes appropriately protect employee statutory rights while providing for efficient government operations. E.O. 13839 requires executive agencies (as defined in section 105 of title 5, U.S. Code, excluding the Government Accountability Office) to facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing employees' procedural rights and protections. In response to the comment that the proposed rule changes are based on an Executive Order issued by this administration which has openly stated its anti-union animus and disregard for the laws which govern and protect federal workers, we reiterate that the policy goals of E.O. 13839 are to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections. These are the policy goals underlying the rule. Notwithstanding the commenter's speculations regarding the intent of the rule, the rule changes adhere to legal requirements.

A national union stated that the need for employee protections has been put into "sharp relief" by actions of this administration which appear to target Federal employees. Commenters voiced opposition to the proposed rule because it allows employees to be fired for political reasons or other non-work-related facets of an employee. A commenter noted that "people died for union rights" and OPM should not take them away. Another commenter stated that the rule changes are "punitive" for employees and enable management to continue "bad behavior" that is arbitrary and without employee recourse. This commenter posited that if these issues were not a reality, unions would have no need to exist. Commenters stated that scientists and civil servants most likely to face censure under this administration are those who render their professional opinions or follow scholarly findings and evidence-based reasoning and thus the expanded powers of the proposed rule in no way benefits the public.

OPM does not agree that the proposed regulations target employees in any

manner. The final regulations streamline and simplify performance-based actions and adverse actions without compromising employees' statutory rights and protections. The statutory protections for Federal employees remain in force and are not affected by the rule.

The regulations also do not change the rights and duties afforded to labor organizations and agencies pursuant to 5 U.S.C. chapter 71. OPM believes that these changes are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective.

Some commenters voiced confusion and believe that the rule is another action by the administration to arbitrarily punish and dispense with Federal employees and union representatives in the name of "efficiency." Many commenters stated that the proposed rule will make it easier to remove employees who do not comply with the administration's views. In particular, one commenter stated the proposal was politically motivated and that the ability of elected officials with political motives to quickly terminate Federal employees leads to excessive influence and poor decision making. The commenter observed that it needs to be "hard" to remove a Federal employee so that they can "operate independently." Another observed that competent people do not deserve to lose their jobs "based on who's in power." A commenter stated that one of the hallmarks of our current system is its freedom from political influence which could change under this proposed rule. One commenter proposed adding protections for those employees who do not comply with the administration and opined that the protections will prevent employees from inadvertently breaking Federal laws, help the American public, and prevent costly wrongful termination lawsuits. This commenter asserted that the rule creates openings for managers to wield political influence in the Federal workplace and to change the workforce to meet a personal or political agenda, rather than fulfilling the mission of the organization. Finally, the commenter stated that Americans deserve a politically neutral Federal workforce.

In response to these concerns, please see our earlier discussion regarding protections. The statutory protections for Federal employees remain in force and are not affected by the rule. In addition, the current and revised procedures are content-neutral; there is nothing in the changes that further permits or encourages the initiation of a personnel action based on an

employee's opinion or viewpoint. All avenues of redress for employees remain unchanged by this regulation, and, should an employee believe that he or she is the subject of a prohibited personnel action, reprisal, etc., the employee remains able to exercise rights to appeal to the Merit Systems Protection Board (MSPB or Board), to seek relief from the Office of Special Counsel (OSC), etc.

A significant issue raised in the public comments concerns the proposed rule's fairness. Many commenters stated that the rule is unfair, fosters a toxic work environment, or weakens employee protections. One commenter stated that when there is "no equal fairness," work productivity will suffer and that OPM "should tread softly" regarding the proposed rule. Another commenter further stated that he has seen the workplace be degraded and morale reduced because of vindictive approaches to employee relations and questionable policy changes at the expense of workplace engagement, performance incentives, and public health and welfare.

Additional commenters were of the view that the proposed rule is senseless and wrong, while another commenter stated that the rule is "morally questionable." Many commenters stated that the proposed rule would seriously disrupt and remove all notions of fairness when Federal employees are subject to adverse actions or that the rule is "abhorrent." Multiple commenters asserted that the proposed rule would foster disparate standards for application to both performance and conduct-based actions. They expressed a view that parts of the rule are merely confusing, while other parts appear to be designed to foster contentious labor relations, rather than resolving these issues in a cooperative and constructive manner. Commenters voiced concerns regarding fairness for those civil service employees who are veterans. Without providing specifics, a commenter stated this rule is very unfair to those individuals who served in the military and those who work as Federal employees. Still another commenter, again without giving a basis for the comment, voiced concerns regarding stripping away rights of those Federal employees who have served this nation and continue to serve and stated that those rights should be left alone.

As previously explained, we disagree that the proposed regulations take employee rights away or are unfair. Although we have made changes to the proposed regulations, statutes that guard against arbitrary actions remain intact. Additionally, protection of employee

rights is an important element of fair treatment in the Federal workforce. The rule observes and is consistent with the merit system principles which state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. The rule and the procedures contained therein apply to all employees equally.

All employees, including those who served in the military, and labor organizations continue to have the right to challenge or seek review of key decisions. Although we have made changes to the proposed regulations, procedural rights and other legal protections are preserved. Mirroring statutory requirements, the regulations continue to provide employees with notice, a right to reply, a final written decision, and a post-decision review of any appealable action. Bargaining unit employees continue to have the option to use negotiated grievance procedures over subjects otherwise not excluded while other employees continue to have the ability to utilize administrative grievance procedures. These regulations do not change the rights and duties afforded to labor organizations in 5 U.S.C. chapter 71. We believe these changes are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective. It is not clear what the concern is regarding the comment about "fostering disparate standards for application to both performance and conduct-based actions." The statutory scheme in 5 U.S.C. chapter 43, Actions Based on Unacceptable Performance, and 5 U.S.C. chapter 75, Adverse Actions, are different and each establishes a distinct procedural process. The proposed regulations are consistent with the statutes that govern these actions. Regarding those commenters who expressed a view that parts of the rule are confusing, while other parts appear to be designed to foster contentious labor relations, rather than resolving issues in a cooperative and constructive manner, we are not able to provide a response without specific reference to the parts of the proposed rule about which they are commenting.

National unions and other commenters asserted that the approval of the proposed rule will set the efficiency of the Federal service back several decades and contribute to what they assert are current issues concerning retention of stellar employees and recruitment in key agencies. Many national unions and commenters expressed considerable apprehension

about the rule's impact on retention and recruitment of employees in the Federal government with an already dwindling workforce. Some commenters pointed out that the rule changes will undermine integrity and morale as well as hamper the recruitment and retention of a quality Federal workforce. Some commenters requested that OPM reconsider given the long-term ramifications that this rule would cause and the dire effects these commenters believe it would have on employee morale, retention, and recruitment. Other commenters stressed that the proposed rule would "wreak havoc" on the stability of the civilian workforce, lower morale, and create a hostile employee/employer relationship during a time when many agencies already suffer from personnel shortages.

We disagree that the rule will unfavorably impact the retention and recruitment of employees in the Federal government or undermine morale. The rule is not a plan for reducing recruitment or interfering with the retention of staff performing at an acceptable level. Rather, the rule carries out E.O. 13839 which notes that merit system principles call for holding Federal employees accountable for performance and conduct. E.O. 13839 finds that the failure to address unacceptable performance or misconduct undermines morale, burdens good performers with subpar colleagues and inhibits the ability of executive agencies to accomplish their missions. Accordingly, the rule is intended to have a positive impact on the Federal government's ability to accomplish its mission for the American taxpayers.

More specifically, with respect to retention, commenters asserted that many talented individuals will not consider the Federal government as an employer and those individuals currently in the Federal government will look elsewhere for employment. Some commenters stated that many agencies have recently executed poorly planned office moves and other reorganizations which have resulted in employees leaving in disgust and a loss of institutional knowledge, accelerating employee losses from attrition. These commenters stated that poorly planned changes to Federal employee performance management such as those in the proposed rule will ensure similar results. One commenter further reflected that imposing damaging rules will make employee retention more difficult than in the private sector and that it will make serving Federal customers "challenging" because it is a known fact that "happy employees work harder."

One commenter asserted that, with what the commenter described as "the hiring restrictions," the proposed rule will result in reducing the efficiency and strength of the Federal workforce as there will be mass attrition and mass migration away from Federal jobs to the severe detriment of all U.S. citizens who need Federal employees.

A commenter stated that the rule serves as additional evidence that the rights of thousands of Federal employees no longer mattered or are valued. Another commenter asserted that these changes are a direct attack on Federal workers and their livelihoods as these rule amendments only make it easier for management to punish arbitrarily and fire at will; the changes thus constitute a major blow to the prospect of the Government becoming a desirable place to work again. Further, one national union stated that the proposed regulations will allow good employees to be terminated and create a high turnover rate in the Federal government.

A commenter also wrote that the commenter felt disrespected by efforts to remove existing benefits for Federal employees and that this rule may result in employees deciding that the private sector is a better option. A commenter remarked that bad treatment of employees will ensure the inevitable failure of our government.

The assertions that the proposed rule would adversely impact retention of Federal employees are incorrect and not supported by any data. The rule does not remove statutory procedural rights afforded to Federal employees and does not turn Federal employees into at-will employees. The rule does not change the protections of notice, an opportunity to reply, the right to representation, and the right to appeal to a third-party entity (and, eventually, the entity's Federal reviewing courts). The rule clearly acknowledges the ongoing obligation of Federal employers to provide statutory safeguards to their workforce. It therefore should be evident from the rule that the Federal government remains committed to practices of fair treatment for employees. In fact, the rule promotes processes that help agencies retain employees who are performing acceptably and efficiently remove those who fail to perform or to uphold the public's trust.

Commenters also raised concerns about recruitment of talented individuals into the Federal workforce. A commenter stated that, although the existing system may have been overly generous to employees, the proposed changes are so "draconian" as to discourage "our best young people"

from wanting to serve their country in Federal civil service. Another commenter asserted that it was hard to believe that the proposed rule would have a positive impact on the Federal government and that "adding a 'lifetime at will' line to the contract after the first year will not attract the best and brightest". Further, a commenter stated that it is deeply troubling that it will be easier to remove Federal employees and that procedures that provide fair and equitable treatment will be stripped away, which would result in attracting a less qualified pool of applicants.

Additionally, with respect to recruitment, another commenter stressed that the role of a government employee is unique and the individuals occupying these roles hold specialized and institutional knowledge not common in private enterprise. This commenter went on to state that if the basic protections of Federal employment are removed, so will be any incentive for individuals to seek and apply for government jobs, an impact that may be hard to overcome or reverse. Another commenter asked what skilled persons would work for the Government if they knew they could be disciplined or fired abruptly for very little or no reason at all, and the commenter further stated that we need those who are skilled to perform the functions of the Federal government.

OPM disagrees that the rule will have an adverse effect on recruitment of talented individuals to the Federal government. Maintaining high standards of integrity, conduct, and concern for the public interest, as enumerated by the merit system principles, and furthered by the rule, only serves to help agencies to deliver on their mission and on providing service to American people. It is thus reasonable to conclude that adherence to these standards will contribute to successful recruitment efforts for the Federal workforce.

Referring to the probationary period in relation to recruitment, a national union stated that in certain regions, the Government experiences challenges in recruiting and retaining first responders. The national union added that the Government provides initial training and certification to new employees to help fill much needed positions. The national union further stated that under the proposed regulations, employees who must complete a two-year probationary period upon appointment could be terminated based on their supervisors' assessment that they cannot adequately perform the job duties. The national union asserted that the proposed regulations will result in the Government losing their investment in

highly skilled workers and continuing to struggle to fill essential first responder positions, leaving government personnel and property more vulnerable to emergencies.

The rule does not change the procedures for terminating a probationer's appointment; it merely requires that agencies notify supervisors to make an assessment of the probationer's overall fitness and qualifications for continued employment at prescribed timeframes before the conclusion of the probationary period. Current regulation, as reinforced by E.O. 13839 and previous OPM guidance, already provides that an agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment. See 5 CFR 315.803(a).

In response to the comment regarding expenditure of agency resources associated with terminations in year two of a probationary period, OPM believes that while a termination in the second year of a probationary term represents a loss of value from significant agency expenses, it would be more wasteful to retain the individual past the probationary period, allow him or her to acquire career status (and adverse action rights), and then be forced to pursue a formal performance-based action or adverse action to remove an employee who had proven to be unable to perform the duties of the position in an acceptable manner even before those rights accrued.

One national union stated that the proposed changes are unsupported by the facts and are likely to have an overall negative effect on government operations by reducing due process for Federal employees and increasing arbitrary and capricious agency conduct. This national union stated that what they described as "the so-called" Case for Action that OPM sets forth at the beginning of the proposed regulations is not grounded in fact. The national union further stated that OPM looks to the Federal Employee Viewpoint Survey (FEVS), which is a subjective survey of employee perceptions. That union further claims that, although "a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance," the evidence actually shows that, far from failing to adequately address poor performance, Federal agencies routinely take actions against employees based on allegations of misconduct or poor

performance and that those actions are almost always upheld. The national union stated that when cases are not upheld by the Board, this small number of cases is not a failure of the system but rather an example of the system working effectively in a manner that fosters merit system principles. The national union also pointed out that given the reasons on which each reversal was based, the proposed regulations will not avoid or eliminate similar outcomes in the future. The national union asserted that OPM's contention that "interpretations of chapter 43 have made it difficult for agencies to take actions against unacceptable performers and to have those actions upheld" is thus demonstrably untrue. The national union argues, therefore, that changes proposed by OPM to 5 CFR part 432 are unwarranted. It further stated that the above-referenced case outcomes are neither anomalous nor confined to performance-based actions. The national union further expounded on its point and stated that, going back to fiscal year 2016, the Board's Annual Report for Fiscal Year 2016 statistics continue to demonstrate that agencies are, in fact, overwhelmingly successful in taking actions based on misconduct or performance. Consequently, this national union stated that The Case for Action that OPM purports to make is illusory.

OPM disagrees with the union's discounting of OPM's reliance upon FEVS statistics. E.O. 13839 asserted that the FEVS has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. OPM believes that this statistic is particularly relevant to the intent of E.O. 13839 and thus to the changes proposed in these regulations. Merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, that inadequate performance should be corrected, and that employees should be separated who cannot or will not improve their performance to meet required standards.

With respect to the frequency with which agencies prevail at the Board, we do not believe any such success makes the rule changes unnecessary. As previously discussed, even if this phenomenon is real, statistics surrounding rate of actions being sustained does not obviate the need to improve the effectiveness and efficiency of the process. These regulations carry

out E.O. 13839 to facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing employees' statutory procedural rights and protections. They clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction in grade, removal actions and adverse actions.

Another national union also discussed The Case for Action, arguing that the rule weakens civil service protections and that it relies upon a premise, as its central argument, that it is too hard to fire Federal employees. The union, without evidence, opined that underlying that premise is the belief that more employees need to be fired. It also noted that while OPM relies upon the FEVS, where a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance, OPM does not cite responses to specific FEVS questions that support this statement. The union goes on to cite responses in 2018 to two FEVS questions: Question 23—"In my work unit, steps are taken to deal with a poor performer who cannot or will not improve" and Question 25—"Awards in my work unit depend on how well employees perform their job." The union gave the percentages of the total respondents who either disagreed or strongly disagreed with these statements and noted that this did not constitute a majority of responders. They also noted that a large percentage of respondents strongly agreed or agreed that they were held accountable for achieving results and felt that the overall quality of their unit's work was good to very good. According to the union, in general, respondents see themselves and others in their work units as being held accountable and performing well, while perceiving that others are not. Additionally, the national union asserted that OPM has "simplistically" cited FEVS data and not followed OPM's own advice, which cautions, on the page titled "Understanding Results," that the survey results do not explain why employees respond to questions as they do and that survey data should be used with other data to assess the state of human capital management.

OPM believes that the union's reliance and characterization of the FEVS data for 2018 is inadequate to dismiss The Case for Action. While the national union asserts that OPM is "simplistically" citing FEVS data, it appears the national union may be

doing this to support its own position. As explained in E.O. 13839, the FEVS has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. As noted in OPM's FEVS Governmentwide Management Report for 2019, this continued a five-year trend of reporting concerns about the manner in which poor performance is addressed. From 2015 to 2019, as few as 28% and as many as 34% of employees believed that steps are taken to deal with poor performers in their work unit. Additionally, the FEVS is only one of the several foundations presented in The Case for Action. Merit system principles are referred to in The Case for Action as the basis for holding Federal employees accountable for performance and conduct. Merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated. Also, the PMA is a key component of The Case for Action. The PMA recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. Further, The Case for Action sets forth that prior to establishment of the PMA, the memorandum M-17-22 called on agencies to take near-term actions to ensure that the workforce they hire and retain is as effective as possible. More recently, E.O. 13839 notes that merit system principles call for holding Federal employees accountable for performance and conduct and found that failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues and inhibits the ability of executive agencies to accomplish their missions. Finally, the union's reliance on how often agencies prevail in employee appeals before the Board is undermined by the FEVS data which shows that a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance. In fact, OPM did not state that these regulatory changes are related to how often agencies win or lose before the Board. How often agencies prevail on cases that

are actually appealed to the Board is not relevant to why OPM proposed these changes.

One commenter asserted that OPM does not state that it has done a Federal workplace root cause analysis to justify the proposed rule, and that, instead, OPM cites a non-scientific FEVS based on subjective opinions. The commenter cautioned OPM that implementing the rule without such analysis can end up costing Federal agencies, although the commenter did not specify in what way there could be a cost to Federal agencies. Another commenter criticized OPM's use of FEVS results to justify the need to support drastic changes to regulations. Other commenters stated that E.O. 13563 cited within the proposed rule emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules and of promoting flexibility and that the proposed rule appears to do none of these things. Some commenters criticized the proposed rule because it does not include an assessment. Two commenters further asserted that OPM should have provided an analysis of the costs and benefits anticipated from the regulatory action as well as an analysis of alternatives. The commenters stated that this omission is especially problematic in light of the Preamble on page 48794 of the **Federal Register** notice of the proposed rule, which "recognizes that federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy." The commenters stated that, because the proposed rule is a "significant regulatory action" under E.O. 12866, OPM must assess the potential costs and benefits of the regulatory action. In addition, the commenters opined that, in addition to this status as a "significant regulatory action," the proposed rule should also be considered "economically significant." In the commenters' view, it is likely to have an annual effect on the economy of \$100 million or more unless OPM can certify that Federal departments and agencies will use the rule to expedite adverse actions of fewer than 1,000 full time equivalents (FTEs) Government-wide. As the basis for this estimate, the commenters stated, "For example, the Proposed Rule would have an effect of \$100 million, such as cost savings, if it would lead to job losses of at least 1,000 full-time equivalent employees earning approximately \$100,000 per employee in salary and benefits. The average salary for federal employees, excluding benefits, was \$84,558, according to OPM

FedScope data for Sept. 2018 (most recent available data) For example, IRS employees have an average return on investment of at least \$2 in revenue collection per \$1 on enforcement staff costs, according to GAO-13-151. SSA employees performing certain eligibility reviews have an estimated return on investment of \$15 in savings per \$1 on staff costs, as noted in GAO-16-250. Similarly, productivity changes could result from other federal employees, including auditors, investigators, and inspectors general with returns on investment for taxpayers and effects on the economy. However, the rule does not assess costs and benefits and does not present or analyze alternatives." The commenters asserted that the rule is likely to have "an annual effect" of at least \$100 million in terms of direct and indirect costs. In the view of the commenters, direct costs include appeals and litigation among other costs and indirect costs include productivity changes and secondary effects such as economic multiplier effects. The commenter did not further explain what is meant by "economic multiplier effects."

We disagree that the proposed rule does not assess costs or reflect benefits that will be conferred, that there is a requirement for the proposed rule to present or analyze alternatives and that there is a requirement to conduct a root cause analysis. In The Case for Action, the proposed rule presents the costs and benefits in numerous instances. We discuss that in the FEVS, a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance. We refer to the PMA and its call for agencies to establish processes that help agencies retain top employees and efficiently remove those who fail to perform or to uphold the public's trust. The Case for Action considers, as well, M-17-22 which notably directed agencies to ensure that managers have the tools and support they need to manage performance and conduct effectively to achieve high-quality results for the American people. As explained in The Case for Action, the changes to the regulations are proposed to implement requirements of E.O. 13839, the vision of the PMA and the objectives of M-17-22. These proposed changes not only support agency efforts in implementing E.O. 13839, the PMA and M-17-22, but also will facilitate the ability of agencies to deliver on their mission and on providing service to American people.

Noting that merit system principles call for holding Federal employees accountable for performance and

conduct, OPM also observed that the merit system principles require that employees should maintain high standards of integrity, conduct and concern for the public trust, and that the Federal workforce should be used efficiently and effectively. Similarly, OPM explained that the merit system principles provide that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. Ultimately, as covered in The Case for Action, these changes support both the merit system principles and the President's goal of effective stewardship of taxpayers' money by our government. Thus, costs and benefits associated with the proposed rule are assessed in The Case for Action.

We disagree with the commenters' assertion that the proposed rule should be considered "economically significant" because it is likely to have an annual effect on the economy of \$100 million or more, unless OPM certifies that Federal departments and agencies use the proposed rule to expedite adverse actions of fewer than 1,000 full time equivalents (FTEs) Government-wide. The commenters assume incorrectly that the Federal government will remove a certain number of FTE positions in one year without any basis for arriving at that figure. Furthermore, in response to the commenters' discussion of direct costs in the form of appeals and litigation, there is nothing to indicate that the changes pursuant to the regulations will in any way increase the number of formal disputes generated rather than make the process more efficient which will actually save the government money. The indirect costs put forward by the commenters include "productivity changes and secondary effects such as economic multiplier effects." To reiterate, the supposition that the proposed rule would have an annual effect on the economy of \$100 million or more unless OPM certifies that the proposed rule would be used to "expedite adverse actions" of fewer than 1,000 FTEs is not based on any reasonable, objective criteria. OPM is unable to fully respond to these comments since the commenter did not explain the basis for their assertions.

Another individual commenter wrote that the proposed rule is a good idea but questioned whether the timeframes were realistic for management to meet, noting that adverse actions and performance-based actions require review and input from several offices in

an agency and that coordinating these moving pieces is often a large part of why actions take so long. The commenter asked, "Is it really only the case that when there's a deviation from the timeframes, the agency reports it to OPM and moves on? What are the consequences?" This commenter also requested that we clarify the extent to which the proposed rule applies to non-executive agencies and employees.

Although the commenter did not refer to a particular section, we surmised that the commenter is referring to § 752.404(b) of the rule which provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under subpart D to the 30 days prescribed in 5 U.S.C. 7513(b)(1). Any notice period greater than 30 days must be reported to OPM. Regarding whether the timeframe is realistic, the provision stipulates that it is required only "to the extent an agency . . . deems practicable." As to what consequences will ensue for departure from the time period prescribed, the rule provides only for a report to OPM. Finally, in response to the commenter's question as to the extent to which the proposed rule applies to non-executive agencies and employees, those agencies covered by title 5 are enumerated in 5 U.S.C. chapter 1.

A national union critiqued the requirement for agencies to collect data about disciplinary, performance and adverse actions taken against probationers and employees as burdensome because it appeared to the national union to be intended to serve no purpose other than to encourage agencies to take such actions. The union averred that adverse personnel actions should be a last resort, not a primary tool for human resource management and that the rule will only discourage the public from pursuing government careers. Yet the overall, unfounded theme of these regulations, according to the union is that more Federal employees need to be fired more quickly. The union stated that OPM cites no authoritative data or studies to support this notion and that no reputable private sector employer publishes attrition or termination data for the obvious reason that it would send the message to prospective applicants: "You don't want to work here." The union surmises that perhaps that is the point of the data collection requirement.

The union recommended that instead of collecting data on punitive measures, data should be collected on agency efforts to improve the skills and

performance levels of their workforce, such as the number of employees who successfully completed their probationary periods and the number of employees who successfully completed a performance improvement period. This union highlighted that much is invested in recruiting and training employees, and if the government wants to portray itself as a welcoming workplace, it should place the emphasis on securing a return on that investment.

The data collection requirement in the rule's preamble carries out E.O. 13839 to enhance public accountability of agencies. It is not a signal to prospective candidates for employment to refrain from joining the Federal workforce. Also, private employers do not have the responsibility to be accountable to the public in the same way as the Federal government.

Some commenters stated that in addition to the issues concerning the legal and technical substance of the rule, there appear to be procedural issues as well. These commenters took objection to the preamble to the rule stating that the rule will not include new regulations to codify the "Data Collection of Adverse Actions" section of the guidance issued by OPM on July 5, 2018, and instead, OPM will issue reminders each year. The commenters asserted that this is a circumvention of requirements for transparent government, and that they believed OPM must issue rules for Federal agencies to comply with, rather than "conducting business and issuing directives behind closed doors, eroding the public's trust rather than building on it."

We disagree with the argument that OPM must outline data requirements in this rule and that not doing so is a circumvention of requirements for transparent government. The data collection requirements are transparent because they are outlined in the publicly available E.O., and OPM's guidance documents to agencies are typically posted on a public Government website.

5 CFR Part 315, Subpart H—Probation on Initial Appointment to a Competitive Position

Section 2(i) of E.O. 13839 provides a probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final.

OPM proposed an amendment to 5 CFR part 315.803(a), which would require agencies to notify supervisors that an employee's probationary period is ending, at least three months or 90 days prior to expiration of the probationary period, and then again one month or 30 days prior to expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action.

Pursuant to current OPM regulations, supervisors are currently required to utilize the probationary period as fully as possible to determine the fitness of employees and further required to terminate the services of a probationary employee if they fail to fully demonstrate qualifications for continued employment. Supervisors choosing to terminate a probationary employee under the procedures outlined in Part 315 must do so affirmatively prior to the conclusion of the probationary period, while an employee is permitted to continue employment following probation merely on the basis of the supervisor's *not* taking action. Nevertheless, and at the heart of this proposed regulation is the fact that supervisors actions or omissions determine whether a probationary employee is retained or terminated in each and every instance. The proposed rule simply reminds supervisors of their responsibility to make an affirmative decision and not allow a probationer to become a career employ merely by default; it does not alter the decision-making process nor does it in any way alter the regulatory structure currently in place that governs the decision-making process.

An agency suggested that OPM amend the proposed rule to change the 90-day and 30-day notification periods to calendar days for clarity. The same agency suggested that agencies may need to develop stand-alone technology solutions for making supervisory notifications because of the lack of Government-wide or even department-wide technology solutions and capabilities. This agency recommends that OPM account for the time it may take for agencies to develop such automated solutions into any implementation timeframes.

OPM agrees that further clarification with respect to the notification periods would be helpful. We have modified the proposed language to require agencies to notify supervisors three months and one month in advance of an employee's expiring probationary period. For example, if an employee's probationary period is due to expire on June 19, 2020,

the three-month notification would occur on March 19, 2020, and the one-month notification on May 19, 2020. OPM has updated the final rule accordingly. Agencies have the discretion to determine the method for making supervisory notifications, but OPM encourages agencies to use existing automated tools, to the extent practicable, to comply with the notification requirement.

Two management associations supported the proposed rule, citing reports issued by the MSPB and the Government Accountability Office (GAO) that highlight Government's inconsistent and poor use of the probationary period for new hires and for new supervisors. These organizations also emphasized the importance of the effective use of probationary periods for both new supervisors and executives.

With regard to the assertion that probationary periods are handled poorly or inconsistently, these concerns are addressed in the current language of the regulation, in part, by encouraging full utilization of probationary periods which allows for effective review of employee fitness for a position and through the 90- and 30-day reminders in the amended regulation which serve both to promote consistency in this process and promote accountability by requiring that agencies affirmatively determine employee fitness rather than making such decisions through inaction. Also, the proposed rule does not impact supervisory or executive probationary periods, which are regulated at subpart I of 5 CFR 315 and subpart E of 5 CFR 317, respectively.

A management association supported the proposed rule and commented that some agencies have cumbersome and time-consuming review processes which make the 90-day notification period ineffective. This organization suggested OPM add a 180-day notification period with 90- and 30-day follow up periods. OPM is not adopting this suggestion. OPM believes the proposed intervals (three months and one month) before expiration are sufficient. Agencies may adopt more frequent reminder periods if they choose to do so.

One agency supported the proposed rule noting that it may make managers and supervisors more aware of probationary deadlines, thus preventing them from waiting until the last minute to decide whether an employee is fit for service beyond the probationary period, and requiring them to better utilize the probationary period. The agency also noted the proposed rule creates a new procedural technicality for agencies to overlook, and noted that inconsistent

notification methods may be problematic across agencies. This agency suggested OPM clarify that an agency's failure to notify supervisors at the proposed intervals does not give the employee any additional appeal rights with respect to probation.

OPM believes such an amendment to the regulation is unnecessary. The one- and three-month notification represents an administrative tool to be utilized internally by agencies to promote efficiency and accountability; it is not intended to, and does not, expand or otherwise impact procedural rights of probationary employees. An agency's non-compliance with these requirements does not give the employee any additional appeal rights beyond those an employee may already have. The procedures for terminating probationers for unsatisfactory performance or conduct are described in § 315.804 and those procedures are unaltered by the changes here.

Despite some support for the proposed rule, OPM received comments from many who expressed opposition and concern. One individual opposed the rule because it does not specify a timeframe within which a supervisor must respond to the employing agency with a decision on whether a probationer should be permanently employed. This individual also commented that the proposed rule change did not provide an avenue for an employee to address an untimely notification from his or her supervisor as to his or her continued employment. Finally, the commenter noted that the proposed rule does not specify any consequences for a supervisor who fails to make a timely notification to the employing agency.

The proposed rule implements Section 2(i) of E.O. 13839. This section provides that a probationary period should be used as the final step in the hiring process of a new employee. This is consistent with OPM's longstanding approach, is supported by judicial decisions, and is also in accord with MSPB's oft-stated guidance urging supervisors to use the probationary period to the fullest possible extent. See, for example, "The Probationary Period: A Critical Assessment Opportunity" (2005) and "Navigating the Probationary Period after Van Wersch and McCormick" (2007). E.O. 13839 also encourages supervisors to use that period to assess how well an employee can perform the duties of a job. E.O. 13839 does not discuss when a supervisor should notify his or her employee of the supervisor's decision pertaining to the employee's continued employment. OPM defers to the

employing agencies as to the frequency, timing, and method of supervisor-employee communications. OPM also defers to agencies in terms of how to address supervisors who fail to make timely decisions regarding their probationary employees, thus creating the potential for the retention, at least in the short run, of an employee unfit to perform the duties of the position and the imposition of additional burden if the agency determines to attempt to remove the employee through a performance-based or adverse action.

Another individual was concerned that the 90-day and 30-day period reminders would cause managers to second guess their hires. The commenter believes that a manager should know what the options are if there are issues within the first year of the employee's appointment and should not need a reminder. OPM disagrees with this comment. The purpose of the proposed rule is to encourage supervisors to make more effective use of the probationary period. The probationary period is the final, evaluative stage in the examining process, not a period to "second guess" new hires. The three-month and one-month notification reminders are designed to help supervisors take full advantage of the probationary period in order to make informed decisions about whether to retain an individual in the agency's permanent workforce. The requirement also promotes accountability amongst supervisors by reminding them of their very important responsibility to assess employee fitness during the probationary period to ensure that public resources in the form of FTEs are being utilized smartly and efficiently.

An agency asked whether OPM foresees any negative impact related to the ability of an agency to terminate probationary employees if the agency fails to notify supervisors both at the 90-day and 30-day mark that an employee's probationary period is ending, and the supervisor fails to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action.

OPM does not foresee non-compliance with this notification requirement having this unintended effect. As explained previously, the proposed language is an internal administrative requirement intended as a reminder to supervisors to make timely determinations regarding probationary employees. It is not intended, however, to modify the current performance assessment process, change the manner in which a supervisor makes such a determination,

or to otherwise bestow any additional rights upon probationary employees. Should an agency decide to issue a termination of an employee during the probationary period, the agency will still rely upon the same assessment pursuant to 5 CFR 315.804 regarding adequacy of employee performance and conduct.

The same agency commented that an assessment of the capability of existing automated tools, or some other method for notification to supervisors that probationary periods are ending is required to ensure consistent and efficient compliance with this regulation. Agencies have the discretion to determine the method for making the notifications to supervisors. OPM encourages agencies to use existing automated tools to facilitate timely and consistent notification and understands that, for agencies that do not have this current technical capacity, there will be a need to take steps to implement a reliable system in a timely manner. The proposed rule does not, however, require the use of automated tools.

One individual commented that the proposed rule places probationers in limbo by requiring a supervisor to provide an affirmative determination for continued employment beyond the probationary period. In addition, this commenter noted the proposed rule does not address situations (or penalties) for supervisors who fail to make a determination either positively or negatively with respect to the determination and noted a lack of fairness because of this.

OPM disagrees with these comments. The proposed rule does not require supervisory determination for continued employment. The proposed regulation requires agencies to remind supervisors of their obligation to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. Supervisors who let the probationary period lapse without consideration of the probationary employee for continued employment run the risk, in the short run, of having to retain poor performers or employees otherwise inadequately suited to perform the duties of a job. This failure to act will also have the effect of increasing the burden on the agency if it later seeks to remove the employee through performance-based or adverse action procedures. However, as explained earlier, it is within the discretion of each agency how they choose to address any such non-compliance.

Two individuals commented that OPM has not addressed why the current

one-year probationary period is insufficient to assess employee effectiveness. These commenters recommended that instead of extending the probationary period, OPM should leave the current probationary period in place and encourage management to make better use of this period.

OPM disagrees with these comments, because the commenters have misunderstood the proposed rule. The rule does not seek to modify the length of the probationary period on initial appointment to a competitive position (currently established as one year in § 315.801). The rule seeks to encourage agencies to fully utilize the current probationary period by requiring agencies to notify their supervisors three months and one month prior to the expiration of an employee's probationary period of their obligations to make an assessment as to whether the employee should be retained beyond the one-year probationary period.

Seven national unions opposed the proposed rule, commenting that it requires supervisors to make a decision prior to the end of an employee's probationary period, thereby depriving an employee of the full probationary period during which the employee can demonstrate his or her fitness for continued employment. These unions stated that probationary periods are set in statute, and that there is no requirement or obligation on the part of an employee to seek a determination at the end of his or her probationary period. These organizations accurately note that the proposed rule does not address the status of an employee whose supervisor fails to make a determination for continued employment before the probationary period ends. For these reasons, these entities believe this requirement is deceptive and will worsen the Federal Government's hiring and retention issues. Several members of one of the unions echoed the same concerns and added that it is improper for OPM to substitute its reasoning for that of Congress.

As a point of clarification, the length of a probationary period on initial appointment to a competitive position is currently established as one year in § 315.801, not statute. Nevertheless, the amended regulation does not mandate that a supervisory determination for continued employment take place at any particular time nor does it establish the 90- or 30-day benchmarks as the conclusion of a supervisor's assessment period. Rather, the rule merely requires agencies to remind a supervisor to make an affirmative decision regarding the employee's fitness for continued employment and take appropriate

action. The supervisor may use this reminder to begin gathering materials or collecting his or her thoughts while still deferring the actual decision to the end of the probationary period. Thus, the rule does not prevent an employee from completing the entire one-year probationary period. OPM believes the proposed measures will improve the Federal Government's ability to hire and retain individuals more effectively than is currently the case. The intent is to avoid situations in which a probationer who is not fit for continued employment is retained because a supervisor was not aware of the probationary period expiration date. OPM trusts that commenters share the goal of providing the most comprehensive information possible to supervisors to enable them to make an informed decision that will ultimately best serve the public.

A national union commented that the revised regulation requires a supervisor to make an affirmative decision and thus for an employee to receive an affirmative decision for continued employment beyond the probationary period. This union suggested OPM clarify that the affirmative supervisory decision contemplated by the proposed rule has no effect on whether an employee's probationary period has been completed, and also clarify that an employee is under no obligation to seek or obtain such an affirmative supervisory decision. Lastly, the union stated that if OPM is requiring agencies to notify supervisors in advance of the end of an employee's probationary period, OPM should also require supervisors to notify their employees. Similarly, a local union commented that there is no reason for a supervisor to provide an affirmative decision regarding an employee's fitness at the end of the probationary period. The union commented that employees will be harmed if a supervisor forgets to make an affirmative decision, and the proposed rule does not address the consequences of such an omission. The union also stated the proposed rule shortens the probationary period on their belief that supervisors must make an affirmative decision for continued employment 30 days before the end of the probationary period.

OPM disagrees with these comments. The rule does not require that a supervisor notify an employee or make an affirmative decision regarding an employee's fitness for continued service, nor does it require an employee to receive such a decision. The proposed rule requires agencies to notify their supervisors of the need to consider whether to retain probationers three months and one month prior to

the expiration of an employee's probationary period. In addition, the proposed regulation requires an agency to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment and take appropriate action in a timely manner to avoid additional burden. The proposed rule does not prevent an employee from completing the one-year probationary period.

Further, after completing a probationary period, with or without an affirmative supervisory determination, the individual becomes a non-probationary employee and attains appeal rights in accordance with 5 U.S.C. 7511. As noted above the proposed rule does not require an employee to receive an affirmative supervisory determination in order to complete the probationary period. Rather, the proposed rule requires agencies to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action, so that the individual does not gain a career position solely by default.

OPM is not adopting the suggestion to require a supervisor to notify his or her employee of an expiring probationary period. The purpose of these rules is to improve communications between agencies and their supervisors with the aim of better utilizing the probationary period. This rule is not intended to modify or otherwise impact mechanisms for assessment of employee performance pursuant to part 432 and applicable agency policies.

Another national union strongly objected to the proposed rule, commenting that it is contrary to the goal of promoting public trust in the Federal workforce. The union went on to say that instead of using the probationary period to assess an employee's ability to perform the job, supervisors are encouraged to terminate probationers for any reason, simply because the probationary period is ending. The union also stated these rules facilitate agencies' ability to terminate probationers as well as permanent employees without providing them with an adequate opportunity to improve their performance.

OPM disagrees that the rule makes it easier for agencies to terminate probationary employees. Termination actions during the probationary period must be taken in accordance with § 315.804 and the criteria for termination established pursuant to these regulations remains unchanged by the revised regulation. OPM also

disagrees with the union's comment that the proposed rule encourages agencies to terminate employees simply because the probationary period is ending. The purpose of the proposed rule is to assist supervisors in using the probationary period properly (*i.e.*, as a period to determine whether an individual is fit for continued employment).

Another national union opposed the rule stating that it is unnecessary and that it sends the message that it is more important to terminate probationers than assist them with successfully completing their probationary period. The same union also commented that OPM should address the consequences of when an agency fails to notify the supervisor at the 90- and 30-day marks, and whether this situation creates a potential defense for a manager faced with a disciplinary or performance-based action for being a poor manager.

OPM disagrees with the assertion that supervisory notification is unnecessary and the suggestion that this rule sends a message that supervisors should terminate probationers rather than assist them in improving their performance. The message this change sends is that supervisors should fulfill their responsibilities by affirmatively making a determination as to the fitness of a probationary employee. It does not encourage supervisors to make any particular determination including to terminate an employee. Instead, it prevents instances where a supervisor may make a decision by default, where the probationary period lapses due to a lack of awareness of the end of the period. Supervisors who allow the probationary period to lapse without consideration of the fitness of the probationary employee to perform the duties of the position create a risk of retaining poor performers or employees otherwise inadequately suited for their position. This outcome benefits neither the agency, the employee nor the public.

Several individuals who identified themselves as members of one of the national unions commented that the proposed rule is deceptive and/or confusing in that it requires an employee to receive an affirmative supervisory determination in order to complete the probationary period, despite no statutory requirement for such a determination. The commenters suggested the proposed rule be eliminated or corrected to avoid confusion. They disagreed with the need to require a separate, affirmative supervisory approval before an employee is found to have completed his or her probationary period and noted there is no obligation on the part of the employee to seek supervisory

approval. One of the individuals added, "The confusion between this rule and the statute will do nothing but create problems." Another added, "The end of a time period is the end." One of the union members stated that since probationary periods are controlled by statute, it is confusing to require supervisory determination.

OPM disagrees with any notion that the proposed rule is deceptive and notes that the probationary period for initial appointment to a competitive position is established in regulation at § 315.801. The amended regulation does not require an employee to receive an affirmative supervisory determination in order to complete the probationary period nor does it require a supervisor to take any action that they are not already required to take. The rule requires agencies to notify supervisors three months and one month prior to the expiration of an employee's probationary period, and to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. The purpose of this language is to serve as a reminder to supervisors that an employee's probationary period will be ending soon, and of the need to consider whether the employee is fit for continued employment beyond the end of the probationary period. Thus, the communication is between the agency and the supervisor, not the supervisor and employee. It is an internal management matter that is not intended to, and does not, confer rights on probationary employees if a supervisor fails to heed this reminder. OPM is not adopting the suggestion to eliminate or amend the proposed rule because it does not conflict with or otherwise alter the statutory or regulatory authority pertaining to probationary periods. OPM is also not adopting the suggestion to require a supervisor to notify his or her employee of an expiring probationary period. The purpose of these rules is to improve communications between agencies and their supervisors with the aim of better utilizing the probationary period.

One individual commented that there is little need to require agencies to notify supervisors of the impending expiration of probationary periods because supervisors closely track these dates.

OPM disagrees with the notion that there is little need for the proposed supervisory notification of an employee's probationary period expiration date. In some instances, supervisors let the probationary period lapse because they are not mindful of

the expiration date. Supervisors who let the probationary period lapse without consideration of the probationer for continued employment run the risk of having to retain poor performers or employees otherwise inadequately suited to perform the duties of a job in the short run and imposing additional burden on the agency if the agency wishes to remove the employee later by a performance-based or adverse action. This outcome benefits neither the agency nor the employee. By reminding supervisors to diligently and promptly make required fitness determinations regarding probationary employees and by issuing these reminders at the same point in time during the probationary period, OPM believes that this requirement promotes procedural consistency and works to the benefit of supervisors and probationers alike.

An agency suggested OPM amend the proposed rule to require only one supervisory notification 90 days prior to the expiration of an employee's probationary period. The agency also asked OPM to address what the consequences will be for an agency which does not provide the supervisory notification.

OPM is not adopting the suggestion to require only one notification to supervisors 90 days before the end of an employee's probationary period. We believe the proposed notification periods are best designed to meet the aim of the Executive Order. We note that agencies may choose to provide more frequent notifications. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final. The procedures for terminating probationers for unsatisfactory performance or conduct are contained in § 315.804 and are not impacted by the revised regulation.

The same agency suggested that OPM amend the proposed rule to require supervisory notification during a set period of time, or window, rather than on the three-month and one-month marks. This commenter suggested OPM amend the rule to allow for supervisory notification "and then again at least one month or thirty days prior to the expiration of the probationary period."

OPM is not adopting this suggestion. We believe agency notification to its supervisors is more effective when it occurs on a specific date, rather than during a window of dates, because the supervisor will know precisely how much time is left in the employee's probationary period. This approach also promotes uniformity.

An organization opposed the proposed rule for four reasons:

First, the organization commented that the 30-day supervisory notification undermines § 315.805, which provides an employee a reasonable amount of time to respond in writing to a termination action for conditions arising before appointment. OPM disagrees the proposed rule could impact an employee's right to respond to a proposed termination action based on conditions arising before appointment pursuant to § 315.805. Under § 315.805(a) an employee is entitled to advanced written notice, and § 315.805(c) states the employee is to be notified of the agency's decision at the earliest practicable date. The proposed rule does not alter this regulatory structure and instead only requires an agency to remind supervisors three months and one month ahead of the end of an employee's probationary period. These provisions do not impact § 315.805.

Secondly, this organization commented that the proposed rule does not require a supervisor to in fact make a decision or to provide any notice to an employee with sufficient time to allow the employee to respond. The procedures for making determinations concerning employees serving in a probationary period, including criteria for termination, are covered under OPM regulations §§ 315.803–315.805. The commentator's assessment is accurate that no "notice" is required when issuing a termination under this authority, nor is there an opportunity to respond. Again, the changes proposed in this regulation do nothing to alter this regulatory structure.

Next, the organization stated that the proposed rule undermines due process because it provides no guidance or requirement that the agency notify the employee prior to their termination for performance or conduct deficiencies. Due process of law under the Constitution turns on the possession of a pre-existing property or liberty interest. The courts have held, therefore, that constitutional Due Process applies only to tenured public employees—not probationers, who are terminable at will. OPM's regulations govern the procedures applicable to probationers. Agency termination procedures applicable to probationers, including notification to an employee of a termination action, are addressed in §§ 315.804 and 315.805.

Lastly, this organization stated that the proposed rule ignores what it considers to be the real issue which is constructive performance management. The organization commented that the

proposed rule merely proposes a reminder system to notify supervisors of the need to terminate employees prior to the completion of their probationary period, without ever addressing an employee's performance or conduct until their termination. The organization noted that a supervisory determination of poor performance made for the first time 30 days before the probationary period ends does not allow an employee to improve his or her performance.

The organization accurately notes the proposed rule creates a reminder system to aid supervisors in determining the fitness of their employees for continued service. However, the commenter misinterprets the regulation by stating that it constitutes a reminder to terminate a probationary employee rather than what this provision will actually serve to do, which will be to simply remind a supervisor of the need to prepare to make a timely determination regarding the future employment status of probationary employees. The point is to remind supervisors of the impending end of the probationary period, to enable them to make thoughtful decisions, not to point the supervisors toward one direction or the other. Again, the intent of these provisions is to remind supervisors of the importance of considering a probationer's performance, good or bad, in determining whether the employee should be retained beyond the probationary period. As current regulations require supervisors to fully utilize the probationary period to assess employee fitness, OPM would contemplate that agencies would not want supervisors to wait until the final month of the probationary period to begin making any such assessment. OPM further notes that the proposed rule, by helping supervisors avoid "last minute" determinations, may improve the quality of such decisions, which is to everyone's benefit.

An agency recommended that supervisory notifications occur 120 days before the end of an employee's probationary period, rather than the proposed 90- and 30-day notifications. This agency expressed concern that the proposed notification intervals may mitigate or conflict with employee due process and adverse action appeal rights. The agency recommended that OPM amend the proposed language in § 315.803(a) to state that appropriate action will be taken to determine whether the employee meets the definition of employee in 5 U.S.C. 7511 and is entitled to due process and appeal rights.

OPM is not adopting the suggestion to require supervisory notification 120

days and 60 days prior to expiration of an employee's probationary period. We believe the proposed notification periods of three months and one month before expiration provide sufficient reminders to supervisors.

OPM is also not adopting the suggestion to amend § 315.803(a) to require agencies to take appropriate action with respect to determining whether an employee is entitled to Due Process and appeal rights under 5 U.S.C. 7511. OPM would again clarify that the purpose of the proposed rule is to implement Section 2(i) of E.O. 13839 and support OPM's consistent position (supported as well by reports of the MSPB) that agencies should make efficient use of the probationary period by requiring agencies to notify supervisors of the date an employee's probationary period ends. The proposed rule represents an internal administrative tool to be utilized by agencies to assist supervisors; it is not intended nor does it modify or impact any procedural processes or rights afforded by statute or regulation. The procedures for terminating probationers for unsatisfactory performance or conduct are contained in § 315.804 and employee appeal rights are described in § 315.806. These provisions are not impacted by the proposed rule. The proposed rule does not impact appeal rights for employees covered by 5 U.S.C. 7511 nor does it preclude agencies from informing an employee covered by 5 U.S.C. 7511 (or the employee's supervisor) of any procedural rights to which he or she may be entitled under section 7511.

An organization commented that the proposed rule encourages agencies to terminate an employee before chapter 75 procedures are required. This organization believes the supervisory notification periods were proposed to remind supervisors to terminate any such employees before the end of the probationary period.

As discussed, OPM disagrees with the contention that the purpose of the proposed rule is to encourage agencies to terminate probationers before chapter 75 procedures are required. The purpose is to encourage supervisors to make a timely determination as to whether to retain an employee beyond the probationary period, whatever that determination may be. The regulation is neutral in terms of what determination a supervisor ultimately makes as it does not steer supervisors in either direction. It simply reminds them of the need to make a determination which is already their responsibility.

5 CFR part 432—Performance-Based Reduction In Grade And Removal Actions

Section 432.101 Statutory Authority

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. In the proposed rule, OPM restated Congress' intent in enacting chapter 43, in part, to create a simple, dedicated, though not exclusive, process for agencies to use in taking actions based on unacceptable performance.

An organization concurred with OPM's explanation of its statutory authority in § 432.101 in the **SUPPLEMENTARY INFORMATION**. OPM will not adopt any revisions based on this comment as no revisions were requested.

Section 432.104 Addressing Unacceptable Performance

This section clarifies that, other than those requirements listed, there is no specific requirement regarding any assistance offered or provided during an opportunity period. In addition, the proposed rule stated that the nature of assistance is not determinative of the ultimate outcome with respect to reduction in grade or pay, or removal. Some commenters, including an agency and two national unions, voiced concerns that the proposed change minimized the importance of providing assistance or relieved agencies of the obligation to provide meaningful assistance. In response, as discussed in greater detail below, OPM has revised § 432.104 to remove the statement that the nature of assistance is not determinative of the outcome with respect to a reduction in grade or pay or removal. However, it is still the case that assistance need not take any particular form. To that end, the final regulation will state that the nature of assistance provided is in the sole and exclusive discretion of the agency."

The section also states that no additional performance improvement period or similar informal period to demonstrate acceptable performance to meet the required performance standards shall be provided prior to or in addition to the opportunity period under this part.

Three management associations commended OPM for streamlining methods for addressing unacceptable performance through chapter 43 procedures. The organizations lamented the status quo in agencies with respect to such actions as burdensome, cumbersome and slow. They expressed support for clarifying agency

requirements with respect to the number and duration of opportunity periods, types of assistance offered to employees with unacceptable performance and the impact of such assistance on a final personnel decision. One of the organizations expressed the view that there should be no lengthy or extensive requirements beyond what the law requires to improve performance. The organizations did not recommend any changes to § 432.104. Indeed, OPM agrees with the commenters that the amended regulation promotes a straightforward and efficient process for addressing unacceptable performance.

Two agencies concurred with the amendment to § 432.104 because it dispels the misconception in some agencies that a pre-Performance Improvement Plan (pre-PIP) or similar informal assistance period is required or advisable for chapter 43 procedures. One of the agencies stated that it believes the amended regulation will result in a shorter, less burdensome, less discouraging, more efficient process for addressing poor performance, but nevertheless made further recommendations. The agency recommended that the decision to extend an employee's performance period should be at the discretion of the employee's immediate supervisor if an employee needs more time to improve his or her performance. The agency stated that an employee with performance issues should be notified formally and given clear direction on how to correct the issues, or else the agency will have difficulty defending a decision to remove the employee. Finally, the agency recommended that OPM provide further guidance in the final rule regarding the types of situations where extending or limiting an opportunity period would be appropriate.

In response, OPM confirms that addressing poor performance should be a straightforward process that minimizes the burden on managers and supervisors and makes the best use of resources, including time spent by agency officials. There is nothing in the proposed rule that prevents or prohibits a supervisor from considering specific facts and circumstances that may impact an employee's job performance and developing a reasonable approach to helping the employee achieve acceptable performance. With regard to formal notice of unacceptable performance, OPM notes that requirements concerning performance evaluation and notification already exist within the law (see 5 U.S.C. 4302 and 4303) and that the proposed amendments to the regulations do not

impact the regulatory requirements that currently exist for agencies to notify employees performing at an unacceptable level "of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position." See § 432.104. Concerning recommendations surrounding the extension of an opportunity period, OPM notes that current and proposed § 432.104 both require that agencies afford a *reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position.* (Emphasis added.) The factors and considerations that establish what constitutes a reasonable opportunity period are also delineated in OPM guidance and case law. For these reasons, OPM believes it is unnecessary to amend the regulation as the agency suggests.

The other agency that concurred with the amendment at § 432.104 stated that the changes lessen the likelihood that a "failure to provide adequate assistance" argument would be persuasive at the Merit Systems Protection Board (MSPB). The agency recommended adding a reference to agencies' requirement to comply with their collective bargaining agreements. OPM agrees but would somewhat qualify the comment. The regulation should preclude employees from raising failure to provide assistance during the opportunity period as a defense against a chapter 43 action to the extent that agencies are required to provide assistance during the opportunity period, though the assistance may take whatever form the supervisor deems necessary to help the employee succeed in his or her position.

OPM will not adopt the agency's recommendation as collective bargaining obligations are preserved as required by law under 5 U.S.C. chapter 71. Further, as stated in E.O. 13839, agencies must consult with their employee labor representatives about the implementation of the Executive Order.

National unions and commenters expressed concerns regarding the rule's impact on performance-based actions, and an employee's opportunity to improve performance. A commenter stated that, although poor performers should be removed from the Federal government, the proposed rule may give some managers the ability to remove employees without factual evidence to back up the removal action. In a similar observation, a national union and

commenter stated that the proposal would remove important protections from employees and deny them the ability to either counter the agency's assessment or correct through a mandated improvement process.

OPM disagrees with these comments. Nothing in the proposed regulations should be construed to relieve agencies of their obligations under Federal law. Additionally, 5 U.S.C. 2301(b)(2) provides that employees should receive fair and equitable treatment. Finally, as Government officials are entitled to a presumption of good faith, OPM does not accept that changes to the governing regulation intended to improve efficiency will lead to abuse. Accordingly, OPM does not believe that the proposed rule would lead to the removal of employees without factual evidence or interfere with important protections for employees, including the ability to provide a response to an accusation or receive the required opportunity to demonstrate acceptable performance. The amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably—which per statute covers the period both prior to and during a formal opportunity period—before initiating an adverse action under chapter 43.

Many commenters objected to the proposed rule at § 432.104 on the bases that the amendment conflicts with certain Executive Orders, statutes, case law, and/or the merit system principles; sets bad management policy; opens the door to supervisors taking a performance-based action hastily without offering or providing assistance to an employee who has rendered unacceptable performance; may result in agencies employing a one-size-fits-all approach to addressing unacceptable performance; weakens or violates protections for Federal employees; and may cause harm to or confusion among Federal employees and or the civil service.

One agency stated that there is a conflict between the current regulation, which requires that an employee be given an opportunity to demonstrate acceptable performance, and E.O. 13839 provisions that (1) promote the use of chapter 75 procedures for addressing unacceptable performance; and (2) require Executive Branch agencies to ensure that no collective bargaining agreements include a provision requiring the use of chapter 43 procedures to address unacceptable performance. To address this concern, the agency suggests rewriting this requirement to make it clearer that it applies under chapter 43 (*i.e.*, if an

employee's removal or demotion if proposed under chapter 43), rather than at "any time" an employee's performance is unacceptable.

OPM will not adopt revisions based on this comment because the regulation already makes it clear that the requirement in question relates to procedures pursuant to chapter 43. Because the requirement is only found under chapter 43, it will only apply if an agency opts to use that particular set of procedures to address an instance of unacceptable performance. If an agency opts to use chapter 75 procedures to address unacceptable performance, the opportunity period, pursuant to chapter 43 would not be applicable. Finally, OPM disagrees that the requirements of 5 U.S.C. chapter 43 or any of the revisions to 5 CFR part 432 conflict with the direction provided to Executive Branch agencies in E.O. 13839. Rather, E.O. 13839 states that chapter 75 should be utilized in appropriate cases and prohibits agencies from agreeing to incorporate into collective bargaining agreements provisions that would preclude use of chapter 75 to address unacceptable performance. The Executive Order also directs agencies to streamline the process of addressing unacceptable job performance by more strategically using the legal authorities that already exist. The revisions to 5 CFR part 432 support the objectives described in the Executive Order by revising regulatory provisions that flow from long-standing and established statutory requirements.

Three national unions emphasized that an agency must meet all the requirements set forth in 5 U.S.C. 4302(c)(5) before taking an action based on unacceptable performance, a substantive right intended by Congress. One of the unions reasoned that, "The assistance required by § 4302(c)(5) is assistance during the opportunity period because (a) by definition, assistance 'in improving unacceptable performance' occurs after the agency has found performance to be unacceptable; (b) under 5 CFR 432.104 the agency must notify an employee '[a]t any time . . . that an employee's performance is determined to be unacceptable'; and (c) the opportunity period begins when the employee is so notified. Because a determination of unacceptable performance triggers the obligation to notify, and notification starts the opportunity period, these three events—the determination, the notification, and the start of the period—are essentially, simultaneous. Upon making the determination, the agency must provide, not delay, the notification; and the notification starts the opportunity

period. Thus, § 4302 (c)(5) assistance 'in improving unacceptable performance' is assistance that occurs during the opportunity period." The union recommended retention of the "correct, clear, and simple" language in the current regulation at § 432.104.

Two of the national unions cited *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 589 (1984) to support their point that the procedural requirements of chapter 43, including provision of a reasonable opportunity to improve, are substantive guarantees and may not be diminished by regulation. One stated that the amended regulation will lead agencies away from providing employees who face performance issues with genuine opportunities to improve, contrary to the language and intent of the Civil Service Reform Act (CSRA). The other union characterized the proposed rule as eliminating required assistance during the opportunity period, contrary to section 4302(c)(6), and minimizing the importance of the assistance provided during the opportunity period by stating that the nature of such assistance is not determinative of a performance-based action, contrary to MSPB case law.

Several national unions and many of their members (via what appeared to be a template letter) expressed concern that the proposed rule eliminates a meaningful opportunity period for Federal workers to improve performance and save agency resources. The commenters stated that the amendments will eliminate and change elements of statutory requirements for opportunity periods. They stated also that the proposed rule "discourages the use of simple, easy-to-follow, objective standards which (when used correctly by supervisors and managers) create consistency across the federal workforce." Finally, the commenters asserted that supervisors will be granted power in a way that was not contemplated by Congress and that conflicts with substantive statutory rights.

In response to the union that recommended retention of § 432.104 as currently written, OPM disagrees. OPM notes that both the current and amended regulations flesh out the statutory requirements of 5 U.S.C. 4302 and 4303 concerning the baseline requirements that all agencies must meet in addressing instances of unacceptable job performance. The proposed rule specifically acknowledges and incorporates the statutory requirement to provide assistance that is set forth in 5 U.S.C. 4302(c)(5). The reference to the relevant statute is intended to convey

that the regulation will work in concert with the law. OPM understands further that the statute requires agencies to assist employees in improving unacceptable performance and in accordance with 5 U.S.C. 4302(c)(6), agencies may take a performance-based action only after affording an employee an opportunity to improve.

The amended regulation does not lead agencies away from providing employees who face performance issues with meaningful or genuine opportunities to improve, and nor is it contrary to the language and intent of the CSRA, as one of the unions contends. For further clarification regarding concerns that OPM is eliminating statutory requirements for opportunity periods or minimizing the importance of the assistance provided during the opportunity period, OPM has decided to further amend the regulation. Specifically, the language originally proposed for § 432.104 will be replaced with, "The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section."

Some commenters believe that OPM has not demonstrated that the current management tools are insufficient. The commenters argued that the tools exist today through performance assistance plans and performance improvement plans and OPM is removing these tools. The commenters further stated that changes in performance assessment could have a chilling effect on employees and allow for removals that cannot be suitably challenged. Also, the commenters expressed concern that these changes will undermine integrity and morale as well as hamper the recruitment and retention of a quality Federal workforce. One commenter in particular asserted that prohibiting an informal assistance period is excessively restrictive and is not mandated by E.O. 13839. The commenter recommended that OPM allow agencies maximum flexibility in managing their workforce by permitting use of informal assistance periods besides the period mandated by 5 U.S.C. 4302(c)(5). The commenter stated, "Retaining experienced employees who demonstrate temporarily unacceptable performance rather than moving swiftly toward

removal increases stability and improves the efficiency of the Federal service.” The commenter recommended that OPM revise the proposed rule to state that no additional assistance period or similar informal period “is required” rather than “shall be provided.”

OPM disagrees and will not make any revisions based on these comments. Establishing limits on the opportunity to demonstrate acceptable performance by precluding additional opportunity periods beyond what is required by law encourages efficient use of chapter 43 procedures and furthers effective delivery of agency mission while still providing employees sufficient opportunity to demonstrate acceptable performance as required by law. It should also be noted that there is nothing in this new requirement that precludes routine performance management practices such as close supervision and training for employees that encounter performance challenges prior to their reaching the point at which they are determined to be performing at an unacceptable level and OPM anticipates that such efforts will often take place prior to reaching this point.

Several commenters, also via a template letter, stated that the proposed revisions to performance-based actions “end-run,” or “violate,” employee rights and a chance to improve during the opportunity period. The commenters believe that the proposed rule gives no consideration to assisting an employee to attain acceptable performance or making the opportunity period genuine and meaningful. The commenters went on to say that the opportunity period is a statutory requirement that OPM may not eliminate or modify by regulation. They stated that OPM is making a mockery of the opportunity period by jettisoning well-established practices and essentially discouraging the use of objective standards and improvement plans, which will result in granting virtually unfettered discretion to supervisors in determining what constitutes an adequate opportunity period. The commenters urged OPM to acknowledge that a reasonable opportunity to improve is a substantive, statutory right that may not be diminished by regulation.

Again, OPM notes that the amended § 432.104 does not alter the statutory requirement concerning agency obligations to address instances of unacceptable job performance, providing that “[f]or each critical element in which the employee’s performance is unacceptable, the agency shall afford the employee a reasonable

opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee’s position.” OPM does not seek to eliminate or modify the statutory opportunity period as asserted; however, OPM does have the authority pursuant to its statutory delegation (see 5 U.S.C 4305) to elaborate on procedures for addressing unacceptable performance to the extent that those procedures are not already delineated in chapter 43. It is unclear what specific practices the commenters believe are being jettisoned and why the commenters believe that the proposed rule discourages the use of objective standards and improvement plans. Nonetheless, OPM disagrees with these characterizations.

One commenter recommended that the prohibition on additional performance assistance periods be deleted from the proposed rule and suggested new language providing an agency with “sole and exclusive” discretion to informally assist an employee in demonstrating acceptable performance. The commenter noted that “sole and exclusive” discretion would place such assistance outside the duty to bargain and otherwise provide agencies the ability to determine their own policies on such matters. The commenter found it ironic that the regulation would prevent agencies from determining their own policies while the Supplementary Information section in support of the proposed rule “quite plainly attacks disciplinary solutions ‘imposed from above’” with regard to tables of penalties.

The commenter is correct that OPM is taking different approaches regarding the prohibition of additional performance assistance periods and the use of tables of penalties. However, we believe different approaches are appropriate. The Supplementary discussion on tables of penalties only informs agencies that the use of tables of penalties is not required by law or OPM regulations and reminds them that it may limit the scope of management’s discretion to tailor the penalty to the facts and circumstances of a particular case by excluding certain penalties along the continuum. These two issues do converge, however, in the sense that additional performance assistance periods are also not required by law or OPM regulations and can negatively impact efficient use of the procedures under chapter 43. While providing “sole and exclusive” discretion would limit collective bargaining on the use of informal assistance as the commenter suggests, the proposed regulatory language would have a similar impact

on collective bargaining. In other words, by precluding the use of informal periods, any bargaining proposal that sought to establish an informal process beyond what is required by law would be considered nonnegotiable, pursuant to 5 U.S.C. 7117. For example, offering an additional opportunity period beyond what is required by 5 U.S.C. 4302(b)(6) would be nonnegotiable by these regulations. It should be emphasized that the regulation does not prevent agencies from making appropriate determinations when offering assistance required by law. Specifically, agencies are provided sole and exclusive discretion by Section 4(c) of E.O. 13839 to offer longer opportunity periods under 5 U.S.C. 4302(b)(6) to provide sufficient time to evaluate an employee’s performance. OPM believes this discretion to provide for longer periods provides agencies sufficient discretion to address an employee’s performance based on the circumstances.

A national union commented that the proposed change to § 432.104 would generally limit opportunity periods to 30 days, a period of time it deemed often insufficient to determine if an employee can improve his or her performance. Similarly, an organization expressed opposition to E.O. 13839 Sections 2 and 6(iii), which it perceives as pressuring agencies to limit opportunity periods to a period (30 calendar days) that would be insufficient for the purpose of demonstrating improvement in many occupations of the Federal workforce. The organization also opposes amended §§ 432.104 and 432.105 to the extent that they excuse agencies from what it described as routine procedures, such as regular supervisor meetings and guidance, that support the opportunity period. The organization cites *Pine v. Department of the Air Force*, 28 M.S.P.R 453 (1985), and *Sandland* in support of its position that an opportunity to improve is not merely a procedural right but rather a substantive condition precedent to a chapter 43 action, and that counseling is a part of the opportunity period. The organization expressed concern that the proposed rule would allow supervisors to declare that an employee’s performance is unsatisfactory without contextualizing the specific ways that an employee needs to substantively improve. An individual commenter weighed in with the observation that the proposed rule would “detrimentally push federal departments and agencies to limit the length of an opportunity period to 30 days,” and that the existing

regulations present a more reasonable approach and better comport with statutory requirements.

Although Section 4(c) of E.O. 13839 addresses the length of performance improvement periods and is in full force and effect, the proposed rule at § 432.104 does not limit the opportunity period to 30 days, as the national union contends. The regulation preserves statutory and regulatory requirements that agencies afford a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position, and offer or provide assistance during the opportunity period. There is also nothing in the regulation that would discourage supervisors from performing routine performance management duties such as providing guidance and meeting with employees and it is anticipated that supervisors would continue to give full consideration to the specific facts and circumstances impacting an employee's job performance and develop a reasonable approach to help the employee achieve acceptable performance.

Some commenters expressed concern that supervisors will deny assistance to employees who are performing unacceptably and hastily remove employees. An organization stated that the proposed rule reduces the requirements for an agency, including making no specific requirement regarding the nature of any assistance an agency should provide to an employee during an opportunity period. One individual asserted that amended § 432.104 is not aligned with the merit system principle at 5 U.S.C. 2301(b)(7), which states that employees should be provided effective education and training when such education and training would result in better organizational and individual performance. The commenter added that it would be a prohibited personnel practice against an employee, via 5 U.S.C. 2302(a)(2)(A)(ix), which encompasses decisions concerning pay, benefits, or awards, or concerning education or training, for an agency to withhold such education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in subparagraph (a)(2)(A). One individual observed that providing assistance with regard to performance issues is cost-effective given the significant amounts of money agencies invest in hiring, onboarding, and training. An agency wrote about cases in which appropriate assistance proved successful and

avoided unnecessary costs associated with turnover, litigation, training and rehiring.

With respect to the concern that supervisors may take abrupt actions without offering or providing assistance to an employee performing at an unacceptable level, OPM would emphasize that the amended regulation does not infringe upon an employee's right to a reasonable opportunity to improve, and it does not excuse Federal agencies from effective performance management or the merit system principles, including with regard to education and training. The amended regulation instead excludes additional assistance requirements outside of that described in 5 U.S.C. 4302(c)(5). OPM neither promotes nor encourages agencies to engage in prohibited personnel practices nor does it believe the changes to the regulation encourage prohibited personnel practices. (Indeed, OPM has an affirmative obligation to enforce the law governing the civil service. See 5 U.S.C. 1103(a)(5).) With regard to comments relating to potential cost savings associated with performance assistance, OPM believes that the procedures will make this process more efficient, which represents a cost savings. Many employees receiving performance assistance will improve their performance to an acceptable level; for those that do not, taking an action such as a removal or a demotion to a position and grade where the employee can perform duties at an acceptable level significantly reduces the public expenditure associated with low productivity.

One national union asserted that the proposed rule changes make it easier for agencies to terminate both probationary and permanent employees, without providing them an adequate opportunity to improve their performance. Another commenter observed that the proposed regulations limit the opportunities that employees have to improve their performance thereby actually creating a more inequitable environment for Federal employees.

Regarding specific protections provided, OPM would reiterate that permanent employees continue to have the same protections as required by statute, including a reasonable opportunity to demonstrate acceptable performance. Individuals who are excluded from coverage under chapter 43 are not covered under part 432 of the regulations and are thus unaffected by the changes to this regulation.

Two national unions, one organization and several individuals voiced concerns that the proposed rule ignores the possibility that employees

have different performance needs and types of jobs and may require different types of assistance and different periods of time to demonstrate improvement. Commenters noted that various professional and personal challenges, poor management, lack of training by supervisory staff, and other factors may underlie or contribute to unacceptable performance. One commenter included man-made or natural disasters, cyber security incidents, or continuing resolutions as events that may interrupt or impact an opportunity period. The same commenter compared the proposed rule to other laws, such as the Family and Medical Leave Act, that contain protections and provisions for employees to take more than 30 days in order to address employment, medical, and other factors. The commenter asserted that the proposed rule would run counter to the Americans with Disabilities Act and the Rehabilitation Act. Another commenter raised a concern that the amendment to § 432.104 will restrict management's ability to interact creatively and proactively to address workplace performance issues collaboratively with employees. Collectively, the commenters cautioned against a one-size-fits-all approach to addressing unacceptable performance and advocated for granting supervisors maximum flexibility and empowering them to determine the best course of action for managing their workforce and improving employee performance, including with respect to the duration of an opportunity period, the number of opportunity periods and the degree to which an employee has improved. Some believe that the existing regulation provides just that.

As noted above, the amended regulation does not prevent management from evaluating the facts and circumstances underlying any individual case of unacceptable performance and collaborating with the employee to determine the best course of action for performance improvement. Under the current and amended regulation, in fact, the opportunity period must be commensurate with the duties and responsibilities of the employee's position. In addition, agencies must continue to abide by the requirements of the Family and Medical Leave Act and the Rehabilitation Act for eligible employees and the amended regulation does nothing to curtail the exercise of employee rights under these laws. Neither does the amended regulation curtail a manager's authority to determine whether an employee has improved during a formal opportunity

period. Rather, it merely clarifies the procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability. The commenter's assertion that the performance assistance provided during the opportunity period is not and should not be a one-size-fits-all approach is well taken. Indeed, OPM views this comment as actually supporting the provision of the regulation that prevents agencies from being tied to any particular type of performance assistance. With respect to the concern over deficits in supervisory management skills and training and the potential impact on employee performance, OPM does not discount this possibility. There is nothing, however, in the amended regulations that increases the likelihood of this circumstance, and OPM believes that the regulatory changes provide supervisors with the flexibility to rely upon the skills and expertise they possess to provide the most effective assistance.

Several national unions, organizations and individuals raised concerns about potential harm to employees and the civil service system as a whole. For example, one union described the limit on additional opportunity periods as "arbitrarily harsh" and believes that employees will be penalized for not making progress as quickly as the agency desires, contrary to the purpose of the opportunity period. One commenter described the proposed rule as punitive and mean-spirited, believing that it will weaken protections for Federal workers and make it easier for management to fire honest civil servants for ideological, partisan, extralegal or even illegal reasons. The commenter contends that OPM does not justify the proposed rule, other than citing the "non-scientific" Federal Employee Viewpoint Survey. Another commenter claimed not to have seen any incentives for positive performance, adding that there appear to be many approaches designed to limit achievement and prevent success. In the commenter's view, no actual performance management is required, and this will destroy Federal agencies. The commenter shared a personal experience of having been told by a supervisor that the supervisor wanted to fire her because the supervisor disliked her, not due to her work. The commenter wrote that had the proposed rule been in place, she could have been fired, to the detriment of the mission.

Still another commenter stated that the proposed rule at § 432.104 will damage the civil service system. The commenter described having seen

managers and supervisors failing to provide any assistance to employees who were having problems doing a portion of their job. The commenter believes that many managers considered this to be a waste of their time and not worth the effort, though it is an essential part of the managers' duties to provide leadership and direction to their employees. One individual expressed support for changes to address poor performance but believes that the changes proposed for the opportunity period go too far. In a different commenter's view, the proposed revisions are an "injustice to the employee, whose opportunity and improvement will be at the discretion of the supervisor." The commenter expressed concern that employees will be open to discriminatory and biased decisions that are based on feeling, not on accomplishment or facts. Finally, a commenter stated that her agency has invested a great deal of training and money into its workforce, and retraining and retaining should be equally practiced for employees and management.

OPM does not agree that the amended regulation is arbitrary, harsh, or punitive, nor does OPM believe that it weakens or violates employee rights. OPM is not seeking to limit or prevent achievement, success or cooperation. The amended regulation continues to require, per statute and regulation, that supervisors of employees performing unacceptably provide them with performance assistance and provide them with an opportunity to improve in each and every case. The regulation does this while also supporting the principles and requirements for efficiency and accountability in the Federal workforce as outlined in E.O. 13839 and including a straightforward process for addressing unacceptable performance. Establishing limits on the opportunity to demonstrate acceptable performance, by precluding additional opportunity periods beyond what is required by law, encourages efficient use of chapter 43 procedures and furthers effective delivery of agency mission while still providing employees sufficient opportunity to demonstrate acceptable performance as required by law. Federal employees will continue to enjoy all core civil service protections under the law, including the merit system principles, procedural rights and appeal rights.

Some commenters objected to the proposed rule at § 432.104 on the basis that OPM, in their view, added language that was unclear and confusing. A national union critiqued the sentence: "No additional performance assistance

period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section" as "unclear" and "absurd or silly." Instead, the union recommended: "Employees who properly are notified by the agency that their performance is unacceptable are entitled only to one period of time affording reasonable opportunity to demonstrate acceptable performance." A different national union expressed concern that the reference to an informal assistance period will cause confusion because, in the union's view, it is unclear whether assistance to improve marginal or unacceptable performance prior to an opportunity period would constitute an informal assistance period. The union added that such assistance should not be prohibited if the law does not require it. An agency described the same sentence as confusing and unnecessary, adding that the terms "informal period" and "additional performance assistance period" are not defined and are vague. An individual commenter offered the following revision: "Prior to initiating the reasonable opportunity to demonstrate acceptable performance, the agency has sole and exclusive discretion to informally assist the employee in demonstrating acceptable performance."

OPM will not adopt the suggested changes as the recommendations are unnecessary. The amended regulation clarifies that agencies are precluded from allowing additional opportunity periods beyond what is required by law. OPM is effectuating the prohibition on additional opportunity periods—beyond what the underlying statute requires—in response to the direction in E.O. 13839. Some agencies have utilized additional, less formal opportunity periods, in response to unacceptable performance, that precede formal opportunity periods, and OPM does not believe that this practice constitutes an efficient use of resources. Moreover, it is not required by statute. For clarification purposes, OPM would distinguish between routine performance management measures such as training and coaching, which may be utilized when employees encounter challenges in the course of their duties, and informal opportunity periods. The first scenario is not impacted by the changes to the regulation; the second is impacted.

One individual commented that the Supplementary Information section of the proposed rule, in its discussion of § 432.104, refers to the 5 U.S.C. 2301(b)(2) requirement that employees should receive fair and equitable treatment without regard to political

affiliation, race, color, religion, national origin, sex, marital status, age and handicapping condition. However, the commenter stated that the language needs to be revised to note that Executive Order 11478, as amended by Executive Order 13672, extends equal employment opportunity protections to include sexual orientation or identity as protected categories.

OPM agrees that Executive Order 13672 expands the categories described in the equal employment opportunity policy originally articulated at Executive Order 11478. Executive Order 13672, however, did not (and could not) amend section 2301, the provision that OPM referenced in the Supplementary Information. And, in any event, case law precedents under the Civil Rights Act determine this issue, from a legal perspective. For this reason, the comment is inapt. Finally, the edit suggested by the commenter does not relate to any language in the proposed rule. Instead it relates solely to language found only in the Supplementary Information section of the notice, in which OPM explained its rationale for related changes to the regulations. Accordingly, there are no substantive changes that can be made to the regulations in response to this comment.

Section 432.105 Proposing and Taking Action Based on Unacceptable Performance

This section specifies the procedures for proposing and taking action based on unacceptable performance once an employee has been afforded an opportunity to demonstrate acceptable performance. 5 U.S.C. 4302(c)(5) provides for “assisting employees in improving unacceptable performance;” and 5 U.S.C. 4302(c)(6) provides for “reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.” The intent of the proposed rule was to clarify the distinction between the statutory requirements found in 5 U.S.C. 4302(c)(5) and (6) by explaining, in § 432.105, that the opportunity to demonstrate acceptable performance required prior to initiating an action pursuant to 5 U.S.C. 4303 may include any and all performance assistance measures taken during the performance appraisal period to assist employees pursuant to 5 U.S.C. 4302(c)(5), not just those taken during the formal opportunity period. The effort to distinguish these provisions was met with significant opposition and concerns from commenters, with the exception of three management

associations. The vast majority of commenters who opposed the proposed rule presented arguments that the proposed rule, as written, could result in circumstances where an agency relies upon assistance provided *prior* to determining that an employee has unacceptable performance to fulfill the agency’s obligation under 5 U.S.C. 4302(c)(5), which explicitly calls for assistance to an employee who has “unacceptable performance.”

One commenter interpreted the proposed rule to suggest that an agency can satisfy a formal opportunity period before an opportunity to correct inadequate performance has begun, which the commenter described as unreasonable, unrealistic and out of alignment with the merit system principles at 5 U.S.C. 2301(b)(6). A self-described employee relations practitioner claiming more than 30 years of experience opposed the proposed rule and questioned whether it would be consistent with the law. The commenter noted 5 U.S.C. 4302(c)(5) states that “each agency’s performance appraisal system shall provide for ‘assisting employees in improving unacceptable performance.’ (emphasis added).” The commenter went on to say, “If OPM means any kind of assistance offered at any performance level during the rating period, this is not what the statutory requirement in 4302(c)(5) addresses.” The commenter described being “confident” in saying that an employee who learns that he or she is performing at an unacceptable level and is placed on an improvement plan during the opportunity period is often surprised and in disbelief. The commenter’s concern is that, in such a scenario, the agency may say that it offered the employee assistance six months prior to this time and does not need to offer any further assistance during “this one and only opportunity period.” The commenter believes that most employees will not know what steps to take to improve their performance unless management provides them assistance in doing so. In the commenter’s view, OPM is violating the spirit and intent of chapter 43 statutory requirements concerning assistance and an opportunity to improve. The commenter recommended that OPM reconsider and continue to require assistance during the opportunity period to alleviate potential for abuse and misuse by some agencies.

A national union objected to the proposed amendment at § 432.105(a)(1), calling it “nonsensical” and contrary to case law to allow the assistance requirement to be satisfied before the opportunity period. The union cited

Brown v. Department of Veterans Affairs, 44 MSPR 635 (1990), and *Sullivan v. Department of the Navy*, 44 MSPR at 646 (1990), in which “the Board emphasized the critical, statutory requirement that employees be notified of the critical job elements which they are failing and be provided a ‘meaningful opportunity to demonstrate acceptable performance’ in those elements.”

A different national union objected to the proposed added language to § 432.105(a)(1) with the rationale that “the second sentence contradicts the first and is contrary to law.” The union stated that assisting an employee before determining that the employee has unacceptable performance and notifying the employee of such is not “for the purpose of assisting employees pursuant to 5 U.S.C. 4302(c)(5),” which requires “assisting employees in improving unacceptable performance” at any time the determination is made. The union recommended that instead of the proposed passage, OPM state, “For the purposes of this section, reasonable opportunity to demonstrate acceptable performance includes reasonable assistance in improving unacceptable performance that the agency provides during the appraisal period, either during the opportunity period or after the opportunity period, and before the agency proposes a reduction-in-grade or removal action.”

An agency recommended that OPM’s proposed amendments to § 432.105(a)(1) not be added or applied to the final version of the regulation and raised a concern that, as written, the proposed rule will create situations where an employee may not get any management help, thereby putting agencies at risk for appeals and litigation.

One commenter recommended that OPM remove the sentence: “For the purposes of this section, the opportunity to demonstrate acceptable performance includes measures taken during the opportunity period as well as any other measures taken during the appraisal period for the purpose of assisting employees pursuant to 5 U.S.C. 4302(c)(5).” The commenter described the sentence as factually inaccurate, contrary to the plain language of the statute, and not mandated by E.O. 13839.

One individual asserted that the proposed rule is illogical because the statute requires that agencies assist employees who have unacceptable performance, and since employees who have unacceptable performance should be placed on a Performance Improvement Plan (PIP), there should not be a time other than the period

during which the employee is on the PIP when an employee with unacceptable performance is receiving assistance that would meet the statutory requirement. The commenter expressed concern that performance assistance could devolve into a “check-the-box” exercise if the agency can demonstrate that it provided the employee with assistance at any point during the rating cycle.

One organization, an agency, and some individual commenters went so far as to say that the proposed rule gave the impression that an agency might take an action for unacceptable performance prior to an impacted employee’s completion of an opportunity period. The organization objected to distinguishing between 5 U.S.C. 4302(c)(5) and (c)(6). It stated that the proposed rule contradicts 5 U.S.C. 4302(c)(6) and is inconsistent with established case law interpreting that statute, including cases that have held a meaningful opportunity to improve to be a substantive right. In the organization’s interpretation, the proposed rule could allow an agency to remove an employee for performance prior to an opportunity period, even if the employee has successful performance during the opportunity period. The organization stated that the proposed rule “purports to allow an agency to use assistance measures even if the employee has not been notified of the subpar performance,” which would be “fundamentally unfair” and “dissuade supervisors from offering adequate training, counseling, and assistance” during an opportunity period.

Three management associations expressed support for the proposal to distinguish 5 U.S.C. 4302(c)(5) and 4302(c)(6), describing it as a valuable clarification of agency obligations and a modernization of the Federal performance review process that better matches the needs of agencies working to achieve mission success.

However, OPM finds greater merit in the objectors’ arguments. Accordingly, the proposed amendment to the regulations at 5 CFR 432.105(a)(1), which adds the language “Agencies may satisfy the requirement to provide assistance before or during the opportunity period” will not be adopted. We will retain the provision that the obligation to assist can be met through measures taken during the appraisal period as well as measures taken during the opportunity period. Permitting an agency to include measures taken during the appraisal period for the purpose of assisting employees pursuant to U.S.C. 4302(c)(5)

encourages managers to engage in continuous performance feedback and early correction of performance concerns, thereby supporting the principles espoused in the Executive Order for promoting accountability.

A commenter stated that the intended purpose of the proposed amendment to § 432.105 could be achieved “by writing: There is no mechanical requirement regarding the form that assistance to an employee should take. Agencies shall satisfy the requirement to assist the employee by providing adequate instructions regarding the manner in which the employee is expected to perform the duties of his position.” The commenter added that this change “would establish that assistance is not an onerous burden without engaging in a misbegotten attempt to ‘delink’ the assistance from the opportunity period.” It is unclear where the commenter is proposing to insert the recommended language or what language it would replace. OPM will not adopt the commenter’s recommendation.

Section 432.108 Settlement Agreements

This section effectuates Section 5 of E.O. 13839. Section 5 establishes a new requirement that an agency shall not agree to erase, remove, alter or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. Such agreements have traditionally been referred to as “clean record” agreements.

This new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete information and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. This regulation, derived from a corresponding provision in E.O. 13839, is further intended to equip Federal agencies with full information needed to assess candidate qualifications and suitability or fitness for Federal employment and make informed hiring decisions. In furtherance of this important goal, instances of employee misconduct and unacceptable performance that may be determinative in these assessments

should not be expunged as a function of a clean record agreement, as doing so deprives agencies of vital information necessary to fulfill their obligation to hire the best candidate within reach.

Section 5 requirements should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. Agencies have the authority, unilaterally or by agreement, to modify an employee’s personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

Further, when persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee’s personnel file or other agency files. Section 5’s requirements would continue to apply to any accurate information about the employee’s conduct leading up to that proposed action or separation from Federal service.

Section 5 requirements apply to actions taken under parts 432 and 752. All comments related to settlement agreements are addressed here in the Supplementary Information for the

change at § 432.108, where the change appears first.

Three management associations expressed support for preventing agencies from erasing, removing, altering or withholding information about a civilian employee's performance in their official personnel record. Two of the organizations, however, noted that some agencies' practice of offering clean record settlement agreements has historically facilitated employee departures in a manner that minimizes litigation and results in a mutually agreeable outcome for agencies and taxpayers. An individual expressed support for the proposed amendment to § 432.108, describing it as "very helpful to hiring managers who should have this information" before bringing on a potential "problem employee." OPM will not make any revisions based on these comments.

An agency discussed potential benefits and drawbacks of the proposed rule, including that it would assist management in making better hiring decisions and discourage employees from using the Equal Employment Opportunity (EEO) process as a way to have records expunged while perhaps at the same time making it difficult and costly for agencies to settle cases. The agency recommended further clarification on the parameters of the rule. As the commenter did not pose specific questions about parameters, we are unable to respond.

Despite some showing of support for the proposed rule, many commenters objected for a variety of reasons. One commenter asserted that an agency cannot issue a rule unless granted authority to do so by law and believes that OPM has exceeded the scope of its regulatory authorities. Specifically, the commenter questioned whether OPM has the authority to regulate settlement agreements. OPM does not agree that it has exceeded its authority. E.O. 13839 directs OPM to propose appropriate regulations to effectuate the principles set forth in Section 2 and the requirements of Sections 3, 4, 5 and 6 of the order. This final rule effectuates the requirements of E.O. 13839.

With respect to the question of OPM's authority raised by commenters, OPM would emphasize that OPM's regulation pertains to the integrity of personnel files which are maintained by OPM and which OPM has the authority and responsibility to maintain; see 5 U.S.C. 2951. OPM also has authority to regulate personnel management functions, hiring appointments, and to oversee the merit system principles; see *e.g.* 5 U.S.C. 1103(a)(5) (stating that OPM's Director executes, administers, and enforces the

law governing the civil service), and (7) (stating that functions vested with the OPM Director include "aiding the President, as the President may request, in preparing such civil service rules as the President prescribes, and otherwise advising the President on actions which may be taken to promote an efficient civil service and a systematic application of the merit system principles, including recommending policies relating to the selection, promotion, transfer, performance, pay, conditions of service, tenure, and separation of employees"); see also 5 U.S.C. 3301 (establishing the President's authority to ascertain fitness of applicants for employment sought). OPM would also emphasize that other than those issues pertaining to areas for which OPM has the authority to regulate, agencies are free to handle settlement agreements as they choose, subject to other appropriate authorities.

Several individuals, via a template letter, commented that the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 will "only lead to bitter and contentious disputes." The commenters stated that unless there is "some provision for settlement or informal resolution of disputes," employees will have little choice but to pursue arbitration or litigation. The commenters urged for an amendment to the proposed rule that would allow cancellation of a proposed action as part of a settlement agreement, so long as no final agency action has been taken. The commenters believe this would "help resolve 90% of disputes without resorting to more legal processes."

A group of several national unions and their members disagreed with the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 and requested that the changes be withdrawn on the basis that agency managers and Federal workers represented by unions disfavor the prohibition on settlement agreements. The commenters stated that the proposed change removes a tool that allows unions and managers to settle disputes efficiently and effectively and forces them to arbitration or litigation instead of encouraging the use of early alternative dispute resolution (ADR). The commenters asserted that OPM presumes that agency supervisors are infallible and their decisions not subject to review, which violates the spirit of the law and creates a Federal workforce which is corruptible, subject to undue influence, and puts the burden of a supervisor's mistake on an employee for the rest of their career.

OPM has not made changes based on these comments and believes that the

concerns are unsubstantiated and, in many respects, addressed in the regulation itself. The proposed regulation effectuates E.O. 13839 requirements. While Section 5 of the E.O. 13839 places restrictions on agency management with regard to certain matters within settlement agreements, it neither prevents settlement agreements nor discourages other forms of alternative dispute resolution utilized by agencies seeking to resolve a formal or informal complaint and avoid litigation. The regulation has protections built in that address commenters' concerns. To the extent that an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, the action can be removed from the employee's personnel file or other agency files. As explained in the regulation, agencies are permitted to correct errors, either unilaterally or pursuant to a settlement agreement, based on discovery of agency error or illegality. The regulation further permits agencies to cancel or vacate a proposed action when persuasive evidence comes to light casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation. The final rule promotes integrity and accountability and facilitates the sharing of records between Federal agencies in a manner that permits the agencies to make appropriate and informed decisions regarding a prospective employee's qualification, fitness and suitability as applicable to future employment.

Two organizations and several individuals objected to restrictions on settlement agreements that limit resolution options or reduce the likelihood of the parties reaching a mutually agreeable resolution of informal or formal complaints. One of the organizations opined that employees who seek such relief will be more inclined to litigate, which will increase the burden on the administrative bodies that hear such cases and cause "unnecessary cost and distraction in the workplace." The other organization strongly opposed the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 on the basis that its members' experience demonstrates that Section 5 has "eliminated the possibility of settlement agreements in cases involving disciplinary or performance actions, especially once the personnel action occurs." The organization claimed that the limiting effect of Section 5 has followed on the heels of agencies implementing new and stringent limits on "non-record

modification settlements,” which we understood to mean settlements that do not involve modification of records and pointed to a particular Federal agency as an example. From the organization’s perspective, agencies have been “highly deterred” from agreeing to post-personnel action settlements involving record modification because they are “loath” to acknowledge a personnel action as illegal, inaccurate or the product of agency error. The organization stated that this forces cases into costly merits litigation, which has risks for all parties involved.

The organization raised a concern that the proposed rule gives too much discretion to “low level supervisors” by rendering their decisions in personnel actions far harder to reverse later through settlement. The commenter stated that, previously, settlement mechanisms provided a means for higher-level management to review the actions of subordinates and make changes to their discretionary decisions through settlement agreements.

OPM will not make any revisions based on these comments. The amended regulation effectuates the requirements of E.O. 13839 and thereby facilitates a Federal supervisor’s ability to promote civil servant accountability and transparency across the Executive Branch.

An organization commented that the proposed rule at § 432.108 “fundamentally contradicts existing federal law in several respects” by (1) creating “an absolute bar” to potential mitigation of a final agency decision when persuasive evidence of an error or mistake is discovered *after* the final agency decision is issued (such as “during an appeal period or during an appeal”) [emphasis in original]; (2) not mandating that an agency correct an employee’s personnel record (before a decision) despite the agency obligation to correct an employee’s record when it determines there has been an error under the Privacy Act; and (3) causing unnecessary economic issues, such as litigating costs and lost salary and leave, for both employees and agencies and crowding the dockets of the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and/or Equal Employment Opportunity Commission (EEOC).

In response, OPM notes that it is incorrect to interpret the proposed rule at § 432.108 as “an absolute bar” to potential mitigation of a final agency decision when persuasive evidence of an error or mistake is discovered after the decision is issued (such as during an appeal period or during an appeal). In fact, the change at § 432.108(b) permits

an agency to take corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. OPM believes that it is understood that the scope of this provision would include actions taken that were out of compliance with the Privacy Act.

OPM also disagrees with the organization on the question of economic issues for employees and agencies and potential crowding of MSPB, OSC, and/or EEOC dockets. While the regulation implementing Section 5 of E.O. 13839 places restrictions on agency management with regard to certain matters within settlement agreements, it does not prevent all settlement agreements from occurring or being pursued by an agency involved in a dispute process.

With regard to comments expressing concerns over potential impact on the practice of higher-level settlement review, this comment presumes that all but the highest level management officials are equipped to use their discretion soundly and accurately, a presumption with which OPM does not agree. Further, as discussed elsewhere, all procedural protections built into the adverse action process, including a notice and opportunity for reply remain intact.

Additionally, the organization objected to §§ 752.104(a)-(c) and 752.203(h) for the reasons cited above and because the organization believes that the proposed amendments are “blatantly prejudicial to employees and contrary to an agency’s duty to apply mitigating circumstances developed in *Douglas v. Veterans Administration*.” The organization stated that the proposed rule would provide agencies with an opportunity to impose disproportionate penalties.

OPM disagrees and notes that §§ 752.104(c), 752.203(h)(3), 752.407(c) and 752.607(c) permit an agency to cancel or vacate a proposed action when persuasive evidence comes to light, prior to a final agency decision, that casts doubt on the validity of the action or the ability of the agency to sustain the action in litigation. The proposed rule does not prevent the agency from mitigating a proposed penalty in such instances as long as the agency adheres to penalty determination provisions in §§ 752.102, 752.202, 752.403 and 752.603 as applicable.

The organization restated similar objections to § 752.407 and added more details to support its position. The

organization expressed concern that the proposed rule will do the opposite of increasing the efficiency of management decisions because it undermines the ability of agencies to settle cases. In the organization’s views, the proposed rule is “simply inoperable in practice,” even allowing for corrective action to a personnel record based on discovery of agency error or discovery of material information prior to final agency action. The organization stated that agencies will be unwilling or unlikely to admit error, unless ordered to do so by a court, not least because of potential further liability.

OPM disagrees with the organization’s assessment. It is not unusual for dispositive information to come to light after an adverse action is proposed, such as during the employee’s reply period or in the submission of the employee’s supporting material. Such dispositive information could very well lead to an agency cancelling or vacating a proposed action during settlement negotiations. The proposed rule facilitates a Federal supervisor’s ability to promote civil servant accountability and simultaneously recognize employee’s procedural rights and protections. Moreover, the proposed rule does not “bar” the EEOC, MSPB, arbitrators and courts from requiring modification of a personnel record as an appropriate remedy for a matter before them based on an agency’s adverse personnel action.

One national union asserted that § 432.108 will diminish the right to collective bargaining, contrary to the spirit of the Federal Service Labor-Management Relations Statute (FSLMRS), by prohibiting agencies from agreeing to clean record terms during collective bargaining negotiations and settlement discussions. In the union’s view, Congress did not intend for agencies and employees to negotiate an appropriate resolution to a matter only to be precluded from implementation by an “unnecessary regulation.” The union believes that the clean record agreements are used by employees in many cases to remove “unfair, baseless charges” from their files and the amended regulations unfairly closes this avenue for employees.

OPM does not agree that the amended regulation impacts collective bargaining in the manner asserted by commenters. Initially, management’s rights pursuant to 5 U.S.C. 7106, including the right to discipline, cannot be diminished through bargaining. Each and every decision as to whether to settle a case and what penalty is appropriate falls within the discretion of agency management and is outside the scope of

bargaining. Further, to the extent that there are any narrow areas of negotiability relating to the use of settlement agreements, the regulation does not preclude bargaining in this area. Rather, consistent with the Executive Order, it directs agencies in terms of how to proceed when making decisions, pursuant to the President's authority to issue such directives and pursuant to management's discretion in disciplinary context. These changes appropriately balance employee rights with efficient government operations.

A national union commented that damage to agencies' and employees' abilities to resolve disputes will outweigh whatever transparency may derive from the proposed rule. The union asserted that litigation will increase exponentially and added that allowing an agency to amend or rescind a record unilaterally is "hardly a savings" because parties are "loath" to admit fault. The union believes that the proposed restrictions on amending personnel records ignore realities. The union also accused OPM of impermissibly inserting itself into the collective bargaining relationship by taking clean record terms off the table, to the extent such clauses are not otherwise prohibited by law. In the union's estimation, because grievance settlements are an extension of the collective bargaining process, OPM's regulation would unilaterally constrict the scope of collective bargaining by precluding a commonly negotiated remedy. Another national union commented that by preventing clean record agreements, OPM "stymies" efficient and effective resolution of disputes. The union added that by giving agencies "unfettered power to unilaterally modify an employee's personnel record," the proposed rule opens the door to arbitrary and capricious agency action and potential Privacy Act violations. The union stated, "These regulations should be withdrawn."

As discussed in the proposed rule, this new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete and accurate information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. We disagree that OPM is impermissibly interfering in the collective bargaining relationship between the agency and the exclusive representative by prohibiting agencies from entering into clean record agreements. Individual supervisory

decisions exercised in the context of settlement agreements are not subject to collective bargaining and cannot be diminished through the collective bargaining process. OPM does not agree that a link exists between settlement agreements of discrete, individual personnel actions and the collective bargaining process over broad conditions of employment which occurs under 5 U.S.C. chapter 71. Also, the President has broad authority to manage the conduct of the Federal workforce. This includes issuing directives to agency supervisors regarding how to exercise their discretion in the context of making decisions on disciplinary actions, including settlement agreements. It is also worth noting that the now vacated preliminary injunction by the DC District Court left intact Section 5 of E.O. 13839 regarding matters related to settlement agreements. Finally, OPM has the authority to require agencies to maintain specific information in personnel records. The prohibition on the use of clean record agreements by agencies would not prevent parties from entering into other types of settlement agreements or other forms of alternative dispute resolution. It would only preclude agencies from entering into agreements that could serve to circumvent necessary transparency. With respect to the concern that the proposed rule could violate the Privacy Act, OPM notes that there is nothing in the rule that relieves agencies of their obligation to maintain accurate personnel records in accordance with the Privacy Act.

A commenter objected to the proposed rule change for §§ 432.108, 752.203, 752.407 and 752.607 concerning settlement agreements, and stated that "prohibiting clean record settlements is a horrible waste of taxpayer money." The commenter asserted that allowing such settlements provides maximum flexibility to agencies and promotes quick settlement of cases at low or no cost to the Government. The commenter stated also that prohibiting agencies from agreeing to alter, erase or withhold information in personnel records would force agencies to engage in lengthy, resource-intensive legal battles, "contrary to the effectiveness and efficiency of the government." Another commenter shared a similar concern that restrictions on clean record agreements will lead to unnecessary, expensive results that are wasteful of time, money and resources. OPM disagrees. As stated above, this new requirement promotes the high standards of integrity and

accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete and accurate information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. Agencies may experience fewer matters that give rise to arbitration and litigation because the prohibition on clean record agreements facilitates the sharing of records between Federal agencies. Agencies will be better able to make appropriate and informed decisions regarding a prospective employee's qualification, fitness and suitability as applicable to future employment.

A commenter stated that the Supplementary Information references a "partial clean record," and the proposed rule itself omitted any reference to a "partial clean record." The commenter suggested that prohibition on expunging personnel records as part of a settlement may force aggrieved former employees to file suit under the Privacy Act to enjoin the disclosure of false derogatory information to another agency or to another prospective employer. The commenter stated that the proposed rule provided no recourse for an employee to challenge the accuracy of the record, or to expunge information about an underlying incident if the employee and agency disagree about the accuracy or legality of the reported action. The commenter added that the "current law provides a workable procedure for bona fide allegations of misconduct or unsatisfactory performance." As an alternative to the proposed rule, the commenter recommended improved guidance to supervisors and human resources staff and improved quality of data on misconduct.

OPM will not adopt any changes based on this comment. Partial clean record settlements are those in which the agency agrees to withhold negative information from any prospective future non-Federal employers but, in conformance with E.O. 13839, does not agree to withhold any negative information from other Federal agencies. Although the language in §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607, does not include the phrase "partial clean record," the rule does in fact state that an agency may not erase, remove, alter or withhold from *another agency* any information about a civilian employee's performance or conduct in that employee's official personnel records. (Emphasis added.) Thus, there was no contradiction or inconsistency between the Supplementary Information and the proposed rule.

Some commenters erroneously interpreted E.O. 13839 and the proposed rule to mean that settlement agreements are eliminated or characterized the proposed amendments as having an intent to cause harm to Federal employees. One commenter stated that E.O. 13839 and the proposed regulations eliminate settlement agreements and fail to recognize that there are “many incompetent managers whose motives do not align with public service.” The commenter stated that additional safeguards are warranted. The commenter asserted that a hardworking, capable employee who loses his or her job should not be further harmed by untruthful allegations that could impede his or her job search. The commenter expressed concern that probationary employees are often afforded no opportunity to contest or submit evidence to support continuation of employment, resulting in personnel files that may not have an accurate picture. A retiree who relies on OPM “for everything” expressed concern for OPM employees and a wish for OPM employees to be treated with respect and fairness. One individual described clean record agreements as a long-standing practice that, if removed, “will only hurt . . . employees.” The commenter asked, “please stop seeking to eliminate federal employee rights.”

Other commenters likened the proposed rule to “prohibition on finding someone innocent” and called it “sadly disconcerting.” Yet another stated, “Basically any wrong can never be righted, regardless of time or improvement in performance.” An individual commented that removing the ability for a record to be “cleaned” is an unfair practice. Believing that everyone has a “bad day,” the commenter asked if this is “a just reason to have a black mark on their record?” A commenter stated that eliminating “clean record” agreements would mean that any negative mark on an employee’s record would be permanent, and that employee rights “should not be eliminated through Executive Order.” The commenter went on to say that employee rights are given via “congressional approval and the rule of law,” and should be changed in those venues. A commenter opposed the proposed changes that “abolish clean record settlements” on the basis that OPM “wants to make it harder to amicably settle employment disputes and instead make their resolution less effective and efficient and more contentious.”

A national union commented that eliminating the opportunity to reach clean record agreements reduces

workplace flexibility. The union asserted that a prohibition on clean record agreements “ensure[s] federal workers are seen in the worst possible light.” A local union commented that the proposed rule can only be interpreted as an attempt to “stack the deck” against an employee under consideration for punishment. The union asserted that under the proposed rule, performance issues from years ago would be used as justification for severe punishment, while letters of admonishment and reprimand are currently removed from an employee’s file after a set period of time. The union stated that clean record settlement agreements are a valuable tool to resolve labor-management disputes, since both parties prefer to settle disputes through settlement rather than through litigation.

OPM will not adopt any revisions to the proposed rule based on these comments. Section 5 of the E.O. 13839 does not prevent parties from entering into settlement agreements to resolve workplace disputes. OPM is not seeking to harm employees, cast them in the worst possible light, “stack the deck” against them, eliminate employee rights, or impede job searches. Further, the amended regulations will not convert time-limited personnel records such as letters of admonishment and reprimand into permanent documents. As previously discussed, Federal employees will continue to enjoy all core civil service protections under the law, be protected by the merit system principles and possess procedural rights and appeal rights. All procedural protections afforded employees who are subject to an adverse action remain unaltered, including the right to contest a proposed adverse action if an employee believes the agency has acted impermissibly or relied upon an error and through submission of a reply and supporting materials. Also, agencies are permitted to correct errors based on discovery of agency error or illegality. The regulation further permits agencies to cancel or vacate a proposed action when persuasive evidence comes to light casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation. OPM is simply effectuating the requirements of E.O. 13839 and thereby facilitating a Federal supervisor’s ability to promote civil servant accountability and simultaneously recognize employee’s procedural rights and protections.

A commenter reacted to the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 by stating that it subjects government employees to a standard unseen in the private sector.

The individual added that government employees need the same protections as private sector employees with regard to sharing employment history. The commenter did not identify what “protections” private sector employees have with respect to sharing employment history. OPM notes that public sector employment is different from private sector employment in a number of key ways, including the fact that Federal employees enjoy *additional* job protections above and beyond what is codified and afforded to private sector employees (See e.g., 5 U.S.C. chapter 23—Merit System Principles). OPM will not adopt changes based on this comment.

An agency recommended removing the references to the OPM report in § 752.104(b) because it is the only time a specific section of the OPM report is discussed. The agency went on to say that it is not clear why there is a “discrete reference” to one part of a larger OPM report “when the report is not otherwise discussed in the text of the regulations.” The agency further recommended either adding a new separate section in the regulations discussing the report and its components, or having the report be covered by E.O. 13839 and OPM policy.

OPM notes that §§ 432.108(b), 752.203(h)(2), 752.407(b) and 752.607(b) also refer to the reporting requirements in Section 6 of E.O. 13839. OPM will not adopt the agency’s recommendations because OPM believes that the reference to reporting requirements, in addition to the instructions provided in E.O. 13839, OPM’s guidance memoranda of July 3, 2018, and October 10, 2018, and any instructions OPM will provide in the data call process constitute useful guidance.

A commenter expressed the view that eliminating clean record agreements would mean that any negative mark, such as letters of admonishment and reprimand, on an employee’s record would be permanent and could be used as justification for proposing a subsequent more severe form of punishment. OPM does not fully agree with this assertion. OPM notes that, for employees that engage in repeated misconduct, increasing the severity of disciplinary measures is likely to be appropriate, and, to the extent that preserving the integrity and accuracy of an employee’s personnel file facilitates an agency’s ability to take such appropriate measures, this is beneficial to the agency and to the public. OPM also notes that the questions of when, how, and for how long an agency may rely on prior incidents of misconduct is

governed by a legal framework that is independent from and unaffected by this rule. Finally, OPM would note that the regulatory amendments also do not impact guidelines surrounding disciplinary instruments such as letters of reprimand or admonishment, the preservation of which is also governed by procedures that are independent of and unaffected by this rule.

A national union recommended that OPM rewrite § 432.108 to make it “clear, comprehensive, and less wordy” and offered the following revision: “(a) *Agreements to alter personnel records.* Except as provided in subsection (b), an agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personal Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action. (b) *Corrective action.* An agency unilaterally or as part of, or as a condition to, resolving by agreement a formal or informal complaint by the employee, or settling an administrative challenge to an adverse action, may at any time erase, remove, alter, or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personnel Folder and Employee Performance File if the agency has reason to believe that: (1) The complaint or administrative challenge is, or might reasonably be found by an adjudicator to be, valid; (2) the information is, or might reasonably be found by an adjudicator to be, inaccurate; (3) the adverse action was, or might reasonably be found by an adjudicator to have been, proposed or taken illegally or in error; or (4) the information records, or might reasonably be found by an adjudicator to record, an adverse action or other agency action that was proposed or taken illegally or in error. (c) *Reporting.* An agency should report any agreements relating to the removal of Information under subsection (b) as part of its annual report to the OPM Director required by Section 6 of E.O. 13839.”

OPM believes that the proposed changes would not make these provisions clearer while they would substantially change the meaning and intent of the proposed rule and would be inconsistent with the requirements of E.O. 13839. Also, as currently written, § 432.108(b) and (c) permit agencies to take corrective action based on

discovery of agency error and discovery of material information prior to final agency action, respectively, before any adjudicator is involved. Further, the union’s revision gives the impression that the reporting requirement applies to actions that are cancelled or vacated based on discovery of material information prior to final agency action, which is not the case. Finally, in response to suggestions regarding post-adjudication action, such a change to the rule would be unnecessary to the extent that OPM would be compelled to initiate any changes to personnel records required to conform to a judicial order. For the foregoing reasons, OPM will not adopt the union’s recommended revision.

In sum, the amended regulation at § 432.108 effectuates Section 5 of E.O. 13839, and thereby promotes integrity and accountability and facilitates the sharing of records between Federal employers in a manner that permits agencies to make appropriate and informed decisions regarding a prospective employee’s qualification, fitness, and suitability as applicable to future employment. However, Section 5 requirements should not be construed to prevent agencies from correcting records should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. Section 5 requirements should also not be construed to prevent agencies from entering into partial clean record settlements with regard to information provided to non-Federal employers.

Finally, when persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an

agency would have the authority to remove that action from the employee’s personnel file or other agency files. However, the requirements described in Section 5 would continue to apply to any accurate information about the employee’s performance or conduct which comes to light prior to issuance of a final agency decision on an adverse action. Based on the foregoing, the final rule at § 432.108 reflects E.O. 13839’s restrictions on settlement agreements arising from chapter 43 actions.

Technical Amendments

The final rule corrects the spelling of the word “incumbents” within § 432.103(g) and the word “extension” at § 432.105(a)(4)(i)(B)(3). OPM replaces the term “handicapping condition” with “disability” at § 432.105(a)(4)(i)(B)(4) to bring the definition into conformance with 29 U.S.C. 705. In this rule, OPM also revises § 432.105(a)(4)(i)(C) to correctly identify the office that an agency shall contact if it believes that an extension of the advance notice period is necessary for a reason other than those listed in § 432.105(a)(4)(i)(B). OPM revises § 432.106(b)(1) to replace “i.g.” with “i.e.” within the parenthetical concerning non-exclusion by the parties to a collective bargaining agreement. Finally, OPM corrects the use of the word “affected” versus “effected” within § 432.107(b).

An agency recommended reviewing and correcting the use of “affect” and “effect” throughout the proposed rule. The final rule corrects the use of the word “affected” versus “effected” within § 432.107(b). There were no other misuses of “affect” and “effect” in the proposed rule. Therefore, no additional changes are necessary based on this comment.

Another commenter recommended that agencies expunge records “after 90 days or until the next formal performance rating, whichever is shorter” if, because of performance improvement during the notice period, the employee is not reduced in grade or removed. OPM will not adopt any revisions based on this comment. The proposed rule is simply a technical amendment intended to make a grammatical correction (i.e., it changes the word “affected” to “effected”). The rest of the language in this section reflects requirements that exist today and predate this proposed regulatory revision.

5 CFR part 752—Adverse Actions

Subpart A — Discipline of Supervisors Based on Retaliation Against Whistleblowers

Recent changes enacted by Congress modifying 5 U.S.C. 7515 establish mandatory procedures for addressing retaliation by supervisors for whistleblowing. The regulations, issued pursuant to this Statute, reinforce the responsibility of agencies to protect whistleblowers from retaliation. These requirements are significant because of the essential protections they provide. Prohibited personnel actions are not consistent with the notion of a system based on merit, and failure to observe these prohibitions must be addressed promptly and resolutely.

OPM has revised our regulations to incorporate these statutory changes and to ensure that agencies understand how to meet the additional requirements in connection with prohibited personnel actions. This new rule falls under subpart A of 5 CFR part 752 as “Discipline of supervisors based on retaliation against whistleblowers.”

An agency suggested that OPM remove portions of the newly created subpart A on the rationale that the Office of Special Counsel (OSC) should issue regulations pertaining to discipline of supervisors based on retaliation against whistleblowers if it desires to do so. This agency stated also that the regulations should be in chapter VIII, of title 5, Code of Federal Regulations. We will not make any revisions to the final rule as a result of this comment. Congress granted OPM authority to regulate adverse actions. The final language implements the statutory authority and procedures of 5 U.S.C. 7515 and reinforces the principle that increased accountability is warranted in situations where a supervisor commits a prohibited personnel action against an employee of an agency in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b).

Two organizations and one individual expressed broad support for subpart A. One of the organizations fully commended OPM, while reminding us that claims of retaliation must be substantiated and proven and cautioning against mere allegations resulting in the dismissal of management. In addition, the organization reminded OPM that managers and supervisors can be whistleblowers as well, but often lack protections equal to those applicable to other employees in making whistleblower disclosures. Lastly, the organization encouraged OPM to protect whistleblowers at all levels and hold all

employees equally accountable for retaliation. While another organization voiced its support for whistleblower protection, the organization emphasized that supervisors, managers, and executives can be whistleblowers, and changes to the system cannot embed an us-versus-them mentality between different levels of the workforce.

OPM agrees with these commenters. We understand that under the relevant statute (*i.e.*, 5 U.S.C. 7515(b)), the claims of retaliation must be substantiated and proven and that mere allegations may not be the basis for the dismissal of management. Further, we believe that the regulations reinforce the responsibility of agencies to protect *all* whistleblowers from retaliation. These regulations help to undergird and support agencies in meeting their requirements to take action against “any” supervisor who retaliates against whistleblowers. Accordingly, different levels of the workforce are subject to the increased accountability and protections.

In response to these comments, OPM also provides the following clarification: The initiation of a removal action pursuant to 7515(b)(1)(B) should be understood to be required under this statute only if a disciplinary action, initiated pursuant to 7515(b)(1)(A)—based on an agency finding of retaliation made pursuant to procedures outlined in 7515(b)(2)(B)—is either uncontested or if contested, is upheld by a third party. As a corollary to this observation, OPM notes that, should a disciplinary action initiated pursuant to 7515(b)(1)(A) be contested and *not* sustained, a subsequent and separate determination by the agency that a supervisor engaged in a prohibited personnel practice (again after following procedures in 7515(b)(2)(B)), would trigger a proposal under 7515(b)(1)(A), not 7515(b)(1)(B).

Section 752.101 Coverage

The final rule describes the adverse actions covered and defines key terms used throughout the subchapter. An organization suggested, without any additional information or specific recommendations, that clarification of definitions in this section is needed and would be helpful. Due to the lack of specifics, OPM did not consider any revisions based on this comment.

The final rule also includes a definition for “insufficient evidence.” OPM defines this new term as evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p). One commenter objected to this definition and recommended that OPM either remove it or change it as

follows: “*Insufficient* Sufficient evidence means evidence that *fails to meet* meets the substantial evidence standard described in 5 CFR 1201.4(p).” The commenter argued that the rule introduces the substantial evidence standard into chapter 75 adverse action procedures. He believes his recommendation will ensure that the agency retains the preponderance of the evidence burden of proof while still maintaining the substantial evidence burden of proof for the employee refuting an allegation of a prohibited personnel action. OPM will not adopt any revisions based on this comment because the recommended changes are unnecessary. First, the term “insufficient evidence” mirrors the content of 5 U.S.C. 7515, which OPM has no authority to change. Further, the employee’s burden of proof of substantial evidence in the proposed regulations applies only to the evidence furnished prior to any agency action. If an action is taken and the employee appeals to the MSPB, the agency bears the burden of proof. The agency’s action must be sustained by a preponderance of the evidence if the action is brought under chapter 75, as it is here.

Also, with respect to coverage, a commenter expressed concern that 5 U.S.C. 7515 fails to hold political appointees accountable for retaliation against whistleblowers and observed that the proposed rule weakens Federal workforce protections at a time when they should be strengthened. OPM did not adopt any revisions based on this comment. An agency head need not follow the procedures outlined in section 7515 in order to separate a political appointee who engaged in whistleblower retaliation. Political appointees serve at will and can be separated at the pleasure of the agency head at any time, including for violating whistleblower rights. Therefore, political appointees can be held accountable for retaliation against whistleblowers. As to the broader assertion that the proposed rule weakens Federal workplace protections, OPM emphasizes that Federal employees will continue to enjoy all core civil service protections under the law, be protected by the merit system principles, and possess procedural rights and appeal rights. The final rule does not remove the procedural protections afforded employees who are subject to an adverse action, including the right to contest a proposed adverse action if an employee believes the agency has acted impermissibly or relied upon an error and the right to submit a reply and supporting materials.

Section 752.102 Standard for Action and Penalty Determination

5 U.S.C. 7515 incorporates many of the procedural elements of 5 U.S.C. 7503, 7513 and 7543, to include the standards of action applied to each type of adverse action. For supervisors not covered under subchapter V of title 5, the proposed rule applies the efficiency of the service standard. For supervisors who are members of the Senior Executive Service (SES), the proposed rule defines the standard of action as misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment, or to accompany a position in a transfer of function.

5 U.S.C. 7515 enhances statutory protection for whistleblowers through the creation of proposed mandatory penalties. In accordance with the statute, the final rule at § 752.102 outlines the penalty structure. Specifically, for the first incident of a prohibited personnel action, an agency is required to propose the penalty at a level no less than a 3-day suspension. Further, the agency may propose an additional action, including a reduction in grade or pay. For the second incident of a prohibited personnel action, an agency is required to propose that the supervisor be removed.

In one agency's view, the required penalties under § 752.102 seem to conflict with language regarding progressive discipline and the penalty determination in the remaining sections of 5 CFR part 752. The agency's commenter stated that it is possible a third-party would see the lower-tiered disciplinary level (suspension) and argue that it should have been taken first (absent any prior disciplinary action). For the first prohibited personnel action committed by the supervisor, the agency recommended modifying § 752.102(b)(1)(i) to state, 'Shall propose a penalty up to and including removal.'

Another commenter who was concerned about the penalty structure stated that a suspension of a minimum of three days for retaliation against a whistleblower is not sufficient given the severity of the offense and opined that a suspension should be a minimum of 30 days or more depending on the severity of the offense. This commenter further stated that if the offending supervisor is retained, then he or she should be retrained for a minimum of 5 days in addition to the suspension. Finally, the commenter stated that if the whistleblower was terminated, the supervisor's penalty should also be termination.

We will not make any revisions to the regulation based on these comments. The mandatory proposed penalties as listed in § 752.102(b)(1) track the relevant statute, 5 U.S.C. 7515. Specifically, for the first incident of a prohibited personnel practice, an agency is required to propose the penalty at a level *no less than a 3-day suspension*. (Emphasis added.) Further, the agency may propose an additional action, including a reduction in grade or pay. We believe the regulation as written is sufficiently broad to give agencies the flexibility and guidance needed to propose a penalty suited to the facts and circumstances of the instant whistleblower retaliation, including severity of the offense.

One commenter stated that any rule change should include notifying employees of what action has been taken to correct a supervisor's "future behavior," which we understood to mean notifying employees of what action was taken to correct a supervisor's behavior to prevent any future wrongdoing. We will not adopt this proposed change based on the need to protect employees' personal privacy. An agency may only share information from an individual's personnel records with those who have a need to know, such as human resources staff involved in advising management and any management official responsible for approving the action.

Section 752.103 Procedures

The final rule establishes the procedures to be utilized for actions taken under this subpart. The procedures in the subpart are the same as those described in 5 U.S.C. 7503, 7513 and 7543. However, the final rule also includes some key exceptions, namely the provisions concerning the reply period and advance notice. Under this subpart, supervisors against whom an action is proposed are entitled to no more than 14 days to answer after receipt of the proposal notice. At the conclusion of the 14-day reply period, the agency shall carry out the proposed action if the supervisor fails to provide evidence or provides evidence that the head of the agency deems insufficient. To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond.

Several commenters, including three agencies, an organization and a national union, expressed concern about the procedures promulgated in § 752.103(d). The agencies inquired about any exceptions to the required timeframe of not more than 14 days to furnish

evidence as provided in 5 U.S.C. 7515(b)(2)(B) in the instance of, for example illness, extenuating circumstances, or in response to a request for extension from the employee or the employee's legal representative. One of the agencies recommended specifically that OPM clarify this matter as to circumstances which may justify extension of this 14-day answer period, if any. With respect to § 752.103(d)(2), the organization characterized the proposed regulation as contrary to statute, stating that OPM cannot waive the statutory requirements for advance notice of proposed adverse actions by regulation, and so cannot set up a scheme whereby the effective date of an adverse action is less than the absolute statutory minimum. Similarly, an individual commenter asserted that it contradicts 5 U.S.C. 7513(b)(1) and 5 U.S.C. 7543(b)(1) with respect to an agency's requirement to give 30-day advance notice of a proposed adverse action. The commenter argued that a statutory amendment is required to exclude disciplinary actions for prohibited personnel practices from the statutorily prescribed notice and response times.

The national union also raised objections to the amount of time allowed for an employee to defend a proposed adverse action under § 752.103, claiming that the proposed rule does not consider the time it may take an employee to gather evidence or obtain capable representation. The union added that agencies must then evaluate evidence and render a decision within 15 days after the response period closes. The union called this a "hurried" approach that places unreasonable time constraints on employees and agencies and favors expediency over accuracy. Another agency recommended clarifying that the 15-business day limit does not apply to suspensions, reductions in grade or pay, or lesser penalties.

OPM will not adopt any revisions based on these comments. The response period and advance notice period in § 752.103 do not represent guidelines originating from OPM regulations, as indicated by these commenters but rather effectuate the statutory requirements in 5 U.S.C. 7515, and the principle outlined in Section 2(f) of E.O. 13839 that provides, to the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75. The requirement regarding the 14 days to submit an answer and furnish evidence in support of that answer is derived from an explicit statutory limitation (See 5 U.S.C. 7515(b)(2)). The statute further

states that if after the end of the 14-day period a supervisor does not furnish any evidence, the head of the agency “shall” carry out the action proposed. The clear language of the statute specifically directing that the head of the agency carry out the action at the conclusion of 14 days reflects a mandatory process that provides no discretion for OPM to make exceptions through regulation nor does it offer discretion for agencies to diverge from the statutory requirements by permitting extensions.

Additionally, a commenting organization expressed concern that, although the 15 business days to issue decisions is “doable” and will speed up the process, these types of actions sometimes do not receive attention in a timely manner at senior level. The organization stated that some of their members have reported removal decisions that are pending for months with the employee in limbo and the office scrambling to accomplish work. The commenter recommended that the reporting requirement should emphasize the importance of meeting the time period of 15 business days to issue decisions.

OPM will not adopt the recommendation that the reporting requirement should emphasize the importance of adhering to the time period of 15 business days to issue decisions. By emphasizing the non-discretionary nature of this reporting requirement in the Data Collection section above., OPM believes that it is conveying the importance of meeting this deadline. That said, OPM agrees that adhering to the time period of 15 business days to issue adverse action decisions is important and would further emphasize that this requirement supports the objective to make disciplinary procedures more efficient and effective.

OPM received comments as well on other requirements established in § 752.103. An agency raised a concern regarding written notice about the right of the supervisor to review the material relied on, as provided for at 752.103(c)(2); and written notice of any right to appeal the action pursuant to section 1097(b)(2)(A), as provided for at 752.103(c)(3). The agency highlighted specifically that according to the National Defense Authorization Act (NDAA) for Fiscal Year 2018, Public Law 115–91, Sec. 1097(b)(2)(A) requirements only apply to proposal notices under 5 U.S.C. 7503(b)(1), 7513(b)(1), and 7543(b)(1) as stated in the law. The commenter stated that Public Law 115–91 Sec. 1097(b)(2)(A) requirements do not apply to 5 U.S.C. 7515 actions and therefore should not be applicable to

proposal notices under section 7515. Also, the commenter went on to observe that 5 U.S.C. 7515 specifically states that its provisions are not subject to 5 U.S.C. 7503(b)(1), 7513(b)(1) and 7543(b)(1).

Upon further review and careful consideration of this comment, OPM has determined that it will not incorporate the requirement to provide information on appeal rights in any notice to an employee for an action taken under section 7515.

An agency and one individual commenter also raised concerns about including appeal rights information in the notice of proposed action. The agency commented that this seems to imply that an employee obtains a right to appeal an action under Public Law 115–91 section 1097(b)(2)(A) while the statute only requires that the agency provide notice of detailed information with respect to any right to appeal the action. The agency suggested that OPM revise § 752.103(c)(3) to read “. . . provides, pursuant to section 1097(b)(2)(A) of Public Law 115–91, notice of any right to appeal. . . .” The individual commenter stated that parts 315, 432, and 752 require that a notice of proposed action include the employee’s appeal rights and time limits, which is inappropriate at the proposal stage. The commenter’s concern is that employees would file appeals before an action is final and create a bottleneck downstream.

As noted above, the amended regulation will not require that agencies include appeals rights information in a notice of proposed action taken under section 7515. Notwithstanding, it is important that the commenters understand that current and amended parts 315 and 432 do not require that agencies provide advance notice of appeal rights. (It is unclear if by “time limits” the commenter is referring to time in which to file an appeal or time to respond to notice of a proposed action.) Further, it is well-established in statute, regulation, and case law that an employee cannot appeal a proposed action.

Finally, the regulation at § 752.103 also includes the requirement that, if the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action, that responsibility may not be delegated. This non-delegation provision generated a significant number of comments. One organization, three agencies, and one individual questioned how it would work to have the head of an agency responsible for determining whether a supervisor has committed a prohibited personnel

action. The organization stated that larger agencies such as the Department of Defense have traditionally delegated authorities to Components who may further delegate within their command structure. The commenters asked for clarity on when an agency head would be responsible for determining whether a supervisor committed a prohibited personnel action. One of the agencies commented that the meaning of this provision is unclear specifically as to whether the head of the agency is responsible for determining, without delegation permitted, whether a supervisor committed a prohibited personnel action or if an agency has decided internally via its disciplinary procedures that the head of the agency must make this determination, then it cannot be delegated. The agency suggested that OPM should exercise its authority to provide more guidance regarding the meaning of 5 U.S.C. 7515(b)(3). A second agency stated that as a political appointee, the head of an agency may be perceived as making politically motivated decisions, resulting in claims of whistleblower retaliation. Another of the agency’s concerns is that a limitation on delegation could be inconsistent with the statute. This agency, along with a third agency, recommended agency discretion to determine delegation level.

Some clarification in response to these comments may be useful. The requirement regarding non-delegation is an explicit statutory limitation under 5 U.S.C. 7515(b)(3) contingent upon whether the head of any agency is responsible for determining whether a supervisor has committed a prohibited personnel practice. The statute states that *if* the head of the agency responsible for making the determination of whether a supervisor committed a prohibited personnel action in retaliation against a whistleblower, the responsibility may not be delegated. However, if that responsibility rests at a lower level within the agency, then decision-making authority as it relates to these types of actions would be similarly re-delegated. Consistent with this wording and with the general authority granted to agencies pursuant to 5 U.S.C. 302, OPM interprets this language to provide agencies with the discretion to internally re-delegate this function to an appropriate level resulting in these responsibilities then resting at that level for the purpose of making these determinations regarding supervisory conduct.

Section 752.104 Settlement Agreements

The language in this section establishes the same requirement that is detailed in the rule changes at § 432.108, Settlement agreements. Please see discussion in § 432.108.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees.

Section 752.201 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.201(c) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.202 Standard for Action and Penalty Determination

While the standard for action under this subpart remains unchanged, the final rule makes clear that an agency is not required to use progressive discipline under this subpart. The final rule supports Section 2(b) of E.O. 13839, which states that supervisors and deciding officials should not be required to use progressive discipline. Three management associations endorsed this clarification. Two of the associations recognized explicitly that supervisors, managers and executives encounter unique circumstances whereby they must apply their judgment, understanding of context and knowledge of their workforce and organization in a manner that collectively informs personnel decisions. One of the groups added that managers who have greater autonomy over personnel actions can better work with their employees to determine which personnel actions will foster success for the agency in the long term.

One association stated that the amended regulation “takes the penalty out of the bargaining arena,” and added that it “never belonged there in the first place.” As reflected in the language of the rule, specifically that a penalty decision is in the sole and exclusive discretion of the deciding official, bargaining proposals involving penalty determinations such as mandatory use of progressive discipline and tables of penalties impermissibly interfere with the exercise of a statutory management right to discipline employees, and are thus contrary to law.

Two of the associations recommended that OPM use “plain English” as much as feasible when updating the regulations. The organization noted that there are many legal phrases used in the Federal employment context which can be highly confusing if not properly

defined and clarified. OPM will not make any revisions based on these comments as the commenters did not identify any specific phrases or terms for consideration and the regulations are based on statutory requirements.

An agency expressed support for OPM’s clarification that agencies are not required to use progressive discipline, adding that use of progressive discipline has led to many delays in removal as well as hardship for supervisors. The agency noted that the rule will give more discretion to supervisors to remove “problematic” employees, thus increasing the efficiency of the service. However, the agency added that progressive discipline is often useful to justify an agency’s action; defeat claims of favoritism, preferential treatment, and discrimination; and provide more consistency between managers. The agency recommended that OPM provide further guidance on when and to what extent progressive discipline should be used as well as clarification on the extent to which agencies should rely upon tables of penalties in making disciplinary decisions. In fact, OPM recently provided such information in a memorandum, “Guidance on Progressive Discipline and Tables of Penalties,” issued on October 10, 2019.

An individual commenter also expressed support for the clarifications as they relate to progressive discipline, tables of penalties and selection of a penalty appropriate to the facts and circumstances, including removal, even if the employee has not been previously subject to an adverse action. Another commenter found the clarification at § 752.202 to be helpful, with the caveat that implementation will be difficult as labor and employee relations staff seem to have it ingrained that progressive discipline is the “safest way to go” to avoid litigation. The commenter observed that without support from labor and employee relations staff, front-line supervisors are often constrained by senior managers. OPM will not make any revisions based on these comments as no revision was requested.

Many commenters objected to the regulatory amendments regarding standard for action and penalty determination. Some, including four national unions, characterized the amendments as eliminating, attacking, or discarding progressive discipline, and argued strongly for withdrawal of the proposed rule. One of the unions commented that “eliminating” progressive discipline places an inordinate amount of power in the hands of deciding officials, who are being directed to impose the most severe penalty possible. The union

added that agencies will impose penalties “within the bounds of tolerable reasonableness” in a manner that leads to subjective discipline. Another national union argued that progressive discipline helps to foster a successful workplace by giving employees an opportunity to learn from their mistakes and ensuring that discipline is proportionate to mistakes. The union went on to say that the rule weakens workplace flexibility and eliminates the ability of Federal managers and employees to come together to develop fair disciplinary procedures. Yet another national union described progressive discipline as an important tool that agencies should use in order to avoid “arbitrary and capricious” penalty determinations. The union expressed concern that a critical safeguard against arbitrary and capricious agency action is being taken away in favor of “inconsistent and ad-hoc decision-making.” Pointing to the CSRA, the union said, “Put simply, jettisoning progressive discipline, confusing the use of comparator evidence, and discouraging tables of penalties, creates an improper bias toward the most drastic penalty an agency thinks it can get away with.” This national union asserted such a “rule of severity” is not only counterproductive and likely to lead to a greater number of penalty reversals, it is also contrary to the text, structure, and purpose of the CSRA. The national union stated that the proposed regulations upset this balance and asserted that OPM’s claim that “[p]rogressive discipline and tables of penalties are inimical to good management principles” is nothing more than a cheap soundbite. This national union insisted that it is not based on sound analysis or solid evidence and stated that the proposed regulations should therefore be abandoned.

The fourth national union stated that the rule will have the “perverse effect” of encouraging agencies to terminate an employee even where there are no prior disciplinary issues and regardless of the seriousness of the infraction at issue. The union went on to say that such results would erode the public trust in Federal agencies and devalue the contributions of hard-working Federal employees. This national union stated that the Federal government invests considerable time and money in training Federal employees, and the notion that a supervisor could decide to fire an employee over a minor transgression and give a written reprimand for the same transgression to another employee

is antithetical to the principles of an unbiased and fair civil service system.

In addition to the comments discussed above that were submitted individually by labor organizations, we received a letter signed by seven national unions as well as comments via a template letter from members of one of the undersigned unions. They discussed that progressive discipline is the “law of the land” and deemed it weakened by the proposed rule. The commenters further stated that the proposed rule does nothing but weaken protections for Federal employees in an effort to circumvent the “efficiency of the service” standard. Also, the commenters opined that the proposed changes cannot change an agency’s obligation to determine an appropriate penalty in accordance with *Douglas v. Veterans Administration*, 5 MSPR 280 (MSPB 1981). The commenters stated the proposed change will lead to confusion and the unjustified punishment of Federal workers, not to mention disparate treatment. One of the union members added that progressive discipline is fair and allows employees a chance to improve their performance without fear of losing their livelihood. The commenter went on to say that progressive discipline prevents favoritism, nepotism and the “good ole boy” networks from forming and flourishing in Federal agencies. The commenter is concerned that rules such as this will deter “young and new talent” from applying for Federal jobs and drive existing workers to the private sector.

Via a different template letter, several members of another national union also interpreted the proposed rule to mean that progressive discipline is abolished. The commenters expressed concern that the regulatory changes will lead to widely varying, incoherent, and discriminatory discipline for similarly situated employees. One of the commenters self-identified as a union steward and asked that their workload is lightened, not increased.

In addition, a national union objected to the proposed rule regarding progressive discipline on the basis that a standard of “tolerable limits of reasonableness” is less clear and may result in various interpretations by supervisory personnel even within the same department of an agency. The union expressed concern that “mandating” that the threshold for review be at a less clear standard invites workplace chaos in which inconsistent penalties and unfair discipline is administered without the opportunity for it to be corrected.

An organization disagreed with the rule because in their view it flies in the face of proportionate discipline, due process and fairness. The organization commented that the regulation is contrary to statutory authority in 5 U.S.C. 7513 and established case law. They stated that eliminating progressive discipline and the consideration of mitigating factors would essentially eliminate the “for cause” standard and turn Federal employees into “at will” employees. The organization observed that this is the type of drastic action that would undo, impermissibly, the dictates of title 5 and interpretive case law, and is the type of action that can only be taken by Congress.

An organization opposed the proposed rule to the extent that it “undercuts” progressive discipline. The organization stated that progressive discipline is a wise approach and asserted that a supervisor can deviate from the guidelines of progressive discipline in certain situations if they have a reasoned explanation for doing so.

Additional commenters expressed concern about potential negative consequences of discouraging progressive discipline, calling it a poor stewardship of tax dollars, contrary to the public interest and a lead up to disparate treatment and retaliation. Some commenters worry that agencies will impose discipline arbitrarily, up to and including removal, for any offense with no obligation to first correct employee behavior. Commenters advocated that agencies give employees an opportunity to be made aware of and correct behavior before being suspended or terminated, including calling it improper to do otherwise. Even a commenter who acknowledged that the rule changes could be beneficial expressed concern that managers are being given “more power” to remove employees without just cause. One asserted that this is a clear violation of the CSRA.

We will not make changes to the final rule based on these comments. The final rule does not eliminate progressive discipline. Rather, the regulatory language makes clear that an agency “is not required” to use progressive discipline under this subpart. In fact, progressive discipline has never been required by law or OPM regulations. It is not the “law of the land” as asserted by one commenter. Notwithstanding a number of comments submitted, the clarifying language in the amended regulations does not set aside or discard progressive discipline but it does, consistent with the Principles for Accountability in the Federal Workforce

contained in Section 2 of E.O. 13839, emphasize that penalties for misconduct should be tailored to specific facts and circumstances, that a more stringent penalty may be appropriate if warranted based on those facts and circumstances, and that a singular focus on whether an agency had followed progressive discipline to the detriment of a more comprehensive fact-based, contextual assessment does not serve to promote accountability nor an effective or efficient government. The regulatory changes emphasize principles and policies contained in E.O. 13839 but are also supported by well-established legal authority: That the penalty for an instance of misconduct should be tailored to the facts and circumstances; an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness; employees should be treated equitably; and conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. Concerns expressed by commenters that the “bounds of tolerable reasonableness” is insufficiently clear appear to take issue with the state of the law, not OPM’s rule which simply incorporates the appropriate legal standard. The rule is also consistent with the efficiency of the service standard for imposing discipline contained in the CSRA notwithstanding assertions that it circumvents this standard. While commenters argued that the changes weaken agency flexibility, reliance upon the efficiency of the service standard, like reliance upon the bounds of tolerable reasonableness in the context of penalty selection in fact provides necessary flexibility to encompass the range of facts and circumstances associated with each individual adverse action. Agencies remained constrained by law to select penalties that conform to these legal requirements and any such penalty remains subject to challenge based on alleged failure to do so. This is undisturbed by the revised rule. Whether or not agencies choose to adopt further, internal constraints beyond these legal standards is purely discretionary, and OPM reminding agencies of this fact does not direct agencies to issue nor otherwise encourage more stringent penalties than are warranted given specific facts and circumstances.

Federal employees will continue to enjoy the protections enshrined in law, including notice, a right to reply, a final written decision, and a post-decision review when an agency proposes to

deprive them of constitutionally protected interests in their employment. Although we have made changes to the regulations, due process and other legal protections are preserved as required by Congress.

Regarding a commenter's criticism that there is a need to look at disciplinary actions before they are taken, the rule does not change the requirement for disciplinary actions to be reviewed under the current regulatory requirements. The existing regulations at §§ 752.203 and 752.404 require that the employee must be provided an opportunity to provide an answer orally and in writing. The agency must consider any answer provided by the employee in making its decision. Moreover, for appealable adverse actions, § 752.404 provides that the agency must designate a deciding official to hear the oral answer who has authority to make or recommend a final decision on the proposed adverse action. Thus, further review of an agency proposed action is required before a decision to take any administrative action.

Regarding the assertion that the regulations cannot be used to circumvent required assessment of the *Douglas* factors, OPM would emphasize that there is no effort to evade any such legal requirement. *Douglas* itself states that the Board will not mitigate a penalty unless it is beyond the bounds of tolerable reasonableness. This permits, but does not require, agencies to impose the maximum reasonable penalty. OPM's regulations on progressive discipline are manifestly in accord with longstanding decisional law. Moreover, the analysis pursuant to *Douglas* that each deciding official must make provides a means of promoting fairness and discouraging the type of subjectivity and disproportionality which some commenters allege the new rule promotes. Meanwhile, the *Douglas* factors ensure consideration of all relevant factors that may impact a penalty determination, consistent with the language of E.O. 13839 and this rule. This includes consideration of whether an employee engaged in previous misconduct or did not engage in previous misconduct. While again, OPM is not seeking to prevent agencies from imposing less than the maximum reasonable penalty with this rule, and the exercise of sole and exclusive discretion is reposed in agencies, not OPM, considerations such as this, carefully weighed alongside numerous other relevant considerations such as the severity of the misconduct and any potential mitigating circumstances provide a carefully calibrated

assessment of penalty that should not be superseded by singular reliance on progressive discipline which may artificially constrain a more comprehensive analysis.

One union noted that the proposed regulations will prevent agencies from engaging in any collective bargaining negotiations that allow for progressive discipline. They asserted that the regulations are contrary to the intent and purpose of the Federal Service Labor-Management Relations Statute (the Statute). The union stated an agency's policy on disciplinary structure directly affects an employee's conditions of employment and is the exact condition that Congress intended to be collectively bargained. While recognizing OPM's authority to issue regulations in the area of Federal labor relations, the union added that OPM may not "dilute the value of employees' statutory right to collectively bargain." The union further stated the regulations should not be implemented because they would "diminish the core elements of collective bargaining by reducing negotiations over primary conditions of employment," including discipline.

We agree that Federal employees have a statutory right to collectively bargain over their conditions of employment. However, there are certain exceptions outlined in the Statute, including a prohibition on substantively bargaining over management rights as outlined in 5 U.S.C. 7106(a). This includes management's statutory right to suspend, remove, reduce in grade or pay, or otherwise discipline employees. Accordingly, bargaining proposals that would mandate a specific penalty under certain circumstances or which mandate the use of progressive discipline and tables of penalties impermissibly interfere with the exercise of a statutory management right to discipline employees. In clarifying that a proposed penalty is at the sole and exclusive discretion of the proposing official, and the penalty decision is at the sole and exclusive discretion of the deciding official (subject to appellate or other review procedures prescribed by law), the rule further elaborates on what is already established by law, management's inherent and non-negotiable right to utilize its discretion in this area, it does not enhance those rights nor diminish bargaining rights in this area.

Some commenters focused especially on OPM's adoption by regulation of the standard applied by MSPB in *Douglas* to removals, suspensions and demotions, including suspensions of fewer than 15 days. Specifically, the final rule adopts the requirement to propose and impose

a penalty that is within the bounds of tolerable reasonableness. An organization discussed that while OPM may issue regulations regarding the procedures to be followed in adverse actions, an action against any employee may only be taken "for such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a). Citing *Douglas* itself and other case law, the organization described as a basic principle of civil service disciplinary action that the penalty must be reasonable in light of the charges and that the penalty not be grossly disproportionate to the offense. The commenter noted that "efficiency of the service" is colloquially referred to as the "nexus" requirement which requires the agency to establish a "clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest promoting the efficiency of the service."

The organization objected also to the consideration of "all prior misconduct." The organization argued that existing case law allows the deciding official to evaluate whether or not prior misconduct should be used as an aggravating or mitigating factor, whereas the regulatory change appears to "require" the deciding official to use the prior discipline as an aggravating factor against the employee. They stated that it would be "patently illogical" for potentially unrelated misconduct from years or decades ago to be considered when determining a penalty for a current instance of misconduct.

OPM notes that the amended regulation is intended to ensure that the deciding official has the discretion to consider any past incident of misconduct that is relevant and applicable while making a penalty determination, consistent with law. To that end, OPM will amend the regulation to clarify that agencies should consider all *applicable* prior misconduct when taking an action under this subpart.

A national union declared that OPM is not empowered to "regulate away" the *Douglas* factors. The union stated that the proposed rule would improperly result in an override of MSPB's longstanding determination of what should be considered in assessing potential employee discipline. In particular, the union believes the proposed rule is at odds with progressive discipline considerations in *Douglas* factors 1, 3, 9 and 12, and penalty consistency considerations in *Douglas* factors 6 and 7.

In addition, an agency commented that OPM only explicitly discussed certain *Douglas* factors, thereby giving the impression that agencies should only prioritize consideration of these factors over those not mentioned. The agency added that “relevant factors” is undefined and vague. The agency recommends that OPM clarify its intention, so agencies and adjudicators have a clear understanding of what standards to apply by either including explicit references to all the factors or making a reference to *Douglas* itself.

OPM disagrees with the commenters and will not make any revisions based on these comments. As explicitly described in the proposed rule, the standard for action under this subpart remains unchanged. Specifically, the final rule at §§ 752.202, 752.403, and 752.603 adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness and make it clear that this standard applies not only to those actions taken under 5 U.S.C. 7513 and 7543 but apply as well to those taken under 5 U.S.C. 7503. As to the criticism that the proposed rule does not observe the efficiency of the service standard and the nexus requirement, §§ 752.202, 752.403, and 752.603 includes: the penalty for an instance of misconduct should be tailored to the facts and circumstances; an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness; employees should be treated equitably; and conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time.

OPM understands and reiterates that agencies continue to be responsible for ensuring that discipline is fair and reasonable, including applying the *Douglas* factors. It is unnecessary to list all the *Douglas* factors in the regulations, but this should not be interpreted to place focus on some more than others. The proposed rule is not at odds with the *Douglas* factors. Factors such as the seriousness of the misconduct and the clarity of notice remain unchanged. The consistency of penalty with a table of penalties would only be applicable if an agency has adopted a table of penalties. This *Douglas* factor, however, does not in any way require or compel an agency to adopt one (though again, there is nothing in the rule that precludes an agency from doing so). Regarding an employee’s past disciplinary record, the rule incorporates the consideration of all applicable prior misconduct. The rule does not require an agency to

consider all applicable prior discipline but gives agencies the discretion to do so. With regard to the consistency of penalty with other employees who have engaged in the same or similar conduct, while the rule incorporates the current legal standard, which informs this analysis, it does nothing to alter the *Douglas* factor itself. Similarly, the *Douglas* factor addressing the adequacy of alternative sanctions to deter conduct remains unaltered, and in fact, this consideration provides a further safeguard against the subjective and disproportionate penalties some commenters allege will result from the changes to the regulation. If a penalty is disproportionate to the misconduct or unreasonable, the agency risks having the penalty mitigated or reversed. For these reasons, we urge managers to exercise thoughtful and careful judgment in applying the broad flexibility and discretion they are granted in addressing misconduct and making penalty determinations.

We received many submissions that included significant objections to OPM’s discussion of the risks of tables of penalties in the Supplementary Information section of the proposed rule. Again, as with progressive discipline, many commenters, including three national unions, had the mistaken impression that the rule somehow eliminated tables of penalties. They expressed concern that the amended regulations will remove transparency and accountability; create an environment of fear, distrust, and resentment; and empower deciding officials to mete out discipline arbitrarily, disparately, and inequitably. The unions advocated for use of tables of penalties, believing that they ensure that discipline is dispensed fairly and employees are treated equitably; provide support to employees by helping them recognize if a penalty is disproportionate to an infraction; and support supervisors by providing readily available and clear guidance.

One of the unions claimed to see in the proposed rule a bias toward removal that is “inconsistent with due process and unjustified.” In support of its position, the union quoted a 2018 U.S. Government Accountability Office (GAO) report as saying that “tables of penalties—a list of recommended disciplinary actions for various types of misconduct—though not required by statute, case law, or OPM regulations, nor used by all agencies, can help ensure the appropriateness and consistency of a penalty in relation to an infraction.” The union added that GAO reported that penalty tables can help ensure the disciplinary process is

aligned with merit principles by making the process more transparent, reduce arbitrary or capricious penalties and provide guidance to supervisors. The union claimed that OPM’s citation to *Nazelrod v. Department of Justice*, 43 F.3d 663 (Fed. Cir. 1994) is

“nonsensical” and added that this will not change the requirement that an agency must prove all the elements of a charged offense. The union goes on to cite *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) to make its point that an employee against whom an action has been proposed is entitled to notice and an opportunity to be heard before the action may become final.

Another national union commented that the regulatory changes weaken rules that forbid disparate treatment for similarly situated employees. In the union’s view, tables of penalties help ensure equitable treatment and guard against discrimination, retribution and favoritism. Two unions asserted that agencies with whom they work typically allow supervisors to assess the situation and use their discretion in determining what action is appropriate rather than using penalty tables blindly or rigidly. The unions urged OPM to withdraw or reject the proposed rule and consider alternative approaches.

Via a template letter, several members of a national union observed that the proposed rule discourages tables of penalties. The commenters expressed concern that the regulatory changes will lead to widely varying, incoherent, and discriminatory discipline for similarly situated employees, regardless of whether the same or different supervisors are involved. They expressed a strong belief that penalties should be the same or similar for similar offenses and dispensed of any idea that identical or similar offenses could lead to disparate discipline as inherently inequitable or invalid. One of the commenters added that in the absence of set penalties, sanctions for like violations will be unequal and invite litigation and tie up agency resources. Others added that the changes are unnecessary and put employees at the mercy of supervisors. Another self-identified as a retiree and called the regulatory changes “unAmerican.”

An agency commented, drawing upon its own experience, that the benefits of a table of penalties have outweighed the cons. The agency listed as benefits helping supervisors and employees recognize what constitutes misconduct, deterring employees from engaging in misconduct, and giving all supervisors and employees a general understanding of the type and level of disciplinary

consequences that can arise from committing misconduct. The agency stated that its table has always been used as advisory guidance, and it requires supervisors to provide an explanation if they want to exceed the table of penalties.

Another agency argued that, when tables of penalties are used properly as guidance, the unique facts of each case are taken into consideration. The agency notes that one of the *Douglas* factors is the consideration of the agency's table of penalties, if any, and thus it is contemplated that such information would be weighed in conjunction with the other factors outlined in *Douglas*. The agency recommends that OPM either delete this discussion from the Supplementary Information or significantly revise it to stress, as a best practice, that tables of penalties, if used, should serve as a guide for disciplinary penalty determinations, and "that offenses contained in such a table of penalties should be written broadly enough to address unique offenses or misconduct that may have not been contemplated in offense."

After expressing general support for incorporation of the *Douglas* factor analysis into the regulations, an organization commented that the proposed rule is contradictory in that it states the importance of *Douglas*, but "undercuts" *Douglas* factor 7, "consistency of the penalty with any applicable agency table of penalties." The organization described tables of penalties as valuable tools that provide a measure of uniformity; help avoid real or perceived favoritism, disparate treatment, and discrimination; and reduce the risk of litigation. The organization is concerned in particular that there will be an increase in disparate treatment complaints before the EEOC and MSPB. According to the organization, its membership has observed that most penalty tables make clear that, in certain situations, a supervisor can deviate from the guidelines if there is a reasoned explanation for doing so. This sentiment was shared by another organization that disputed that agencies adhere to tables of penalties in a formulaic manner, as stated by OPM in the proposed rule.

One commenter wrote that the proposed rule does not acknowledge any advantages or benefits of progressive discipline or tables of penalties. The commenter suggested that the final rule should state that an agency may choose to but is not required to use progressive discipline. Another commenter referred to cumulative infractions as typically leading to escalating enforcement

actions, which the commenter described as fair. The person went on to express that "[t]his E.O.," which we understood to mean E.O. 13839, will allow Federal employees to be removed for nearly any perceived infraction and stated not to allow the Executive Order to be passed. Yet another commenter raised the concern that while it does make sense to take disciplinary action for performance reasons or misconduct, there should be "levels" on which actions are taken. The commenter also stated that any "offense should be looked at before taking any action" because disgruntled employees could be that way due to poor management. One person noted that managers actually make more and worse choices than bargaining unit staff but are not held accountable. Another person characterized the revised regulations as demoralizing to the Federal workforce and expressed concern that they will produce a Government that is "fearful, cautious, and incapable of making bold decisions" rather than the "resourceful, creative, and effective" Government that we need.

Finally, a management association disagreed with OPM that agencies can address misconduct appropriately without a table of penalties, though the association did agree that nothing surpasses a manager's judgment and independent thinking when determining the best way to handle their team.

The Supplementary Information in the proposed rule identified pitfalls agencies may encounter when basing disciplinary decisions on a table of penalties. The Supplementary Information reminded agencies that penalty consideration requires an individual assessment of all relevant facts and circumstances. To promote efficiency and accountability, OPM is encouraging agencies to afford their managers the flexibility to take actions that are proportional to an offense but further the mission of the agency and promote effective stewardship. The existence of tables of penalties may create confusion for supervisors who believe that only the misconduct explicitly identified in the table can be addressed through a chapter 75 process. Inappropriate reliance on a table of penalties or progressive discipline can prevent management from taking an adverse action that would promote the efficiency of the service and survive judicial scrutiny. Chapter 75 does not only apply to misconduct. It applies to any action an agency may take to promote the efficiency of the service, including unacceptable performance and certain furloughs. Further, there is

no way to define the infinite permutations, combinations and variations of possible misconduct through preconceived labels. Many types of misconduct or behavior that must be dealt with to promote the efficiency of the service fall in the gaps between offenses listed in tables of penalties. And some of these labeled charges require an agency to meet an elevated standard of proof, such as intent, whereas behavior warranting discipline may be merely negligent or careless or unintentional. Further, someone charged with a certain type of misconduct not enumerated in the table of penalties may argue that he was not on notice that what he did was wrong. Tables of penalties are rigid, inflexible documents that may cause valid adverse actions to be overturned. Further, they promote mechanistic decision-making, which is contrary to OPM's policy that proposing and deciding officials exercise independent judgment in every case according to its particular facts and circumstances in leveling the charge and the appropriate penalty.

With respect to the GAO report, OPM notes that the report does not explain how having a table of penalties will help an agency prevent misconduct or respond to it. The mere existence of a table of penalties does not necessarily serve as a warning to employees or compel supervisors to carry out more disciplinary actions for the conduct identified in the table. If anything, it is as likely to de-emphasize constructive early intervention in favor of a more punitive approach that focuses only on the offenses covered by the table. It may also be read or understood to induce or worse, require, managers in some cases to impose a lesser penalty where a greater penalty is warranted. The GAO report references some of OPM's concerns about tables of penalties, but there is no serious discussion of the disadvantages of a table of penalties, which we believe are important in assessing their value. It is vital for effective workforce management consistent with the CSRA and the merit system principles that supervisors use independent judgement, take appropriate steps in gathering facts and conduct a thorough analysis to decide the appropriate penalty in individual cases.

We reiterate that the creation and use of a table of penalties is not required by statute, case law or OPM regulation. These regulations do not prohibit an agency from establishing a table of penalties, though OPM strongly advises against their use. However, once an agency establishes a table of penalties, it will have to live with the

consequences of a document containing mechanistic and perhaps arbitrarily-selected labels, possibly issued years or even decades earlier at a safe remove from the realities and variety of day-to-day life in the Federal workplace. For that reason, the amendments emphasize that the penalty for an instance of misconduct should be tailored to the facts and circumstances, in lieu of any formulaic and rigid penalty determination. The final rule states that employees should be treated equitably and that an agency should consider appropriate comparators as the agency evaluates a potential disciplinary action, as well as other relevant factors including an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

With respect to appropriate comparators, as stated in the proposed rule, conduct that justifies discipline of one employee at one time by a particular deciding official does not necessarily justify the same or a similar disciplinary decision for a different employee at a different time. For this reason, we have decided to incorporate the *Miskill* test. The language in the proposed rule reflected important language in *Miskill v. Social Security Administration*, 863 F.3d 1379 (2017), that a comparator is an employee that “was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline.” As explained in detail below and in response to many commenters, including national unions, who objected to the definition of comparator in the proposed rule, OPM has modified the final rule to clarify that appropriate comparators are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct.

A management association lauded the Government-wide application of *Miskill* and clarification of the standard for comparators. However, other commenters expressed that the adoption of *Miskill* narrows the scope of comparators in a manner that will make it difficult for employees to demonstrate inequitable discipline or abuse of discretion and easy for managers to engage in arbitrary and capricious conduct. Some, including a national union, went so far as to say that OPM misinterpreted and misapplied *Miskill*. The union argued that in *Miskill*, the court merely applied existing law and did not make any material change to the evaluation of agency penalties nor adopt any manner of new test or bright line rule. The union stated that the amended regulation is not responsive to the issue

of disparate penalties and will lead to confusion and an increase in arbitrary and capricious agency conduct. An individual commenter stated that incorporating *Miskill* into the regulations assumes that the case overrules *Lewis v. Department of Veterans Affairs*, which it does not. (We interpret this as a citation to 113 M.S.P.R. 657, 660 (2010).)

Another national union claimed that there is no legal support for such a narrow assessment of comparators. In the union's view, comparators serve as a safeguard against unfair and arbitrary discipline. The union is deeply concerned that their members will be improperly disciplined, with minimal avenue for recourse. The union advocated for use of comparators in helping supervisors administer penalties that align with the offense, with allowances for supervisors to use their discretion to deviate from the suggested penalty when necessary. An organization asserted that OPM is making a limited, mechanical analysis of comparators. The organization's commenter stated that this approach ignores significant realities of disciplinary actions, agency organizational structures, and actual comparators. As an example, the organization offered a scenario in which two employees with different supervisors are together involved in one instance of misconduct and receive different penalties. The organization asserted that these two individuals would not qualify as comparators under the OPM regulations and would be unable to challenge their penalties as disparate, which undermines the basic principles of fairness that undergird the merit system principles. The organization also opined that certain charges—“low level charges, AWOL [absence without leave], failure to follow instructions, etc.”—should receive the same punishment regardless of the supervisor, whereas more egregious conduct may require “a deeper analysis.” The organization added that the regulatory amendments will allow two supervisors with differing opinions of discipline to issue disparate penalties to similarly situated employees for similar misconduct.

In a similar scenario, one commenter posited that narrowing the scope of comparators also means that employees in different work units would be operating under vastly different sets of conduct rules and expectations, which does not foster the efficiency and effectiveness of Government. In addition, the commenter stated that a consistent set of rules for the workforce and a consistent “conduct of code” and

discipline facilitates managers' jobs and helps protect them from perceptions of unfairness, favoritism and discrimination.

An agency commented that OPM should specify that appropriate comparators have also engaged in the same or similar offense. The agency stated that this is unclear in the current wording. The agency's commenter added that including a definition of appropriate comparators in the regulation is limiting and recommended deleting the last sentence.

After considering the comments on this regulation, OPM provides the following assessment and amplification of the philosophy and approach underlying this regulatory change.

First, as we have previously said regarding progressive discipline and tables of penalties, each action stands on its own footing and demands careful consideration of facts, circumstances, and, as one commenter wrote, context and nuance. It is the proposing and deciding official who are conferred the authority and charged with the responsibility to make these careful assessments. Second, no proposing or deciding official should be forced into a decisional straitjacket based on what others in comparable situations have done in the past. These prior decisions are not a binding set of precedent, and a different assessment is not a deviation from settled principle imposing a burden of explanation. However, the officials should explain their reasoning, which implicitly or explicitly will distinguish their principled reasoning from that of previous proposals and outcomes. If previous proposals and decisions were to serve as a body of precedent, it logically follows that current proposing and deciding officials would be in many cases constrained or impeded from expressing an accurate assessment (or view) on the matter at hand. Proposing and deciding officials are not administrative agencies or courts. Rather, they are executive branch management officials, responsible for managing their own workforce.

Further, mechanistic subservience to what has occurred before could bind a new agency official to penalties that he or she believes to have been too harsh as well as, in some cases, too lenient. Those commenters who have written that this regulation would in some way deprive employees of something of value that they had before overlook that what occurred before not only might have been of little value to an employee against whom an adverse action was taken, but also might have caused them

to be disadvantaged or harmed by rote obedience to what was done earlier.

That said, as the agency endowed with authority conferred by Congress and the President to make personnel policy through notice-and-comment regulation, and after having reviewed and considered the comments and decisional law to date, OPM decided to change the proposed regulatory text. The better approach is to change the proposed regulatory language to recognize that the decisions of similarly situated agency officials might be useful to a current decisionmaker, though not constraining. Accordingly, we are modifying the regulation somewhat to read “Appropriate comparators ‘primarily’ are individuals in the same work unit” We are also adding language to clarify that proposing and deciding officials are not bound by previous decisions, but should consider them, as the proposing and deciding officials, in their sole and exclusive discretion. This approach is consistent with current decisional law set forth recently in *Miskill*, an outgrowth of earlier decisions. OPM does not intend to and is not upending existing decisional law but is filling a regulatory void in exercise of its policy and legal authority. We are placing the focus where most appropriate. Here, it is management officials who bear the burden of managing their workforce and who are solely accountable to their superiors and agency heads for effectiveness, efficiency, productivity and the morale of their work unit. Along with this responsibility, they must be allowed to choose to implement a different approach from predecessors or peers to achieve that goal. The rule in no way detracts from the rights of or harms employees against whom an adverse action is initiated.

A commenter discussed the 2018 GAO report in reference to guidance for agencies on penalty determination. According to the commenter, GAO reported that Federal agencies formally discipline approximately 17,000 employees annually. The commenter stated that agency officials interviewed by GAO reported that they were unfamiliar with the disciplinary process, had inadequate training, or received inadequate support from human resource offices. GAO recommended improved guidance to supervisors and human relations staff along with improved quality of data on misconduct.

Note that OPM provides guidance to agencies through its accountability toolkit, which includes some of the key practices and lessons learned discussed in the GAO report. OPM frequently

communicates these strategies and approaches to the Federal community through the OPM website and ongoing outreach to agencies. As discussed above, on October 10, 2019, OPM issued a memorandum to agencies entitled “Guidance on Progressive Discipline and Tables of Penalties.” Regarding data on misconduct, it is not feasible to collect instances of misconduct at an enterprise level given the array of potential types of misconduct that may form the basis for management action. While common types of misconduct exist, such as time-and-attendance infractions, many unique types of misconduct cannot be placed into easily identifiable categories. Instead, agencies should address the unique aspects of each instance of misconduct and tailor discipline to the specific situation. Moreover, Section 6 of E.O. 13839 requires agencies to report the frequency or timeliness with which various types of penalties for misconduct are imposed (e.g., how many written reprimands, how many adverse actions broken down by type, including removals, suspensions, and reductions in grade or pay, removals, and how many suspensions). OPM believes that agencies will find value in collecting such data by providing each agency an enterprise-wide view of employee accountability.

Moreover, the final rule at § 752.202 (f) adds language stating that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts. An agency suggested adding “more” before “appropriate” in the first sentence of § 752.202(f). The agency stated that as written, the language could be read as requiring removal even if suspension would be more appropriate.

OPM disagrees and will not adopt the recommended revision. The language is clear as written. The penalty for an instance of misconduct should be tailored to the facts and circumstances of each case. If the facts and circumstances of a case warrant removal, an agency should not substitute a suspension. We emphasize again that there is no substitute for managers thinking independently and carefully about each incident as it arises, and, as appropriate, proposing or deciding the best penalty to fit the circumstances.

Section 752.203 Procedures

Section 752.203(b) discusses the requirements for a proposal notice issued under this subpart. This section provides that the notice of proposed action must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The final rule includes language that the notice must also provide detailed information with respect to any right to appeal the action pursuant to Public Law 115–91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Public Law 115–91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

In relation to this provision of the proposed rule, OPM received several comments. A national union recommended that OPM revise § 752.203(b) to add “and any other material relevant to the action” to the end of the sentence requiring that agencies inform the employee of his or her right to review the material relied upon to support the reasons for action given in the notice. To support its recommendation, the union gave an example of a scenario wherein there are conflicting witness statements in an investigative report and the agency provides only the statements that it relied upon to propose action. The union believes that in such a scenario, the agency should be obligated to provide all witness statements, including those not relied upon to propose the action. The union’s recommended change does not conform to the statute, which requires only that agencies provide employees with materials relied upon to support the action upon request.

A management association provided comments explaining that one of their members agrees with including more detailed information with respect to appeal rights. The commenting manager cited the benefits to an employee becoming aware of available options before the decision letter thus enabling them to seek legal counsel at an early stage if necessary.

As noted above in § 752.103, an agency raised a concern about including appeal rights information in the notice

of proposed action. The agency suggested that OPM revise the second sentence of § 752.203(b) to read “. . . provides, pursuant to section 1097(b)(2)(A) of Public Law 115–91, notice of any right to appeal” OPM will not accept the suggested change but will offer some clarification.

The requirement to provide the appeal rights information at the proposal notice stage is a statutory requirement under section 1097(b)(2)(A) of Public Law 115–91. Part 752 is amended in part to effectuate the statute, which requires that a notice of proposed action under subparts B, D and F include detailed information about any right to appeal any action upheld, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This regulatory change does not confer on an employee a right to seek redress at the proposal stage that an employee did not have previously. As the above-referenced commenter notes, this information may assist employees with regard to decisions such as whether he or she may want to seek representation. While there are specific circumstances where there may be a cause of action at the proposal stage, such as when an employee alleges that a proposed action constitutes retaliation for previous whistleblower activity, an employee would generally not have a colorable claim under any of the venues discussed in the appeal rights section unless and until a decision was issued that conferred such rights on the employee.

OPM would further clarify that the appeal rights language included at the proposal stage specifically relating to choice of forum and limitations related to an employee's choice of forum will vary depending on circumstances, the nature of a claim and the type of employee. Appeal rights may include but are not be limited to filing an Equal Employment Opportunity complaint with the Equal Employment Opportunity Commission; a prohibited personnel practice complaint with the U.S. Office of Special Counsel (OSC); a grievance under a negotiated grievance procedure; or an appeal with the Merit Systems Protection Board. Each process has different requirements and standards that must be satisfied. Meanwhile, the extent to which a choice of venue may preclude subsequent pursuit of a claim in a different venue will be determined by a statutory patchwork that includes 5 U.S.C. 7121 and 5 U.S.C. 7702.

OPM does not view the addition of procedural appeal rights language in the

regulation to constitute a requirement to provide substantive legal guidance at the proposal stage or to serve as a substitute for the advice from an employee's representative. Given this, as well as the divergent circumstances and individualized nature of any particular adverse action, agencies are encouraged and advised to consult closely with their agency counsel to develop the best course of action for implementation of this requirement. Employees are encouraged to consult with their representatives to determine the best options available to them at the proposal and/or decision stage if an employee believes that an agency has taken an action which triggers the right to file a complaint, an appeal or a grievance.

Finally, the language in § 752.203(h) establishes the same requirement that is detailed in the final rule changes at § 432.108, Settlement agreements. See discussion in § 432.108.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removals, suspensions for more than 14 days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of 30 days or less for covered employees.

Section 752.401 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.401(b)(14) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.401(c) identifies employees covered by this subpart. The final rule at § 752.401(c)(2) updates coverage to include an employee in the competitive service who is not serving a probationary or trial period under an initial appointment or, except as provided in section 1599e of title 10, United States Code, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. This language has been updated to align with 5 U.S.C. 7511(a)(1)(A)(ii).

Section 752.402 Definitions

The final rule includes a definition for the term “business day.” This addition is necessary to implement the 15-business day decision period described in E.O. 13839.

Section 752.403 Standard for Action and Penalty Determination

As with the rule changes finalized for § 752.202, the standard for action under

this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839.

One commenter recommended changing § 752.403(d) to add to the end “Differences in penalties between similarly situated employees must depend on specific factual difference between those employees. To the greatest extent practicable, agencies must document and explain these differences in the record to defend against later allegations of disparate penalties.” In support of his position, the commenter cites *Lewis v. Department of Veterans Affairs*, 111 M.S.P.R. 388, 391 (2009) and quotes the decision whereby an agency must prove a legitimate reason for the difference in treatment by a preponderance of evidence if an employee raises an allegation of disparate penalties in comparison to specified employees. OPM will not adopt the recommended change as it is unnecessary. Please see discussion in § 752.202 for further details.

The final rule at § 752.403 also adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

A management association concurred with OPM that a demotion or suspension should not be substituted for removal when removal is appropriate. The association reasoned that such a substitution will not fix the underlying problem. As the association did not recommend any changes, none will be made based on this comment.

An agency suggested adding “more” before “appropriate” in the first sentence of 752.403(f). The agency stated that as written, the language could be read as requiring removal even if suspension would be more appropriate. For the reasons discussed in § 752.202, OPM will not adopt the revision.

Section 752.404 Procedures

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. In particular, § 752.404(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C.

7513(b)(1). Any notice period greater than 30 days must be reported to OPM.

In reference to § 752.404(b)(1) regarding notice periods, a national union stated that “OPM cannot unilaterally take a negotiable topic off the bargaining table, as this subsection would do.” We disagree. In fact, the Statute recognizes situations where bargaining would not extend to matters that are the subject of Federal law or Government-wide rule or regulation; see 5 U.S.C. 7117(a)(1). And while commenters may disagree, as a matter of policy, with the subjects the President has determined are sufficiently important for inclusion in an Executive Order and Federal regulation, it is well established that the President has the authority to make this determination and that OPM regulations issued pursuant to this authority constitute Government-wide rules under Section 7117(a)(1) for the purpose of foreclosing bargaining. See *NTEU v. FLRA*, 30 F.3d 1510, 1514–16 (D.C. Cir. 1994).

The final rule also includes the requirement that the notice must provide detailed information with respect to any right to appeal the action pursuant to Public Law 115–91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement in Public Law 115–91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

As noted above, an agency voiced concern about including appeal rights information in the notice of proposed action. The agency recommended modifying § 752.404(b)(1) to read “The notice must further include, pursuant to section 1097(b)(2)(A) of Public Law 115–91, detailed information with respect to any right to appeal” For the reasons discussed above in § 752.203, OPM will not accept the suggested change.

The final rule at § 752.404(b)(3)(iv) also discusses the provisions of 5 U.S.C. 6329b, the Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. An agency stated that the rule is silent on an agency’s authorization to use administrative leave for the duration of the notice period (*i.e.*, 30 days), which would be in excess of the 10 days per year limitation under 5 U.S.C. 6329a. The agency asked for clarification on the authority by which agencies may or may not use

administrative leave for the duration of the notice period until notice leave regulations are implemented.

Until OPM has published the final regulation for 5 U.S.C. 6329b and after the conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee’s continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an agency will continue to have as an alternative the ability to place an employee in a paid non-duty status for such time to effect the action. Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

An individual commented that the rule appears to be incorrect in stating that an agency may place an employee in a notice leave status “after conclusion of the agency implementation period.” The commenter stated that the subpart needs to be modified to reflect “investigative leave.” We note that the rule addresses the notice of proposed action, which would be subsequent to the investigation. Investigative leave would be an inappropriate status during the notice period. The “implementation period” refers to the statutory requirement that agencies, not later than 270 calendar days after the publication date of OPM regulations effectuating 5 U.S.C. 6329b, must revise and implement the internal policies of the agency to meet the notice leave requirements. See 5 U.S.C. 6329b(h)(2).

Finally, the final rule at § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the final rule at § 752.404(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee’s opportunity to respond to reflect a key principle of E.O. 13839.

An agency expressed support for the timely handling of adverse actions and added that the regulatory amendments will discourage unreasonable delays for both employees and supervisors. The agency cautioned that human resources staffs will need to have sufficient resources to assist supervisors in meeting the 15-business day limit. The agency recommended that OPM clarify in the final rule what will happen in the event an agency does not comply with the time limitation set by the rule as well as the consequence for the employee and/or manager that does not

meet the deadline. OPM concurs that the regulatory changes will discourage unreasonable delays. OPM believes the recommended modification is unnecessary. The regulatory amendment states that agencies are to issue decisions on proposed removals within 15 business days, to the extent practicable. The purpose of the change is to facilitate an agency’s ability to resolve adverse actions in a timely manner. To the extent an agency fails to exercise its authority to act promptly, the agency risks retaining a subpar or unfit employee longer than necessary.

Two national unions objected to limiting advance notice of an adverse action to 30 days. One of the unions objected further to requiring agencies to report to OPM the number of adverse actions for which employees receive written notice in excess of 30 days. Claiming that the requirements are unsupported by facts and counterproductive, the union stated that the regulations will hinder the efficient resolution of cases prior to litigation by curtailing the time in which an agency and employee might reach an alternative resolution. The union called for the limitation to be withdrawn. The other union asserted that due process violations could result if agencies rush the time to respond or give an employee too little time to respond in such circumstances as voluminous materials to review or a personal emergency. The union asserted the limited time frame for an employee to respond to a proposed disciplinary action is contrary to the due process protections of the Constitution. Citing *Loudermill and Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999), the union noted that an employee must be given a meaningful opportunity to respond and invoke the discretion of the deciding official.

In addition, an organization discussed the various tasks such as securing counsel, drafting affidavits and interviewing witnesses that may impact an employee’s ability or time to respond to a proposed action. The organization expressed concern that limiting the written notice of an adverse action to the 30 days prescribed in 5 U.S.C. 7513(b)(1) in turn limits the opportunity for identification of evidence and rushes management into hasty decisions. The organization objected to a cap on the response period or a limit on an agency’s discretion to extend the notice period or implement the adverse action. The organization believes that agencies should retain discretion to go beyond 30 days for a decision when requested by the employee for good reason. The organization added that the existing

system works satisfactorily, and agencies are not prejudiced given that they are in control of the length of any extension.

OPM will not make any revisions based on these comments. The regulatory changes effectuate the principles and requirements of E.O. 13839, including swift and appropriate action when addressing misconduct. These changes facilitate timely resolution of adverse actions while preserving employee rights provided under the law.

Section 752.407 Settlement Agreements

The language in this section establishes the same requirement that is detailed in the final rule changes at § 432.108, Settlement agreements. See discussion regarding § 432.108 above.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

This subpart addresses the procedural requirements for suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

A management association commented that it does not see much difference between SES and the rest of the workforce in this situation. OPM will not adopt any revisions based on this comment as none were requested.

Section 752.601 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.601(b)(2) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.602 Definitions

The final rule includes a definition for the term “business day.” This addition is necessary to implement the 15-business day decision period described in E.O. 13839.

Section 752.603 Standard for Action and Penalty Determination

As with the final rule changes for §§ 752.202 and 752.403, the standard for action under this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839. In addition, the proposed rule at § 752.603 adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as

may be appropriate under applicable facts.

Please see discussion in §§ 752.202 and 752.403.

Section 752.604 Procedures

Section 752.604(b) discusses the requirements for a notice of proposed action issued under this subpart. We have revised the language in this subpart to be consistent with the advance notice period for general schedule employees. Specifically, § 752.604(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7543(b)(1). Any notice period greater than 30 days must be reported to OPM.

The final rule also includes additional language that the notice must provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115–91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Public Law 115–91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

As previously discussed, an agency recommended modifying the regulatory language regarding advance notice of appeal rights information at the proposal stage. Specifically, the agency recommended changing § 752.604(b)(1) to read “The notice must further include, pursuant to section 1097(b)(2)(A) of Public Law 115–91, detailed information with respect to any right to appeal . . .” For the reasons discussed in § 752.203, OPM will not adopt the recommendation.

The final rule at § 752.604(b)(2)(iv) also discusses the provisions of 5 U.S.C. 6329b, the Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. However, as noted above, until OPM has published the final regulation for 5 U.S.C. 6329b, and after conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee’s continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an

agency will continue to have as an alternative the ability to place an employee in a paid, nonduty status for such time to effect the action.

Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

Finally, the final rule at § 752.604(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the final rule at § 752.604(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee’s opportunity to respond to reflect one of the key principles of E.O. 13839.

Please see also the discussion in §§ 752.203 and 752.404.

Section 752.607 Settlement Agreements

The language in this section establishes the same requirement that is detailed in the final rule changes at §§ 432.108, 752.203 and 752.407. Please see discussion regarding § 432.108 above.

Technical Amendment

This final rule makes “forum” plural in § 752.203(b).

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

E.O. 13563 and E.O. 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under Executive Order 12866.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017)

because this rule is not significant under 12866.

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in Section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a 'rule' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 315, 432 and 752

Government employees.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 315, 432, and 752 as follows:

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

- 1. Revise the authority citation for part 315 to read as follows:

Authority: 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted;

E.O. 13162, and E.O. 13839. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O.13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart H—Probation on Initial Appointment to a Competitive Position

- 2. Revise § 315.803(a) to read as follows:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment. The agency must notify its supervisors that an employee's probationary period is ending three months prior to the expiration of an employee's probationary period, and then again one month prior to the expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding an employee's fitness for continued employment or otherwise take appropriate action. For example, if an employee's probationary period ends on August 15, 2020, the agency must notify the employee's supervisor on May 15, 2020, and then again on July 15, 2020. If the 3-month and 1-month dates fall on a holiday or weekend, agencies must provide notification on the last business day before the holiday or weekend.

* * * * *

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

- 3. Revise the authority citation for part 432 to read as follows:

Authority: 5 U.S.C. 4303, 4305.

* * * * *

- 4. Amend § 432.103 by revising paragraph (g) to read as follows:

§ 432.103 Definitions.

* * * * *

(g) *Similar positions* mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

* * * * *

- 5. Revise § 432.104 to read as follows:

§ 432.104 Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.

- 6. Amend § 432.105 by revising paragraphs (a)(1), (a)(4)(i)(B)(3) and (4) and paragraph (a)(4)(i)(C) to read as follows:

§ 432.105 Proposing and taking action based on unacceptable performance.

(a) * * *

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in one or more of the critical elements for which the

employee was afforded an opportunity to demonstrate acceptable performance. For the purposes of this section, the agency's obligation to provide assistance, under 5 U.S.C. 4302(c)(5), may be discharged through measures, such as supervisory assistance, taken prior to the beginning of the opportunity period in addition to measures taken during the opportunity period. The agency must take some measures to provide assistance during the opportunity period in order to both comply with section 4302(c)(5) and provide an opportunity to demonstrate acceptable performance under 4302(c)(6).

* * * * *

(4) * * *

(i) * * *

(B) * * *

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);

(4) To consider reasonable accommodation of a disability;

* * * * *

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415.

* * * * *

■ 7. Revise § 432.106(b)(1) to read as follows:

§ 432.106 Appeal and grievance rights.

* * * * *

(b) *Grievance rights.* (1) A bargaining unit employee covered under § 432.102(e) who has been removed or reduced in grade under this part may file a grievance under an applicable negotiated grievance procedure if the removal or reduction in grade action falls within its coverage (i.e., is not excluded by the parties to the collective bargaining agreement) and the employee is:

* * * * *

■ 8. Revise § 432.107(b) to read as follows:

§ 432.107 Agency records.

* * * * *

(b) *When the action is not effected.* As provided at 5 U.S.C. 4303(d), if, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's

performance continues to be acceptable for one year from the date of the advanced written notice provided in accordance with § 432.105(a)(4)(i), any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any agency record relating to the employee.

■ 9. Add § 432.108 to read as follows:

§ 432.108 Settlement agreements.

(a) *Agreements to alter personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting

doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

PART 752—ADVERSE ACTIONS

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

Sec.

752.201 Coverage.

752.202 Standard for action and penalty determination.

752.203 Procedures.

Subpart C [Reserved]

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

Sec.

752.401 Coverage.

752.402 Definitions.

752.403 Standard for action and penalty determination.

752.404 Procedures.

752.405 Appeal and grievance rights.

752.406 Agency records.

752.407 Settlement agreements.

Subpart E [Reserved]

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

Sec.

752.601 Coverage.

752.602 Definitions.

752.603 Standard for action and penalty determination.

752.604 Procedures.

752.605 Appeal rights.

752.606 Agency records.

752.607 Settlement agreements.

■ 10. Revise the authority citation for part 752 to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91.

■ 11. Add subpart A to part 752 to read as follows:

Subpart A —Discipline of Supervisors Based on Retaliation Against Whistleblowers

Sec.

- 752.101 Coverage.
- 752.102 Standard for action and penalty determination.
- 752.103 Procedures.
- 752.104 Settlement agreements.

§ 752.101 Coverage.

(a) *Adverse actions covered.* This subpart applies to actions taken under 5 U.S.C. 7515.

(b) *Definitions.* In this subpart—
Agency—

(1) Has the meaning given the term in 5 U.S.C. 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and
(2) Does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003).

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

Day means a calendar day.

Grade means a level of classification under a position classification system.

Insufficient evidence means evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p).

Pay means the rate of basic pay fixed by law or administrative action for the position held by the employee, that is, the rate of pay before any deductions and exclusive of additional pay of any kind.

Prohibited personnel action means taking or failing to take an action in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b) against an employee of an agency.

Supervisor means an employee who would be a supervisor, as defined in 5 U.S.C. 7103(a)(10), if the entity employing the employee was an agency.

Suspension means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 752.102 Standard for action and penalty determination.

(a) Except for actions taken against supervisors covered under subchapter V of title 5, an agency may take an action under this subpart for such cause as will promote the efficiency of the service as described in 5 U.S.C. 7503(a) and 7513(a). For actions taken under this subpart against supervisors covered under subchapter V of title 5, an agency may take an action based on the standard described in 5 U.S.C. 7543(a).

(b) Subject to 5 U.S.C. 1214(f), if the head of the agency in which a

supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under this subpart—

(1) For the first prohibited personnel action committed by the supervisor—

(i) Shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) May propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(2) For the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

§ 752.103 Procedures.

(a) *Non-delegation.* If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of § 752.102(b), the head of the agency may not delegate that responsibility.

(b) *Scope.* An action carried out under this subpart—

(1) Except as provided in paragraph (b)(2) of this section, shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under 5 U.S.C. 7503, 7513, or 7543; and

(2) Shall not be subject to—
(i) Paragraphs (1) and (2) of 5 U.S.C. 7503(b);

(ii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7513; and

(iii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7543.

(c) *Notice.* A supervisor against whom an action is proposed to be taken under this subpart is entitled to written notice that—

(1) States the specific reasons for the proposed action;

(2) Informs the supervisor about the right of the supervisor to review the material that is relied on to support the reasons given in the notice for the proposed action; and

(d) *Answer and evidence.* (1) A supervisor who receives notice under paragraph (c) of this section may, not later than 14 days after the date on which the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.

(2) If, after the end of the 14-day period described in paragraph (d)(1) of this section, a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under § 752.102 (b), as applicable.

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (d)(1) of this section.

§ 752.104 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, the agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based

action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 12. In § 752.201, revise paragraphs (c)(4) and (5) and add paragraph (c)(6) to read as follows:

§ 752.201 Coverage.

* * * * *

(c) * * *

(4) Of a re-employed annuitant;

(5) Of a National Guard Technician; or

(6) Taken under 5 U.S.C. 7515.

* * * * *

■ 13. In § 752.202, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.202 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time

does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

■ 14. Amend § 752.203 by revising paragraph (b) and by adding paragraph (h) to read as follows:

§ 752.203 Procedures.

* * * * *

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

(h) *Settlement agreements.* (1) An agency shall not agree to erase, remove, alter, or withhold from another agency

any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(2) The requirements described in paragraph (h)(1) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(3) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (h)(1) of this section would, however, continue to

apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 15. In § 752.401, revise paragraphs (b)(14) and (15), add paragraphs (b)(16) and revise paragraph (c)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(b) * * *

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions established at the time of appointment;

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments; or

(16) An action taken under 5 U.S.C. 7515.

(c) * * *

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment; or

(ii) Except as provided in section 1599e of title 10, United States Code, who has completed one year of current continuous service under other than a temporary appointment limited to one year or less;

* * * * *

■ 16. In § 752.402, add the definition for “Business day” in alphabetical order to read as follows:

§ 752.402 Definitions.

* * * * *

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

* * * * *

■ 17. In § 752.403, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.403 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable

reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension or a reduction in grade or pay should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

■ 18. Amend § 752.404 by revising paragraphs (b)(1) and (b)(3)(iv), and adding paragraph (g)(3) to read as follows:

§ 752.404 Procedures.

* * * * *

(b) * * *

(1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable,

agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

(3) * * *

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

* * * * *

(g) * * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

* * * * *

■ 19. Add § 752.407 to read as follows:

§ 752.407 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a

personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 20. Revise § 752.601(b)(2) to read as follows:

§ 752.601 Coverage.

* * * * *

(b) * * *

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, 7532, or 7515.

* * * * *

■ 21. Amend § 752.602 by adding a definition for "Business day" in alphabetical order to read as follows:

§ 752.602 Definitions.

* * * * *

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

* * * * *

■ 22. In § 752.603, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension or reduction in grade or pay should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee

have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

■ 23. Amend § 752.604 by revising paragraphs (b)(1) and (b)(2)(iv), and adding paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

* * * * *

(b) * * *

(1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7543(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b) (2) (A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2) * * *

(iv) Placing the appointee in a paid, no duty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

* * * * *

(g) * * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

* * * * *

■ 24. Add § 752.607 to read as follows:

§ 752.607 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any

information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the

record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the

issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

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Part IV

Securities and Exchange Commission

Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail To Enhance Data Security; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89632; File No. S7–10–20]

RIN 3235–AM62

Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail To Enhance Data Security

AGENCY: Securities and Exchange Commission.

ACTION: Proposed amendments to national market system plan.

SUMMARY: The Securities and Exchange Commission is proposing amendments to the national market system plan governing the consolidated audit trail. The proposed amendments are designed to enhance the security of the consolidated audit trail.

DATES: Comments should be received on or before November 30, 2020.

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. S7–10–20 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. S7–10–20. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of

the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT:

Erika Berg, Special Counsel, at (202) 551–5925, Jennifer Colihan, Special Counsel, at (202) 551–5642, Rebekah Liu, Special Counsel, at (202) 551–5665, Susan Poklemba, Special Counsel, at (202) 551–3360, Andrew Sherman, Special Counsel, at (202) 551–7255, Gita Subramaniam, Attorney Advisor, at (202) 551–5793, or Eugene Lee, Attorney Advisor, at (202) 551–5884, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to the CAT NMS Plan.

TABLE OF CONTENTS

- I. Background
- II. Description of Proposed Amendments
 - A. Comprehensive Information Security Program
 - B. Security Working Group
 - C. Secure Analytical Workspaces
 1. Provision of SAW Accounts
 2. Data Access and Extraction Policies and Procedures
 3. Security Controls, Policies, and Procedures for SAWs
 4. Implementation and Operational Requirements for SAWs
 5. Exceptions to the SAW Usage Requirements
 - D. Online Targeted Query Tool and Logging of Access and Extraction
 - E. CAT Customer and Account Attributes
 1. Adopt Revised Industry Member Reporting Requirements
 2. Establish a Process for Creating Customer-ID(s) in Light of Revised Reporting Requirements
 3. Plan Processor Functionality To Support the Creation of Customer-ID(s)
 4. Reporting Transformed Value
 5. Data Availability Requirements
 6. Customer and Account Attributes in CAIS and Transformed Values
 7. Customer-ID Tracking
 8. Error Resolution for Customer Data
 9. CAT Reporter Support and CAT Help Desk
 - F. Customer Identifying Systems Workflow
 1. Application of Existing Plan Requirements to Customer and Account Attributes and the Customer Identifying Systems
 2. Defining the Customer Identifying Systems Workflow and the General Requirements for Accessing Customer Identifying Systems
 3. Introduction to Manual and Programmatic Access
 4. Manual CAIS Access
 5. Manual CCID Subsystem Access

6. Programmatic Access—Authorization for Programmatic CAIS Access and Programmatic CCID Subsystem
7. Programmatic CAIS Access
8. Programmatic CCID Subsystem Access
- G. Participants' Data Confidentiality Policies
 1. Data Confidentiality Policies
 2. Access to CAT Data and Information Barriers
 3. Additional Policies Relating to Access and Use of CAT Data and Customer and Account Attributes
 4. Approval, Publication, Review and Annual Examinations of Compliance
- H. Regulator & Plan Processor Access
 1. Regulatory Use of CAT Data
 2. Access to CAT Data
- I. Secure Connectivity & Data Storage
- J. Breach Management Policies and Procedures
- K. Firm Designated ID and Allocation Reports
- L. Appendix C of the CAT NMS Plan
- M. Proposed Implementation
 1. Proposed 90-Day Implementation Period
 2. Proposed 120-Day Implementation Period
 3. Proposed 180-Day Implementation Period
- N. Application of the Proposed Amendments to Commission Staff
- III. Paperwork Reduction Act
 - A. Summary of Collections of Information
 1. Evaluation of the CISP
 2. Security Working Group
 3. SAWs
 4. Online Targeted Query Tool and Logging of Access and Extraction
 5. CAT Customer and Account Attributes
 6. Customer Identifying Systems Workflow
 7. Proposed Confidentiality Policies, Procedures and Usage Restrictions
 8. Secure Connectivity—"Allow Listing"
 9. Breach Management Policies and Procedures
 10. Customer Information for Allocation Report Firm Designated IDs
 - B. Proposed Use of Information
 1. Evaluation of the CISP
 2. Security Working Group
 3. SAWs
 4. Online Targeted Query Tool and Logging of Access and Extraction
 5. CAT Customer and Account Attributes
 6. Customer Identifying Systems Workflow
 7. Proposed Confidentiality Policies, Procedures and Usage Restrictions
 8. Secure Connectivity—"Allow Listing"
 9. Breach Management Policies and Procedures
 10. Customer Information for Allocation Report Firm Designated IDs
 - C. Respondents
 1. National Securities Exchanges and National Securities Associations
 2. Members of National Securities Exchanges and National Securities Association
 3. Total Initial and Annual Reporting and Recordkeeping Burdens
 1. Evaluation of the CISP
 2. Security Working Group
 3. SAWs
 4. Online Targeted Query Tool and Logging of Access and Extraction

5. CAT Customer and Account Attributes
6. Customer Identifying Systems Workflow
7. Proposed Confidentiality Policies, Procedures and Usage Restrictions
8. Secure Connectivity—"Allow Listing"
9. Breach Management Policies and Procedures
10. Customer Information for Allocation Report Firm Designated IDs
- E. Collection of Information is Mandatory
- F. Confidentiality of Responses to Collection of Information
- G. Retention Period for Recordkeeping Requirements
- H. Request for Comments
- IV. Economic Analysis
 - A. Analysis of Baseline, Costs and Benefits
 1. CISP
 2. Security Working Group
 3. Secure Analytical Workspaces
 4. OTQT and Logging
 5. CAT Customer and Account Attributes
 6. Customer Identifying Systems Workflow
 7. Participants' Data Confidentiality Policies
 8. Regulator & Plan Processor Access
 9. Secure Connectivity
 10. Breach Management Policies and Procedures
 11. Firm Designated ID and Allocation Reports
 - B. Impact on Efficiency, Competition, and Capital Formation
 1. Baseline for Efficiency, Competition and Capital Formation in the Market for Regulatory Services
 2. Efficiency
 3. Competition
 4. Capital Formation
 - C. Alternatives
 1. Private Contracting for Analytic Environments
 2. Not Allowing for Exceptions to the SAW Use Requirement
 3. Alternative Download Size Limits for the Online Targeted Query Tool
 4. Allowing Access to Customer Identifying Systems From Excepted Environments
 - D. Request for Comment on the Economic Analysis
- V. Consideration of Impact on the Economy
- VI. Regulatory Flexibility Act Certification
- VI. Statutory Authority and Text of the Proposed Amendments to the CAT NMS Plan

I. Background

In July 2012, the Securities and Exchange Commission (the "Commission") adopted Rule 613 of Regulation NMS, which required national securities exchanges and national securities associations (the "Participants")¹ to jointly develop and

submit to the Commission a national market system plan to create, implement, and maintain a consolidated audit trail (the "CAT").² The goal of Rule 613 was to create a modernized audit trail system that would provide regulators with more timely access to a sufficiently comprehensive set of trading data, thus enabling regulators to more efficiently and effectively reconstruct market events, monitor market behavior, and investigate misconduct. On November 15, 2016, the Commission approved the national market system plan required by Rule 613 (the "CAT NMS Plan").³

The security and confidentiality of CAT Data⁴ has been—and continues to be—a top priority of the Commission. The CAT NMS Plan approved by the Commission already sets forth a number of requirements regarding the security and confidentiality of CAT Data. The CAT NMS Plan states, for example, that the Plan Processor⁵ shall be responsible for the security and confidentiality of all CAT Data received and reported to the Central Repository.⁶ In furtherance of

New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

² See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) ("Rule 613 Adopting Release").

³ Securities Exchange Act Release No. 78318 (November 15, 2016), 81 FR 84696, (November 23, 2016) ("CAT NMS Plan Approval Order"). The CAT NMS Plan is Exhibit A to the CAT NMS Plan Approval Order. See CAT NMS Plan Approval Order, at 84943–85034. The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (the "Company"). Each Participant is a member of the Company and jointly owns the Company on an equal basis. The Participants submitted to the Commission a proposed amendment to the CAT NMS Plan on August 29, 2019, which they designated as effective on filing. Under the amendment, the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC serves as the CAT NMS Plan, replacing in its entirety the CAT NMS Plan. See Securities Exchange Act Release No. 87149 (September 27, 2019), 84 FR 52905 (October 3, 2019).

⁴ "CAT Data" is a defined term under the CAT NMS Plan and means "data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as 'CAT Data' from time to time." See CAT NMS Plan, *supra* note 3, at Section 1.1.

⁵ "Plan Processor" is a defined term under the CAT NMS Plan and means "the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to SEC Rule 613 and Sections 4.3(b)(i) and 6.1, and with regard to the Initial Plan Processor, the Selection Plan, to perform the CAT processing functions required by SEC Rule 613 and set forth in this Agreement." See *id.*

⁶ See *id.* at Section 6.5(f)(i). "Central Repository" is a defined term under the CAT NMS Plan and means "the repository responsible for the receipt, consolidation, and retention of all information

this directive, the CAT NMS Plan requires the Plan Processor to develop and maintain an information security program for the Central Repository. The Plan Processor must have appropriate solutions and controls in place to address data confidentiality and security during all communication between CAT Reporters,⁷ Data Submitters,⁸ and the Plan Processor; data extraction, manipulation, and transformation; data loading to and from the Central Repository; and data maintenance by the CAT System.⁹ The CAT NMS Plan also sets forth minimum data security requirements for CAT that the Plan Processor must meet, including requirements governing connectivity and data transfer, data encryption, data storage, data access, breach management, data requirements for personally identifiable information ("PII"),¹⁰ and applicable data security industry standards.¹¹ CAT Data reported to and retained in the Central Repository is thus subject to what the Commission believes are stringent security policies, procedures, standards, and controls. Nevertheless, the Commission believes that it can and should take additional steps to further protect the security and confidentiality of CAT Data. Therefore, the Commission proposes to amend the CAT NMS Plan to enhance the security of the CAT and the protections afforded to CAT Data.

Specifically, the Commission proposes to amend the CAT NMS Plan to: (1) Define the scope of the current

reported to the CAT pursuant to SEC Rule 613 and this Agreement." See *id.*

⁷ "CAT Reporter" is a defined term under the CAT NMS Plan and means "each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c)." See *id.*

⁸ "Data Submitter" is a defined term under the CAT NMS Plan and means "national securities exchanges, national securities associations, broker-dealers, the SIPs for the CQS, CTA, UTP and Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA") Plans, and certain other vendors or appropriate third parties." See *id.* at Appendix C, Section A(1)(a).

⁹ See *id.* at Appendix D, Section 4.1. "CAT System" is a defined term in the CAT NMS Plan and means "all data processing equipment, communications facilities, and other facilities, including equipment, utilized by the Company or any third parties acting on the Company's behalf in connection with operation of the CAT and any related information or relevant systems pursuant to [the CAT LLC Agreement]." See CAT NMS Plan, *supra* note 3, at Section 1.1.

¹⁰ "PII" is a defined term under the CAT NMS Plan and means "personally identifiable information, including a social security number or tax identifier number or similar information; Customer Identifying Information and Customer Account Information." See *id.* at Section 1.1.

¹¹ See *id.* at Section 6.12; see also *id.* at Appendix D, Section 4.

¹ The Participants include BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors' Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAx Emerald, LLC, MIAx PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The Nasdaq Stock Market LLC,

information security program; (2) require the Operating Committee¹² to establish and maintain a security-focused working group; (3) require the Plan Processor to create secure analytical workspaces, direct Participants to use such workspaces to access and analyze PII and CAT Data obtained through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) of the CAT NMS Plan, set forth requirements for the data extraction, security, implementation, and operational controls that will apply to such workspaces, and provide an exception process that will enable Participants to use the user-defined direct query and bulk extract tools in other environments; (4) limit the amount of CAT Data that can be extracted from the Central Repository outside of a secure analytical workspace through the online targeted query tool described in Section 6.10(c)(i)(A) of the CAT NMS Plan and require the Plan Processor to implement more stringent monitoring controls on such data; (5) impose requirements related to the reporting of certain PII; (6) define the workflow process that should be applied to govern access to customer and account attributes that will still be reported to the Central Repository; (7) modify and supplement existing requirements relating to Participant policies and procedures regarding the confidentiality of CAT Data; (8) refine the existing requirement that CAT Data be used only for regulatory or surveillance purposes; (9) codify existing practices and enhance the security of connectivity to the CAT infrastructure; (10) require the formal cyber incident response plan to incorporate corrective actions and breach notifications; (11) amend reporting requirements relating to Firm Designated IDs and Allocation Reports; and (12) clarify that Appendix C of the CAT NMS Plan has not been updated to reflect subsequent amendments to the CAT NMS Plan. The proposed amendments are discussed in more detail below.

II. Description of Proposed Amendments

A. Comprehensive Information Security Program

Section 6.12 of the CAT NMS Plan requires the Plan Processor to develop and maintain an information security program for the Central Repository that, at a minimum, meets the security

requirements set forth in Section 4 of Appendix D to the CAT NMS Plan.¹³ Section 4 of Appendix D sets out information security requirements that cover “all components of the CAT System” and is not limited to the Central Repository.¹⁴ The Commission preliminarily believes that the scope of the information security program referenced in Section 6.12 of the CAT NMS Plan should be more explicitly defined to apply to the CAT System, as well as to the Plan Processor.

Accordingly, the Commission proposes to add the term “Comprehensive Information Security Program” (the “CISP”) to Section 1.1 of the CAT NMS Plan and to define this term to mean the “organization-wide and system-specific controls and related policies and procedures required by NIST SP 800–53¹⁵ that address information security for the information and information systems of the Plan Processor and the CAT System, including those provided or managed by an external organization, contractor, or source.” The proposed definition would further state that the CISP will also apply to Secure Analytical Workspaces, new environments within the CAT System to which CAT Data may be downloaded.¹⁶ The Commission also proposes to make corresponding changes to Section 6.12 of the CAT NMS Plan. Specifically, the Commission proposes to rename Section 6.12 as “Comprehensive Information Security Program”¹⁷ and to delete the phrase

¹³ See *id.* at Appendix D, Section 4 (Data Security). In Appendix D, Section 4, the Plan sets out the basic solutions and controls that must be met to ensure the security and confidentiality of CAT Data. Such requirements relate to Connectivity and Data Transfer (Section 4.1.1); Data Encryption (Section 4.1.2); Data storage and Environment (Section 4.1.3); Data Access (Section 4.1.4); Breach Management (Section 4.1.5); PII Data Requirements (Section 4.1.6); and Industry Standards (Section 4.2).

¹⁴ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4 (“The Plan Processor must provide to the Operating Committee a comprehensive security plan that covers *all components of the CAT System*, including physical assets and personnel” (emphasis added)).

¹⁵ See Security and Privacy Controls for Federal Information Systems and Organizations, NIST Special Publication 800–53 Revision 4, National Institute of Standards and Technology, U.S. Dep’t of Commerce (April 2013), available at <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf> (“NIST SP 800–53”).

¹⁶ See Part II.C. *infra*, for a discussion of the definition of “Secure Analytical Workspace” and the specific CISP requirements that would apply to such environments under proposed Section 6.13.

¹⁷ Similar changes have been made throughout the CAT NMS Plan, at proposed Section 6.2(a)(v)(H), proposed Section 6.5(f)(i)(C), proposed Section 6.6(b)(ii)(B)(3), and proposed Section 4.1 of Appendix D.

“for the Central Repository” in Section 6.12.¹⁸

The Commission preliminarily believes that these proposed amendments are appropriate to set forth all elements of the information security program that must be developed and maintained by the Plan Processor and approved and reviewed at least annually by the Operating Committee.¹⁹ While Section 6.12 of the CAT NMS Plan currently refers to the Central Repository, as noted above, Section 4 of Appendix D refers to information security program requirements that apply more broadly to the entire CAT System²⁰ and also references the NIST SP 800–53 standard as one that must be followed by the Plan Processor.²¹ NIST SP 800–53 defines and recommends security controls, policies, and procedures that should be employed as part of a well-defined risk management process for organizational-level information security programs, including personnel security controls.²² NIST SP 800–53, which sets forth security and privacy controls for federal information systems and organizations, requires the establishment of information security and risk management due diligence on an organizational level.²³ The CAT NMS Plan’s inclusion of NIST SP 800–53 as a relevant industry standard that must be followed to manage data security for information systems therefore requires that the Plan Processor apply its information security program at an organizational level, and not just to the Central Repository. The Commission preliminarily believes the proposed amendments to define the CISP and other corresponding changes should therefore clearly require the information security program to apply to personnel and information systems that support the CAT System.

As explained above, the proposed amendments, by referencing NIST SP

¹⁸ A similar change has been made at proposed Section 6.5(f)(i)(C) to replace a reference to the Central Repository with a reference to the CAT System.

¹⁹ To the extent that the CISP would be made up of multiple policies, procedures, or other documents, the Commission preliminarily believes that the Operating Committee could review each document on an independent or rolling timeline, rather than reviewing all components of the CISP at the same time.

²⁰ See note 14 *supra*.

²¹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.2.

²² See NIST SP 800–53, at 1, *supra* note 15.

²³ See, e.g., *id.* at vi, x–xii. See also, e.g., *id.* at 1 (“The security controls defined in this publication and recommended for use by organizations to satisfy their information security requirements should be employed as part of a well-defined risk management process that supports organizational information security programs.”).

¹² “Operating Committee” is a defined term in the CAT NMS Plan and means “means the governing body of the Company designated as such and described in Article IV.” See *id.* at Section 1.1.

800–53 in the definition of the CISP, would amend Section 6.12 of the CAT NMS Plan to explicitly require the information security program to apply broadly at an organizational level—that is, to address specific organizational mission and/or business needs and risk tolerances for all of the information and information systems that support the operations of the Plan Processor and the CAT System, including Secure Analytical Workspaces.²⁴ The proposed amendments would also explicitly require the information security program to be applied to information systems within the CAT System that are managed or provided by external organizations, contractors, or other sources that the Plan Processor or the Participants may determine that it is necessary to engage to perform functions related to the implementation, operation, or maintenance of the CAT.²⁵ Appendix D, Section 4.1 of the CAT NMS Plan currently requires a comprehensive security plan, including information security requirements, that covers the entire CAT System, and the CAT System, as currently defined, encompasses the data processing equipment, communications facilities, and other facilities utilized by external parties acting on the Company's behalf in connection with the operation of the CAT.²⁶ The proposed amendments would consolidate these requirements into one definition and explicitly require that external parties be subject to the CISP if they are providing or managing information or information systems that are within the CAT System. Finally, the proposed amendments would explicitly state that the CISP includes the controls, policies, and procedures required by NIST SP 800–53, including organizational-level controls. As noted above, this is already a requirement under Appendix D, Section 4 of the CAT NMS Plan, which states that NIST SP 800–53 must be followed as part of a comprehensive security plan applying to all components of the CAT System

²⁴ Under the proposed amendments, Secure Analytical Workspaces would, by definition, be within the CAT System. See proposed Section 1.1, “Secure Analytical Workspace.” The inclusion of Secure Analytical Workspaces in the proposed definition of the CISP would therefore not be an expansion, as the current information security program is required to cover the entire CAT System pursuant to Appendix D, Section 4 of the CAT NMS Plan.

²⁵ For example, the Plan Processor engaged an external contractor to implement and operate the component of the CAT known as the Customer and Account Information System (“CAIS”). The Plan Processor also selected an external cloud provider as the host for the CAT System.

²⁶ See CAT NMS Plan, *supra* note 3, at Section 1.1; see *id.* at Appendix D, Section 4.

implemented by the Plan Processor.²⁷ Nevertheless, the Commission preliminarily believes that including an explicit reference to NIST SP 800–53 in the proposed definition of the CISP will reinforce that fact.

The Commission preliminarily believes that these changes should improve the security of the CAT by defining the scope of the information security program required to be developed and maintained by the Plan Processor to be sufficiently clear and to account for the entire CAT, with accompanying personnel security controls for all Plan Processor staff and relevant personnel from external organizations, contractors or other sources, and for all relevant information systems or environments.

The Commission requests comment on the proposed definition of the CISP and the proposed corresponding changes to the CAT NMS Plan. Specifically, the Commission solicits comment on the following:

1. Is the proposed definition for the CISP necessary? Is it already clear that the information security requirements described in Section 6.12 and Appendix D, Section 4 apply at an organizational level to the Plan Processor, to external parties acting on behalf of the Company to support CAT operations, and to all information systems or environments that are within the CAT System, including Secure Analytical Workspaces? Is it already clear that the information security requirements described in Section 6.12 and Appendix D, Section 4 must incorporate the controls, policies, and procedures required by NIST SP 800–53?

2. Should the proposed definition for the CISP be expanded or modified? Are there other personnel, information systems, organizations, or environments that should be covered by the CISP? If so, please specifically identify those personnel, information systems, organizations, or environments and explain why it would be appropriate to include them in the definition of the CISP.

3. Should additional references in the CAT NMS Plan related to the information security program be conformed to refer to the CISP? Should proposed Section 6.12 refer to any other provisions of the CAT NMS Plan in addition to Section 4 of Appendix D and Section 6.13? If so, please identify those provisions and explain why it would be appropriate to incorporate a reference to such provisions in proposed Section 6.12.

²⁷ See *id.* at Section 6.12, Appendix D, Section 4.2.

B. Security Working Group

To provide support and additional resources to the Chief Information Security Officer of the Plan Processor (the “CISO”) and the Operating Committee of the CAT NMS Plan, the proposed amendments would require the Operating Committee to establish and maintain a security working group composed of the CISO and the chief information security officer or deputy chief information security officer of each Participant (the “Security Working Group”).²⁸ Commission staff would be permitted to attend all meetings of the Security Working Group as observers, and the CISO and the Operating Committee would further be allowed to invite other parties to attend specific meetings.³⁰ The proposed amendments would specify that the purpose of the Security Working Group shall be to advise the CISO and the Operating Committee,³¹ including with respect to issues involving: (1) Information technology matters that pertain to the development of the CAT System; (2) the development, maintenance, and application of the CISP; (3) the review and application of the confidentiality policies required by proposed Section 6.5(g); (4) the review and analysis of

²⁸ “Chief Information Security Officer” is a defined term under the CAT NMS Plan and means “the individual then serving (even on a temporary basis) as the Chief Information Security Officer pursuant to Section 4.6, Section 6.1(b), and Section 6.2(b).” See CAT NMS Plan, *supra* note 3, at Section 1.1. The CISO is an officer of the Company and has a fiduciary duty to the Company. See *id.* at Section 4.6(a), Section 4.7(c). The CISO, among other things, is responsible for creating and enforcing appropriate policies, procedures, and control structures regarding data security. See *id.* at Section 6.2(b)(i) and 6.2(b)(v).

²⁹ See proposed Section 4.12(c).

³⁰ See *id.* Given the sensitive nature of the issues that would be discussed at meetings of the Security Working Group, the Commission believes that the CISO and the Operating Committee should consider requiring any non-member invitees to sign a non-disclosure agreement or to adhere to some other protocol designed to prevent the release of confidential information regarding the security of the CAT System. Members of the Security Working Group, and any Participant staff that they consult regarding matters before the Security Working Group, would likewise be subject to the confidentiality obligations set forth in Section 9.6 of the CAT NMS Plan. See, e.g., CAT NMS Plan, *supra* note 3, at Section 9.6(a) (stating that information disclosed by or on behalf of the Company or a Participant to the Company or any other Participant (the “Receiving Party”) shall be maintained by the Receiving Party in confidence with the same degree of care it holds its own confidential information and disclosed to its Representatives on a need-to-know basis and only to those of such Representatives who have agreed to abide by the non-disclosure and non-use provisions of Section 9.6).

³¹ The proposed amendments would clearly state that the CISO shall continue to report directly to the Operating Committee in accordance with Section 6.2(b)(iii) of the CAT NMS Plan. See proposed Section 4.12(c).

third party risk assessments conducted pursuant to Section 5.3 of Appendix D, including the review and analysis of results and corrective actions arising from such assessments; and (5) emerging cybersecurity topics.³² In addition, the proposed amendments would require the CISO to apprise the Security Working Group of relevant developments and to provide the Security Working Group with all information and materials necessary to fulfill its purpose.³³

The Commission preliminarily believes it is appropriate to require the Operating Committee to formally establish and maintain a Security Working Group.³⁴ Although a group has already been established by the Operating Committee to discuss the security of the CAT,³⁵ the Commission preliminarily believes it is important to require the formation of a Security Working Group with a defined set of participants and a defined purpose. The proposed amendments, for example, would require that each Participant's chief information security officer or deputy chief information security officer be a member of the Security Working Group; other security and regulatory experts would not fulfill the requirements of the proposed amendments.³⁶ The Commission preliminarily believes these membership requirements are appropriate, because the chief information security officer and deputy chief information security officer of each Participant are the parties that are most likely to have general expertise with assessing organizational-level security issues for complex information systems. Moreover, because the Central Repository is a facility of each Participant,³⁷ the Commission preliminarily believes that the chief

information security officer and deputy chief information security officer of each Participant are likely to have specific expertise with assessing organizational-level and system-specific security issues for the CAT System, as well as an interest in making sure that the CAT System and CAT Data are sufficiently protected. The Commission therefore preliminarily believes that requiring the membership of each Participant's chief information security officer or deputy chief information security officer in the Security Working Group should help to provide effective oversight of CAT security issues.

The proposed amendments would permit the CISO and the Operating Committee to invite other parties, including external consultants with expertise in organizational-level or system-specific security or industry representatives, to attend specific meetings. In addition, the proposed amendments would permit Commission observers to attend all meetings. The Commission preliminarily believes these provisions will enable the Security Working Group to obtain a broad spectrum of views and to present such views to the CISO and the Operating Committee on key security issues.

Finally, the proposed amendments would state that the purpose of the group shall be to aid the CISO and the Operating Committee.³⁸ This is a broad mandate, because the Commission preliminarily believes that the CISO and the Operating Committee would generally benefit from the combined expertise of the Security Working Group on a broad array of matters. To enable the Security Working Group to provide the requisite aid, the proposed amendments would further state that the CISO must apprise the Security Working Group of relevant developments and provide the Security Working Group with all information and materials necessary to fulfill its purpose. This provision is designed to keep the Security Working Group adequately informed about issues that fall within its purview.

The proposed amendments would also require the Security Working Group to aid the CISO and the Operating Committee on certain issues that the

Commission preliminarily believes are particularly important. For example, issues involving information technology matters that pertain to the development of the CAT System,³⁹ the development of the CISP,⁴⁰ or emerging cybersecurity topics⁴¹ are likely to present questions of first impression, and it is important that such questions be handled appropriately in the first instance. The Commission preliminarily believes that the involvement of the Security Working Group could be of valuable assistance to the CISO. Similarly, issues involving the maintenance and application of the CISP⁴² and the review and application of the confidentiality policies required by proposed Section 6.5(g)⁴³ relate to two initiatives that would protect the security and confidentiality of CAT Data. These initiatives would control access to and extraction of such data outside the Central Repository and would directly impact how Participants interact with CAT Data within and outside the CAT System.⁴⁴ The Commission preliminarily believes that the Security Working Group would be able to provide valuable feedback on these initiatives, which, as explained more fully below, are critical to the security of the CAT because they would govern the development and implementation of the Participants' confidentiality and security policies for handling non-public data generally and CAT Data specifically.⁴⁵ The Commission also preliminarily believes that the Security Working Group should aid the CISO in reviewing and analyzing third-party risk assessments conducted pursuant to Section 5.3 of Appendix D, as well as the results and corrective actions arising from such assessments.⁴⁶ Given the combined expertise of the Security Working Group, the Commission preliminarily believes that its membership would be uniquely adept at understanding the results, prioritizing necessary corrective action, and providing valuable feedback on the plan of action to address any open

³² See *id.*

³³ See *id.* With respect to this provision, the Commission does not preliminarily believe that members of the Security Working Group would need access to CAT Data to fulfill their function. Nonetheless, because members of the Security Working Group would not be considered "Regulatory Staff" under the proposed amendments described in Part II.G.2.a., Security Working Group members would only be able to gain access to CAT Data by following the policies set forth in proposed Section 6.5(g)(i)(E).

³⁴ See *id.* The Commission proposes a conforming change to the title of this section to make it clear that section will apply to both subcommittees and working groups.

³⁵ See CAT Security Overview: Safeguarding Data Reported to CAT, available at https://www.catnmsplan.com/wp-content/uploads/2019/08/FINRA-CAT-Security-Approach-Overview_20190828.pdf.

³⁶ See proposed Section 4.12(c).

³⁷ See, e.g., CAT NMS Plan, *supra* note 3, at Appendix C (indicating that the CAT will be a facility of each Participant).

³⁸ The list of issues provided in proposed Section 4.12(c) is not exclusive; it may be appropriate for the Security Working Group to aid the CISO with respect to other issues, and the proposed amendments require the involvement of the Security Working Group on other matters. See, e.g., proposed Section 6.13(d)(i)(A) (requiring a Participant seeking an exception from the proposed Secure Analytical Workspace usage requirements to provide the Security Working Group with specified application materials).

³⁹ See proposed Section 4.12(c)(i).

⁴⁰ See *id.* at (c)(ii).

⁴¹ See *id.* at (c)(v).

⁴² See *id.* at (c)(ii).

⁴³ See *id.* at (c)(iii).

⁴⁴ See Part II.A. *supra*, for a discussion of the proposed CISP and its importance to CAT security; Part II.C. *infra*, for a discussion of data access and extraction policies that would be applied as part of the proposed CISP. See also Part II.G. *infra*, for a discussion of the proposed amendments relating to Participants' data confidentiality policies, which would include restrictions on data access and extraction, and their importance to CAT security.

⁴⁵ See *id.*

⁴⁶ See proposed Section 4.12(c)(iv).

issues that might be identified by these assessments.

The Commission requests comment on proposed Section 4.12(c). Specifically, the Commission solicits comment on the following:

4. Should a Security Working Group be formally established and maintained?

5. The proposed amendments require the Security Working Group to be composed of the CISO and the chief information security officer or deputy chief information security officer of each Participant. Do commenters agree that the chief information security officer or deputy chief information security officer of each Participant is likely to be best informed regarding security issues that might affect the CAT? Should any other parties be included as required members of the Security Working Group? If so, please identify these parties and explain why it would be appropriate to include them. For example, should representatives from the Advisory Committee established by Section 4.13 of the CAT NMS Plan be added as required members to the Security Working Group? Should the CISO and the Operating Committee be permitted to invite other parties to attend specific meetings? Should any limitations be placed on the kinds of parties the CISO and the Operating Committee may invite? For example, should the CISO and the Operating Committee be limited to inviting personnel employed by the Participants, because such personnel would already be subject to the confidentiality obligations set forth in Section 9.6 of the CAT NMS Plan for Representatives? If not, should external parties invited by the CISO and the Operating Committee be explicitly required by proposed Section 4.12(c) to sign a non-disclosure agreement or to comply with any other kind of security protocol in order to prevent the disclosure of confidential information regarding the security of the CAT System? If so, please identify the security protocol such parties should comply with and explain why such protocol would be effective.

6. The proposed amendments state that the Security Working Group's purpose is to advise the CISO and the Operating Committee. Is that an appropriate mandate? If not, please identify a mandate that would be appropriate and explain why it is a better mandate for the Security Working Group. Should the Security Working Group advise the Plan Processor or some other party, instead of the CISO and the Operating Committee?

7. Will the proposed amendments keep the Security Working Group

apprised of relevant information or developments? Should the proposed amendments require the CISO and/or the Operating Committee to consult the Security Working Group only on certain matters? If so, please identify these matters and explain why it would be appropriate to require the CISO and/or the Operating Committee to consult the Security Working Group only on such matters. Should the proposed amendments require periodic meetings among the CISO, the Operating Committee and the Security Working Group? If so, how often should such meetings occur and why? Should the proposed amendments require the Security Working Group to provide the CISO and/or the Operating Committee with feedback on a regular basis?

8. The proposed amendments include a non-exhaustive list of specific issues that would be within the purview of the Security Working Group. Should this list include any additional matters? Should any of these matters be removed from this list or amended?

C. Secure Analytical Workspaces

The CAT NMS Plan must sufficiently enable regulators to access and extract CAT Data in order to achieve specific regulatory purposes. The CAT NMS Plan currently describes various means by which regulators may access and extract CAT Data. Section 6.5(c) of the CAT NMS Plan, for example, requires the Plan Processor to provide regulators access to the Central Repository for regulatory and oversight purposes and to create a method of accessing CAT Data that enables complex searching and report generation. Section 6.10(c) of the CAT NMS Plan specifies two methods of regulator access: (1) An online targeted query tool with predefined selection criteria to choose from; and (2) user-defined direct queries and bulk extracts of data via a query tool or language allowing querying of all available attributes and data sources.⁴⁷ The CAT NMS Plan also specifies how regulators may download the results obtained in response to these queries. For example, with respect to the online targeted query tool, the CAT NMS Plan provides that, "[o]nce query results are available for download, users are to be given the total file size of the result set and an option to download the results

in a single or multiple file(s). Users that select the multiple file option will be required to define the maximum file size of the downloadable files. The application will then provide users with the ability to download the files. This functionality is provided to address limitations of end-user network environment[s] that may occur when downloading large files."⁴⁸ With respect to the user-defined direct queries and bulk extracts of data, the CAT NMS Plan provides that "[t]he Central Repository must provide for direct queries, bulk extraction, and download of data for all regulatory users. Both the user-defined direct queries and bulk extracts will be used by regulators to deliver large sets of data that can then be used in internal surveillance or market analysis applications."⁴⁹

To better protect CAT Data, the Commission preliminarily believes that efforts should be taken to minimize the attack surface associated with CAT Data; to maximize security-driven monitoring of CAT Data, both as it is reported to the CAT and as it is accessed and utilized by regulators; and to leverage, wherever possible, security controls and related policies and procedures that are consistent with those that protect the Central Repository.

The Commission preliminarily believes that these objectives can be met by requiring the creation and use of Secure Analytical Workspaces ("SAWs") that would be part of the CAT System and therefore subject to the CISP.⁵⁰ The proposed amendments would define a "Secure Analytical Workspace" as "an analytic environment account that is part of the CAT System, and subject to the Comprehensive Information Security Program, where CAT Data is accessed and analyzed as part of the CAT System pursuant to [proposed] Section 6.13. The Plan Processor shall provide a SAW account for each Participant that implements all common technical security controls required by the Comprehensive Information Security Program."⁵¹ The Commission also proposes to add a new Section 6.13 to the CAT NMS Plan to set forth the requirements that would apply to SAWs. The Commission understands that the Participants have recently

⁴⁷ See CAT NMS Plan, *supra* note 3, at Section 6.10(c)(i); see also *id.* at Appendix D, Section 8.1 through Section 8.2. Section 6.10(c) also requires the Plan Processor to reasonably assist regulatory staff with queries, to submit queries on behalf of regulatory staff (including regulatory staff of Participants) as reasonably requested, and to maintain a help desk to assist regulatory staff with questions about the content and structure of CAT Data. *Id.* at Section 6.10(c)(iv) through (vi).

⁴⁸ See *id.*, at Appendix D, Section 8.1.1.

⁴⁹ See *id.*, at Appendix D, Section 8.2.

⁵⁰ In addition, the Commission also preliminarily believes that certain limitations on the downloading capabilities of the online targeted query tool will help to achieve these objectives. See Part II.D. *infra*, for a discussion of these proposed limitations.

⁵¹ See proposed Section 1.1, "Secure Analytical Workspace."

authorized the Plan Processor to build similar environments for some of the Participants and that each Participant would be responsible for the implementation of its own security controls.⁵² The Commission preliminarily believes that it would be beneficial to require that the Plan Processor provide SAW accounts to be used by all Participants in certain circumstances and to formally codify the functionality available in and the security controls applicable to SAWs. The Commission preliminarily believes that this approach will best enable the implementation of the SAWs with a consistent and sufficient level of security.

Accordingly, the Commission is proposing amendments to the CAT NMS Plan that will specify: (1) The provision of the SAW accounts; (2) data access and extraction policies and procedures, including SAW usage requirements; (3) security controls, policies, and procedures for SAWs; (4) implementation and operational requirements for SAWs; and (5) exceptions to the SAW usage requirements. These proposed amendments are discussed in further detail below.

1. Provision of SAW Accounts

The proposed amendments would require each Participant to use a SAW for certain purposes,⁵³ but the proposed definition of “Secure Analytical Workspace” and proposed Section 6.1(d)(v) make it clear that Participants would not build their own SAWs within the CAT System or implement the technical security controls required by the CISP. Rather, the proposed amendments state that the “Plan Processor shall provide a SAW account for each Participant that implements all common technical security controls required by the Comprehensive Information Security Program.”⁵⁴

⁵² See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Hon. Jay Clayton, Chairman, Commission, dated November 27, 2019, at 4–5, available at <https://www.catnmsplan.com/sites/default/files/2020-02/Simon-Letter-SIFMA-%28Final%29.pdf> (“Simon Letter”).

⁵³ See Part II.C.2. *infra*, for a discussion of the SAW usage requirements.

⁵⁴ See proposed Section 1.1, “Secure Analytical Workspaces.” See also proposed Section 6.1(d)(v) (stating that the Plan Processor shall “provide Secure Analytical Workspaces in accordance with Section 6.13”). The Central Repository, as a facility of each of the Participants, is an SCI entity and the CAT System is an SCI system, and thus it must comply with Regulation SCI. See CAT NMS Plan Approval Order, *supra* note 3, at 84758; see also 17 CFR 242.1000 (definition of “SCI system” and “SCI entity”). Because the CAT systems, including the Central Repository, are operated on behalf of the Participants by the Plan Processor, the Participants are responsible for having in place processes and

The Commission preliminarily believes that requiring the Plan Processor to provide SAW accounts to the Participants that implement all common technical security controls required by the CISP is the most effective way to achieve a consistent level of security across multiple SAWs and between SAWs.⁵⁵ The Commission preliminarily believes that the alternative of allowing each Participant to build its own SAW would inhibit the Plan Processor’s ability to control, manage, operate, and maintain the CAT System, which would include the SAWs. By centralizing provision of the SAW accounts with the Plan Processor, the common technical controls associated with the CISP should be built consistently and in a way that newly enables the Plan Processor to conduct consistent and comprehensive monitoring of analytic environments employed by Participants to access and analyze CAT Data—a task the Plan Processor is not currently able to perform.⁵⁶

The Plan Processor is the party most familiar with the existing information security program and would be the party most familiar with the security controls, policies, and procedures that would be required under the proposed CISP. The Commission preliminarily believes this familiarity would enable

requirements to ensure that they are able to satisfy the requirements of Regulation SCI for the CAT systems operated by the Plan Processor on their behalf. See also Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251, 72276 (December 5, 2014) (“Regulation SCI Adopting Release”). The CAT NMS Plan states that data security standards of the CAT System shall, at a minimum, satisfy all applicable regulations regarding database security, including provisions of Regulation SCI. The Plan Processor thus must establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the CAT System has levels of capacity, integrity, resiliency, availability, and security adequate to maintain its operational capability to comply with Regulation SCI. See CAT NMS Plan Approval Order, *supra* note 3, at 84758–59; CAT NMS Plan, *supra* note 3, at Section 6.9(b)(xi)(A). See also, e.g., Letter from Michael J. Simon, Chair, CAT NMS, LLC Operating Committee, to Brent J. Fields, Secretary, Commission, at 1–2, dated April 9, 2019, available at <https://www.sec.gov/divisions/marketreg/rule613-info-notice-of-plan-processor-selection-040919.pdf> (setting forth the material terms of the Plan Processor agreement, which obligate the Plan Processor to perform CAT-related functions and services in a manner that is consistent with and in accordance with the CAT NMS Plan and Commission rules and regulations).

⁵⁵ See Part II.C.3. *infra* for a discussion of the common technical security controls that must be required for SAWs by the CISP. The Commission also preliminarily believes that this requirement would enable the Plan Processor to achieve a consistent level of security across the CAT System, as the Central Repository and the SAWs would have common controls that were implemented by the same party.

⁵⁶ See Part II.C.4.b. *infra* for a discussion of the monitoring requirements for SAWs.

the Plan Processor to build the required security controls more efficiently and more effectively than if each Participant were responsible for its own SAW account.⁵⁷ If each Participant were permitted to build the common security controls for its SAW account without the input or knowledge of the Plan Processor, different Participants might make different (and potentially less secure) decisions about how to implement the information security program or the proposed CISP. These different decisions could, in turn, hamper the Plan Processor’s ability to consistently monitor the SAWs, because it would be difficult for the Plan Processor to automate its monitoring protocols or to uniformly monitor SAWs that had been not been uniformly implemented. A lack of consistent monitoring could endanger the overall security of the CAT, because the Plan Processor could be less likely to identify non-compliance with the CISP or with the SAW design specifications.⁵⁸

The Commission also preliminarily believes that centralizing provision of the SAW accounts with the Plan Processor is the most efficient approach.⁵⁹ Given the size of the CAT database that the Plan Processor already manages in a cloud environment, the Plan Processor is in a position to leverage economies of scale and, possibly, to obtain preferential pricing in establishing SAW accounts with the same cloud provider and in the same cloud environment.⁶⁰ Having the Plan Processor be responsible for the provision of all SAW accounts could also make administration of SAW security easier. For example, cloud environments offer features that enable security-related administrative functions to be performed simultaneously and consistently across multiple accounts. Such features could also be leveraged by the Plan Processor to extend its existing information security controls for the Central

⁵⁷ See, e.g., CAT NMS Plan, *supra* note 3, at Section 6.12 (requiring the Plan Processor to develop and maintain the information security program).

⁵⁸ See note 56 *supra*.

⁵⁹ Because SAW accounts are, by definition, part of the CAT System, the Commission preliminarily believes that SAW accounts would likely be built by the same cloud provider and in the same cloud environment as the Central Repository.

⁶⁰ See Part IV.C.1. *infra* for a discussion of the potential costs related to each Participant providing its own SAW account. With respect to SAW pricing, the Commission preliminarily believes that the Plan Processor will charge back variable cloud services fees to each Participant in a manner consistent with how current variable fees incurred by the Plan Processor are charged back to the Company. See Part IV.A.3. *infra* for further discussion of such pricing and potential fees.

Repository across all SAW accounts. Requiring each Participant to independently implement relevant security controls would be comparatively inefficient, needlessly duplicative, and, potentially, less secure.

Although the Plan Processor would provide each SAW account, the proposed amendments would still afford the Participants a fair amount of autonomy in the operation of the SAW. The definition of “Secure Analytical Workspace” would make it clear that proposed Section 6.13 would govern the use of the SAWs, and proposed Section 6.13 explicitly states that each Participant would be allowed to provide and use its own choice of software, hardware configurations, and additional data within its SAW, so long as such activities otherwise comply with the CISP.⁶¹ This language would permit the Participants to create whatever analytic environment they prefer within the SAWs. For example, each Participant would be free to choose which hardware configurations inclusive of computing power and storage, analytical tools, and additional content should be available in its SAW. This language also would not prevent the Participants from collectively contracting with a third party, such as the Plan Processor, to provide each SAW with common tools or the infrastructure needed to query and process CAT Data. The Commission therefore preliminarily believes that the proposed amendments give each Participant sufficient flexibility to operate its SAW according to its own preferences, while still ensuring that the SAWs are built and implemented in a consistent and efficient manner.⁶²

The Commission requests comment on the proposed requirements for SAWs. Specifically, the Commission solicits comment on the following:

9. Is the proposed definition for Secure Analytical Workspaces sufficient? Should the proposed definition specify that the SAW accounts must be built using the same cloud provider that houses the Central Repository? Is the Commission correct in its belief that SAW accounts would be built in the same environment as the Central Repository because they would be part of the CAT System? If not, should such a requirement be added?

10. Is it possible that Participants might perform tasks in a SAW other

than accessing and analyzing CAT Data, such as workflows for generating and handling alerts? Please identify any such tasks with specificity and explain whether the definition should include those tasks. Is it appropriate to characterize SAWs as “part of the CAT System”? Are there alternative definitions of a SAW that would be more appropriate? If so, what are those definitions and why are they appropriate.

11. Is it appropriate for the Plan Processor to provide the SAW accounts? To the extent that the Plan Processor has already been authorized to begin developing and/or implementing analytic environments for the Participants, will the Plan Processor be able to leverage any of this work to build the SAW accounts? If so, please explain what efforts have already been made by the Plan Processor and whether the Plan Processor will be able to leverage any of these efforts to build the SAW accounts. Should each Participant be permitted to provide its own SAW account? Is there a third party who should provide the SAW accounts? If so, please identify that party, explain why it would be appropriate for that party to provide the SAW accounts, and explain why such structure would not inhibit the Plan Processor’s ability to control, manage, operate, and maintain the CAT System. Are there alternative structures that the Commission has not explicitly considered here? If so, please explain what these structures are and why they would be more appropriate for SAWs. Is it appropriate for the Plan Processor to implement all common security controls required by the CISP? Would implementation of such controls hamper the Participants’ ability to customize their SAWs? Should each Participant be able to implement the common security controls on its own?

12. Should the Plan Processor be required to provide each Participant with a SAW account? Should the proposed amendments explicitly specify that Participants are permitted to share SAW account(s)? If a Participant does not believe it will need to use a SAW account, should the Plan Processor still be required to build a SAW account for that Participant? If not, how and at what point should the Participant inform the Plan Processor that it does not need a SAW account? Should such a Participant be allowed to change its mind if the Participant later determines that it needs to use a SAW account? If so, how long should the Plan Processor be given to build a SAW account for that Participant? Should the Plan Processor be required to provide each Participant

with more than one SAW account upon request?

13. Do commenters agree that centralizing provision of the SAW accounts with the Plan Processor is the most effective and efficient way to implement the common technical controls associated with the CISP and to enable the Plan Processor to conduct consistent and comprehensive monitoring of SAWs? If not, please identify any alternative approaches that would be more effective and more efficient.

14. The proposed amendments state that the Participants may provide and use their choice of software, hardware configurations, and additional data within their SAWs, so long as such activities otherwise comply with the CISP. Should the Plan Processor, as the provider of each SAW account, be required to assist with any such activities? If not, do commenters believe that the Participants will be able to provide their own software, hardware configurations, and additional data without the assistance of the Plan Processor? For example, do commenters believe that a Participant would need the Plan Processor to grant special access or other administrative privileges in order to provide such software, hardware configurations, or additional data? Are there any other administrative tasks that the Plan Processor would or should be expected to provide? If so, please identify any such tasks and explain whether the proposed amendments should explicitly address the performance of such tasks.

15. Do commenters believe that the Plan Processor will charge back variable cloud services fees to each Participant for SAWs in a manner consistent with how current variable fees incurred by the Plan Processor are charged back to the Company? If not, how will the Plan Processor charge each Participant for SAW implementation and usage? Should the proposed amendments state how the Plan Processor may charge the Participants for SAW implementation and usage? If so, should each Participant be billed by the Plan Processor for providing a SAW, even if the Participants choose not to use that SAW? How should the Participants be billed for their use of the SAWs?

2. Data Access and Extraction Policies and Procedures

The Commission continues to believe that regulators must be permitted to access and extract CAT Data when such access and extraction is for surveillance and regulatory purposes, but only as long as such access and extraction does not compromise the security of CAT

⁶¹ See proposed Section 6.13(c)(iii); see also Part II.C.4.b. *infra*, for a discussion of and questions about this provision.

⁶² The Commission would have the same ability to configure its SAW to migrate third-party or in-house applications, analytical tools, or external data as the Participants.

Data. Proposed Section 6.13(a)(i) would therefore require the CISP to, at a minimum, establish certain data access and extraction policies and procedures.⁶³

First, under proposed Section 6.13(a)(i)(A), the CISP must establish policies and procedures that would require Participants to use their SAWs as the only means of accessing and analyzing customer and account data. While the database containing customer and account data would no longer include social security numbers, dates of birth, and/or account numbers for individual retail investors,⁶⁴ the unauthorized access and use of the remaining customer and account data—Customer and Account Attributes—could still be damaging. Because Customer and Account Attributes data may currently be accessed outside of the CAT System, the Commission preliminarily believes that the proposed SAW usage requirement would better protect this information by ensuring that it is accessed and analyzed within the CAT System and therefore subject to the security controls, policies, and procedures of the CISP when accessed and analyzed by the Participants.⁶⁵

Second, under proposed Section 6.13(a)(i)(B), the CISP must establish policies and procedures that would require the Participants to use their SAWs when accessing and analyzing CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan, unless an exception is granted pursuant to proposed Section 6.13(d).⁶⁶ Under the CAT NMS Plan, the online targeted query tool facilitates access to focused, narrowly-defined

queries, while the user-defined direct query and bulk extract tools enable the Participants to download much larger sets of data from the Central Repository to external systems that are not required to comply with the information security program described in Section 6.12.⁶⁷ The user-defined direct query and bulk extract tools therefore have a greater impact on the attack surface of the CAT. The Commission preliminarily believes that the proposed SAW usage restrictions will keep more CAT Data within the CAT System and subject to the CISP, while still providing the Participants with the flexibility of performing focused searches outside of the SAW through the online targeted query tool.⁶⁸

Third, under proposed Section 6.13(a)(i)(C), the CISP must establish policies and procedures that would require that the Participants only extract from SAWs the minimum amount of CAT Data necessary to achieve a specific surveillance or regulatory purpose.⁶⁹ While the proposed amendments require access and analysis of CAT Data within the SAW for Customer and Account Attributes and transaction data accessed with the user-defined direct query or bulk extract tools, the Commission recognizes that it may sometimes be necessary for the Participants to extract CAT Data that is otherwise required to be accessed or analyzed in a SAW to external systems or environments, including those beyond the Participants' control. For example, the Participants might need to extract CAT Data to respond to a court order or to some other regulatory or statutory mandate, to submit a matter to a disciplinary action committee, to file a complaint against a broker-dealer, or to refer an investigation or examination to other regulators like the

Commission.⁷⁰ The Commission does not wish to unnecessarily constrain the Participants in situations like these, where only a targeted, small amount of CAT Data is needed to achieve a specific surveillance or regulatory purpose. The Commission preliminarily believes that these provisions strike an appropriate balance by maintaining CAT Data largely within the CAT System, but still enabling limited extraction of data to allow the Participants to comply with their regulatory or statutory obligations.

Fourth, under proposed Section 6.13(a)(i)(D), the CISP must establish policies and procedures that would require that secure file sharing capability provided by the Plan Processor be the only mechanism for extracting CAT Data from SAWs. Because file-based sharing systems have the ability to track file size and recipients, the Commission preliminarily believes that requiring the use of file-based sharing will help the Plan Processor to monitor for non-compliant use of the SAWs. The Commission further preliminarily believes that requiring the use of a secure file sharing capability will better protect CAT Data by enabling confidential transmission of data between authorized users. Finally, the Commission preliminarily believes that it is appropriate for the Plan Processor to provide this capability. As the party responsible for developing and maintaining the CISP, the Plan Processor is in the best position to determine which file-based sharing system will fit the security needs of the CAT System. Requiring that the Plan Processor provide one universally-used secure file-based sharing system may also reduce the administrative burdens and security risks that might arise if each Participant developed and used a different file-based sharing capability to extract CAT Data out of its SAWs.

Finally, the CAT NMS Plan currently states that the Chief Compliance Officer⁷¹ (the "CCO") shall oversee the

⁶³ Proposed Section 6.13(a) also states explicitly that the CISP shall apply to every Participant's SAW. This is also required by the proposed definition of "Comprehensive Information Security Program." See proposed Section 1.1; see also Part II.A. *supra*, for a discussion of the proposed CISP. Similarly, proposed Section 6.12 would make clear that the CISP should include the requirements set forth in proposed Section 6.13.

⁶⁴ See Securities Exchange Act Release No. 88393 (March 17, 2020), 85 FR 16152 (March 20, 2020) (granting conditional exemptive relief from certain requirements of the CAT NMS Plan, including requirements related to the reporting of PII). With the elimination of social security numbers, dates of birth, and/or account numbers from the CAT, the Commission proposes to eliminate the term "PII" and refer to the remaining customer and account data in the CAT as "Customer and Account Attributes" throughout the CAT NMS Plan. See Part II.E. *infra*, for a discussion of this proposed change.

⁶⁵ The Commission is also proposing amendments to the CAT NMS Plan to define the security requirements of the Customer Identifying Systems Workflow. See Part II.F. *infra*, for a discussion of these amendments.

⁶⁶ See Part II.C.5.a. *infra*, for a discussion of the proposed exception process.

⁶⁷ For example, the online targeted query tool limits searches using a date or time range and only makes certain predetermined fields available to users, whereas the user-defined direct query tool can be used to query all available attributes and data sources without such limitations. *Cf.*, e.g., CAT NMS Plan, *supra* note 3, at Section 6.10(c)(1)(A); *id.* at Section 6.10(c)(1)(B).

⁶⁸ To further protect CAT Data, the Commission is also proposing amendments to the CAT NMS Plan that would reduce the amount of information that the Participants could extract via the online targeted query tool. See Part II.D. *infra*, for a discussion of these proposed amendments.

⁶⁹ See also Part II.G. for further discussion of other proposed controls on access to and use of CAT Data, which would, among other things, limit the extraction of CAT Data to the minimum amount of data necessary to achieve a specific regulatory or surveillance purpose, define the staff that would be entitled to access or use CAT Data, and increase the oversight of the Chief Regulatory Officer (or similarly designated head(s) of regulation) of each Participant over access to and use of CAT Data.

⁷⁰ See also Part II.N. *infra*, for a discussion of how the proposed amendments would apply to Commission staff. The Commission preliminarily believes that the restrictions set forth in the proposed amendments would still enable the extraction of required data—for example, to support discussions with a regulated entity regarding activity that raises concerns, to file a complaint against a regulated entity, or to support an investigation or examination of a regulated entity.

⁷¹ "Chief Compliance Officer" is a defined term in the CAT NMS Plan and means "the individual then serving (even on a temporary basis) as the Chief Compliance Officer pursuant to Section 4.6, Section 6.1(b), and Section 6.2(a)." See CAT NMS Plan, *supra* note 3, at Section 1.1. The CCO is an officer of the Company and has a fiduciary duty to the Company. See *id.* at Section 4.6(a), Section 4.7(c).

regular written assessment of the Plan Processor's performance that is required to be provided to the Commission and that this assessment shall include an evaluation of the existing information security program "to ensure that the program is consistent with the highest industry standards for the protection of data."⁷² In addition to replacing the reference to the "information security program" with a reference to the proposed "Comprehensive Information Security Program," the proposed amendments would require the CCO, in collaboration with the CISO, to include in this evaluation a review of the quantity and type of CAT Data extracted from the CAT System to assess the security risk of permitting such CAT Data to be extracted⁷³ and to identify any appropriate corrective measures.⁷⁴ The Commission preliminarily believes that these proposed requirements will facilitate Commission oversight of the security risks posed by the extraction of CAT Data. The proposed review should enable a thorough assessment of security risks to CAT Data and whether changes to the current security measures are appropriate.

The Commission requests comment on the proposed data access and extraction policies and procedures. Specifically, the Commission solicits comment on the following:

16. Is it appropriate to require the CISP to establish data access and extraction policies and procedures? Should the proposed amendments specify each component that should be

included in the data access and extraction policies and procedures? If so, please describe what components should be included and explain why those components would be appropriate. For example, should the proposed amendments specify that the data access and extraction policies and procedures should establish which data will be provided to Participants in the form of data extraction logs, how the proposed confidentiality policies described in Part II.G. should apply to SAW usage, or when data extraction should be permissible? Is CAT Data sufficiently protected by the current terms of the CAT NMS Plan? If so, please explain how the current protection is adequate.

17. The proposed amendments require the CISP to establish policies and procedures that require the Participants to use SAWs as the only means of accessing and analyzing Customer and Account Attributes. Should Participants be allowed to analyze Customer and Account Attributes data outside of a SAW?

18. The proposed amendments require the CISP to establish policies and procedures that require Participants to use SAWs when accessing and analyzing CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2, unless granted an exemption pursuant to proposed Section 6.13(d). Would it be more effective to limit the number of records that could be returned by these search tools? If so, please explain how those tools should be limited and explain why those limitations are appropriate. Should the proposed amendments also require the Participants to use SAWs when accessing and analyzing CAT Data retrieved through the online targeted query tool described in Section 6.10(c)(i)(A)? Should the proposed amendments require that all CAT Data be accessed and analyzed in a SAW, regardless of how it was retrieved?

19. The proposed amendments require the CISP to establish policies and procedures directing the Participants to extract only the minimum amount of CAT Data necessary to achieve a specific surveillance or regulatory purpose. Should the Commission revise this requirement to specifically limit the number of records, the size of the data that may be extracted, or the file types permitted for extraction in support of a specific surveillance or regulatory purpose? If so, what should the Commission specify as the number of records or the size of the data? For

example, should the number of records be limited to 200,000 rows, the size of the data that may be extracted be limited to 1 gigabyte, or the file types permitted for extracted be limited to Excel spreadsheets? Please identify any appropriate limitations, explain why those limitations would be appropriate, and describe how regulatory use cases requiring the extraction of data from the SAW would be fully supported. Should the CISP be allowed to establish a more permissive policy governing the extraction of CAT Data from the SAWs? If so, please identify any conditions that should be placed on the extraction of CAT Data from the SAWs and explain why they are appropriate.

20. Should the proposed amendments require the application of additional security controls, policies, or procedures for data that is extracted from a SAW or that is extracted directly from the Central Repository by Participants into a non-SAW environment that has not been granted an exception pursuant to proposed Section 6.13(d)—*i.e.*, data extracted using the online targeted query tool? Or do existing rules and regulations under the Exchange Act, like Regulation SCI, sufficiently protect CAT Data that would be extracted from a SAW or from the Central Repository?

21. The proposed amendments require the CISP to establish policies and procedures that state that secure file sharing capability provided by the Plan Processor shall be the only mechanism for extracting CAT Data from the SAW. Do commenters understand what is meant by "secure file sharing" or should the Commission specify criteria that should be used to assess whether a system provides "secure file sharing capability"? What criteria would evaluate whether a system provides "secure file sharing capability"? Should a different method of extraction be permitted? If so, please identify that method of extraction and explain why it would be appropriate. Is it clear what the Commission means by "secure file sharing capability"? Please explain what commenters understand this term to mean and whether it is appropriate for the Commission to add more detail to the proposed amendments. Should a different party provide the secure file sharing capability? If so, please identify that party and explain why that party would be a more appropriate choice. Should the proposed amendments be more specific about what kind of capability must be provided by the Plan Processor? If so, please explain what kinds of details would be helpful.

22. The proposed amendments require the CCO, in collaboration with

⁷² See *id.* at Section 6.6(b)(i)(B), Section 6.6(b)(ii)(B)(3). The CAT NMS Plan requires the written assessment of the Plan Processor's performance to be provided to the Commission annually or more frequently in connection with any review of the Plan Processor's performance under the CAT NMS Plan pursuant to Section 6.1(n). See *id.* at Section 6.6(b)(i)(A).

⁷³ The Commission believes that such an evaluation could be performed using metrics associated with aggregated data. For example, the Plan Processor could review the amount of data that each Participant extracted on a monthly basis and analyze extraction trends for each Participant to identify any anomalies or to compare the amount of data extracted from the CAT against the amount of data ingested into the CAT.

⁷⁴ See proposed Section 6.6(b)(ii)(B)(3). The proposed amendments do not limit this review to CAT Data extracted from SAWs; the proposed review should also include CAT Data extracted using other methods, like the online targeted query tool. These requirements are also enshrined in proposed Section 6.2. See also proposed Section 6.2(a)(v)(T) (requiring the CCO to determine, pursuant to Section 6.6(b)(ii)(B)(3), to review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted); proposed Section 6.2(b)(x) (requiring the CISO to determine, pursuant to Section 6.6(b)(ii)(B)(3), to review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted).

the CISO, to include, in the regular written assessment of the Plan Processor's performance that is required to be provided to the Commission, a review of the quantity and type of CAT Data extracted from the CAT System to assess the security risk of permitting such extraction. This review must also identify any appropriate corrective measures. Is it appropriate to require this review to be included in the regular written assessment of the Plan Processor's performance that is required to be provided to the Commission? Is there a better vehicle for communicating this information to the Commission? If so, please identify that vehicle and explain why it would be a more appropriate way of communicating this information to the Commission. Should the Commission receive this information more often than it would receive the regular written assessment of the Plan Processor's performance? If so, how often should the Commission receive this information and through what means should such information should be communicated? Is there any other information that should be included in this review? If so, please identify such information and explain why it would be appropriate to include such information in the review.

3. Security Controls, Policies, and Procedures for SAWs

To protect the security of the SAWs, the Commission preliminarily believes that it is appropriate to require the CISP to set forth the security controls, policies, and procedures that must apply to the SAWs. The Plan Processor already must adhere to the NIST Risk Management Framework and implement the security controls identified in National Institute of Standards and Technology's Special Publication 800–53 to protect CAT Data that is reported to and retained at the Central Repository.⁷⁵ To promote the consistent treatment of CAT Data that might be downloaded to SAWs, the proposed amendments would state that the CISP must establish security controls, policies, and procedures for SAWs that require all NIST SP 800–53 security controls and associated policies and

procedures required by the CISP to apply to the Participants' SAWs.⁷⁶

The proposed amendments would also require the CISP to establish security controls, policies, and procedures that would specify that certain security controls, policies, and procedures must be applied to SAWs by the Plan Processor and that such security controls, policies, and procedures must be common to both the SAWs and the Central Repository in accordance with Section 2.4 of NIST SP 800–53, unless technologically or organizationally not possible.⁷⁷ Common security controls, policies, and procedures would be required for at least the following NIST SP 800–53 control families: Audit and accountability, security assessment and authorization, configuration management, incident response, system and communications protection, and system and information integrity.⁷⁸

The NIST SP 800–53 control families specifically identified by the proposed amendments are core families that would enable the Plan Processor to better monitor the security of the SAWs.⁷⁹ For example, requiring that audit and accountability,⁸⁰ security assessment and authorization,⁸¹ incident response,⁸² and systems and information integrity⁸³ controls, policies, and procedures be “common” in accordance with Section 2.4 of NIST SP 800–53 would facilitate consistent monitoring of systems and personnel and associated analysis across the CAT System, including the generation and review of activity logs, identification of potential anomalies or attacks, incident-specific monitoring and notification, analysis of security-related infrastructure and possible system vulnerabilities, and uniform issuance of security alerts. In addition, by requiring that security assessment and

authorization controls, policies, and procedures be “common” in accordance with Section 2.4 of NIST SP 800–53, the proposed amendments would include security assessments of the SAWs as part of the overall risk assessment of the CAT System; risks would be tracked and escalated in the same way. Common configuration management⁸⁴ and system and communication protection⁸⁵ controls, policies, and procedures would centralize the management of crucial infrastructure, so that each SAW would operate according to the same parameters as the rest of the CAT System and thereby enable the Plan Processor to conduct the above-described monitoring more efficiently.

The Commission preliminarily believes that it is appropriate for all NIST SP 800–53 security controls, policies, and procedures required by the CISP to apply to the SAWs; the same set of control families, policies, and procedures should apply when CAT Data is accessed and downloaded to a SAW. In addition, the Commission preliminarily believes that it is appropriate to further require common implementation for NIST SP 800–53 control families that relate to critical monitoring functions, unless technologically or organizationally not possible. By requiring the CISP to establish common security controls, policies, and procedures for these NIST SP 800–53 control families, the proposed amendments would establish security protections for SAWs that are harmonized to the greatest extent possible with the security protections of the Central Repository. The security of the SAWs should therefore be robust.⁸⁶ Moreover, the Commission preliminarily believes that the proposed amendments would facilitate the efficient implementation of the SAWs by specifying that the Plan Processor will be responsible for implementing the common security controls, policies, and procedures. If each Participant were allowed to implement the common security controls, policies, and procedures, different Participants might

⁷⁶ See proposed Section 6.13(a)(ii).

⁷⁷ See proposed Section 6.13(a)(ii)(A). See NIST SP 800–53, *supra* note 15, at Section 2.4 (explaining what common controls are and how they should be implemented).

⁷⁸ See proposed Section 6.13(a)(ii)(A).

⁷⁹ Although the proposed amendments would require the Plan Processor to monitor the SAWs to verify that relevant security controls, policies, and procedures are being followed, the proposed amendments would not permit the Plan Processor to monitor analytical activities taking place within the SAWs, including analytical activities that may take place within any SAW provided for the Commission's use. See Part II.C.4.b. *infra* for further discussion of the monitoring requirements; see also Part II.N. *infra* for further discussion regarding the application of the proposed amendments to Commission staff.

⁸⁰ See NIST SP 800–53, *supra* note 15, at Appendix F–AU.

⁸¹ See *id.* at Appendix F–CA.

⁸² See *id.* at Appendix F–IR.

⁸³ See *id.* at Appendix F–SI.

⁸⁴ See *id.* at Appendix F–CM.

⁸⁵ See *id.* at Appendix F–SC.

⁸⁶ By contrast, if the proposed amendments were not adopted, the Participants would be allowed to build these analytical environments with their own security measures. Although the CAT NMS Plan requires the CISO to review the Participants' information security policies and procedures related to any such analytical environments to ensure that such policies and procedures are comparable to the information security policies and procedures that are applicable to the Central Repository, the proposed amendments will promote uniformity, which the Commission preliminarily believes is more likely to protect CAT Data for the reasons discussed above. See CAT NMS Plan, *supra* note 3, at Section 6.2(b)(vii).

⁷⁵ See, e.g., CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.2 (setting forth a non-exhaustive list of applicable industry standards, including NIST SP 800–53). See also *id.* at Appendix D, Section 5.3 (“The Plan Processor must conduct third party risk assessments at regular intervals to verify that security controls implemented are in accordance with NIST SP 800–53.”). See also NIST SP 800–53, *supra* note 15, at 7–8 (explaining how NIST SP 800–53 implements the NIST Risk Management Framework).

make different (and potentially less secure or less efficient) implementation choices. As the party who would be the most familiar with the CISP, the Plan Processor can more efficiently implement these common security controls, policies, and procedures⁸⁷ and is the best situated to verify that such security controls, policies, and procedures are implemented consistently.

The Commission recognizes, however, that common implementation will likely not be feasible for all of the NIST SP 800–53 security controls, policies, and procedures required by the CISP. Accordingly, proposed Section 6.13(a)(ii)(B) would permit the security controls, policies, and procedures established by the CISP to indicate that implementation of NIST SP 800–53 security controls, policies, and procedures required by the CISP may be done in a SAW-specific way and by either the Plan Processor or each Participant.⁸⁸ The Commission emphasizes, however, that “SAW-specific” does not mean that each Participant may independently select or assess the NIST SP 800–53 security controls, policies, and procedures that should apply for its SAWs. Rather, this provision would still require the CISP to provide the basis for the NIST SP 800–53 security controls, policies, and procedures that should be applied to SAWs, but allow that the implementation of controls, policies, and procedures may be different for each SAW. The Commission preliminarily believes this provision would provide an appropriate level of control to the Plan Processor while permitting SAW-specific implementation of the security controls, policies, and procedures that would apply to SAWs, as SAWs would have different functional and technical requirements from the Central Repository and may therefore require tailored implementation of controls.

The Commission requests comment on the proposed security controls, policies, and procedures requirements. Specifically, the Commission solicits comment on the following:

23. The proposed amendments require the CISP to establish security controls, policies, and procedures such

that all NIST SP 800–53 security controls and associated policies and procedures required by the CISP apply to the SAWs. Should the CISP be required to establish security controls, policies, and procedures to implement any other industry standard for SAWs? If so, please identify the relevant industry standard(s) and explain why it would be appropriate to require the CISP to establish security controls, policies, and procedures to implement that standard(s). Should the CISP be required to implement additional NIST SP 800–53 security controls, policies, or procedures for SAWs, including security controls, policies, and procedures that would protect the boundary of each SAW from other SAWs and/or other components of the CAT System? If so, please identify those security controls, policies, or procedures and explain why they should be implemented for SAWs. Should the SAWs be required to implement all security controls, policies, and procedures required by the CISP? If not, please identify the security controls, policies, and procedures that might be required by the CISP (if adopted) that should not be applied to SAWs and explain why excluding such security controls, policies, or procedures would be appropriate.

24. Unless technologically or organizationally not possible, the proposed amendments require the CISP to establish controls, policies, and procedures that require the following NIST SP 800–53 control families to be implemented by the Plan Processor and to be common to both the SAWs and the Central Repository: Audit and accountability, security assessment and authorization, configuration management, incident response, system and communications protection, and system and information integrity. Are there technological, organizational, or other impediments to requiring common implementation for the specified control families? Should the security controls, policies, and procedures for other NIST SP 800–53 control families be commonly implemented for the SAWs and the Central Repository? If so, please identify these control families and explain why it would be appropriate to require common implementation. Is it appropriate to require that the common security controls be implemented by the Plan Processor? Is there another party that should implement the common security controls? If so, please identify that party and explain why it would be more appropriate for that party to implement the common security controls.

25. The proposed amendments require the CISP to establish security controls, policies, and procedures such that SAW-specific security controls, policies, and procedures are implemented to cover any NIST SP 800–53 security controls for which common controls, policies, and procedures are not possible. Should the proposed amendments provide this flexibility? Does providing this flexibility endanger the security of the SAWs?

4. Implementation and Operational Requirements for SAWs

To further the security of the CAT System, the Commission preliminarily believes it is important that the SAWs be implemented and operated consistently and in accordance with the CISP.

a. Implementation Requirements for SAWs

Proposed Section 6.13(b)(i) would require the Plan Processor to develop, maintain, and make available to the Participants detailed design specifications for the technical implementation of the access, monitoring,⁸⁹ and other controls required for SAWs by the CISP.⁹⁰ Proposed Section 6.13(b)(ii) would further require the Plan Processor to notify the Operating Committee that each Participant’s SAW has achieved compliance with the detailed design specifications issued by the Plan Processor pursuant to proposed Section 6.13(b)(i) before such SAW may connect to the Central Repository.

The Commission preliminarily believes that it is appropriate to require the Plan Processor to develop and maintain detailed design specifications for the technical implementation of the CISP controls. As the party responsible for maintaining data security across the CAT System and for providing the SAWs, the Plan Processor would have the most information regarding the security requirements that are

⁸⁹ In addition to the controls, policies, and procedures that specifically relate to or require monitoring, monitoring of security controls is part of the general risk management framework established by NIST SP 800–53. *See, e.g.,* NIST SP 800–53, *supra* note 15, at 8. Detailed design specifications implementing the NIST SP 800–53 controls required by the CISP should therefore detail how the Plan Processor will perform such monitoring and give the Plan Processor sufficient access to the SAWs to conduct such monitoring.

⁹⁰ *See* Part II.A.1. and Part II.C.2.–3. *supra*, for a discussion of the CISP. The Commission preliminarily believes that the Plan Processor could make these detailed design specifications available to the Participants in a number of formats, including by making available a reference SAW account for the Participants to review and analyze.

⁸⁷ *See* Part II.C.1. *supra* (explaining why it is more efficient for the Plan Processor to implement and administer relevant security controls).

⁸⁸ It may also be technologically or organizationally impossible to commonly implement all of the security controls, policies, and procedures identified by proposed Section 6.13(a)(ii)(A), in which case proposed Section 6.13(a)(ii)(B) would control how the security controls, policies, and procedures established by the CISP for SAWs address such implementation.

applicable to SAWs.⁹¹ The Commission preliminarily believes that it would be appropriate for the Plan Processor to share this information with the Participants through detailed design specifications,⁹² because releasing such information through detailed design specifications would help the Participants to more precisely understand how they would be able to use and provision their SAWs, what information they would be required to share with the Plan Processor to enable the NIST SP 800–53 access and monitoring controls that are applicable to SAWs, and how the security parameters of the SAWs might impact their existing surveillance protocols.⁹³ Requiring the Plan Processor to make available detailed design specifications for SAWs may thus increase the likelihood that Participants provision their SAWs with hardware, software, and data that complies with the CISP. Moreover, the development of detailed design specifications would also provide the Plan Processor with uniform criteria with which to evaluate and validate SAWs, which the Commission preliminarily believes should make the notification process required by proposed Section 6.13(b)(ii) more efficient for the Plan Processor and more fair for the Participants.

The security of the CAT is critically important, and the Commission preliminarily believes that it would be prudent to confirm that the detailed design specifications have been implemented properly before permitting any Participant to use its SAW to access CAT Data. Accordingly, the Commission preliminarily believes it is appropriate to require the Plan Processor to evaluate each Participant's SAW and notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications required by proposed Section 6.13(b)(i) before that SAW may connect to the Central Repository. The Commission preliminarily believes that such an evaluation would establish that the access, monitoring, and other

technical controls required for SAWs by the CISP have been implemented properly. The Commission preliminarily believes that SAWs that comply with these detailed design specifications should be sufficiently secure, because those detailed design specifications must implement the full battery of technical controls associated with the CISP, including all required NIST SP 800–53 security controls.⁹⁴ The Plan Processor is not only knowledgeable about NIST SP 800–53 security controls, but is also responsible for developing the CISP and the detailed design specifications that would be used to implement the CISP controls.⁹⁵ In addition, the Plan Processor would have access, through the CISO, to the collective knowledge and experience of the Security Working Group.⁹⁶ For these reasons, the Commission further preliminarily believes that the Plan Processor is best situated to determine whether each Participant's SAW has achieved compliance with such detailed design specifications. Finally, the Commission believes it is appropriate to require that the Plan Processor notify the Operating Committee, that each Participant's SAW has achieved compliance with the detailed design specifications before that SAW may connect to the Central Repository, as this requirement would enable the Operating Committee to better oversee the Plan Processor and the security of the CAT.

The Commission requests comment on proposed Section 6.13(b). Specifically, the Commission solicits comment on the following:

26. Do commenters agree that development and maintenance of detailed design specifications for the technical implementation of the CISP will enable the consistent, efficient, and secure implementation of SAWs?

27. The proposed amendments require the Plan Processor to develop and maintain detailed design specifications for the technical implementation of the access, monitoring, and other controls required for SAWs by the CISP. Should a different party develop and maintain these detailed design specifications? If so, please identify the party that should develop and maintain these detailed design specifications and explain why. Should the detailed design specifications be subject to review by

the Operating Committee, the Security Working Group, or some other entity? If so, please explain why and provide a detailed explanation of what such review process should entail.

28. Should the proposed amendments specify the nature of the monitoring required by NIST SP 800–53 controls? Should the proposed amendments specify that monitoring should be continuous? If so, please explain how that term should be defined and why such definition would be appropriate. Should the proposed amendments indicate whether manual or automated processes (or both) should be used by the Plan Processor and whether automated support tools should be used? Should the proposed amendments explicitly state that the NIST SP 800–53 controls, policies, and procedures require the Participants to give the Plan Processor sufficient access to SAWs in order to enable the monitoring inherently required by such NIST SP 800–53 controls, policies, and procedures? If so, please explain what details should be included in the proposed amendments.

29. The proposed amendments do not specify how the detailed design specifications should be provided by the Plan Processor. Should the proposed amendments require the Plan Processor to provide a reference SAW account? If a specific format should be used, please identify the format that the detailed design specifications should be provided in and explain why that format is appropriate.

30. The proposed amendments require the Plan Processor to notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications required by Section 6.13(b)(ii) before that SAW may connect to the Central Repository. Is the Plan Processor the appropriate party to make this determination? If not, what other party should make this determination and why? Is evaluation against some benchmark appropriate in order to safeguard the security of CAT Data? Should the SAWs be allowed to connect to the Central Repository without any evaluation process? Are the detailed design specifications required by Section 6.13(b)(ii) an appropriate benchmark? If it is not an appropriate benchmark, please identify what benchmark would be appropriate and explain why. Is it appropriate for the Plan Processor to notify a third party? Should the Operating Committee receive the notification? Should any other parties receive the notification? If so, please identify the parties and

⁹¹ See Part II.A, Part II.C.1. *supra*

⁹² As public disclosure of these detailed design specifications could raise security concerns, the Commission believes that the Plan Processor and the Participants generally should keep these detailed design specifications confidential.

⁹³ The Commission emphasizes that these detailed design specifications need only implement the access, monitoring, and other controls required by the CISP. Each Participant will have the flexibility to otherwise design the analytic capabilities of its own SAW and to provision it with its own hardware, software, and other data, so long as such activities comply with the CISP. See proposed Section 6.13(c)(iii); see also Part II.C.4.b. *infra*, for a discussion of the flexibility afforded to the Participants by the proposed amendments.

⁹⁴ See proposed Section 6.13(b)(i); proposed Section 6.13(a)(ii). See also Part II.A.1. and Part II.C.2.–3. *supra*, for a discussion of the requirements of the CISP.

⁹⁵ See proposed Section 6.13(b)(i).

⁹⁶ See Part II.B. *supra* for a discussion of the proposed Security Working Group.

explain why it would be appropriate to provide the notification to these parties.

b. Operation of the SAWs

Proposed Section 6.13(c) would set forth requirements for the Plan Processor and the Participants that are designed to promote compliance with the CISP. First, proposed Section 6.13(c)(i) would require the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i), for compliance with the CISP and the detailed design specifications only, and to notify the Participant of any identified non-compliance with the CISP or the detailed design specifications.⁹⁷ Second, proposed Section 6.13(c)(ii) would require the Participants to comply with the CISP, to comply with the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i), and to promptly remediate any non-compliance identified.⁹⁸

The Commission preliminarily believes that these requirements will facilitate compliance with the CISP and, therefore, the overall security of the CAT. Requiring the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i) should enable the Plan Processor to conduct such monitoring consistently and efficiently across SAWs. It should also help the Plan Processor to identify and to escalate any non-compliance events,

threats, and/or vulnerabilities as soon as possible, thus reducing the potentially harmful effects of these matters. Likewise, requiring the Plan Processor to notify the Participant of any identified non-compliance will likely speed remediation of such non-compliance by the Participant and thereby better protect the security of the SAW in question. The Commission also preliminarily believes it is appropriate to limit the scope of the Plan Processor's monitoring to compliance with the CISP and the detailed design specifications developed by the Plan Processor pursuant to Section 6.13(b)(i). The Commission preliminarily believes that this limitation would make it clear that analytical activities in the SAW would not be subject to third-party monitoring, without hampering the ability of the Plan Processor to adequately protect the security of each SAW.⁹⁹

The Commission also preliminarily believes it is appropriate to set forth the Participants' obligations to comply with the CISP, as well as the detailed design specifications developed by the Plan Processor pursuant to Section 6.13(b)(i), and to require the Participants to promptly remediate any identified non-compliance.¹⁰⁰

Such compliance is important, but the Commission does not wish to unnecessarily constrain the Participants from employing tools or importing external data that might support or enhance the utility of the SAWs. As noted above, the CISP and the detailed design specifications would only dictate that SAWs comply with certain security requirements; the Participants would still be responsible for building the internal architecture of their SAWs, for providing the analytical tools to be used in their SAWs, and for importing any desired external data into their SAWs. Accordingly, proposed Section 6.13(c)(iii) would explicitly state that the Participants may provide and use their choice of software, hardware, and

additional data within their SAWs, so long as such activities otherwise comply with the CISP and the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i). The Commission preliminarily believes that this provision would provide the Participants with sufficient flexibility in and control over the use of their SAWs, while still maintaining the security of the SAWs and the CAT Data that may be contained therein.¹⁰¹

The Commission requests comment on proposed Section 6.13(c). Specifically, the Commission solicits comment on the following:

31. The proposed amendments would require the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i). Instead of specifying that such monitoring should be conducted in accordance with the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i), should the proposed amendments specify the nature of the access and monitoring required by relevant NIST 800–53 controls? Should the proposed amendments specify the nature of the monitoring required by NIST SP 800–53 controls? Should the proposed amendments specify that monitoring should be continuous? If so, please explain how that term should be defined and why such definition would be appropriate. If not, please explain how often such monitoring should be conducted and explain why. Should the proposed amendments indicate whether manual or automated processes (or both) should be used by the Plan Processor and whether automated support tools should be used?

32. The proposed amendments would restrict the Plan Processor to monitoring SAWs for compliance with the CISP and with the detailed design specifications developed pursuant to Section 6.13(b)(i). Is this an appropriate limitation?

33. Is the Plan Processor the right party to monitor each Participant's SAW for compliance with the CISP and with the detailed design specifications developed pursuant to Section 6.13(b)(i)? If a different party should

⁹⁷ The proposed amendments would require the Participant to comply with the CISP and the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i). See proposed Section 6.13(c)(ii). If adopted, these requirements would be part of the CAT NMS Plan. Any non-compliance by a Participant with the proposed amendments would constitute non-compliance with the CAT NMS Plan and Rule 613(h)(1) and would also be a systems compliance issue, as defined in Regulation SCI, by such Participant (each Participant being an SCI entity). See 17 CFR 242.613(h)(1) (requiring Participants to comply with the provisions of the CAT NMS Plan); 17 CFR 242.608(c) (“Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant.”). See also 17 CFR 242.1000 (defining “systems compliance issue” as “an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the [Exchange] Act and the rules and regulations thereunder,” defining “SCI event” to include “systems compliance issues,” and defining “SCI entity” to include self-regulatory organizations like the Participants); 17 CFR 242.1002 (setting forth the notification and recordkeeping obligations related to SCI events).

⁹⁸ This provision would require each Participant to remedy any non-compliance promptly, whether such non-compliance was identified by the Participant or by the Plan Processor.

⁹⁹ Similarly, any SAW operated by the Commission would only be subject to monitoring for compliance with the CISP and with the detailed design specifications developed by the Plan Processor pursuant to Section 6.13(b)(i). See Part II.N. *infra* for further discussion regarding how the proposed amendments would apply to Commission staff.

¹⁰⁰ Determining whether remediation is prompt may depend on the facts and circumstances surrounding the non-compliance event. The Commission understands that the Plan Processor has developed a risk management policy that outlines appropriate timeframes for remediation based on the risks associated with the non-compliance event, and the Commission preliminarily believes that referring to this policy may be one way of determining whether remediation is prompt under the proposed amendments.

¹⁰¹ The Commission would have the same flexibility in and control over the use of its SAW. See Part II.N. *infra* for further discussion regarding the application of the proposed amendments to Commission staff. The proposed amendments would not prevent the importation of existing third-party or in-house applications or analytical tools into the SAWs, the migration of external data into the SAWs, or the configuration of the internal architecture of the SAWs.

conduct this monitoring, please identify that party and explain why it would be a more appropriate choice. Is there a different set of standards that should control the monitoring process? If so, please identify that set of standards and explain why it is a more appropriate choice.

34. The proposed amendments would require the Plan Processor to notify the Participant of any identified non-compliance with the CISP or the detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i). Should a different party notify the Participant of any identified non-compliance? If so, please identify that party and explain why it would be appropriate for them to provide the notification. Are there any additional parties that the Plan Processor should notify of any identified non-compliance—for example, the Security Working Group or the Operating Committee? If so, please identify the party or parties that should also be notified, explain why such notification would be appropriate, and explain whether such notification would raise any confidentiality, security, or competitive concerns.

35. The proposed amendments would specify that the Participants must comply with the CISP and the detailed design specifications developed pursuant to Section 6.13(b)(i). Should the proposed amendments specify that the Participants must comply with any other security protocols or industry standards? If so, please identify these security protocols or industry standards and explain why it would be appropriate to require the Participants to comply with them.

36. Should the proposed amendments specify a process to govern the resolution of potential disputes regarding non-compliance identified by the Plan Processor? For example, should the proposed amendments permit Participants to appeal to the Operating Committee? If such an appeal process should be included in the proposed amendments, please identify all aspects of that appeal process in detail and explain why those measures would be appropriate. How long should a Participant be given to make such an appeal and what materials should be provided to the Operating Committee? Would it be appropriate to require a Participant to appeal the determination to the Operating Committee within 30 days? Is 30 days enough time for a Participant to prepare an appeal? How long should the Operating Committee have to issue a final determination? Would 30 days be sufficient? Should the final determination be required to

include a written explanation from the Operating Committee supporting its finding? Once the final determination has been issued, how long should the Participant be given to remediate any non-compliance that is confirmed by the Operating Committee's determination? Should Participants who are appealing to the Operating Committee be permitted to continue to connect to the Central Repository while such an appeal is pending?

37. Is it appropriate to require the Participants to promptly remediate any identified non-compliance or should another standard be used? Should the proposed amendments specify what would qualify as "prompt" remediation? If so, please explain what amount of time should be specified and explain why that amount of time is sufficient. Would it be appropriate for the proposed amendments to refer specifically to the risk management policy developed by the Plan Processor for appropriate remediation timeframes? Is there another policy that provides remediation timeframes that would be more appropriate for these purposes? If so, please identify that policy and explain why it would be a better benchmark.

38. The proposed amendments clarify that the Participants may provide and use their choice of software, hardware, and additional data within the SAWs, so long as such activities otherwise comply with the CISP. Is it appropriate to provide Participants with this level of flexibility in and control over their use of the SAWs?

39. The proposed amendments do not require the Plan Processor to customize each SAW account for Participant use. Should the proposed amendments require the Plan Processor to provide each Participant with a SAW that already has certain analytic capabilities or internal architecture built into it? If so, please explain why that would be more appropriate and identify what analytic capabilities or internal architecture the Plan Processor should provide. Should the Plan Processor be required to take specific and individual instructions from each Participant as to how each SAW should be built? Should the proposed amendments specify that each SAW should be of a certain size and/or capable of supporting a certain amount of data? If so, please explain what parameters would be appropriate.

5. Exceptions to the SAW Usage Requirements

As explained above, the Commission preliminarily believes that the CAT NMS Plan should be amended to better protect CAT Data accessed via the user-

defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan, as the current CAT NMS Plan does not limit the download capabilities associated with these tools.¹⁰² The Commission, however, recognizes that some Participants may have a reasonable basis for not using a SAW to access CAT Data via the user-defined direct query or bulk extract tools and may have built a sufficiently secure non-SAW environment in which these tools may be employed. The Commission therefore proposes to add provisions to the CAT NMS Plan that would set forth a process by which Participants may be granted an exception from the requirement in proposed Section 6.13(a)(i)(B) of the CAT NMS Plan to use a SAW to access CAT Data through the user-defined direct query and bulk extract tools.¹⁰³ The Commission also proposes to add provisions to the CAT NMS Plan that would set forth implementation and operational requirements for any non-SAW environments granted such an exception.

a. Exception Process for Non-SAW Environments

The proposed amendments would permit a Participant to be granted an exception to employ the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan in a non-SAW environment. Proposed Section 6.13(d)(i)(A) would require the Participant requesting the exception to provide the Plan Processor's CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group with various application materials. First, the Participant would be required to provide a security assessment of the non-SAW environment, conducted within the prior twelve months by a named, independent third party security assessor,¹⁰⁴ that (a) demonstrates the extent to which the non-SAW environment complies with the NIST SP 800–53 security controls and associated

¹⁰² See also Part II.C. *supra*.

¹⁰³ Only transactional data can be accessed through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan. Therefore, the proposed exception process would not permit the Participants to access Customer and Account Attributes data in a non-SAW environment.

¹⁰⁴ For the purposes of the proposed amendments, affiliates of a Participant would not be considered "independent third party security assessors."

policies and procedures required by the CISP pursuant to Section 6.13(a)(ii), (b) explains whether and how the Participant's security and privacy controls mitigate the risks associated with extracting CAT Data to the non-SAW environment through the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan, and (c) includes a Plan of Action and Milestones document detailing the status and schedule of any corrective actions recommended by the assessment.¹⁰⁵ Second, the Participant would be required to provide detailed design specifications for the non-SAW environment demonstrating: (a) The extent to which the non-SAW environment's design specifications adhere to the design specifications developed by the Plan Processor for SAWs pursuant to proposed Section 6.13(b)(i), and (b) that the design specifications will enable the operational requirements set forth for non-SAW environments in proposed Section 6.13(d)(iii), which include, among other things, Plan Processor monitoring.¹⁰⁶

Proposed Section 6.13(d)(i)(B) would then require the CISO and the CCO to simultaneously notify the Operating Committee and the requesting Participant of their determination within 60 days of receipt of these application materials. Under the proposed amendments, the CCO and CISO may jointly grant an exception if they determine, in accordance with policies and procedures developed by the Plan Processor, that the residual risks¹⁰⁷ identified in the security assessment or detailed design specifications provided by the requesting Participant do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53.¹⁰⁸ This

standard effectively subjects each non-SAW environment to the same risk management policy as the CAT System itself, as the Commission preliminarily believes that the Participant applying for the exception should demonstrate that the CAT Data in its non-SAW environments will be protected in a similar manner as CAT Data within the CAT System.

If the exception is granted or denied, the proposed amendments would require the CISO and the CCO to provide the requesting Participant¹⁰⁹ with a detailed written explanation setting forth the reasons for that determination. For applications that are denied, the proposed amendments would further require the CISO and the CCO to specifically identify the deficiencies that must be remedied before an exception could be granted.¹¹⁰

The proposed amendments state that continuance of any exceptions that are granted is dependent upon an annual review process.¹¹¹ To continue an exception, the proposed amendments would require the requesting Participant to provide a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials required by proposed Section 6.13(d)(i)(A)(2) to the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group at least once a year, as measured from the date that the initial application materials were submitted.¹¹² Exceptions would be revoked by the CISO and the CCO for Participants who do not submit these application materials on time, in accordance with remediation timeframes developed by the Plan Processor.¹¹³ Such Participants

includes, among other things, “an unambiguous expression of the risk tolerance for the organization” See NIST SP 800–53, *supra* note 15, at Appendix G–6 (providing supplemental guidance for the PM–9 control).

¹⁰⁹ See proposed Section 6.13(d)(i)(B)(1).

¹¹⁰ See proposed Section 6.13(d)(i)(B)(2). Denied Participants would be permitted to re-apply for an exception, after remedying the deficiencies identified by the CISO and the CCO, by submitting a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified in proposed Section 6.13(d)(i)(A)(2). See proposed Section 6.13(d)(i)(C).

¹¹¹ See proposed Section 6.13(d)(ii).

¹¹² See proposed Section 6.13(d)(ii)(A).

¹¹³ See *id.* The Commission understands that the Plan Processor has developed a risk management policy that outlines appropriate timeframes for remediation based on the risks presented by a non-compliance event, and the Commission preliminarily believes that referring to this policy would be an appropriate method for determining what timeframe is appropriate for revoking a Participant's exception.

would be required to cease using their non-SAW environments to access CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan.¹¹⁴

Within 60 days of receipt of these updated application materials, the CISO and the CCO would then be required to simultaneously notify the Operating Committee and the requesting Participant of their determination.¹¹⁵ The proposed amendments would require the CISO and the CCO to make this determination using the same criteria, and issue that determination following the same process, set forth for initial exceptions.¹¹⁶ Participants that receive a determination granting a continuance would be required to repeat this process annually; participants that receive a determination denying a continuance would be required by the CISO and the CCO to cease using the user-defined direct query and bulk extract tools to access CAT Data in their non-SAW environments in accordance with the remediation timeframes developed by the Plan Processor.¹¹⁷

The proposed exception process is designed to help improve the security of CAT Data while allowing the Participants some flexibility in how they access CAT Data. Participants may have reasons for needing to use a non-SAW environment to access CAT Data, including, for example, reduction of burdensome costs and/or operational complexity. The Commission therefore preliminarily believes it is appropriate to provide the Participants with the option to use non-SAW environments, if that can be accomplished in a manner that will not compromise the overall security of CAT Data. To that end, the proposed exception process would not

¹¹⁴ See proposed Section 6.13(d)(ii)(C).

¹¹⁵ See proposed Section 6.13(d)(ii)(B). See also proposed Section 6.2(a)(v)(S) (requiring the CCO to determine, pursuant to Section 6.13(d), whether a Participant should be granted an exception from Section 6.13(a)(i)(B) and, if applicable, whether such exception should be continued); proposed Section 6.2(b)(ix) (requiring the CISO to determine, pursuant to Section 6.13(d), whether a Participant should be granted an exception from Section 6.13(a)(i)(B) and, if applicable, whether such exception should be continued).

¹¹⁶ See proposed Section 6.13(d)(ii)(B). Likewise, denied Participants would be permitted to re-apply following the same process that was outlined above for initial exceptions. See proposed Section 6.13(d)(ii)(C); see also note 110 *supra*.

¹¹⁷ See proposed Section 6.13(d)(ii)(A); proposed Section 6.13(d)(ii)(C). See also note 113 *supra*. Denied Participants would be permitted to re-apply for an exception, after remedying the deficiencies identified by the CISO and the CCO, by submitting new and updated versions of the application materials that have been prepared within twelve months of the date of submission. See proposed Section 6.13(d)(ii)(C).

¹⁰⁵ See proposed Section 6.13(d)(i)(A)(1). NIST SP 800–53 defines a Plan of Action and Milestones document as a “document that identifies tasks needing to be accomplished. It details resources required to accomplish the elements of the plan, any milestones in meeting the tasks, and scheduled completion dates for the milestones.” See NIST SP 800–53, *supra* note 15, at B–16.

¹⁰⁶ See proposed Section 6.13(d)(i)(A)(2). See also proposed Section 6.13(d)(iii); Part II.C.5.b. *infra*, for a discussion of the operational requirements that must be enabled by the design specifications for a non-SAW environment.

¹⁰⁷ By “residual risks,” the Commission means any risks that are associated with the absence of a security control or the deficiency of a security control, as evaluated by the required security assessment.

¹⁰⁸ See proposed Section 6.13(d)(i)(B)(1). NIST SP 800–53 requires the Plan Processor to develop an organization-wide risk management strategy that

permit the Participants to access Customer and Account Attributes data in a non-SAW environment; only transactional data is retrievable through the user-defined direct query or bulk extract tools described by Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan.¹¹⁸ Non-SAW environments meeting the requirements outlined above may provide a sufficient level of security for all CAT Data, but it is of paramount importance that access to Customer and Account Attributes data is guarded by the highest possible level of protection. Because the Commission preliminarily believes that such protection is only available through the use of a SAW environment and through the proposed limitations on the extraction of Customer and Account Attributes data from a SAW environment,¹¹⁹ the proposed exception process would not apply to Customer and Account Attributes data.

With respect to the specific features of the proposed exception process, the Commission preliminarily believes it is appropriate to require Participants seeking an exception to provide the CISO and the CCO with the proposed application materials, because such materials should provide critical information to the parties responsible for deciding whether to grant an exception.¹²⁰ The proposed requirement that the Participant produce a security assessment conducted within the last twelve months by an independent and named third party should give these decision-makers access to up-to-date, accurate, and unbiased information about the security and privacy controls put in place for the relevant non-SAW environment, including reliable information about risk mitigation measures and recommended corrective

actions.¹²¹ The Commission also preliminarily believes that it is appropriate, as part of this security assessment, to require the requesting Participant to demonstrate the extent to which the non-SAW environment complies with the NIST SP 800–53 security controls and associated policies and procedures required by the CISP pursuant to proposed Section 6.13(a)(ii), to explain whether and how the Participant's security and privacy controls mitigate the risks associated with extracting CAT Data to the non-SAW environment, and to include a Plan of Action and Milestones document detailing the status and schedule of any recommended corrective actions.¹²² The CAT NMS Plan requires the Plan Processor to perform similar security assessments to verify and validate the security of the CAT System,¹²³ so the Commission preliminarily believes that it is reasonable to require a Participant seeking to export CAT Data outside of the CAT System to demonstrate a similar level of due diligence and a similar level of security as would be required for SAWs pursuant to proposed Section 6.13(a)(ii). The Commission also preliminarily believes that this information will help the CISO and the CCO to determine whether the non-SAW environment is sufficiently secure to be granted an exception from the SAW usage requirements set forth in proposed Section 6.13(a)(i)(B).¹²⁴

Similarly, the Commission preliminarily believes that it is appropriate to require the requesting Participant to provide detailed design specifications for its non-SAW environment that demonstrate the extent of adherence to the SAW design specifications developed by the Plan Processor pursuant to Section 6.13(b)(i). The detailed design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i) would implement the access, monitoring, and other technical controls of the CISP that are applicable to SAWs. Requiring Participants seeking an exception to the SAW usage requirements to demonstrate whether the design specifications for their non-SAW environment adhere to the SAW design specifications would therefore provide the CISO and the CCO with specific technical information regarding

the security capabilities of the non-SAW environment and may therefore prove more informative than the review of the Participant's information security policies for comparability that is currently required by Section 6.2(b)(vii) of the CAT NMS Plan. The Commission further preliminarily believes that it is appropriate to require the requesting Participant to demonstrate that the design specifications will enable the proposed operational requirements for non-SAW environments.¹²⁵ This information would help the CISO and the CCO to assess the security-related infrastructure of the non-SAW environment and whether the non-SAW environment would support the required non-SAW operations.¹²⁶

The Commission preliminarily believes that it is also appropriate for the members of the Security Working Group (and their designees) and Commission observers of the Security Working Group to receive the above-described application materials.¹²⁷ Although the Security Working Group is not a decision-maker under the proposed amendments, the Commission preliminarily believes that it would be in the public interest to enable both the decision-makers and the members of the Security Working Group (and their designees)—a body of information security experts that would be specifically established to assess and protect the security of the CAT—to review any application materials. Given the expertise of its members, which would include the chief or deputy chief information security officer for each Participant, the Security Working Group may be able to provide valuable feedback to the CISO and the CCO regarding any request for an exception to the SAW usage requirements.¹²⁸ Moreover, by providing the application materials to the Commission observers of the Security Working Group, the Commission preliminarily believes that

¹¹⁸ See, e.g., CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.6 (“PII data must not be included in the result set(s) from online or direct query tools, reports or bulk data extraction. Instead, results will display existing non-PII unique identifiers (e.g., Customer-ID or Firm Designated ID).”).

¹¹⁹ See Part II.C.2. *supra* for additional discussion of these proposed limitations.

¹²⁰ Certain aspects of the proposed amendments put the burden of proof on the requesting Participant. For example, in its application, the Participant would be required to demonstrate that the non-SAW environment complies with the NIST SP 800–53 security controls required by the CISP pursuant to proposed Section 6.13(a)(ii) and that the design specifications enable the operational requirements for non-SAW environments. The Commission preliminarily believes that this is the most appropriate and efficient approach; the party seeking an exception from the security requirements of the CAT should be required to bear the burden of demonstrating that such an exception is justified, and the requesting Participant will be better situated to marshal evidence to prove that its systems are secure than would be the CISO, the CCO, or the Security Working Group.

¹²¹ See proposed Section 6.13(d)(i)(A)(1).

¹²² See *id.*

¹²³ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 5.3 (“The Plan Processor must conduct third party risk assessments at regular intervals to verify that security controls implemented are in accordance with NIST SP 800–53.”).

¹²⁴ See proposed Section 6.13(d)(i)(B)(1).

¹²⁵ See note 106 *supra*.

¹²⁶ See proposed Section 6.13(d)(iii).

¹²⁷ See proposed Section 6.13(d)(i)(A). The proposed amendments specifically limit the distribution of the application materials to members of the Security Working Group and their designees so that the confidentiality obligations of Section 9.6 of the CAT NMS Plan will apply to protect the sensitive information contained in the application materials. See note 30 *supra*.

¹²⁸ The Commission does not preliminarily believe that competitive relationships between the Participants would affect how individual members of the Security Working Group review the application materials and advise the CISO and the CCO, because each Participant has an overriding interest in the security of the CAT. See CAT NMS Plan, *supra* note 3, at Appendix C (indicating that the CAT will be a facility of each Participant); see also Part IV.A.2. *infra* for further discussion of this concern.

the proposed amendments will better facilitate Commission oversight of the security of CAT Data.

The Commission preliminarily believes, however, that only the CISO and the CCO should be the decision-makers regarding any requested exceptions. Not only are the CISO and the CCO fiduciaries to the Plan Processor and to the Company,¹²⁹ but they also have the most experience, knowledge, and expertise regarding the overall operation of the CAT, the state of the CAT's security, and compliance with the CAT NMS Plan. These two officers are likely to be the best situated to identify any issues that may be raised by applications for exceptions from the SAW usage requirements. As the decision-makers, the CISO and the CCO would ultimately be responsible under the proposed amendments for determining whether an exception from the SAW usage requirements may be granted.

The proposed amendments state that the CISO and the CCO must simultaneously notify the Operating Committee and the requesting Participant of their determination within 60 days of receiving the above-described application materials.¹³⁰ The Commission preliminarily believes that the proposed 60-day review period provides the CISO and the CCO with sufficient time to examine, analyze, and investigate the application materials. Moreover, the Commission preliminarily believes that this limitation should also provide the requesting Participant with some amount of certainty regarding the length of the review period and the date by which a determination will be issued, which could be useful for planning purposes.¹³¹

The proposed amendments also specify that an exception may only be granted if the CISO and the CCO determine, in accordance with policies developed by the Plan Processor, that the residual risks identified in the

security assessment or detailed design specifications provided by the requesting Participant do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53.¹³² The Commission preliminarily believes that it is appropriate to identify the conditions under which an exception from the SAW usage requirements may be granted. By making it clear that an exception may only be granted if an objective standard is met or exceeded, the proposed amendments should facilitate a consistent and fair decision-making process.¹³³

Furthermore, the Commission preliminarily believes that it is appropriate to require the CISO and the CCO to determine, in accordance with policies developed by the Plan Processor, that the residual risks identified in the security assessment or detailed design specifications provided by the requesting Participant do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53. This criterion would prohibit granting an exception to non-SAW environments that are not sufficiently secure to house CAT Data.

As noted above, the Commission preliminarily believes that it is important that the review by the CISO and the CCO be consistent and fair, and transparency will advance both objectives. The proposed amendments therefore include measures designed to protect the transparency of the review process. First, the CISO and the CCO would be required to simultaneously notify both the requesting Participant and the Operating Committee of their determination.¹³⁴ This requirement is designed to provide the Operating Committee with the most up-to-date information about non-SAW environments that house CAT Data. Second, the CISO and the CCO would be required to provide the Participant with a detailed written explanation setting forth the reasons for their determination and, for denied Participants, specifically identifying the deficiencies that must be remedied

before an exception could be granted.¹³⁵ The Commission preliminarily believes that this kind of feedback could be quite valuable—not only because it should require the CISO and the CCO to thoroughly review an application and to identify and articulate any deficiencies, but also because it should provide denied Participants with the information needed to effectively bring their non-SAW environments into compliance with the proposed standards.¹³⁶

For exceptions that are granted, the proposed amendments would require the requesting Participant to seek a continuance of this exception by initiating an annual review process through the submission of a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date application materials at least once a year, as measured from the date that the initial application materials were submitted. Participants that fail to submit updated application materials on time would have their exceptions revoked in accordance with the remediation timelines developed by the Plan Processor, and the proposed amendments would require such Participants to cease using their non-SAW environments to access CAT Data through the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan.

These proposed requirements essentially would impose an annual term on any exception granted by the CISO and the CCO. The Commission preliminarily believes that this limitation is appropriate. Technology and security concerns are constantly and rapidly evolving, and the conditions that might justify the initial grant of an exception from the proposed SAW usage requirements may no longer be in place at the end of an annual term.¹³⁷ Accordingly, the Commission

¹²⁹ See CAT NMS Plan, *supra* note 3, at Section 4.6(a), Section 4.7(c). In addition, to the extent that competitive relationships between the Participants may affect how individual members of the Security Working Group review the application materials and advise the CISO and the CCO, the Commission preliminarily believes that identifying the CISO and the CCO as the decision-makers will protect against any such bias in the review process. See Part IV.A.2. *infra* for further discussion of the Security Working Group.

¹³⁰ See proposed Section 6.13(d)(i)(B).

¹³¹ Participants that choose to rely solely on a non-SAW environment for certain surveillance or regulatory functions may not be able to perform those functions unless and until an exception is granted; therefore, placing a time limit on the review period may help these Participants to stage their resources appropriately.

¹³² See proposed Section 6.13(d)(i)(B)(1).

¹³³ Similarly, the Commission believes that requiring the CISO and the CCO to reach their determination in accordance with policies developed by the Plan Processor will facilitate a consistent and fair decision-making process. See *id.*

¹³⁴ See proposed Section 6.13(d)(i)(B)(1)–(2). The Commission preliminarily believes that the Advisory Committee generally should be notified when the Operating Committee is notified.

¹³⁵ See proposed Section 6.13(d)(i)(B)(2).

¹³⁶ See proposed Section 6.13(d)(i)(C). The Commission does not believe that a formal appeals process is appropriate or necessary. However, the Commission preliminarily believes that a denied Participant should not be barred from re-applying for an exception from the SAW usage requirements set forth in proposed Section 6.13(a)(i)(B) if a Participant is able to remediate the issues identified by the CISO and the CCO.

¹³⁷ This annual term is also consistent with existing requirements in the CAT NMS Plan that the Plan Processor's performance be evaluated on at least an annual basis. See CAT NMS Plan, *supra* note 3, at Section 6.6(b). The Commission preliminarily believes it is reasonable to require a Participant seeking to export CAT Data outside of the CAT System to be evaluated with a similar frequency.

preliminarily believes that it is appropriate to require a requesting Participant to provide a new security assessment and up-to-date design specifications for the non-SAW environment. Updated design specifications may adequately capture any technical changes made to a non-SAW environment over the course of a year, but the Commission preliminarily believes that a more in-depth approach is needed with respect to the required security assessment. Requiring the requesting Participant to provide a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1)—as opposed to an updated version of the security assessment provided with the initial application—would better identify and describe any risks presented by a non-SAW environment, based on the current security control implementation of the Participant.

For similar reasons, the Commission preliminarily believes that the proposed continuance process is appropriate. The proposed continuance process is substantially identical to the proposed process for initial exceptions; it requires that the requesting Participant submit a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials required by proposed Section 6.13(d)(i)(A)(2) to the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group and that the CCO and CISO notify the Operating Committee and the requesting Participant of their determination, using the same criteria and process outlined for the initial exception process, within 60 days of receiving those application materials. The Commission preliminarily does not believe that it is appropriate to lighten the requirements for the continuance process. To best protect the CAT and CAT Data, Participants seeking a continued exception to the SAW usage requirements should not be allowed to meet a lesser standard for continuance than was required for the initial exception.¹³⁸ Because technology and security concerns are constantly evolving, as noted above, the Commission preliminarily believes it is

crucial to implement a continuance process that emphasizes regular and consistent reevaluation of the security of non-SAW environments.

Finally, and for the same reasons expressed above, the Commission preliminarily believes it is appropriate for the proposed amendments to cut off access to the user-defined direct query and bulk extract tools if a Participant is denied a continuance or fails to submit updated application materials in a timely manner. Participants should not be indefinitely allowed to continue to access large amounts of CAT Data outside the security perimeter of the CAT without an affirmative determination that their systems are secure enough to adequately protect that information. However, the Commission preliminarily believes that the risks involved with permitting a Participant to continue using a non-SAW environment, after its exception has lapsed and while transitioning into a SAW, will likely depend on the facts and circumstances related to that particular Participant and the way it uses the non-SAW environment. Immediate revocation of access to CAT Data may be appropriate in some situations, particularly where a significant risk is posed to CAT Data, but a long transition period may be more appropriate in other situations. Requiring an exception to be revoked by the CISO and the CCO in accordance with remediation timeframes developed by the Plan Processor would allow the CISO and the CCO to take into account any relevant facts and circumstances and to craft an appropriate response to the presented risks.

The Commission requests comment on the proposed exception process. Specifically, the Commission solicits comment on the following:

40. Should Participants be permitted to seek an exception from the requirement in proposed Section 6.13(a)(i)(B) to use a SAW to access CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan? Should Participants only be able to employ user-defined direct query and bulk extract tools in connection with a SAW?

41. As noted above, Customer and Account Attributes data is not available through the user-defined direct query and bulk extraction tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan. Therefore, the proposed amendments would not permit any Participants to access Customer and Account Attributes in a non-SAW environment via the

exceptions process. Should Participants be allowed to access Customer and Account Attributes data in a non-SAW environment approved by the CISO and the CCO? If so, please explain under what circumstances such access should be allowed and what limits, if any, should be applied.

42. The proposed amendments would require the requesting Participant to submit to CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group the following materials: (1) A security assessment of the non-SAW environment, conducted within the last twelve months by a named, independent third party security assessor, that: (a) Demonstrates the extent to which the non-SAW environment complies with the NIST SP 800–53 security controls and associated policies and procedures required by the CISP pursuant to proposed Section 6.13(a)(ii), (b) explains whether and how the Participant's security and privacy controls mitigate the risks associated with exporting CAT Data to the non-SAW environment through the user-defined direct query or bulk extraction tools, and (c) includes a Plan of Action and Milestones document detailing the status and schedule of any corrective actions recommended by the assessment; and (2) detailed design specifications for the non-SAW environment demonstrating (a) the extent to which the non-SAW environment's design specifications adhere to the design specifications developed by the Plan Processor for SAWs pursuant to proposed Section 6.13(b)(i), and (b) that the design specifications will enable the operational requirements set forth for non-SAW environments in proposed Section 6.13(d)(iii).

a. Is it appropriate to require that the requesting Participant submit a security assessment of the non-SAW environment that has been conducted by a named, independent third party security assessor within the last twelve months? Should the Commission require that a more recent security assessment be submitted or permit a less recent security assessment to be submitted? If so, how recent should the security assessment be? Please explain. Would the security assessment be as reliable if the Commission eliminated the requirement that it be conducted by a named, independent third party security assessor?

b. Is it appropriate to require that the proposed security assessment demonstrate the extent to which the non-SAW environment complies with

¹³⁸ For similar reasons, the Commission believes it is appropriate to require denied Participants to re-apply by submitting a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date materials that comply with the requirements of proposed Section 6.13(d)(i)(A)(2) and by subjecting their non-SAW environments to the same review processes used for initial evaluations.

the NIST SP 800–53 security controls and associated policies and procedures required by the CISP established pursuant to proposed Section 6.13(a)(ii)? Would a different set of security and privacy controls be more appropriate? If so, please identify that set of security and privacy controls and explain in detail why that standard would be a better benchmark. Would it be more appropriate to require the non-SAW environment to demonstrate compliance with the security and privacy controls described in NIST SP–800–53 for low, moderate, and high baselines, as described in NIST SP 800–53? If so, please indicate which benchmark would be more appropriate and explain why.

c. Is it appropriate to require that the proposed security assessment explain whether and how the Participant's security and privacy controls mitigate the risks associated with exporting CAT Data to the non-SAW environment through the user-defined direct query or bulk extraction tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan?

d. Is it appropriate to require that the proposed security assessment include a Plan of Action and Milestones document detailing the status and schedule of any recommended corrective actions?

e. Are there any other items that should be included in the security assessment, including any items that would assist the CISO and the CCO to determine whether the non-SAW environment is sufficiently secure to be granted an exception from the SAW usage requirements set forth in proposed Section 6.13(a)(i)(B)? Please identify these items and explain why they should be included.

f. Is it appropriate to require that the requesting Participant provide detailed design specifications for its non-SAW environment that demonstrate the extent of adherence to the SAW design specifications developed by the Plan Processor pursuant to proposed Section 6.13(b)(i)? Is a different set of design specifications a better benchmark by which to judge the non-SAW environment's operational capabilities? If so, please identify that set of design specifications and explain why it is more appropriate. The proposed amendments also require that the requesting Participant demonstrate that the submitted design specifications will enable the proposed operational requirements for non-SAW environments under proposed Section 6.13(d)(iii). Is this an appropriate requirement?

g. Is it appropriate to require that the proposed application materials be submitted to the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group? Should any different or additional parties receive the proposed application materials? If so, please identify those parties and explain why they should receive the proposed application materials. Does the inclusion of the members of the Security Working Group and their designees raise any confidentiality, security, or competitive concerns? If so, please identify such concerns and explain whether the benefits of including the Security Working Group nevertheless justify providing the members of the Security Working Group and their designees with the required application materials.

43. The proposed amendments state that the CISO and the CCO must notify the Operating Committee and the requesting Participant of their determination regarding an exception (or a continuance) within 60 days of receiving the application materials described in proposed Section 6.13(d)(i)(A).

a. Is it appropriate to require that the CISO and the CCO make this determination? If it is not appropriate to require the CISO and the CCO to make this determination, which party or parties should be required to make this determination? Please explain why those parties would be appropriate decision-makers.

b. Is it appropriate that the CISO and the CCO simultaneously notify the Operating Committee and the requesting Participant of their determination? Should the Participant be notified before the Operating Committee? If so, how long should the CISO and the CCO be required to wait before notifying the Operating Committee? Are there any different or additional parties that should receive the determination? If so, please identify those parties and explain why it would be appropriate for them to receive the determination issued by the CISO and the CCO. For example, should the proposed amendments require notification of the Advisory Committee, even though the Advisory Committee is likely to be informed of these determinations in regular meetings of the Operating Committee? Would notification of the Advisory Committee raise any security or confidentiality concerns, such that these matters should only be addressed in executive sessions of the Operating Committee? Should the rule specify that any issues related to exceptions should only be discussed in

executive sessions of the Operating Committee? Does a Participant's application for an exception create circumstances in which it would be appropriate to exclude non-Participants from discussion of such applications? Should the Participants be required to submit requests to enter into an executive session of the Operating Committee on a written agenda, along with a clearly stated rationale for each matter to be discussed? If so, should each such request have to be approved by a majority vote of the Operating Committee?

c. Is it appropriate to require the CISO and the CCO to make their determination within 60 days of receiving the application materials? If a different review period would be more appropriate, please state how much time the CISO and the CCO should have to review the application materials and explain why that amount of time would be more appropriate.

d. Should the proposed amendments include provisions allowing the CISO and the CCO to extend the review period? If so, what limitations should be placed on their ability to extend the review period?

44. The proposed amendments specify that an exception (or a continuance) may only be granted if the CISO and the CCO determine, in accordance with policies and procedures developed by the Plan Processor, that the residual risks identified in the security assessment or detailed design specifications provided pursuant to proposed Section 6.13(d)(i)(A) or proposed Section 6.13(d)(ii)(A) do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53.

a. This standard puts the burden of proof on the requesting Participant. Is that appropriate? If it is inappropriate, please identify the party that should bear the burden of proof and explain why putting the burden of proof on that party is a better choice.

b. Is it appropriate for the proposed amendments to specify the exact conditions under which an exception (or a continuance) may be granted? Should the CISO and the CCO be required to make any specific findings before granting an exception? If so, please state what these findings should be and explain why they would be appropriate requirements. Are there any conditions that should bar the CISO and the CCO from granting an exception (or a continuance)? If so, please identify these conditions and explain why they are appropriate.

c. Is it appropriate to specify that an exception (or a continuance) may not be granted unless the CISO and the CCO determine, in accordance with policies and procedures developed by the Plan Processor, that the residual risks identified in the provided security assessment or detailed design specifications do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53? Should the proposed amendments use a different set of risk tolerance levels as a benchmark? If so, please explain what risk tolerance levels should be used and why those levels would be more appropriate. Should the CISO and the CCO determine whether to grant an exception using a different standard of review? If so, please describe the standard of review that should be used and why that standard would be more appropriate. Should the CISO and the CCO make their determination in accordance with policies and procedures developed by the Plan Processor? Should a different party develop these policies and procedures—for example, the Operating Committee? If so, please identify the party that should develop the policies and procedures and explain why it would be appropriate for that party to do so.

45. Is it appropriate to require the CISO and CCO to provide the requesting Participant with a detailed written explanation setting forth the reasons for that determination and, for denied Participants, specifically identifying the deficiencies that must be remedied before an exception (or a continuance) could be granted? Should the Operating Committee also be provided with this explanation? If so, should the CISO and the CCO be required to wait for a certain period of time before notifying the Operating Committee? How long should they be required to wait?

46. Should the proposed amendments provide a process for denied Participants to appeal to the Operating Committee, or is it sufficient that a denied Participant may re-apply for an exception after remedying the deficiencies identified by the CISO and the CCO, by submitting a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified in proposed Section 6.13(d)(i)(A)(2)? If such an appeal process should be included in the proposed amendments, please identify all aspects of that appeal process and explain why those measures would be appropriate. How long should a denied Participant be

given to make such an appeal and what materials should be included? Please explain your response in detail. For example, would it be appropriate to require a denied Participant to appeal the determination to the Operating Committee within 30 days by providing the Operating Committee with its most up-to-date application materials, the detailed written statement provided by the CISO and the CCO, and a rebuttal statement prepared by the denied Participant? Is 30 days enough time for a denied Participant to prepare an appeal? Should any additional materials be provided? If so, please describe those materials and describe why it would be helpful to provide them. How long should the Operating Committee have to issue a final determination? Would 30 days be sufficient? Should the final determination be required to include a written explanation from the Operating Committee supporting the finding? Once the final determination has been issued, should the requesting Participant be allowed to remedy any deficiencies and re-apply? Do different considerations apply to appeals brought by Participants denied the initial exception and appeals brought by Participants denied a continuance of an exception? If so, what are these considerations, and how should the appeal process for each type of Participant differ? Please explain in detail. Should Participants who are denied a continuance be permitted to continue to connect to the Central Repository while any appeal is pending, even if that would enable them to connect to the Central Repository beyond the remediation timeframes developed by the Plan Processor?

47. Is it appropriate to condition the continuance of any exception from the proposed SAW usage requirements on an annual review process to align with the Participants' review of the Plan Processor's performance? In light of the constantly-evolving nature of technology and security standards, should the continuance be evaluated more often? Should the continuance be evaluated less often? If so, please explain how often the continuance should be evaluated and why that frequency is appropriate.

48. The proposed amendments provide that an exception will be revoked if a Participant fails to submit a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified by proposed Section 6.13(d)(i)(A)(2) at least once a year, as measured from the date that the initial application materials were submitted. Should another date be

used to measure the annual review—for example, the date that the CISO and the CCO issue their joint determination granting the exception? If so, please identify the date that should be used and explain why that date is more appropriate.

49. Should the CISO and the CCO be enabled to revoke any exception at will, and prior to the expiration of the annual term, if they are able to determine that the residual risks presented in a security assessment or detailed design specifications for a non-SAW environment are no longer within the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53 or if the Plan Processor identifies non-compliance with the detailed design specifications submitted by the requesting Participant? If the CISO and the CCO should be enabled to revoke the exception at will, should the proposed amendments set forth a process for appealing to the Operating Committee that should be followed before the exception is revoked and the non-SAW environment is disconnected from the Central Repository? If such an appeal process should be included, please identify all aspects of that appeal process and explain why those measures would be appropriate. How long should a revoked Participant be given to make such an appeal and what materials should be included? Please explain your response in detail. For example, should the CISO and the CCO be required to provide a revoked Participant with a detailed written statement setting forth the reasons for that determination and specifically identifying the deficiencies that must be remedied? Would it be appropriate to require a revoked Participant to appeal the determination to the Operating Committee within 30 days by providing the Operating Committee with the most up-to-date application materials, the detailed written statement provided by the CISO and the CCO, and a rebuttal statement prepared by the denied Participant? Is 30 days enough time for the revoked Participant to prepare an appeal? Should revoked Participants be permitted to connect to the Central Repository while an appeal is pending, even if such appeal would last beyond the remediation timeframe developed by the Plan Processor? Is 30 days too much time for a revoked Participant to be allowed to access CAT Data through the Central Repository if the CISO and the CCO have identified a deficiency? Should any additional materials be provided to the Operating Committee? If

so, please describe those materials and describe why it would be helpful to provide them. How long should the Operating Committee have to issue a final determination? Would 30 days be sufficient or too long? Should the final determination be required to include a written explanation by the Operating Committee supporting the finding? Once the final determination has been issued, should the requesting Participant be allowed to remedy any deficiencies and re-apply?

50. The proposed amendments provide that Participants who are denied a continuance, or Participants who fail to submit their updated application materials on time, must cease using their non-SAW environments to access CAT Data through the user-defined direct query and bulk extract tools in accordance with the remediation timeframes developed by the Plan Processor. Should the exception be revoked immediately and automatically? Are there other processes that would be more appropriate here? If so, please identify such processes and explain why those processes are appropriate. Should such Participants be provided a standard grace period in which to cease using this functionality in their non-SAW environments? If so, please explain how long this grace period should be and why such a grace period would be appropriate. Should the proposed amendments instead indicate that such Participants should promptly cease using their non-SAW environments to access CAT Data through the user-defined query and bulk extract tools or specify a specific timeframe? Should the proposed amendments require the CISO and the CCO to provide preliminary findings to Participants that will be denied a continuance, such that those Participants have the ability to minimize any disruption? Should the proposed amendments address how CAT Data already exported to non-SAW environments that lose their exception should be treated? If so, how should the proposed amendments treat such data? Should the proposed amendments require that all such CAT Data be immediately or promptly deleted? Should the Participants be allowed to retain this data in their non-SAW environment? If so, please explain why this would be appropriate in light of the Commission's security concerns. Would such data be sufficiently stale so as to pose a minimal security threat?

51. Is it appropriate to require that a Participant seeking a continued exception (or a Participant re-applying for an exception) provide a new security

assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified by proposed Section 6.13(d)(i)(A)(2) to the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group? Should a Participant seeking a renewed exception be allowed to provide an updated security assessment instead of a new security assessment? Should a Participant seeking a renewed exception be required to provide new design specifications instead of updated design specifications? Should a Participant seeking a renewed exception (or re-applying for an exception) be required to provide any additional materials? If so, please describe such additional materials and explain why such additional materials might be appropriate to include in an application for a renewed exception. Are there different or additional parties that should receive the application materials for a continued exception? If so, please identify these parties and explain why it would be appropriate for them to receive the application materials.

52. Is it appropriate for the CISO and the CCO to follow the same process and to use the same standards to judge whether to grant initial exceptions and continued exceptions? If the standards or process should be different, please explain which aspects should differ and explain why that would be appropriate.

b. Operation of Non-SAW Environments

To further safeguard the security of the CAT, the proposed amendments also include provisions that would govern how non-SAW environments are operated during the term of any exception granted by the CISO and the CCO.

Specifically, proposed Section 6.13(d)(iii)(A) would state that an approved Participant may not employ its non-SAW environment to access CAT Data through the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 until the Plan Processor notifies the Operating Committee that the non-SAW environment has achieved compliance with the detailed design specifications submitted by that Participant as part of its application for an exception (or continuance). This provision mirrors the proposed requirements set forth for SAWs¹³⁹ and serves the same

purpose—namely, to protect the security of the CAT. The Commission preliminarily believes that it is important to require approved Participants to adhere to and implement the detailed design specifications that formed a part of their application packages, because such detailed design specifications will have been reviewed and vetted by the CISO, the CCO, and the Security Working Group.¹⁴⁰ Detailed design specifications for non-SAW environments that have been granted an exception by the CISO and the CCO should be detailed design specifications for an environment that does not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor pursuant to NIST SP 800–53.¹⁴¹ Therefore, the Commission preliminarily believes that non-SAW environments that implement their submitted design specifications should be sufficiently secure, and, for an additional layer of protection and oversight, the proposed amendments require the Plan Processor¹⁴² to determine and notify the Operating Committee that the non-SAW environment has achieved compliance with such detailed design specifications before CAT Data can be accessed via the user-defined direct query or bulk extraction tools.

Proposed Section 6.13(d)(iii)(B) would require the Plan Processor to monitor the non-SAW environment in accordance with the detailed design specifications submitted with the exception (or continuance) application, for compliance with those detailed design specifications only,¹⁴³ and to notify the Participant of any identified non-compliance with such detailed

¹⁴⁰ See proposed Section 6.13(d)(i)(A), (d)(ii)(A).

¹⁴¹ See proposed Section 6.13(d)(i)(B), (d)(ii)(B).

¹⁴² The Commission preliminarily believes that the Plan Processor is best situated to perform this task. Under the proposed amendments, the Plan Processor will be required to perform a similar task for SAWs, see proposed Section 6.13(b)(ii), so the Plan Processor will be most familiar with the task and with similar design specifications. Moreover, the Plan Processor will be responsible for monitoring any approved non-SAW environments for compliance with the design specifications, so it makes sense to require the Plan Processor to perform the initial evaluation. See proposed Section 6.13(d)(iii)(B).

¹⁴³ The Commission preliminarily believes it is appropriate to limit the scope of the Plan Processor's monitoring to compliance with the detailed design specifications submitted by the Participant pursuant to proposed Section 6.13(d)(i)(A)(2) or proposed Section 6.13(d)(ii)(A). The Commission preliminarily believes that this limitation would protect the Participants by making it clear that analytical activities in their non-SAW environments would not be subject to monitoring by the Plan Processor, without hampering the ability of the Plan Processor to adequately protect the security of CAT Data.

¹³⁹ See, e.g., proposed Section 6.13(b); see also Part II.C.4. *supra*, for further discussion of these proposed requirements.

design specifications.¹⁴⁴ This provision would also require the Participant to comply with the submitted design specifications and to promptly remediate any identified non-compliance.¹⁴⁵ Moreover, proposed Section 6.13(d)(iii)(C) would require the Participant to simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment.

The Commission preliminarily believes that these requirements will improve the security of the non-SAW environments that are granted an exception by the CISO and CCO and, therefore, the overall security of the CAT. Requiring the Plan Processor to monitor each non-SAW environment that has been granted an exception for compliance with the submitted design specifications would help the Plan Processor to identify and notify the Participants of any non-compliance events, threats, and/or vulnerabilities, thus reducing the potentially harmful effects these matters could have if left unchecked and uncorrected.¹⁴⁶ The Commission also preliminarily believes that it is appropriate to require approved Participants to simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to the security controls for the non-SAW environment.¹⁴⁷ Exceptions would be granted after a review of a non-SAW environment's existing security

controls, policies, and procedures, but the importance of such protocols does not end at the application stage. Therefore, if the security controls reviewed and vetted by the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group change in any material way, the Commission preliminarily believes it is appropriate to require the escalation of this information to the party responsible for monitoring the non-SAW environment for compliance—the Plan Processor. The Commission also preliminarily believes that it is appropriate to simultaneously provide this information to the members of the Security Working Group (and their designees) and Commission observers of the Security Working Group.¹⁴⁸ As noted above, the proposed amendments would require the Security Working Group to include the chief or deputy chief information security officers for each Participant. These experts would likely be able to provide valuable feedback to the CISO and the CCO (or to the Operating Committee) on how to address such non-compliance or how to prevent similar events in the future, and simultaneous notification of the members of the Security Working Group (and their designees) would help them to provide such feedback in a timely manner.

Finally, the Commission wishes to emphasize that the above-stated requirements for non-SAW environments only dictate that Participants must meet certain security requirements. The Participants would still be wholly responsible for all other aspects of their non-SAW environment, including the internal architecture of their non-SAW environment(s), the analytical tools to be used in their non-SAW environment(s), and the use of any additional data. Accordingly, proposed Section 6.13(d)(iii)(D) indicates that an approved Participant may provision and use its choice of software, hardware, and additional data within the non-SAW environment, so long as such activities otherwise comply with the detailed design specifications provided by the Participant pursuant to proposed Section 6.13(d)(i)(A)(2) or proposed Section 6.13(d)(ii)(A). The Commission preliminarily believes that this provision will give the Participants sufficient flexibility in and control over the use of their non-SAW environments, while still maintaining the security of

such environments and the CAT Data that may be contained therein.

The Commission requests comment on the proposed operational requirements for non-SAW environments. Specifically, the Commission solicits comment on the following:

53. The proposed amendments would require the Plan Processor to notify the Operating Committee that an approved Participant's non-SAW environment has achieved compliance with the detailed design specifications submitted pursuant to proposed Section 6.13(d)(i) or (ii) before that non-SAW may access CAT Data through the user-defined direct queries or bulk extraction tools. Is the Plan Processor the appropriate party to make this notification? If not, what other party should make the notification and why? Is it appropriate to notify the Operating Committee? Should any other parties be notified? If so, please identify those parties and explain why it would be appropriate for them to be notified. Should approved non-SAW environments be allowed to connect to the Central Repository without any evaluation process? Are the detailed design specifications submitted by the approved Participant as part of the application process an appropriate benchmark? If it is not an appropriate benchmark, please identify what benchmark would be appropriate and explain why.

54. The proposed amendments would require the Plan Processor to monitor an approved Participant's non-SAW environment in accordance with the detailed design specifications submitted with that Participant's application for an exception. Is the Plan Processor the right party to conduct this monitoring? If a different party should conduct this monitoring, please identify that party and explain why it would be a more appropriate choice. Is it appropriate to require that the proposed monitoring be conducted in accordance with the detailed design specifications submitted with the Participant's application for an exception? Should a different benchmark provide the controlling standard for such monitoring? If so, please identify that benchmark and explain why it would provide a more appropriate standard. Instead of specifying that such monitoring should be conducted in accordance with the detailed design specifications submitted by the Participant, should the proposed amendments specify the nature of the access and monitoring required? Should the proposed amendments specify that monitoring should be continuous? If so, please explain how that term should be defined and why such definition would

¹⁴⁴ The proposed amendments would require the Participant to comply with the detailed design specifications submitted pursuant to proposed Section 6.13(d)(i)(A)(2) or proposed Section 6.13(d)(ii)(A). See proposed Section 6.13(d)(iii)(B); see also note 97 *infra*.

¹⁴⁵ This provision would require each Participant to remedy any non-compliance promptly, whether such non-compliance was identified by the Plan Processor or by the Participant. See note 100 *supra*, for a discussion of what might constitute "prompt" remediation.

¹⁴⁶ The detailed design specifications submitted pursuant to proposed Section 6.13(d)(i) or (ii) must demonstrate the extent to which they adhere to the detailed design specifications developed by the Plan Processor for SAWs pursuant to proposed Section 6.13(b)(i), and they must enable substantially similar operational functions. Accordingly, the Commission does not preliminarily expect the monitoring required by proposed Section 6.13(d)(iii) to impose an undue burden on the Plan Processor, because the Plan Processor should be able to leverage and use the monitoring processes developed for SAWs. See, e.g., note 534 *infra*.

¹⁴⁷ An example of such a change would be if a Participant implements a new system which establishes a new control or changes a detail design specification.

¹⁴⁸ See note 30 *supra* for a discussion of the confidentiality obligations to which the members of the Security Working Group and their designees would be subject.

be appropriate. If not, please explain how often such monitoring should be conducted and explain why. Should the proposed amendments indicate whether manual or automated processes (or both) should be used by the Plan Processor and whether automated support tools should be used? Should the proposed amendments indicate whether the Participant should provide the Plan Processor with market data feeds, log files, or some other data? Please identify any data that should be provided to the Plan Processor to enable the required monitoring.

55. The proposed amendments would restrict the Plan Processor to monitor SAWs for compliance with the detailed design specifications submitted pursuant to proposed Section 6.13(d)(i)(A)(2) or proposed Section 6.13(d)(ii)(A). Is this an appropriate limitation? Should the Plan Processor be able to monitor any of the activities that might be conducted within a Participant's non-SAW environment? If so, please specify what activities the Plan Processor should be permitted to monitor and explain why such monitoring would be appropriate.

56. The proposed amendments would require the Plan Processor to notify the Participant of any identified non-compliance with the design specifications provided pursuant to proposed Section 6.13(d)(i) or (ii). Should a different party notify the Participant of any identified non-compliance? If so, please identify that party and explain why it would be appropriate for that party to provide the notification. Are there any additional parties that the Plan Processor should notify of any identified non-compliance—for example, the Operating Committee? If so, please identify the party or parties that should also be notified, explain why such notification would be appropriate, and explain whether notification of those parties would raise any confidentiality, security, or competitive concerns.

57. The proposed amendments would specify that approved Participants must comply with the detailed design specifications provided pursuant to proposed Section 6.13(d)(i) or (ii). Should the proposed amendments specify that the Participants should comply with another set of requirements? If so, please identify those requirements and explain why it would be more appropriate for a non-SAW environment to comply with those requirements.

58. The proposed amendments would require the Participants to promptly remediate any identified non-compliance. Should the proposed

amendments specify what would qualify as “prompt” remediation? If so, please explain what amount of time should be specified and explain why that amount of time is sufficient. Would it be appropriate for the proposed amendments to refer specifically to the risk management policy developed by the Plan Processor for appropriate remediation timeframes? Is there another policy that provides remediation timeframes that would be more appropriate for these purposes? If so, please identify that policy and explain why it would be a better benchmark.

59. The proposed amendments would specify that approved Participants must simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls. Is it appropriate to require the Participant to simultaneously notify the members of the Security Working Group (and their designees) and Commission observers of the Security Working Group? Should the Plan Processor be provided with a notification before the members of the Security Working Group (and their designees) and Commission observers of the Security Working Group? If so, how long should the Participant be required to wait before notifying the members of the Security Working Group (and their designees) and Commission observers of the Security Working Group? What kinds of changes should be considered “material”? Please provide specific and detailed examples. Should the proposed amendments specify that the Participants must comply with any other security protocols? If so, please identify these security protocols and explain why it would be appropriate to require the Participants to comply with them. Should the Participants be allowed to make material changes to their non-SAW environments without first getting the express approval of the CISO and the CCO? Does the proposed notification of the members of the Security Working Group and their designees raise any confidentiality, security, or competitive concerns? If so, please identify such concerns and explain whether the benefits of notifying the members of the Security Working Group (and their designees) nevertheless justify such notification. Are there any other parties that should be notified if a material change is made to the security controls of a non-SAW environment—for instance, the CISO and the CCO? If so, please identify these

parties and explain why it would be appropriate to notify them.

60. The proposed amendments clarify that the Participants may provision and use approved non-SAW environments with their choice of software, hardware, and additional data, so long as such activities are sufficiently consistent with the detailed design specifications submitted by the Participant pursuant to proposed Section 6.13(d)(i)(A)(1) or proposed Section 6.13(d)(ii)(A). Are there specific software, hardware, or additional data that the Commission should explicitly disallow in the proposed amendments? If so, please identify such software, hardware, or data specifically and explain why it would be appropriate to disallow it.

D. Online Targeted Query Tool and Logging of Access and Extraction

The CAT NMS Plan does not limit the amount of CAT Data a regulator can extract or download through the online targeted query tool; the CAT NMS Plan states that the Plan Processor must define the maximum number of records that can be viewed in the online tool as well as the maximum number of records that can be downloaded.¹⁴⁹ The Commission believes that certain limitations and changes are required to prevent the online targeted query tool from being used to circumvent the purposes of the proposed CISP and SAW usage requirements.¹⁵⁰ Specifically, the Commission proposes to amend Appendix D, Section 8.1.1 of the CAT NMS Plan to remove the ability of the Plan Processor to define the maximum number of records that can be downloaded via the online query tool, and instead limit the maximum number of records that can be downloaded via the online targeted query tool to 200,000 records per query request.¹⁵¹ In addition, the Commission proposes to

¹⁴⁹ The CAT NMS Plan does specify that the minimum number of records that the online targeted query tool is able to process is 5,000 (if viewed within the online query tool) or 10,000 (if viewed via a downloadable file). See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1.1. Section 8.1.1 of Appendix D of the CAT NMS Plan also requires that result sets that exceed the maximum viewable or download limits must return to testers a message informing them of the size of the result set and the option to choose to have the result set returned via an alternate method (*e.g.*, multiple files).

¹⁵⁰ Under the proposed amendments described in Part II.A above, regulators would be permitted to use the online targeted query tool outside of a Participant SAW.

¹⁵¹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1.1. If the Plan Processor provides more than one online targeted query tool, the proposed requirements of Appendix D, Section 8.1.1, and existing requirements of the CAT NMS Plan, would apply to each online targeted query tool.

amend Appendix D, Section 8.1.1 of the CAT NMS Plan to permit the downloading of a result set through the online targeted query tool, in either a single or multiple file(s), only if the download per query result does not exceed 200,000 records. Proposed Appendix D, Section 8.1.1 would also provide that users that select a multiple file option will be required to define the maximum file size of the downloadable files subject to the download restriction of 200,000 records per query result. As proposed, the Plan Processor may still define a maximum number of records that can be downloaded to a number lower than 200,000.

As proposed, regulatory users that need to download specific result sets for regulatory and surveillance purposes from the targeted online query tool must refine their searches to fewer than 200,000 records in order to be able to download entire record sets. If a regulatory user receives a result set larger than 200,000 records in the online targeted query tool, the Commission believes that it is appropriate for the regulatory user to further refine the query used so that the result set is smaller than 200,000 records before the regulatory user would be permitted to download the entire record set. Alternatively, if a regulatory user must download more than 200,000 records for surveillance or regulatory purposes, the Commission believes that it is appropriate that the regulatory user be required to access CAT Data through the SAWs.

The Commission preliminarily believes that limiting the number of records that can be downloaded to 200,000 is reasonable and appropriate because it is a sufficiently large number to allow for result sets to be generated for the type of targeted searches for which the online targeted query tool is designed.¹⁵² Based on the Commission's experience a 200,000 download limit would not prevent regulators from performing many investigations, such as investigations into manipulation schemes in over-the-counter stocks or investigations based on shorter-term trading activity. However, the Commission believes that programmatic analysis of very large downloaded datasets is more appropriately provided for in a SAW or approved non-SAW environment, which would be subject to the requirements of proposed Section

6.13.¹⁵³ The Commission also preliminarily believes that a 200,000 download limit would help prevent large scale downloading of CAT Data outside of SAW or approved non-SAW environments using the online targeted query tool.

The Commission preliminarily believes that the proposed limitations on downloading records would not prevent regulatory users from using the online query tool to perform regulatory analysis of result sets greater than 200,000 records,¹⁵⁴ even if such result sets could not be downloaded. The Commission understands that the Plan Processor's online targeted query tool is designed to provide for the analysis of massive data sets like the CAT database. This functionality would allow users to perform their surveillance and regulatory functions within the online targeted query tool, as appropriate, and allow regulatory users to narrow queries to obtain more manageable data sets that are not greater than 200,000 records for download or further analysis.

The CAT NMS Plan currently requires the targeted online query tool to log submitted queries, query parameters, the user ID of the submitter, the date and time of the submission, and the delivery of results.¹⁵⁵ The CAT NMS Plan further requires that the Plan Processor provide monthly reports based on this information to each Participant and the SEC of its respective metrics on query performance and data usage, and that the Operating Committee receive the monthly reports to review items, including user usage and system processing performance.¹⁵⁶ The CAT NMS Plan, however, does not require that the online query tool log information relating to the extraction of CAT Data.¹⁵⁷ The Commission now proposes to make changes to these logging requirements.

First, the Commission proposes to amend Appendix D, Section 8.1.1 of the CAT NMS Plan to define the term "delivery of results," to mean "the number of records in the result(s) and the time it took for the query to be performed." As noted above, the CAT NMS Plan requires the logging of "the delivery of results," but does not define what that term means. The Commission preliminarily believes the proposed

definition would result in logs that provide more useful information to the Plan Processor and Participants and will assist in the identification of potential issues relating to the security or access to CAT Data. For example, this information would provide the Plan Processor data that could be used to help assess the performance of access tools, and whether the system is meeting performance criteria related to the speed of queries.¹⁵⁸

The Commission also proposes to amend Appendix D, Section 8.1.1 of the CAT NMS Plan to require that the online targeted query tool also log information relating to the access and extraction of CAT Data, when applicable. The CAT NMS Plan already requires the logging of access, but the Commission is proposing the change to require both access and extraction of CAT Data be logged. This change would also require the same logging of access and extraction of CAT Data from the user-defined direct queries and bulk extraction tools, which the Commission believes would be possible because of the required usage of SAWs proposed above. The Commission preliminarily believes that the requirement to log access and extraction of CAT Data for all three types of access is appropriate because the monthly reports of information relating to the query tools will be provided to the Operating Committee so that the Participants can review information concerning access and extraction of CAT Data regularly and to identify issues related to the security of CAT Data in accordance with Participants' data confidentiality policies, which are also being amended as described in Part II.G below.

Lastly, the Commission proposes to amend Appendix D, Section 8.2.2 of the CAT NMS Plan to modify the sentence "[t]he Plan Processor will use this logged information to provide monthly reports to the Operating Committee, Participants and the SEC of their respective usage of the online query tool," by replacing "online query tool" with "user-defined direct query and bulk extraction tool," because the relevant section of the CAT NMS Plan is about bulk extraction performance and the subject of the preceding sentence concerns logging of the user-defined direct query and bulk extraction tool. The Commission preliminarily

¹⁵² The Participants have stated that when fully complete, CAT will ingest "in excess of 58 billion records per day." See CAT NMS, LLC, "CAT NMS Selects FINRA as Consolidated Audit Trail Plan Processor," available at: https://www.catnmsplan.com/wp-content/uploads/2019/02/CAT_FINRA_Press_Release_FINAL.pdf.

¹⁵³ See Part II.C.

¹⁵⁴ The proposed amendments would not limit the query results that can be viewed within the online targeted query tool. The limitation would only apply to downloads from the tool.

¹⁵⁵ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1.1.

¹⁵⁶ *Id.*

¹⁵⁷ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.2.

¹⁵⁸ The Commission also preliminarily believes that this information could be used to help monitor whether or not Regulatory Staff are accessing CAT Data appropriately and whether or not Participants' extraction of CAT Data is limited to the minimum amount of data necessary to achieve specific surveillance or regulatory purposes. See *infra* Parts II.G.2 and II.G.3.a.

believes that the intent of the sentence was to refer to user-defined direct query and bulk extraction tool and that it is appropriate to amend this to provide clarity and consistency to the sentence and section of the CAT NMS Plan.

The Commission requests comment on the proposed amendments to the provisions regarding the targeted online query tool and logging of access and extraction of CAT Data. Specifically, the Commission solicits comment on the following:

61. Should the maximum the number of records that can be downloaded from the online targeted query tool to 200,000 records? If not, what should the maximum number of records be set at?

62. Should the CAT NMS Plan define what “delivery of results” means in the context of logging? Is the proposed definition of “delivery of results” reasonable and appropriate?

63. Should the CAT NMS Plan require the CAT System to log extraction of CAT Data from the targeted online query tool, as the CAT System must do for the user-defined query tool and bulk extraction tool? Should other information be logged by the CAT System?

E. CAT Customer and Account Attributes

Citing to data security concerns raised with regard to the reporting and collection of information that could identify a Customer in the CAT, and in particular the reporting of SSN(s)/ITIN(s), dates of birth and account numbers, the Participants submitted a request for an exemption from certain reporting provisions of the CAT NMS Plan pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) ¹⁵⁹ and Rule 608(e) of Regulation NMS under the Exchange Act ¹⁶⁰ (the “PII Exemption Request”). ¹⁶¹ Specifically, the Participants requested an exemption from (1) the requirement that Industry Members ¹⁶² report SSN(s)/ITIN(s) to the CAT in order to create the Customer-ID, so as to allow for an alternative approach to generating a Customer ID without requiring SSN(s)/ITIN(s) to be reported to the CAT; and (2) the requirement that Industry Members

report dates of birth and account numbers associated with natural person Customers to the CAT, and instead requiring Industry Members to report the year of birth associated with natural person Customers, and the Industry Member Firm Designated ID for each trading account associated with all Customers. ¹⁶³

On March 17, 2020, the Commission granted the Participants’ request for an exemption from reporting the SSN(s)/ITIN(s), date of birth and account number associated with natural person Customers to the CAT, conditioned on the Participants meeting certain conditions (the “PII Exemption Order”). ¹⁶⁴ The proposed amendments would modify the Customer-ID creation process and reporting requirements in a manner consistent with the PII Exemption Request, including all changes requested by the Participants to the data elements required to be reported to and collected by the CAT. ¹⁶⁵

The Commission proposes to amend the CAT NMS Plan to: (1) Adopt revised Industry Member reporting requirements to reflect that ITINs/SSNs, dates of birth and account numbers will not be reported to the CAT; (2) establish a process for creating Customer-ID(s) in light of the revised reporting requirements; (3) impose specific obligations on the Plan Processor that would support the revised reporting requirements and creation of Customer-ID(s); and (4) amend existing provisions of the CAT NMS Plan to reflect the new reporting requirements and process for creating Customer-ID(s), as further discussed below.

1. Adopt Revised Industry Member Reporting Requirements

The CAT NMS Plan requires Industry Members to collect and report “Customer Account Information” ¹⁶⁶

¹⁶³ The “Industry Member Firm Designated ID” refers to the Firm Designated ID associated with that specific Industry Member.

¹⁶⁴ See Securities Exchange Act Release No. 88393 (March 17, 2020), 85 FR 16152, (March 20, 2020) (“PII Exemption Order”).

¹⁶⁵ See PII Exemption Request, *supra* note 161.

¹⁶⁶ The CAT NMS Plan defines “Customer Account Information” to “include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable); except, however, that (a) in those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution, the Industry Member will (i) provide the Account Effective Date in lieu of the “date account opened”; (ii) provide the relationship identifier in lieu of the “account number”; and (iii) identify the “account type” as a “relationship”; (b) in those circumstances in which the relevant account was established prior to the implementation date of the CAT NMS Plan applicable to the relevant CAT Reporter (as set forth

and “Customer Identifying Information” ¹⁶⁷ to the CAT in order to identify Customers. ¹⁶⁸ As noted above, the PII Exemption Order permits the Participants to no longer require Industry Members to report SSN(s)/ITIN(s), dates of birth and account numbers for natural person Customers, which are data elements in the definition of Customer Account Information and Customer Identifying Information, provided that Industry Members report the year of birth for natural person Customers to the CAT. ¹⁶⁹ Consistent with the PII Exemption Order, the Commission proposes to amend the CAT NMS Plan to delete the requirement that SSN(s)/ITIN(s) be reported to and collected by the CAT, and to replace the requirement that Industry Members report the dates of birth for their natural person Customers with the requirement that Industry Members report the year of birth for their natural person Customers. ¹⁷⁰ In addition, the Commission proposes to delete the requirement that account numbers be reported to and collected by the CAT as a data element in Account Attributes. ¹⁷¹ The proposed amendments also would require that the Customer-ID of a legal entity Customer

in Rule 613(a)(3)(v) and (vi)), and no “date account opened” is available for the account, the Industry Member will provide the Account Effective Date in the following circumstances: (i) Where an Industry Member changes back office providers or clearing firms and the date account opened is changed to the date the account was opened on the new back office/clearing firm system; (ii) where an Industry Member acquires another Industry Member and the date account opened is changed to the date the account was opened on the post-merger back office/clearing firm system; (iii) where there are multiple dates associated with an account in an Industry Member’s system, and the parameters of each date are determined by the individual Industry Member; and (iv) where the relevant account is an Industry Member proprietary account.”

¹⁶⁷ The CAT NMS Plan defines “Customer Identifying Information” to mean “information of sufficient detail to identify a Customer, including, but not limited to, (a) with respect to individuals: name, address, date of birth, individual tax payer identification number (“ITIN”)/social security number (“SSN”), individual’s role in the account (e.g., primary holder, joint holder, guardian, trustee, person with the power of attorney); and (b) with respect to legal entities: name, address, Employer Identification Number (“EIN”)/Legal Entity Identifier (“LEI”) or other comparable common entity identifier, if applicable; provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer’s LEI in addition to other information of sufficient detail to identify a Customer.”

¹⁶⁸ The CAT NMS Plan defines “Customer” as having the same meaning provided in SEC Rule 613(j)(3). See CAT NMS Plan *supra* note 3 at Article I, Section 1.1 “Customer.”

¹⁶⁹ See PII Exemption Order, *supra* note 164.

¹⁷⁰ See *id.*

¹⁷¹ See *infra* this Part II.E.1 for a description and discussion of Account Attributes and the data elements contained in Account Attributes. See also PII Exemption Order, *supra* note 164 at 16154.

¹⁵⁹ 15 U.S.C. 78mm(a)(1).

¹⁶⁰ 17 CFR 242.608(e).

¹⁶¹ See letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated January 29, 2020 (the “PII Exemption Request”).

¹⁶² “Industry Member” is a defined term under the CAT NMS Plan and means “a member of a national securities exchange or a member of a national securities association.” See CAT NMS Plan *supra* note 3 at Article I, Section 1.1.

be based on the transformation of that legal entity's EIN by the CCID Transformation Logic,¹⁷² just as the SSN of a natural person Customer would be transformed.¹⁷³

The Commission proposes the following additional amendments to reflect the revised reporting requirements for Industry Members: The defined term "Customer Attributes," would replace the defined term "Customer Identifying Information" and "Account Attributes" would replace the defined term "Customer Account Information" to more accurately reflect the data elements being reported by Industry Members; and a newly defined term "Customer and Account Attributes" would be defined to include all the data elements, or attributes, in both "Customer Attributes" and "Account Attributes."¹⁷⁴ Finally, as a result of the changes to the Customer and Account Attributes that are reported to and collected by the CAT, which will no longer require the reporting of the most sensitive PII, the Commission proposes to delete the defined term "PII" from the CAT NMS Plan.

"Customer Attributes" would include all of the same data elements as "Customer Identifying Information" except the proposed definition would not include the requirement to report ITIN/SSN and date of birth, and the proposed definition would add the requirement that the year of birth for a natural person Customer be reported to CAT.¹⁷⁵ As such, "Customer Attributes"

would be defined to mean "information of sufficient detail to identify a Customer, including, but not limited to, (a) with respect to individuals: name, address, year of birth, individual's role in the account (e.g., primary holder, joint holder, guardian, trustee, person with the power of attorney); and (b) with respect to legal entities: Name, address, Employer Identification Number ("EIN") and Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable;¹⁷⁶ provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer."¹⁷⁷

In addition, "Account Attributes" would be defined to include all of the same data elements as "Customer Account Information," except a Customer's account number and the relationship identifier in lieu of an account number would not be reported by an Industry Member as an Account Attribute.¹⁷⁸ As proposed, therefore, "Account Attributes" would be defined in part to "include, but not limited to, account type, customer type, date account opened, and large trader identifier (if applicable)."¹⁷⁹

¹⁷² The proposed amendment also would clarify that a legal entity's EIN is different than the legal entity's Legal Entity Identifier ("LEI"). In relevant part, the CAT NMS Plan currently provides that the Industry Member will report "Employer Identification Number ("EIN")/Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable." The Commission is amending the CAT NMS Plan to require that an Industry Member report the "Employer Identification Number ("EIN") and Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable; provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer." See Proposed Appendix D, Section 9.2.

¹⁷⁷ See *id.* As is currently required, Customer Attributes would be defined to "include, but not be limited to" the data elements listed in the definition of Customer Attributes. If the Participants intend to require additional data elements to be reported to the CAT, such changes must be filed with the Commission and would be subject to public notice and comment, and need to be approved by the Commission before becoming effective. See 17 CFR 240.19b-4; see also 17 CFR 242.608(a).

¹⁷⁸ A relationship identifier is used when an Industry Member does not have an account number available to its order handling and/or execution system at the time of order receipt, but can provide an identifier representing the client's trading. When a relationship identifier is used instead of a parent account number, and an Industry Member places an order on behalf of the client, any executed trades will be kept in a firm account until they are allocated to the proper subaccount(s). Relationship identifiers would be reported as Firm Designated IDs pursuant to the Firm Designated ID amendment in this situation.

¹⁷⁹ The proposed definition of Account Attributes would retain the alternative data elements that an

The Commission preliminarily believes that eliminating reporting of SSNs to the CAT is appropriate because SSNs are considered among the most sensitive PII that can be exposed in a data breach, and the elimination of the SSNs from the CAT may reduce both the risk of attracting bad actors and the impact on retail investors in the event of a data breach.¹⁸⁰ The Commission preliminarily believes that the same concern applies to the reporting of account numbers and thus it is appropriate to no longer require account numbers to be reported to the CAT as part of Account Attributes to the CAT.¹⁸¹ The removal of account numbers and dates of birth is expected to further reduce both the attractiveness of the database as a target for hackers and the impact on retail investors in the event of a data breach.¹⁸² The Commission also preliminarily believes that replacing the requirement that Industry Members report the date of birth with the year of birth of natural person Customers is appropriate because it will continue to allow Regulatory Staff to carry out regulatory analysis that focuses on certain potentially vulnerable populations, such as the elderly.

In addition, replacing the term "Customer Identifying Information" with the term "Customer Attributes" and replacing the term "Customer Account Information" with the term "Account Attributes" is also appropriate because the data elements in both categories are more accurately described as information that can be attributed to a Customer or a Customer's account in light of the PII that has been removed from these categories. Furthermore, adopting a new defined term, "Customer and Account Attributes," that refers collectively to all the attributes in Customer Attributes and Account Attributes is a useful and efficient way to refer to all the attributes associated with a Customer that is either a natural person or a legal entity that are required to be reported by Industry Members and collected by the CAT.

Industry Member can report in the circumstances in which the Industry Member has established a trading relationship with an institution but has not established an account with that institution. See CAT NMS Plan *supra* note 3 at Article I, Section 1.1 "Customer Account Information."

¹⁸⁰ See PII Exemption Order, *supra* note 164, at 16156; see also Identify Theft Resource Center 2018 End of Year Breach Report, pg. 13, https://www.idtheftcenter.org/wp-content/uploads/2019/02/ITRC_2018-End-of-YearAftermath_FINAL_V2_combinedWEB.pdf.

¹⁸¹ See proposed definition of "Account Attributes" in proposed Section 1.1.

¹⁸² See PII Exemption Order, *supra* note 164, at 16156.

¹⁷² "CCID Transformation Logic" refers to "the mathematical logic identified by the Plan Processor that accurately transforms an individual tax payer identification number(s)(ITIN(s))/social security number(s)(SSN(s))/Employer Identification Number (EIN(s)) into a Transformed Value(s) for submission into the CCID Subsystem, as set forth in Appendix D, Section 9.1." See proposed Section 1.1 "CCID Transformation Logic".

¹⁷³ See *infra* Part II.E.2 for a description of the use of the CCID Transformation Logic by Industry Members. The Commission is not changing the CAT NMS Plan's requirement that a legal entity's EIN be reported as part of Customer and Account Attributes to CAIS. See *supra* Part II.F.2 for a discussion of how Regulatory Staff and SEC staff can access and use a legal entity's EIN to obtain that entity's Customer-ID through the CCID Subsystem, or access the legal entity's EIN in CAIS to obtain related Customer and Account Attributes, Customer-ID or other identifier (e.g., Industry Member Firm Designated ID) associated with that legal entity.

¹⁷⁴ See *id.*

¹⁷⁵ Specifically, name, address, individual's role in the account (e.g., primary holder, joint holder, guardian, trustee, person with the power of attorney); and legal entity name, address, EIN and LEI or other comparable common entity identifier, if applicable (provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer) are data elements that will not be changed pursuant to the amendments proposed by the Commission.

The Commission also preliminarily believes that it is appropriate to delete the term “PII” from the CAT NMS Plan and replace that term with “Customer and Account Attributes” as that would more accurately describe the attributes that must be reported to the CAT, now that ITINs/SSNs, dates of birth and account numbers would no longer be required to be reported to the CAT pursuant to the amendments being proposed by the Commission. Thus, the Commission proposes to eliminate the term “PII” in Article VI, Sections 6.2(b)(v)(F) and 6.10(c)(ii); and Appendix D, Sections 4.1; 4.1.2; 4.1.4; 6.2; 8.1.1; 8.1.3; 8.2; and 8.2.2.

The Commission requests comment on the proposed amendments that would adopt revised Industry Member reporting requirements to reflect that ITINs/SSNs, dates of birth and account numbers will not be reported to the CAT. Specifically, the Commission solicits comment on the following:

64. The proposed amendments define “Customer and Account Attributes” as meaning the data elements in Account Attributes and Customer Attributes. Do commenters believe these definitions should be modified to add or delete data elements? If so, what elements?

2. Establish a Process for Creating Customer-ID(s) in Light of Revised Reporting Requirements

The creation of a Customer-ID by the Plan Processor that accurately identifies a Customer continues to be a requirement under the CAT NMS Plan. The Commission preliminarily believes that it is appropriate to amend the CAT NMS Plan to set forth the process for how the Plan Processor would create Customer-IDs in the absence of the requirement that SSNs/ITINs, dates of birth and account numbers be reported to and collected by the CAT, consistent with the PII Exemption Order.¹⁸³ As further discussed below, however, the amendments proposed by the Commission deviate from the PII Exemption Order by requiring that a Customer’s EIN would also be transformed by the CCID Transformation Logic, along with SSNs/ITINs, so that the same process for creating Customer-IDs for natural persons also would apply to the creation of Customer-IDs for legal entities.¹⁸⁴

Accordingly, the Commission proposes the following amendments to the CAT NMS Plan: Section 9 of Appendix D, would be renamed “CAIS, the CCID Subsystem and the Process for Creating Customer-IDs”;¹⁸⁵ a new Section 9.1 would be added to Appendix D, entitled “The CCID Subsystem,” which would describe the operation of the CCID Subsystem and the process for creating Customer-IDs; Section 9.2, would be revised to describe the Customer and Account Attributes reported to and collected in the CAIS¹⁸⁶ and Transformed Values;¹⁸⁷ Section 9.3 would be amended to reflect the revised reporting requirements that require the reporting of a Transformed Value and Customer and Account Attributes by Industry Members; and Section 9.4 would be amended to specify the error resolution process for the CCID Subsystem and CAIS, and the application of the existing validation process required by Section 7.2 of Appendix D applied to the Transformed Value, Customer-IDs, the CCID Subsystem. The proposed amendments to each of these provisions is described below.

The Commission proposes to describe the CCID Subsystem and the process for creating Customer-IDs for both natural person and legal entity Customers through the CCID Subsystem in Section 9.1 of Appendix D. The proposed amendments provide that Customer-IDs would be generated through a two-phase transformation process. In the first phase, a Customer’s ITIN/SSN/EIN would be transformed into a Transformed Value using the CCID Transformation Logic provided by the Plan Processor. The Transformed Value, and not the ITIN/SSN/EIN of the Customer, would then be submitted to the CCID Subsystem, a separate subsystem within the CAT System,¹⁸⁸ along with any other information and additional events (e.g., record number)

Value and submitted to the CCID Subsystem, as well as reported to the CAT as an element of Customer and Account Attributes.

¹⁸⁵ Currently, Section 9 of Appendix D is entitled “CAT Customer and Customer Account Information.”

¹⁸⁶ “CAIS” refers to the Customer and Account Information System within the CAT System that collects and links Customer-ID(s) to Customer and Account Attributes and other identifiers for queries by Regulatory Staff. See proposed Section 1.1 “CAIS”.

¹⁸⁷ “Transformed Value,” would be defined to mean “the value generated by the CCID Transformation Logic as set forth in proposed Section 6.1(v) and Appendix D, Section 9.1 of the CAT NMS Plan. See *infra* note 190 for a discussion of this proposed definition.

¹⁸⁸ See proposed Section 1.1 “CCID Subsystem.” See also proposed Appendix D, Section 9.1 (The CCID Subsystem).

as may be prescribed by the Plan Processor that would enable the final linkage between the Customer-ID and the Customer Account Attributes. The CCID Subsystem would perform a second transformation to create a globally unique Customer-ID for each Customer. From the CCID Subsystem, the Customer-ID for the natural person and legal entity Customer would be sent to the CAIS¹⁸⁹ separately from any other CAT Data required to be reported by Industry Members to identify a Customer, which would include the Customer and Account Attributes.¹⁹⁰ In CAIS, the Customer-ID would be linked to the Customer and Account Attributes associated with that Customer-ID, and linked data would be made available to Regulatory Staff for queries in accordance with Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow) and Appendix D, Section 6 (Data Availability). The proposed amendments would make clear that the Customer-ID may not be shared with an Industry Member.

The proposed amendments also would require the Plan Processor to provide the CCID Transformation Logic to Industry Members and Participants pursuant to the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).¹⁹¹ For Industry Members, the proposed amendments would provide that the CCID Transformation Logic would be embedded in the CAT Reporter Portal or used by the Industry Member in machine-to-machine processing.¹⁹²

For Regulatory Staff, the Commission proposes to amend Appendix D, Section 9.1 to first reflect the fact that, unlike Industry Members who receive ITIN(s)/SSN(s)/EIN(s) from their Customers as part of the process of identifying their Customers for purposes of reporting to the CAT, Regulatory Staff may receive ITIN(s)/SSN(s)/EIN(s) of Customers from outside sources (e.g., via regulatory data, a tip, complaint, or referral).¹⁹³ Therefore, the proposed amendments would provide that for Regulatory Staff, the Plan Processor would embed the CCID Transformation Logic in the CAIS/CCID Subsystem Regulator Portal for manual CCID Subsystem Access.¹⁹⁴ For

¹⁸⁹ See *infra* note 203 for a discussion of this proposed definition.

¹⁹⁰ A legal entity’s EIN, which is an attribute included in Customer and Account Attributes, also would be sent directly to CAIS, as further discussed below.

¹⁹¹ See proposed Appendix D, Section 9.1 (The CCID Subsystem).

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ For a full discussion of Manual CCID Access, see *infra* Part II.F.4. As further discussed in Part

¹⁸³ See proposed Appendix D, Section 9.

¹⁸⁴ See proposed Appendix D, Section 9.1. In addition, a legal entity Customer would continue to be required to report its EIN to the CAT pursuant to the CAT NMS Plan because such EIN is an attribute included in Customer and Account Attributes. See proposed Appendix D, Section 9.2. Thus, a legal entity’s EIN would be transformed by the CCID Transformation Logic into a Transformed

Programmatic CCID Subsystem Access by Regulatory Staff, Participants approved for Programmatic CCID Subsystem Access would use the CCID Transformation Logic in conjunction with an API provided by the Plan Processor.¹⁹⁵

Given the need to safeguard the security of the CCID Subsystem, the Commission also proposes to amend the CAT NMS Plan to provide that the CCID Subsystem must be implemented using network segmentation principles to ensure traffic can be controlled between the CCID Subsystem and other components of the CAT System, with strong separation of duties between it and all other components of the CAT System.¹⁹⁶ The proposed amendments would furthermore state that the design of the CCID Subsystem will maximize automation of all operations of the CCID Subsystem to prevent, if possible, or otherwise minimize human intervention with the CCID Subsystem and any data in the CCID Subsystem.

Finally, as proposed, the CAT NMS Plan's existing requirement that the Participants ensure the timeliness, accuracy, completeness, and integrity of CAT Data would apply to the Transformed Value(s) and the overall performance of the CCID Subsystem to support the creation of a Customer-ID that uniquely identifies each Customer.¹⁹⁷ The proposed amendments would also require that the annual Regular Written Assessment required by Article VI, Section 6.6(b)(i)(A) assess the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s).¹⁹⁸ The proposed amendments would clarify that because the CCID Subsystem is part of the CAT System, all provisions of the CAT NMS Plan that apply to the CAT System would also apply to the CCID Subsystem.¹⁹⁹

II.F.4, Manual CCID Subsystem Access would be used when Regulatory Staff require the conversion of fifty or fewer ITIN(s)/SSN(s)/EIN(s). See proposed Section 4.1.6.

¹⁹⁵ For a full discussion of Programmatic CCID Access, see *infra* Part II.F.7. As further discussed in Part II.F.7, Programmatic CCID Subsystem Access would allow Regulatory Staff to submit multiple ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of interest identified through regulatory efforts outside of CAT to obtain Customer-ID(s) in order to query CAT Data regarding such Customer(s). See proposed Appendix D, Section 4.1.6.

¹⁹⁶ See proposed Appendix D, Section 9.1 (The CCID Subsystem).

¹⁹⁷ See *id.* See also CAT NMS Plan 4.12(b)(ii).

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

In order to implement these proposed amendments, the Commission proposes to adopt several new definitions, as follows: "CCID Subsystem" would be defined to mean the "subsystem within the CAT System which will create the Customer-ID from a Transformed Value(s)," as set forth in proposed Section 6.1(v) and Appendix D, Section 9.1 of the CAT NMS Plan.²⁰⁰

"Transformed Value," would be defined to mean "the value generated by the CCID Transformation Logic as set forth in proposed Section 6.1(v) and Appendix D, Section 9.1 of the CAT NMS Plan."²⁰¹ "CCID Transformation Logic" would be defined to mean the mathematical logic identified by the Plan Processor that accurately transforms an ITIN/SSN/EIN into a Transformed Value(s) for submission to the CCID Subsystem as set forth in Appendix D, Section 9.1.²⁰² "CAIS," would be defined to mean the "Customer and Account Information System within the CAT System that collects and links Customer-ID(s) to Customer and Account Attributes and other identifiers for queries by Regulatory Staff."²⁰³ "Customer Identifying Systems" would be defined to mean both the CAIS and the CCID Subsystem.²⁰⁴ Finally, the "CAIS/CCID Subsystem Regulator Portal" would be defined to mean the online tool enabling Manual CAIS access and Manual CCID Subsystem access.²⁰⁵

The Commission preliminarily believes that it is appropriate to amend the CAT NMS Plan to establish the process for creating Customer IDs using Transformed Values. This approach would preserve and facilitate the creation of a unique Customer-ID for all Customers and would track orders from, or allocations to, any Customer or group of Customers over time, regardless of what brokerage account was used without requiring the submission of the ITIN/SSN to the CAT.

As noted above, the proposed amendments would require that the EIN for a Customer that is a legal entity be submitted to the CCID Transformation Logic to create the legal entity's

Customer-ID; as such, the creation of a legal entity's Customer-ID would undergo the same transformation by the CCID Transformation Logic as a natural person Customer's ITIN/SSN. The Commission believes that this requirement is appropriate in order to leverage the operational efficiency that can be gained by requiring the same process for creating Customer-IDs for both natural person Customers and Customers that are legal entity Customers. The Commission also believes that requiring a legal entity's EIN to undergo the same transformation by the CCID Transformation Logic should also facilitate the ability of the Plan Processor to check the accuracy of the Customer-ID creation process since the Plan Processor can confirm that the same Customer-ID is created for the same EIN.

The Commission also preliminarily believes that these proposed amendments appropriately specify and describe the two systems within the CAT System that would ingest the various pieces of information that identify a Customer: (1) The CCID Subsystem, which would ingest the Transformed Value(s), along with any other information and additional events as may be prescribed by the Plan Processor that would enable the final linkage between the Customer-ID and the Customer Account Attributes, and (2) CAIS, which would collect the Customer and Account Attributes and other identifiers (*e.g.*, Industry Member Firm Designated IDs and record numbers) and link this data with the Customer-ID(s) created by the CCID Subsystem. The creation of the CCID Subsystem would facilitate the ability to create Customer-IDs in a process that is separate from the process that would require Industry Members to report Customer and Account Attributes to CAIS, but would ultimately link the Customer-IDs of Customers with the associated Customer and Account Attributes, so that Customers could be identified by Regulatory Staff when appropriate.

The Commission preliminarily believes that it is appropriate for the CAT NMS Plan to address the manner in which the CCID Transformation Logic is provided by the Plan Processor because the manner differs as between Industry Members on the one hand and Regulatory Staff on the other hand.

²⁰⁰ See proposed Section 1.1.

²⁰¹ See proposed Section 1.1 "Transformed Value."

²⁰² See proposed Section 1.1 "CCID Transformation Logic."

²⁰³ See proposed Section 1.1 "CAIS."

²⁰⁴ See proposed Section 1.1 "Customer Identifying Systems."

²⁰⁵ See *infra* Part II.F.3 for a discussion on Manual CAIS access and Manual CCID Subsystem access.

With respect to Industry Members, the manner in which the CCID Transformation Logic would be implemented depends on the submission method chosen by the Industry Member—e.g., CAT Reporter Portal²⁰⁶ or machine-to-machine submission²⁰⁷ (e.g., SFTP upload).²⁰⁸ Because the CAT Reporter Portal is provided by the Plan Processor, the CCID Transformation Logic would have to be embedded in the CAT Reporter Portal for use by the Industry Member. However, if the Industry Member were to connect to the CAT through a machine-to-machine interface, the Industry Member would have to embed the CCID Transformation Logic into its own reporting processes. In both cases, transformation of the Customer ITIN/SSN would be done by the Industry Member in its own environment.

With respect to the provision of the Transformation Logic to Regulatory Staff, the Commission preliminarily believes it is appropriate to first note in the proposed amendments that Regulatory Staff may receive ITIN(s)/SSN(s)/EIN(s) from outside sources such as through regulatory data, tips, complaints, or referrals. Regulatory Staff also would be using the CCID Transformation Logic to convert ITIN(s)/SSN(s)/EIN(s) for regulatory and oversight purposes, unlike Industry Members.²⁰⁹ Similar to Industry Members, however, Regulatory Staff would need to convert such ITIN(s)/SSN(s)/EIN(s) into Customer-IDs, using the CCID Transformation Logic provided by the Plan Processor. Therefore, the Commission believes that

it is appropriate to specify that the CCID Transformation Logic for Regulatory Staff will be based on the type of access to the CCID Subsystem sought by Regulatory Staff. For Manual CCID Subsystem Access, the Plan Processor would embed the CCID Transformation Logic in the client-side code of the CAIS/CCID Subsystem Regulator Portal;²¹⁰ for Programmatic CCID Subsystem Access, Participants would use the CCID Transformation Logic with an API provided by the Plan Processor.²¹¹ Providing the CCID Transformation Logic in this manner would facilitate ITIN(s) and SSN(s) not being submitted to the CAT.²¹²

The Commission preliminarily believes that the proposed amendments addressing the structure and operation of the CCID Subsystem are appropriate. Requiring that the CCID Subsystem be implemented using network segmentation principles to ensure traffic can be controlled between the CCID Subsystem and other components of the CAT System will facilitate the CCID Subsystem being designed, deployed, and operated as a separate and independent system within the CAT system. Strong separation of duties also will add an additional level of protection against unlawful access to the CCID Subsystem, CAIS, or any other component of the CAT System. Minimizing the need for human intervention in the operation of the CCID Subsystem and any data in the CCID Subsystem should also help minimize the introduction of human data-entry errors into the operation of the CCID Subsystem.

Finally, the existing CAT NMS Plan requires that the Participants provide to the SEC a Regular Written Assessment pursuant to Article VI, Section 6.6(b)(i)(A). As proposed, the Participants must include in this assessment an assessment of the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s).²¹³ The Commission believes these amendments are appropriate because the assessment required by Article VI, Section 6.6(b)(i)(A) includes an assessment of

the CAT System, and the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s) are elements of the CAT System.²¹⁴

The Commission requests comment on the proposed amendments that would serve to describe the process for creating Customer-ID(s) in light of the revised reporting requirements. Specifically, the Commission solicits comment on the following:

65. The proposed amendments define the “CAIS” as the Customer and Account Information System within the CAT System that collects and links Customer-IDs to Customer and Account Attributes and other identifiers for queries by Regulatory Staff. Are there other data elements that should be included in CAIS, and if so, what are they and why would it be appropriate to include them? How would adding these data elements to the CAIS impact regulatory value? Please explain.

66. The proposed amendments define the “CAIS/CCID Subsystem Regulator Portal” as the online tool enabling Manual CAIS access and Manual CCID Subsystem access. Is the term “online tool” in the proposed definition sufficient to describe the manner of access, or would it be beneficial to provide more detail regarding the access mechanism? Please explain.

67. The proposed amendments define the “CCID Subsystem” as the subsystem within the CAT System that will create the Customer-ID from a Transformed Value, as set forth in Section 6.1(v) and Appendix D, Section 9.1. Would it be beneficial to provide more information about how the CCID Subsystem functions based on the substance of Section 6.1(v) and Appendix D, Section 9.1 in the proposed definition? If so, what additional information would be helpful?

68. The proposed amendments define “CCID Transformation Logic” as the mathematical logic identified by the Plan Processor that accurately transforms an individual taxpayer

²⁰⁶ The Industry Member CAT Reporter Portal is a web-based tool that allows CAT Reporters to monitor and manage data submissions to the CAT. See Industry Member CAT Reporter Portal User Guide, Version 1.0 (dated April 20, 2020) at 4, available at https://www.catnmsplan.com/sites/default/files/2020-04/IM%20Reporter%20Portal%20User%20Guide_04202020.pdf.

²⁰⁷ The machine-to-machine interface is available via the CAT Secure File Transfer Protocol (“SFTP”) Accounts, which enable Industry Members and CAT Reporting Agents to create a machine-to-machine connection to securely transmit data to CAT and receive related feedback. See FINRA CAT Industry Member Onboarding Guide, Version 1.9 (dated April 15, 2020) at 17, available at <https://www.catnmsplan.com/sites/default/files/2020-04/FINRA%20CAT%20Onboarding%20Guide%20v1.9.pdf>.

²⁰⁸ See proposed Appendix D, Section 9.1 (The CCID Subsystem).

²⁰⁹ SEC staff shall have the same access to and functionalities of the CAT as Regulatory Staff. For example, in the case of ITIN(s) and SSN(s), SEC would receive these data elements from sources outside of the CAT and use the CCID Transformation Logic for Regulatory Staff to convert such data elements into Customer-IDs. See proposed Section 4.1.6 of Appendix D, Manual CCID Subsystem Access and Programmatic CCID Subsystem Access.

²¹⁰ See *infra* Part II.F.4 for a discussion on Manual CCID Subsystem access.

²¹¹ See *infra* Part II.F.; see also proposed Appendix D Section 4.1.6. EINs are published in publicly available documents and will continue to be submitted to the CAT as Customer Attributes.

²¹² Manual CCID Subsystem access would only be used when Regulatory Staff or SEC staff already have the ITIN(s)/SSN(s)/EIN(s) associated with a Customer of regulatory interest through regulatory efforts that have taken place outside of the CAT. See proposed Section 4.1.6 of Appendix D, Manual CCID Subsystem Access.

²¹³ See CAT NMS Plan *supra* note 3, Section 6.6.

²¹⁴ Article VI, Section 6.6(b)(i)(A) provides that “annually, or more frequently in connection with any review of the Plan Processor’s performance under this Agreement pursuant to Section 6.1(n), the Participants shall provide the SEC with a written assessment of the operation of the CAT that meets the requirements of SEC Rule 613, Appendix D, and this Agreement.” See CAT NMS Plan *supra* note 3, Article VI, Section 6.6(b)(i)(A). The “CAT System” is defined to mean “all data processing equipment, communications facilities, and other facilities, including equipment, utilized by the Company or any third parties acting on the Company’s behalf in connection with operation of the CAT and any related information or relevant systems pursuant to this Agreement,” which would include the CCID Subsystem. See CAT NMS Plan Section 1.1 “Cat System.”

identification number, SSN, or EIN into a Transformed Value for submission into the CCID Subsystem, as set forth in Appendix D, Section 9.1. Would it be beneficial to provide more information in the proposed definition about how the CCID Transformation Logic functions based on the substance of Appendix D, Section 9.1? If so, what additional information would be helpful?

69. The proposed amendments define the “Transformed Value” as the value generated by the CCID Transformation Logic, as set forth in proposed Section 6.1(v) and Appendix D, Section 9.1. Would it be beneficial to provide more information in the proposed definition about how the Transformed Value is used, based on the substance of proposed Section 6.1(v) and Appendix D, Section 9.1? If so, what additional information would be helpful?

70. The proposed amendments contain a description of how the Plan Processor would generate a Customer-ID, which would be made available to Regulatory Staff for queries, by using a two-phase transformation process that does not require ITINs, SSNs, or EINs to be reported to the CAT. Is the description of this process sufficient for a clear understanding of the process? Is the description of the process sufficient for a clear understanding of the process for generating a Customer-ID for a Customer that does not have an ITIN/SSN (e.g., a non-U.S. citizen Customer)? Would additional detail be beneficial for understanding the process? If so, please explain what kind of detail would be helpful.

71. The proposed amendments state that Industry Members or Regulatory Staff will transform the ITINs, SSNs, or EINs of a Customer using the CCID Transformation Logic into a Transformed Value, which will be submitted to the CCID Subsystem with any other information and additional elements required by the Plan Processor to establish a linkage between the Customer-ID and Customer and Account attributes. Are there other factors that would impact the ability of Industry Members or Regulatory Staff to execute the transformation process as described and to submit Transformed Values to the CCID Subsystem? If so, please explain.

72. For Industry Members, the proposed amendments state that the CCID Transformation Logic will be either embedded in the CAT Reporter Portal or used by the Industry Member in machine-to-machine processing. Would additional detail be helpful for understanding the process? Do commenters understand what is meant

by machine-to-machine processing? Please explain what kind of additional detail would be helpful.

73. Do commenters agree that requiring the CCID Subsystem to be implemented using network segmentation principles to ensure that traffic can be controlled between the CCID Subsystem and other components of the CAT System, with strong separation of duties between it and all other elements of the CAT System, would be an effective mechanism to provide protection against unlawful access to the CCID Subsystem and any other component of the CAT System? Would additional requirements be beneficial? If so, please specify and explain why it would be appropriate to include them.

74. As proposed, the Participants would be required to meet certain standards with respect to the process for creating Customer-IDs, *i.e.*, ensuring the timeliness, accuracy, completeness, and integrity of a Transformed Value, and ensuring the accuracy and overall performance of the CCID Subsystem. Do commenters agree that these standards would serve to accomplish the purpose of accurately attributing order flow to a Customer-ID? If not, please specify how the standards could be modified to achieve their intended goal and explain why it would be appropriate to impose these modified standards.

75. As proposed, the Participants are required to assess both (1) the overall performance and design of the CCID Subsystem, and (2) the process for creating Customer-IDs annually as part of each annual Regular Written Assessment. Are there other specific aspects of the CCID Subsystem or the Customer-ID creation process that might benefit from regular assessment? If so, please specify and explain why it would be appropriate to include them.

3. Plan Processor Functionality To Support the Creation of Customer-ID(s)

The CCID Subsystem needs to function appropriately and be sufficiently secure. Therefore, the Commission proposes amendments to Article VI, Section 6 to add a new Section 6.1(v) that would require the Plan Processor to develop, with the prior approval of the Operating Committee, specific functionality to implement the process for creating a Customer-ID(s), consistent with both Section 6.1 and Appendix D, Section 9.1.²¹⁵ With respect to the CCID Subsystem specifically, the proposed amendments would also require the Plan Processor to develop functionality

to: Ingest Transformed Value(s) and any other required information and convert the Transformed Value(s) into an accurate Customer-ID(s); validate that the conversion from the Transformed Value(s) to the Customer-ID(s) is accurate and reliable; and transmit the Customer-ID(s), consistent with Appendix D, Section 9.1, to CAIS or a Participant's SAW.²¹⁶

The Commission also preliminarily believes that it is appropriate to require the Plan Processor to develop the functionality by the CCID Subsystem to ingest the Transformed Value(s), along with any other information and additional events as may be prescribed by the Plan Processor that would enable the final linkage between the Customer-ID and the Customer Account Attributes and convert the Transformed Value(s) into an accurate and reliable Customer-ID(s); to validate that the conversion from the Transformed Value(s) to the Customer-ID(s) is accurate and reliable; and to transmit the Customer-ID(s) to CAIS or a Participant's SAW because these are the critical operational phases that must be performed by the CCID Subsystem in order to facilitate the creation of accurate Customer-IDs.

The Commission requests comment on the proposed amendments that would serve to impose specific obligations on the Plan Processor that will support the revised reporting requirements and creation of Customer-ID(s). Specifically, the Commission solicits comment on the following:

76. The proposed amendments require the Plan Processor to develop, with the prior approval of the Operating Committee, the functionality to implement the process for creating Customer-IDs consistent with this section and Appendix D, Section 9.1. Are the details provided in relation to developing this functionality between this section and Appendix D, Section 9.1 sufficient for purposes of implementation? Would additional detail be beneficial? If so, please explain.

77. With respect to the CCID Subsystem, the proposed amendments require the Plan Processor to develop functionality to (1) ingest Transformed Values and any other required information to convert the Transformed Values into an accurate and reliable Customer-IDs, (2) validate that that conversion from the Transformed Values to the Customer-IDs is accurate, and (3) transmit the Customer-IDs, consistent with Appendix D, Section 9.1, to CAIS or a Participant's SAW. Should the proposed amendments be

²¹⁵ See proposed Section 6.1(v) (Plan Processor).

²¹⁶ See proposed Section 6.1(v).

more specific about what kind of functionality must be provided by the Plan Processor? If so, please explain what kinds of details would be helpful.

4. Reporting Transformed Value

The Commission proposes to amend Article VI, Section 6.4 of the CAT NMS Plan to adopt Article VI, Section 6.4(d)(ii)(D) to require Industry Members to report on behalf of all Customers that have an ITIN/SSN/EIN the Transformed Value for that Customer's ITIN/SSN/EIN.²¹⁷ The Commission preliminarily believes these amendments are appropriate because they reflect the fact that Industry Members will be required to report the Transformed Value for their Customers in order to create the Customer-IDs for natural person and legal entity Customers, rather than the ITIN/SSN/EIN of such a Customer.

The Commission requests comment on the proposed amendments that relate to reporting required Industry Member Data in Section 6.4(d)(ii). Specifically, the Commission solicits comment on the following:

78. The proposed amendments require Industry Members to report on behalf of all Customers that have an ITIN/SSN/EIN the Transformed Value for that Customer's ITIN/SSN/EIN. Are there any factors that could impact the ability of Industry Members to report the Transformed Value? Please explain.

5. Data Availability Requirements

Appendix D, Section 6.2 (Data Availability Requirements) of the CAT NMS Plan generally addresses the processing of information identifying Customers that is reported by Industry Members to the CAT, the reporting timeframes for such information that must be met by Industry Members, and the availability of such information to regulators.²¹⁸ The Commission proposes to amend this section to require that (i) Industry Members submit Customer and Account Attributes and Transformed Values to the CCID Subsystem and CAIS, which are a part of the Central Repository, by the same deadline already required by the CAT NMS Plan (no later than 8:00 a.m. Eastern Time on T+1);²¹⁹ (ii) the CAT NMS Plan's validation; generation of error reports;

processing and resubmission of data; correction of data; and resubmission of corrected data requirements in Appendix D, Section 6.2 apply to the CCID Subsystem and CAIS, which are part of the Central Repository, and (iii) Customer and Account Attributes and Customer-IDs be available to regulators immediately upon receipt of initial data and corrected data, pursuant to security policies for retrieving Customer and Account Attributes and Customer-IDs.²²⁰ Finally, the Commission proposes to replace references to the term "PII" in this section with references to "Customer and Account Attributes."

In order to provide Regulatory Staff with access to Customer and Account Attributes in a timely manner, the Commission believes it is appropriate for the proposed amendments to set forth the requirements for (i) processing Customer and Account Attributes and Transformed Value(s) that are reported by Industry Members to the CAT, (ii) the reporting timeframes for such information identifying a Customer(s) that must be met by Industry Members, and (iii) the availability of such information to regulators.

6. Customer and Account Attributes in CAIS and Transformed Values

Appendix D, Section 9.1 of the CAT NMS Plan (Customer and Account Information Storage) generally addresses the attributes identifying a Customer that are required to be reported to and collected by the Plan Processor; the validation, maintenance and storage of such attributes; the creation and use of a Customer-ID; and the manner in which attributes identifying a Customer should initially be reported to the Central Repository.²²¹

²²⁰ Previously, this section of Section 6.2 of Appendix D required that PII must be available to regulators immediately upon receipt of initial data and corrected data, pursuant to security policies for retrieving PII. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 6.2. Raw unprocessed data that has been ingested by the Plan Processor must be available to Participants' regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1. Access to all iterations of processed data must be available to Participants' regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 6.2. Processing timelines start on the day the order event is received by the Central Repository for processing. Most events must be reported to the CAT by 8:00 a.m. Eastern Time the Trading Day after the order event occurred, which is referred to as the transaction date. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 6.1.

²²¹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 9.1. The Central Repository includes the CAIS system. The CAT NMS Plan defines "Central Repository" to mean "the repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to SEC

Appendix D, Section 9.2 generally lists the account attributes that would be reported to and collected by the Central Repository.²²² The Commission proposes to combine those sections into one section that would comprehensively list all the Customer and Account Attributes that Industry Members must report to CAT and clarify existing requirements in the CAT NMS Plan. Accordingly, Section 9.2 will reflect the entire list of Customer and Account Attributes and other identifiers associated with a Customer (e.g., Firm Designated IDs) that must be reported by Industry Members. The Commission also proposes that for the name field, the first, middle, and last name must be reported; and for the address field, the street number, street name, street suffix and/or abbreviation (e.g., road, lane, court, etc.), city, state, zip code, and country must be provided.²²³ The Commission also proposes changes that would organize the attributes reported by Industry Members so that all attributes identifying a Customer would be grouped together and all attributes identifying an account would be grouped together (including any attributes currently listed in Sections 9.1 and 9.2 of the CAT NMS Plan).

The proposed amendments also would address the storage of Customer Account Attributes by requiring that "[t]he CAT must collect and store Customer and Account Attributes in a secure database physically separated from the transactional database" and would require that "[t]he Plan Processor must maintain valid Customer and Account Attributes for each trading day and provide a method for Participants' Regulatory Staff and SEC staff to easily obtain historical changes to Customer-IDs, Firm Designated IDs, and all other Customer and Account Attributes."²²⁴ The proposed amendments also would require that Industry Members initially submit full lists of Customer and Account Attributes, Firm Designated IDs, and Transformed Values for all active accounts and submit updates and changes on a daily basis.²²⁵ In addition, the proposed amendments would require that the Plan Processor must have a process to periodically receive updates, including a full refresh of all Customer and Account Attributes, Firm Designated IDs, and Transformed Values to ensure the completeness and

Rule 613 and this Agreement." See CAT NMS Plan, *supra* note 3 at Section 1.1.

²²² See CAT NMS Plan, *supra* note 3, at Appendix D, Section 9.2.

²²³ See proposed Appendix D, Section 9.2.

²²⁴ See *id.*

²²⁵ See *id.*

²¹⁷ See proposed Section 6.4(d)(ii)(D); see also *infra* Part II.K (Firm Designated ID and Allocation Reports) for a discussion that addresses another proposed amendment to Section 6.4(d)(ii), specifically a proposed amendment that would require Customer and Account Attributes and Firm Designated IDs associated with Allocation Reports to be reported.

²¹⁸ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 6.2.

²¹⁹ See proposed Appendix D, Section 6.2.

accuracy of the data in CAIS, and would require that the Central Repository must support account structures that have multiple account owners and associated Customer and Account Attributes, and must be able to link accounts that move from one Industry Member to another.²²⁶ Finally, the proposed amendments would delete the requirement that previous name and previous address be reported to the CAT.²²⁷

The Commission preliminarily believes that the proposed amendments to Section 9.2 of Appendix D are appropriate because the CAT NMS Plan currently includes an incomplete list of all the Customer and Account Attributes that must be reported to the CAT. The proposed amendments would provide a list of all of the Customer and Account Attributes that Industry Members must report and would retain existing requirements in the CAT NMS Plan related to the availability of historical changes and the assignment of Customer-IDs, as well as reflect new definitions and reporting requirements (e.g., the requirement to report the Transformed Value to the CCID Subsystem). The proposed amendments also would update the CAT NMS Plan's requirement regarding the initial submission of full lists of Customer and Account Attributes and subsequent updates and refreshes of such information to reflect that these requirements would apply to Customer and Account Attributes, Firm Designated IDs, and associated Transformed Values.

The Commission also believes that it is appropriate to amend the CAT NMS Plan to require that the name field for Customers include the Customer's first name, middle name, and last name, and that the address field include the street number, street name, street suffix and/or abbreviation (e.g., road, lane, court, etc.), city, state, zip code, and country.²²⁸ The Commission understands that such specificity is already collected by broker-dealer databases identifying individuals and believes that this level of specificity is required to facilitate regulatory or surveillance efforts, and could diminish the need to conduct broader searches of CAIS in order to identify an individual of regulatory interest because such specificity would enable more focused searches of CAT Customer and Account Attributes. Deleting the requirement for previous name and previous address fields to be reported is also appropriate

because such information can be determined by the Plan Processor when providing historical information for the name and address attributes, as required by the proposed amendments to this section.

The Commission requests comment on the proposed amendments that would combine Sections 9.1 and 9.2 of Appendix D of the CAT NMS Plan and the proposed revisions therein. Specifically, the Commission solicits comment on the following:

79. For natural persons, Appendix D, Section 9.1 requires a name attribute to be captured and stored. For implementation purposes, the proposed amendments would specify that all of the aspects of the "Name" attribute must be captured, including first, middle, and last name, as separate fields within the attribute. Do commenters agree that adding specificity to the "Name" attribute would aid in facilitating regulatory or surveillance efforts by enhancing the ability for regulators to search the data? Would it be helpful to add more specificity to any other attributes in proposed Appendix D, Section 9.1 for implementation purposes? For example, would it be helpful to add a name suffix (e.g., Jr.)?

80. For both natural persons and legal entities, Appendix D, Section 9.1 requires an address attribute to be captured and stored. For implementation purposes, the proposed amendments would specify that all of the aspects of the "Address" attribute must be captured, including street number, street name, street suffix and/or abbreviation (e.g., road, lane, court, etc.), city, state, zip code, and country, as separate fields within the attribute. Do commenters agree that adding specificity to the "Address" attribute would aid in facilitating regulatory or surveillance efforts by enhancing the ability for regulators to search the data? Alternatively, could this search capability be a function of the CAIS/CCID Subsystem Regulator Portal rather than a reporting requirement for Industry Members?

81. Would it be helpful to add more specificity to any other attributes in proposed Appendix D, Section 9.2 for implementation purposes? For example, would it be helpful to add the last four digits to the zip code in the address attribute, so that the full nine digit zip code would be captured? Please identify what separate fields could be included within the attribute, and why it would be appropriate to include them.

82. Appendix D, Section 9.1 requires full account lists for all active accounts and subsequent updates and changes to be submitted to the Plan Processor. As

part of the process for periodically receiving updates, the proposed amendments would require the Plan Processor to have a process to periodically receive updates, rather than full account lists, which could include a full refresh of all Customer and Account Attributes, Firm Designated IDs, and Transformed Values. Would it be appropriate to require the Plan Processor to have a process to periodically receive a full refresh update?

7. Customer-ID Tracking

Appendix D, Section 9.3 (Customer-ID Tracking) generally describes the creation, linking, and persistence of a Customer-ID for use by regulators.²²⁹ The Commission proposes to amend this section to require that Customer-IDs would be created based on the Transformed Value, rather than the ITIN/SSN of a natural person Customer, and that the Customer-ID for a legal entity would be based on the EIN for the legal entity Customer, as discussed above.²³⁰ The Commission also proposes to amend the CAT NMS Plan to require the Plan Processor to resolve discrepancies in the Transformed Values.²³¹ The Commission preliminarily believes these amendments are appropriate because they reflect the fact that ITINs/SSNs will no longer be reported to the CAT but that Transformed Values will be reported to and collected by the CAT, and that existing requirements regarding Customer-IDs and their function will continue to be required for natural person Customers and Customers that are legal entities under the amendments proposed by the Commission. In addition, the CAT NMS Plan currently requires that the Participants and the SEC must be able to use the unique CAT-Customer-ID to track orders from any Customer or group of Customers, regardless of what brokerage account was used to enter the order. The Commission proposes to amend this section to explicitly require that Participants and the SEC be able to use

²²⁹ Currently, Section 9.3 of Appendix D provides that "The Plan Processor will assign a CAT-Customer-ID for each unique Customer. The Plan Processor will determine a unique Customer using information such as SSN and DOB for natural persons or entity identifiers for Customers that are not natural persons and will resolve discrepancies. Once a CAT-Customer-ID is assigned, it will be added to each linked (or unlinked) order record for that Customer. Participants and the SEC must be able to use the unique CAT-Customer-ID to track orders from any Customer or group of Customers, regardless of what brokerage account was used to enter the order." See CAT NMS Plan, *supra* note 3, at Appendix D, Section 9.3.

²³⁰ See *supra* Part II.E.2.

²³¹ See proposed Appendix D, Section 9.3.

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See proposed Appendix D, Section 9.2.

the unique Customer-ID to track allocations to any Customer or group of Customers over time, regardless of what brokerage account was used to enter the order as well. The Commission believes these changes are appropriate so that regulators can track Customer-IDs over time.

The Commission requests comment on the proposed amendments to Appendix D, Section 9.3 (Customer-ID Tracking) of the CAT NMS Plan. Specifically, the Commission solicits comment on the following:

83. Are there any factors that could impact the ability of the Plan Processor to resolve discrepancies in the Transformed Values?

8. Error Resolution for Customer Data

Appendix D, Section 9.4 (Error Resolution for Customer Data) currently addresses the Plan Processor's general obligations with respect to errors, and minor and material inconsistencies.²³² Section 9.4 of Appendix D requires the Plan Processor to design and implement procedures and mechanisms to handle both minor and material inconsistencies in Customer information, and to accommodate minor data discrepancies such as variations in road name abbreviations in searches.²³³ This section of the CAT NMS Plan further provides that material inconsistencies such as two different people with the same SSN must be communicated to the submitting CAT Reporters and resolved within the established error correction timeframe as detailed in Section 8.²³⁴ Regarding the audit trail showing the resolution of all errors, this provision also requires that the audit trail include certain information including, for example, the CAT Reporter; the initial submission date and time; data in question or the ID of the record in question; and the reason identified as the source of the issue.²³⁵

The Commission preliminarily believes that it is appropriate to apply the error resolution process to the CCID Subsystem and CAIS; to provide details as to how the existing validation requirements of Section 7.2 of Appendix D relate to the CCID Subsystem and CAIS; and to amend the existing audit trail requirements addressing the resolution of all errors to take into account the revised reporting requirements that would require the submission of Transformed Values by Industry Members and Participants.

Accordingly, the proposed amendments to Section 9.4 would require that the CCID Subsystem and CAIS support error resolution functionality which includes the following components: Validation of submitted data, notification of errors in submitted data, resubmission of corrected data, validation of corrected data, and a full audit trail of actions taken to support error resolution.²³⁶ The proposed amendments also would require, consistent with Section 7.2, the Plan Processor to design and implement a robust data validation process for all ingested values and functionality including, at a minimum: The ingestion of Transformed Values and the creation of Customer-IDs through the CCID Subsystem; the transmission of Customer-IDs from the CCID Subsystem to CAIS or a Participant's SAW; and the transmission and linking of all Customer and Account Attributes and any other identifiers (e.g., Industry Member Firm Designated ID) required by the Plan Processor to be reported to CAIS.²³⁷ The proposed amendments also provide that at a minimum, the validation process should identify and resolve errors with an Industry Member's submission of Transformed Values, Customer and Account Attributes, and Firm Designated IDs including where there are identical Customer-IDs associated with significantly different names, and identical Customer-IDs associated with different years of birth, or other differences in Customer and Account Attributes for identical Customer-IDs.²³⁸ The Commission also proposes to amend Section 9.4 to require that the proposed validations must result in notifications to the Industry Member to allow for corrections, resubmission of corrected data and revalidation of corrected data, and to note that as a result of this error resolution process there will be accurate reporting within a single Industry Member as it relates to the submission of Transformed Values and the linking of associated Customer and Account Attributes reported.²³⁹

Timely, accurate, and complete CAT Data is essential so that Regulatory Staff and SEC staff can rely on CAT Data in their regulatory and oversight responsibilities.²⁴⁰ Therefore, the Commission preliminarily believes that these proposed amendments addressing how the Plan Processor must address

errors in data reported to CAIS and the CCID Subsystem are appropriate. The proposed amendments also set out the key components that such error resolution functionality must address, namely the validation of submitted data; notification of error in submitted data, resubmission of corrected data, validation of corrected data, and an audit trail of actions taken to support error resolution. Error resolution for each of these key functionalities will help ensure that CAT Data is timely, accurate and complete.

Section 7.2 of Appendix D already requires that CAT Data be validated.²⁴¹ The proposed amendments to Section 9.4 provide detail as to how the existing validation process in Section 7.2 of Appendix D should apply to the revised reporting requirements applicable to Industry Members and the process for creating Customer-IDs through the CCID Subsystem. As proposed, the amendments specify that the validation process must address the ingestion of Transformed Values and the creation of Customer-IDs through the CCID Subsystem; the transmission of Customer-IDs to CAIS or the Participant's SAW; and the linking between the Customer-IDs and the Customer and Account Attributes within CAIS.²⁴² Each of those requirements addresses key reporting requirements and operations that must be validated by the Plan Processor as part of the validation process of CAT Data as required by Section 7.2 of Appendix D. The Commission also believes that the examples of what the validation process should, at a minimum, address is appropriate because these examples relate to the new reporting requirements related to Transformed Values and Customer and Account Attributes, and therefore were not discussed in the CAT NMS Plan. The Commission also preliminarily believes that it is appropriate to amend the CAT NMS Plan to require that the Plan Processor notify Industry Members of errors so that they can correct them. This notification facilitates a process for reporting corrected data to the CAT.

Finally, the Commission also believes that it is appropriate to modify the existing CAT NMS Plan requirement that the Central Repository have an audit trail showing the resolution of all errors, including material inconsistencies, occurring in the CCID Subsystem and CAIS. Article VI, Section 6.5(d) of the CAT NMS Plan requires that CAT Data be accurate, which would

²³² See CAT NMS Plan, *supra* note 3, at Appendix D, Section 9.4.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See CAT NMS Plan Approval Order, *supra* note 3, at Part III.19 "Error Rates."

²⁴¹ See CAT NMS Plan, *supra* note 3, Appendix D Section 7.2.

²⁴² See proposed Appendix D Section 9.4.

include data that is reported to the CCID Subsystem and CAIS.²⁴³ The Commission is proposing that there be an audit trail showing the resolution of all errors, including material inconsistencies, occurring in the CCID Subsystem and CAIS because tracking error resolution will assist in identifying compliance issues with CAT Reporters, and therefore help ensure that CAT Data is accurate.

84. The proposed amendments would require the Plan Processor to design and implement a robust data validation process for all ingested values and functionality, consistent with Appendix D, Section 7.2. Are the minimum requirements set forth for inclusion in this data validation process sufficiently detailed for the purposes of implementing such a process? Should the proposed amendments be more specific about what kind of capability must be provided by the Plan Processor? If so, please explain what kinds of details would be helpful.

85. The proposed amendments would require the CCID Subsystem and CAIS to support error resolution functionality which includes the following components: Validation of submitted data, notification of errors in submitted data, resubmission of corrected data, validation of corrected data, and an audit trail of actions taken to support error resolution. Do the proposed amendments set forth the components of the error resolution functionality that must be supported by the CCID Subsystem and CAIS with an appropriate amount of detail? If not, should other details be added or are some not necessary?

86. Appendix D, Section 9.4 requires the Central Repository to have an audit trail showing the resolution of all errors. The proposed amendments would require the audit trail to show the resolution of all errors, including material inconsistencies, occurring in the CCID Subsystem and CAIS. Do the proposed amendments set forth the components of the audit trail requirements with an appropriate amount of detail? If not, what details should be added or are some not necessary?

87. Should the proposed amendments address error resolution requirements with respect to Transformed Values and Customer and Account Attributes, and reporting Transformed Values to the CCID Subsystem and Customer and Account Attributes to CAIS? If error resolution requirements are not applied to Transformed Values and Customer

and Account Attributes, and reporting Transformed Values to the CCID Subsystem and Customer and Account Attributes to CAIS, how would errors in those data elements be identified and corrected? Please be specific in your response.

9. CAT Reporter Support and CAT Help Desk

Currently, Appendix D, Section 10.1 of the CAT NMS Plan addresses the technical, operational, and business support being offered by the Plan Processor to CAT Reporters as applied to all aspects of reporting to CAT, and Section 10.3 of Appendix D addresses the responsibilities of the CAT Help Desk to support broker-dealers, third party CAT Reporters, and Participant CAT Reporters with questions and issues regarding reporting obligations and the operation of the CAT.²⁴⁴ The Commission proposes to amend the CAT NMS Plan to add the requirements that (i) the Plan Processor would also provide CAT Reporter Support and Help Desk support for issues related to the CCID Transformation Logic and reporting required by the CCID Subsystem, and (ii) the Plan Processor would have to develop tools to allow each CAT Reporter to monitor the use of the CCID Transformation Logic, including the submission of Transformed Values to the CCID Subsystem.²⁴⁵ The Commission believes these amendments are appropriate so that all CAT Reporters who must submit Transformed Values to the CCID Subsystem can get the assistance that they need should any problems arise with their efforts to report the required data to the CAT.

The Commission requests comment on the proposed amendments that would amend Appendix D, Sections 10.1 and 10.3 of the CAT NMS Plan. Specifically, the Commission solicits comment on the following:

88. With respect to CAT Reporter support, the proposed amendments would require the Plan Processor to develop functionality that allows each CAT Reporter to monitor the use of the CCID Transformation Logic including the submission of Transformed Values to the CCID Subsystem. Should the proposed amendments be more specific about what kind of functionality must be provided by the Plan Processor? If so, please explain what kinds of details would be helpful.

89. The proposed amendments would require the CAT Help Desk to support responding to questions from and providing support to CAT Reporters regarding all aspects of the CCID Transformation Logic and CCID Subsystem. Are there any specific aspects that should be enumerated in relation to CAT Help Desk support?

F. Customer Identifying Systems Workflow

The CAT NMS Plan currently requires Industry Members to report PII²⁴⁶ to the CAT, and states that such “PII can be gathered using the ‘PII workflow’ described in Appendix D, Data Security, PII Data Requirements.”²⁴⁷ However, the “PII workflow” was neither defined nor established in the CAT NMS Plan.²⁴⁸ While the modifications proposed by the Commission in Part II.E no longer require a Customer’s ITIN(s)/SSN(s), account number and date of birth be reported to and collected by the CAT, Customer and Account Attributes, as described in Part II.E., are still reported to and collected by the CAT and could be used to attribute order flow to a single Customer across broker-dealers.²⁴⁹ The collection of Customer and Account Attributes and access to such attributes will facilitate the ability of Regulatory Staff to carry out their regulatory and oversight obligations.²⁵⁰ Therefore, the Commission is proposing to amend the CAT NMS Plan to define the Customer Identifying Systems Workflow for accessing Customer and Account Attributes, and to establish restrictions governing such access. Accordingly, the Commission proposes to amend the CAT NMS Plan to (1) specify how existing data security requirements apply to Customer and Account Attributes; (2) define the Customer Identifying Systems; (3) establish general requirements that must be met by Regulatory Staff before accessing the Customer Identifying Systems, which access will be divided between two types of access—manual access and programmatic access; and (4) establish the specific requirements for each type of access to the Customer Identifying Systems.²⁵¹

²⁴⁶ See *supra* note 10.

²⁴⁷ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.6.

²⁴⁸ *Id.*

²⁴⁹ See *supra* Part II.E; see also proposed Section 1.1 for the proposed definition of “Customer and Account Attributes.”

²⁵⁰ See *supra* Part II.E for a discussion of the changes to the data collected by the CAT that would identify an individual or legal entity, and the associated defined term “Customer and Account Attributes.”

²⁵¹ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

²⁴³ See CAT NMS Plan, *supra* note 3, Article VI, Section 6.5(d).

²⁴⁴ See CAT NMS Plan, *supra* note 3, at Appendix D, Sections 10.1 and 10.3.

²⁴⁵ See proposed Appendix D, Sections 10.1 and 10.3.

1. Application of Existing Plan Requirements to Customer and Account Attributes and the Customer Identifying Systems

Appendix D, Section 4.1.6 of the CAT NMS Plan currently requires that PII must be stored separately from other CAT Data, and that PII must not be accessible from public internet connectivity.²⁵² The CAT NMS Plan also states that PII data must not be included in the result set(s) from online or direct query tools, reports, or bulk data extraction; instead, results are to display existing non-PII unique identifiers (e.g., Customer-ID or Firm Designated ID).²⁵³ The PII corresponding to these identifiers can be gathered using a “PII workflow.”²⁵⁴ The CAT NMS Plan also provides that by default, users entitled to query CAT Data are not authorized for PII access, and that furthermore the process by which someone becomes entitled to PII access, and how they then go about accessing PII data, must be documented by the Plan Processor.²⁵⁵ The chief regulatory officer, or other such designated officer or employee at each Participant must review and certify that people with PII access have the appropriate level of access for their role at least annually.²⁵⁶ The CAT NMS Plan also provides that a full audit trail of PII access (i.e., who accessed what data, and when) must be maintained, and that the Chief Compliance Officer and the Chief Information Security Officer must have access to daily PII reports that list all users who are entitled to PII access, as well as the audit trail of all PII access that has occurred for the day being reported upon.²⁵⁷ In other sections of the CAT NMS Plan, PII data is also required to be “masked” unless a user has permission to view it.²⁵⁸

The Commission proposes to amend these provisions to replace the term “PII” with “Customer and Account Attributes” and to reflect that Customer Identifying Systems, including CAIS, would now contain the information that identifies a Customer.²⁵⁹ Accordingly, the proposed amendments to Appendix D, Section 4.1.6 would provide that Customer and Account Attributes data must be stored separately from other CAT Data within the CAIS, that

Customer and Account Attributes cannot be stored with the transactional CAT Data in the Central Repository, and that Customer and Account Attributes must not be accessible from public internet connectivity. Similarly, the proposed amendments would provide that Customer and Account Attributes must not be included in the result set(s) from online or direct query tools, reports, or bulk data extraction tools used to query transactional CAT Data. Instead, query results of transactional CAT Data would display unique identifiers (e.g., Customer-ID or Firm Designated ID) and the Customer and Account Attributes corresponding to these identifiers could be gathered by accessing CAIS in accordance with the “Customer Identifying Systems Workflow,” as described in the proposed amendments and discussed below. The proposed amendments would provide that, by default, users entitled to query CAT Data would not be authorized to access Customer Identifying Systems, and the process by which someone becomes entitled to Customer Identifying Systems and how an authorized person then could access Customer Identifying Systems, would have to be documented by the Plan Processor. The proposed amendments also would modify the CAT NMS Plan to require that a similarly designated head(s) of regulation or the designee of the chief regulatory officer or such similarly designated head of regulation must, at least annually, review and certify that people with Customer Identifying Systems access have the appropriate level of access for their role, in accordance with the Customer Identifying Systems Workflow, as discussed and described below.²⁶⁰

The proposed amendments also would modify the requirement related to maintaining a full audit trail to require that the audit trail must reflect access to the Customer Identifying Systems by each Participant and the Commission (i.e., who accessed what data, and when), and to require that the Plan Processor provide to each Participant and the Commission the audit trail for their respective users on a monthly basis. In addition, the proposed amendments would require that the Chief Compliance Officer and Chief Information Security Officer have access to daily reports that list all users who are entitled to Customer Identifying Systems access, and that such reports

must be provided to the Operating Committee on a monthly basis.²⁶¹

The Commission believes that the proposed amendments are appropriate because storing Customer and Account Attributes separately from other CAT Data would aid in protecting the confidentiality of Customer identifying information that is reported to and collected by the CAT, and would reflect what the CAT NMS Plan currently requires for PII.²⁶² Moreover, Customer and Account Attributes should neither be stored with transactional CAT Data nor be accessible by public internet in order to further aid in protecting this information. Similarly, to help safeguard Customer and Account Attributes, such attributes should not be included in result set(s) obtained from online or direct query tools or bulk extraction tools. The proposed amendments that would permit a designated head of regulation similar to the chief regulatory officer, or his or her designee, to at least annually review and certify that people with Customer Identifying Systems Access have the appropriate level of access for their role in accordance with the Customer Identifying Systems Workflow are appropriate because this change will serve to ease any potential delays in the annual review and certification process. The proposed amendments would accomplish this by expanding the pool of individuals that are authorized to conduct such reviews and certifications.

In addition, the proposed amendments deleting “masked” Customer and Account Attributes are appropriate because “masked” Customer and Account Attributes implies that certain Customer and Account Attributes (i.e., “masked” Customer and Account Attributes) would be made available to certain Regulatory Staff outside of the access requirements set forth in these proposed amendments. The Commission believes that if Regulatory Staff do not meet the requirements to be entitled to access Customer and Account Attributes, then Regulatory Staff should not be allowed to access those Customer and Account Attributes, even if such data were to be masked.

The Commission preliminarily believes it is appropriate to require the Plan Processor to provide the audit trail of access to Customer Identifying Systems by each Participant and the Commission (who accessed what data and when), and to require the Plan

²⁵² See CAT NMS Plan, *supra* note 3, Appendix D, Section 4.1.6.

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ See CAT NMS Plan, *supra* note 3, at Section 6.10(c)(ii) and Appendix D, Section 8.2.2.

²⁵⁹ See *supra* Part II.E.1; see also proposed Appendix D, Section 4.1.6.

²⁶⁰ Other provisions of the CAT NMS Plan that refer to PII are also proposed to be similarly modified to remove the term “PII” and instead refer to “Customer and Account Attributes” or “Customer Identifying Systems” as appropriate. See, e.g., Appendix D, Sections 4.1.6 and 8.2.2.

²⁶¹ See proposed Appendix D, Section 4.1.6.

²⁶² The CAT NMS Plan presently requires PII to be stored separately from other CAT Data. See Appendix D, Section 4.1.6.

Processor to provide to each Participant and the Commission the audit trail for their respective users on a monthly basis because providing such information may increase the accountability and transparency into the justification(s) for each Participant's access to Customer Identifying Systems. The benefit of providing the audit trail of Customer Identifying Systems access to each Participant is that it would enable each Participant to monitor use in accordance with their data confidentiality policies, procedures, and usage restriction controls. Similarly, the Commission could use such data in support of their internal policies governing access to Customer Identifying Systems.²⁶³ The Commission also believes that providing the daily reports of all users entitled to access the Customer Identifying Systems to the Operating Committee on a monthly basis would enable Participants and the Operating Committee to verify that only Regulatory Staff who are entitled to access Customer Identifying Systems have such access.

The Commission requests comment on the continued application of existing provisions of Appendix D, Section 4.1.6 to help ensure the security and confidentiality of the information reported to and collected by the Customer Identifying Systems. Specifically, the Commission solicits comment on the following:

90. Existing provisions of the CAT NMS Plan address the security and confidentiality of CAT Data by requiring that PII must be stored separately from other CAT Data. These provisions also specifically require that PII cannot be stored with transactional CAT Data and that PII must not be accessible from public internet connectivity. Should the existing provisions of Appendix D, Section 4.1.6 continue to apply so as to require: (i) That Customer and Account Attributes data are stored separately from other CAT Data within the CAIS, (ii) that Customer and Account Attributes cannot be stored with the transactional CAT Data in the Central Repository, and (iii) that Customer and Account Attributes must not be accessible from public internet connectivity? Why or why not? Please explain with specificity why such provisions should or should not apply.

91. Should existing provisions of Appendix D, Section 4.1.6 continue to apply so as to require that Customer and

Account Attributes must not be included in the result set(s) from online or direct query tools, reports, or bulk data extraction tools used to query transactional CAT Data? In addition, is it appropriate to amend the CAT NMS Plan to require that query results of transactional CAT Data will display unique identifiers (e.g., Customer-ID or Firm Designated ID)? If such unique identifiers are not displayed, what should be provided in result set(s) from online or direct query tools, reports, or bulk data extraction tool queries?

92. Is it appropriate to amend the CAT NMS Plan to state that by default, users entitled to query CAT Data are not authorized to access Customer Identifying Systems? Why or why not? Please explain with specificity why this provision should or should not apply and what other process would be appropriate to ensure that only authorized users access the Customer Identifying systems.

93. The existing CAT NMS Plan requires that the Chief Regulatory Officer or another such designated officer or employee at each Participant must at least annually review and certify that people with PII access have the appropriate level of access in light of their respective roles. The proposed amendments state that the review and certification must be made by the Chief Regulatory Officer or similarly designated head(s) of regulation, or his or her designee, at each Participant, and that the Chief Regulatory Officer or similarly designated head(s) of regulation, or his or her designee must, at least annually, review the list of people who have access to Customer Identifying Systems at their organization, the role of each person on the list and the level of access of each person. Based on that review, the Chief Regulatory Office must certify that people with Customer Identifying Systems access have the appropriate level of access for their role, in accordance with the Customer Identifying Systems Workflow. Is it appropriate to continue to facilitate oversight regarding who has access to the Customer Identifying Systems by applying these requirements to the Customer Identifying Systems Workflow? Why or why not? Please explain with specificity why such provisions should or should not apply.

94. Appendix D, Section 4.1.6 of the CAT NMS Plan requires a full audit trail of access to PII (who accessed what data, and when) to be maintained. Should the proposed amendments require that the Plan Processor maintain a full audit trail of access to Customer Identifying Systems by each Participant

and the Commission (who accessed what data and when), and require that the Plan Processor provide to each Participant and the Commission the audit trail for their respective users on a monthly basis? Furthermore, should the proposed amendments require that the Chief Compliance Officer and the Chief Information Security Officer I have access to daily reports that list all users who are entitled to Customer Identifying Systems access, and for such reports to be provided to the Operating Committee on a monthly basis? Why or why not? Is there another means of providing information to the Participants and the Operating Committee to facilitate their review of access to Customer Identifying Systems? If so, please identify this means and explain why it would be an appropriate way to facilitate review of access to Customer Identifying Systems.

2. Defining the Customer Identifying Systems Workflow and the General Requirements for Accessing Customer Identifying Systems

Given that Regulatory Staff may seek to access both CAIS and the CCID Subsystem (collectively, the Customer Identifying Systems) in order to carry out their regulatory and oversight responsibilities, the Commission preliminarily believes that it is appropriate to establish access requirements that would apply to both systems. Accordingly, the Commission proposes to amend Section 4.1.6 of Appendix D to require that access to Customer Identifying Systems be subject to the following restrictions, many of which already exist in the CAT NMS Plan today, as discussed below.²⁶⁴

First, only Regulatory Staff may access Customer Identifying Systems and such access would have to follow the "least privileged" practice of limiting access to Customer Identifying Systems as much as possible.²⁶⁵ Second, using the role based access control ("RBAC") model described in the CAT NMS Plan, access to Customer and Account Attributes would have to be configured at the Customer and Account Attributes level.²⁶⁶ Third, all queries of Customer Identifying Systems would have to be based on a "need to know"

²⁶⁴ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow, Access to Customer Identifying Systems).

²⁶⁵ The CAT NMS Plan currently states that "[u]sing the RBAC model described above, access to PII data shall be configured at the PII attribute level, following the 'least privileged' practice of limiting access as much as possible." See CAT NMS Plan, *supra* note 3, Appendix D, Section 4.1.6 (PII Data Requirements).

²⁶⁶ See proposed Appendix D, Section 4.1.6.

²⁶³ See also Part II.N. *infra*, for a discussion of how the proposed amendments would apply to Commission staff. The Commission understands that a full audit trail of all access to Customer Identifying Systems is required by NIST 800-53.

the data²⁶⁷ in the Customer Identifying Systems, and queries must be designed such that the query results would contain only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries, consistent with Article VI, Section 6.5(g) of the CAT NMS Plan.²⁶⁸ Fourth, Customer Identifying Systems would have to be accessed through a Participant's SAW.²⁶⁹ Fifth, access to Customer Identifying Systems would be limited to two types of access: Manual access (which would include Manual CAIS Access and Manual CCID Subsystem Access, as further discussed below) and programmatic access (which would include Programmatic CAIS Access and Programmatic CCID Subsystem Access, as further discussed below). Lastly, authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access would have to be requested and approved by the Commission, pursuant to the process as further described in the proposed amendments below.²⁷⁰

The Commission preliminarily believes that the proposal to establish rules applicable to all forms of access to the Customer Identifying Systems by all Participants would facilitate the application of the same requirements and standards across all Regulatory Staff at each Participant seeking access to Customer Identifying Systems. Furthermore, restricting access to Regulatory Staff is appropriate because such staff are required to report directly to the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation), or to persons within the Participant's Chief Regulatory Officer's (or similarly designated head(s) of regulation's) reporting line, and because such staff must be specifically identified and approved in writing by the Participant's Chief Regulatory Officer

(or similarly designated head(s) of regulation).²⁷¹ Thus, the proposed amendments would help to ensure that the Participant's staff accessing Customer and Account Attributes and other identifying information about a Customer are doing so for regulatory—not commercial—purposes, and that sufficient oversight of such access by the Participant's Chief Regulatory Officer exists.²⁷² In addition, by allowing a similarly designated head(s) of regulation to also approve such access, the Commission preliminarily believes that any operational issues in obtaining such approval should be minimized.

The Commission also preliminarily believes that it is appropriate to limit access to Customer Identifying Systems to the minimum level of access that will achieve the Participant's regulatory purposes.²⁷³ For example, a regulator investigating alleged fraud against senior investors may only need the year of birth to investigate such matters; thus, under the “least privileged practice” model, such Regulatory Staff would only be entitled to view year of birth from CAIS in response to queries, and would only access the minimum amount of CAT Data, including Customer and Account Attributes, that would be required to conduct their investigation.

The RBAC model, which is already an access requirement contained in the CAT NMS Plan, requires that the Plan Processor grant permission to access certain CAT Data based on the user's regulatory role.²⁷⁴ The Commission believes it is appropriate to apply the same RBAC model to access to Customer and Account Attributes because not all Regulatory Staff will need to access Customer and Account Attributes, and limitations on such access should be based on the role that such Regulatory Staff fill for the Participant.

The Commission also preliminarily believes that it is appropriate to require that all queries of the Customer Identifying Systems be based on a regulator's “need to know” the data in the Customer Identifying Systems, and to require that queries be designed such that query results contain only the

Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries, consistent with Article VI, Section 6.5(g) of the CAT NMS Plan.²⁷⁵ The Participants stated that they intended the CAT NMS Plan to require that a regulator “need to know” the Customer and Account Attributes, and thus only those users who have “need to know” the Customer and Account Attributes will be granted access to the Customer and Account Attributes.²⁷⁶ The Commission believes that incorporating the “need to know” standard in the proposed amendments would require Regulatory Staff to articulate their reasons for needing access to search CAIS or use the CCID Subsystem. These proposed amendments also would help to limit the results of queries to containing only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries that are being pursued by Regulatory Staff, which would be consistent with the requirements set forth in Article VI, Section 6.5(g) of the CAT NMS Plan.²⁷⁷

The Commission believes that the proposed amendments would result in Regulatory Staff continually assessing whether there is a need to know the volume of Customer and Account Attributes that may be returned in response to a query in light of the regulatory purpose of the query being submitted, and whether the query results contain only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the Regulatory Staff's inquiry or set of inquiries. The same requirement applies when Regulatory Staff utilizes programmatic access; to the extent applications to query Customer and Account Attributes are developed as part of programmatic access, such applications must support a design that limits Customer and Account Attributes to only those which Regulatory Staff reasonably believes are needed to achieve the regulatory purpose of the inquiry or set of inquiries. The Commission also expects that this assessment would operate as a useful check on the scope of the queries being submitted by Regulatory Staff, and that this requirement would complement the proposed amendments

²⁶⁷ The Participants stated that they “anticipate that access to PII will be limited to a ‘need-to-know’ basis. Therefore, it is expected that access to PII associated with customers and accounts will have a much lower number of registered users, and access to this data will be limited to Participants’ staff and the SEC who need to know the specific identity of an individual.” See CAT NMS Plan, *supra* note 3, Appendix C, Section A.4.(b). The Plan also states that “[t]he Participants are requiring multi-factor authentication and Role Based Access Control for access to PII, separation of PII from other CAT Data, restricted access to PII (only those with a ‘need to know’ will have access), and an auditable record of all access to PII data contained in the Central Repository.” See CAT NMS Plan Appendix C, Section D.12.(e).

²⁶⁸ See *id.*

²⁶⁹ See *id.* For a discussion of the requirements related to SAWs, see *infra* Part II.C.

²⁷⁰ See proposed Appendix D, Section 4.1.6 (Customer and Accounts Attributes Data Requirements).

²⁷¹ See proposed Section 6.5(g).

²⁷² See Part II.H.1, *infra*, for a discussion of proposed amendments related to restricting access to CAT Data solely for regulatory purposes. Access to Customer and Account Attributes, which are a subset of CAT Data, would be subject to these restrictions.

²⁷³ See CAT NMS Plan Approval Order, *supra* note 3 at note 1299.

²⁷⁴ See CAT NMS Plan, *supra* note 3, Appendix D, Section 4.1.4 (Data Access).

²⁷⁵ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow, Access to Customer Identifying Systems).

²⁷⁶ See CAT NMS Plan, *supra* note 3, Appendix C, Section A.4.(b); see also CAT NMS Plan Appendix C, Section D.12.(e).

²⁷⁷ See proposed Appendix D, 4.1.6 (Customer Identifying Systems Workflow).

that address access-level requirements, as discussed above (*i.e.*, that only Regulatory Staff may access Customer Identifying Systems and such access must follow the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible).²⁷⁸

The Commission also believes that it is appropriate to require that Customer Identifying Systems must be accessed through a Participant’s SAW.²⁷⁹ As described above in Part II.C.3., each Participant’s SAW is a secure analytic environment that would be part of the CAT System and therefore subject to the CISP.²⁸⁰ This provision together with Proposed Section 6.13(a)(i)(A) establishes the SAW as the only means of accessing and analyzing Customer and Account Attributes and applies the security safeguards implemented in a Participant’s SAW to protect all access to Customer Identifying Systems, leveraging security controls and related policies and procedures that are consistent with those that protect the Central Repository.²⁸¹ Requiring access through a Participant’s SAW also would enable the Plan Processor to capture information about CAT Data usage by Participants, which would assist Participants in analyzing such usage to determine whether CAT Data is being used for legitimate regulatory or oversight purposes.

The Commission also preliminarily believes that it is appropriate to limit access to the Customer Identifying Systems to two types of access—manual and programmatic.²⁸² As noted above, the CAT NMS Plan currently follows the “least privileged” practice of limiting access to information identifying a Customer to the greatest extent possible.²⁸³ The Commission believes that applying this same security focused, minimum access approach to the data in the Customer Identifying systems is appropriate in order to safeguard the Customer information contained in each system from bad

actors who obtain such information through a data breach. The Commission believes that the “least privileged practice” approach also means that only Regulatory Staff will be permitted to access Customer Identifying Systems.²⁸⁴ Accordingly, the Commission is proposing to limit access to those systems to two methods: Manual access (which would include Manual CAIS Access and Manual CCID Subsystem Access) and programmatic access (which would include Programmatic CAIS Access and Programmatic CCID Subsystem Access), which would be subject to an approval process, as further described below, and only granted if certain circumstances are met.²⁸⁵

Finally, the Commission preliminarily believes that Programmatic CAIS Access and Programmatic CCID Subsystem Access, as further detailed below, should only be used by Participants if requested and approved by the Commission.²⁸⁶ Indeed, the Participants represented in the CAT NMS Plan that “general queries can be carried out using the Customer-ID without the need to know specific, personally-identifiable information (*i.e.*, who the individual Person or legal entity associated with the Customer-ID is). The Customer-ID will be associated with the relevant accounts of that Person; thus, the use of Customer-ID for querying will not reduce surveillance.”²⁸⁷ Thus, the Commission preliminarily believes that it is appropriate to require Regulatory Staff to use manual access to Customer Identifying Systems in order to carry out their regulatory responsibilities because such access should meet the regulatory purpose of their inquiry or set of inquiries—and only access CAIS and the CCID Subsystem programmatically if authorized by the Commission.²⁸⁸

The Commission requests comment on the proposed amendments to define the Customer Identifying Systems Workflow and the requirements for accessing Customer Identifying Systems. Specifically, the Commission solicits comment on the following:

95. Do Commenters agree that it is necessary to define and set forth the requirements for the Customer Identifying Systems Workflow? If not, what provisions of the CAT NMS Plan

apply to govern access to Customer Identifying Systems? Please be specific about those provisions and explain how they protect the information reported to and collected by the Customer Identifying Systems.

96. Is there a different set of requirements that should be applied to the proposed Customer Identifying Systems Workflow? If yes, please describe with specificity what those requirements are and how they would operate to support the security and confidentiality of the information reported to and collected by the Customer Identifying Systems.

97. The proposed amendments require that only Regulatory Staff may access Customer Identifying Systems and such access must follow the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible. What are the advantages to limiting access to the Customer Identifying Systems in this manner? Are there other standards of access to Customer Identifying Systems that would be appropriate? If so, what are those standards? Please be specific in your response.

98. The proposed amendments require that access to Customer and Account Attributes shall be configured at the Customer and Account Attributes level using the Role Based Access Model in the Customer Identifying Systems Workflow. Is there another more appropriate way to configure access to Customer and Account Attributes? Should access to identifiers in the transaction database (*e.g.*, Customer-ID(s) or Industry Member Firm Designated ID(s)) be permitted, or entitled, separately such that Regulatory Staff would need specific permissions to access these identifiers? If so, how would regulatory use of CAT Data still be accomplished? Please discuss implementation details addressing both security and usability.

99. The proposed amendments require that all queries of Customer Identifying Systems must be based on a “need to know” data in the Customer Identifying Systems. Is there a different standard that should apply to queries of the Customer Identifying Systems and if so, why is that standard more appropriate? Please be specific in your response.

100. The proposed amendments state that the standard for assessing the Customer and Account Attributes that can be returned in response to a query is what Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries in the Customer Identifying Systems Workflow. Is this standard appropriate?

²⁷⁸ Similar to the requirement that applications developed in connection with programmatic access must support a design that limits the Customer and Account Attributes to only that which Regulatory Staff reasonably believes are needed to achieve the regulatory purpose of the inquiry or set of inquiries as discussed above, these applications also must support all elements of the Customer Identifying Systems Workflow (*e.g.*, following the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible).

²⁷⁹ See Part II.C. *supra* for a discussion of the proposed SAWs.

²⁸⁰ See proposed Section 6.13.

²⁸¹ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

²⁸² See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

²⁸³ See *supra* note 273.

²⁸⁴ See also Part II.H.1, *infra*, for a discussion of proposed amendments requiring need for regulatory purpose for access to Customer and Account Attributes.

²⁸⁵ See proposed Appendix D, Section 4.1.6.

²⁸⁶ See *infra* Part II.F.5.

²⁸⁷ See CAT NMS Plan Approval Order, *supra* note 3, at 84983 note 826.

²⁸⁸ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

Why or why not? If there is another standard that should apply, what should that standard be? Please be specific in your response.

101. The proposed amendments require that Customer Information Systems must be accessed through a Participant's SAW in the Customer Identifying Systems Workflow. Should the proposed amendments permit access other than through a Participant's SAW? If so, is there another way to subject the accessing and analyzing of Customer and Account Attributes to the CISP?

102. The proposed amendments state that access to Customer Identifying Systems will be limited to two types of access: Manual access (which would include Manual CAIS Access and Manual CCID Subsystem Access) and programmatic access (which would include Programmatic CAIS Access and Programmatic CCID Subsystem Access). Are these methods of access appropriate for facilitating the ability of Regulatory Staff to fulfill their regulatory and oversight obligations? Please explain.

103. The proposed amendments require that authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access must be requested and approved by the Commission pursuant to the Customer Identifying Systems Workflow. Do Commenters agree that it is appropriate to require Commission authorization to use Programmatic Access to the CAIS and the CCID Subsystem?

3. Introduction to Manual and Programmatic Access

As noted above, the proposed amendments would limit access to Customer Identifying Systems to two general methods of access—manual and programmatic access. Accordingly, the Commission is proposing amendments to the CAT NMS Plan that would define and set forth the requirements for (1) Manual CAIS Access and Manual CCID Subsystem Access; and (2) Programmatic CAIS Access and Programmatic CCID Subsystem Access. A description of the requirements applicable to each method of access follows.

4. Manual CAIS Access

The Commission proposes to amend the CAT NMS Plan to define Manual CAIS Access to mean “[w]hen used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to manually query CAIS, in accordance with Appendix D, Data Security, and the Participants’ policies as set forth in

Section 6.5(g).”²⁸⁹ Under the proposed amendments, if Regulatory Staff have identified a Customer(s) of regulatory interest through regulatory efforts and require additional information from the CAT regarding such Customer(s), then they may use Manual CAIS Access.²⁹⁰ The proposed amendments also would provide that additional information about Customer(s) may be accessed through Manual CAIS Access by (1) using identifiers available in the transaction database (e.g., Customer-ID(s) or Industry Member Firm Designated ID(s)) to identify Customer and Account Attributes associated with the Customer-ID(s) or Industry Member Firm Designated ID(s), as applicable; or (2) using Customer Attributes in CAIS to identify a Customer-ID(s) or Industry Member Firm Designated ID(s), as applicable, associated with the Customer Attributes, in order to search the transaction database.²⁹¹ The proposed amendments would not permit open-ended searching of parameters not specific to a Customer(s).²⁹²

In addition, the Commission proposes to amend the CAT NMS Plan to require that Manual CAIS Access must provide Regulatory Staff with the ability to retrieve data in CAIS via the CAIS/CCID Subsystem Regulator Portal with query parameters based on data elements including Customer and Account Attributes and other identifiers available in the transaction database (e.g., Customer-ID(s) or Industry Member Firm Designated ID(s)).²⁹³

Finally, the proposed amendments would require that the performance requirements for Manual CAIS Access be consistent with the criteria set out in Appendix D, Functionality of the CAT System, Online Targeted Query Tool Performance Requirements.²⁹⁴

These proposed amendments reflect a principle that underlies the required use of manual access to CAIS (and manual access to the CCID Subsystem, as further discussed below) that if Regulatory Staff have already identified a Customer(s) of interest based on their regulatory efforts and Regulatory Staff have a “need to know” additional identifying information about the Customer(s), then

manual access may be used to obtain such information.²⁹⁵ For example, manual access would be appropriate if Regulatory Staff have the Customer-ID of a Customer or the Industry Member Firm Designated ID of Customer as a result of a search of the transactional CAT database in furtherance of a regulatory purpose, and Regulatory Staff require additional Customer and Account Attributes associated with that Customer (e.g., the name and address associated with that Customer-ID). Manual CAIS Access also would be appropriate if Regulatory Staff have identifying information that are Customer and Account Attributes (e.g., name or address of a natural person Customer) and have a regulatory “need to know” that Customer’s Customer-ID in order to search the transactional CAT Data.²⁹⁶

The Commission preliminarily believes these proposed amendments are appropriate because they describe the specific circumstances under which Regulatory Staff may use Manual CAIS Access. In accordance with the proposed amendments, if Regulatory Staff have already identified a Customer of regulatory interest, Manual CAIS Access may be used. If a Customer of regulatory interest has been identified, Regulatory Staff could access CAIS manually to seek additional information about that identified Customer. CAIS would contain Customer and Account Attributes and other identifiers associated with a Customer (e.g., Customer-ID and Industry Member Firm Designated ID).

Consistent with this approach, the proposed amendments permit wildcard searches based on multiple spellings of the known Customer’s name (e.g., Jone or Jones) or multiple spellings of a street associated with a known Customer’s name (e.g., the name “Sally Jones” could be searched with “Fis?her Street” to identify individuals with that name that live on either “Fisher” or “Fischer” Street). However, open-ended searching of parameters that are not specific to an identified Customer would be prohibited. Similarly, Regulatory Staff without additional Customer identifying information would not be permitted to search for all people sharing a common zip code, birth year or street. The Commission preliminarily believes this proposed provision is appropriate

²⁸⁹ See proposed Section 1.1.

²⁹⁰ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See *id.* “Performance requirements” refers to the response times Online Targeted Queries. See CAT NMS Plan, *supra* note 3, Appendix D Section 8.1.2. Pursuant to Appendix D, Section 8.1.2, the performance requirement for Manual CAIS Access must generally be in increments of less than one minute. *Id.*

²⁹⁵ See Part II.G.2., *infra* for a discussion of policies and procedures relating to access to and use of CAT Data.

²⁹⁶ Manual CAIS Access is distinct from Programmatic CAIS Access and Programmatic CCID Subsystem Access, as discussed *infra* Part II.F.6 (Programmatic CAIS Access) and Part II.F.7 (Programmatic CCID Subsystem Access).

because it extends the principle that Regulatory Staff must already have identified a Customer of regulatory interest pursuant to regulatory efforts before Manual CAIS Access will be permitted.

The Commission also preliminarily believes that the proposed amendments requiring that Manual CAIS Access be provided by the Plan Processor via the CAIS/CCID Subsystem Regulator Portal are appropriate because they set forth access and use restrictions, while at the same time facilitating regulatory use. Specifically, the proposed requirement specifies how such manual access must be implemented (*i.e.*, through the CAIS/CCID Subsystem Regulatory Portal) by the Plan Processor for access by Regulatory Staff. The CAIS/CCID Subsystem Regulator Portal must facilitate query parameters based on data elements in Customer and Account Attributes and other identifiers available in the transaction database (*e.g.*, Customer-ID(s) or Industry Member Firm Designated ID(s)).²⁹⁷

Finally, the Commission preliminarily believes that it is appropriate to amend the CAT NMS Plan to adopt performance requirements for Manual CAIS Access so that there is a baseline performance metric to assess the operation of Manual CAIS Access, and to facilitate the return of query results within a timeframe that facilitates the usefulness of the data obtained by Regulatory Staff from CAIS. Further, the Commission also believes that it is appropriate to base the Manual CAIS Access performance requirements on the Online Targeted Query Tool Performance Requirements because the Online Targeted Query Tool enables Regulatory Staff to retrieve transactional CAT Data using an on-line query screen and includes the ability to choose from a variety of pre-defined selection criteria, which is similar in operation to Manual CAIS Access.

The Commission requests comment on the proposed amendments to define Manual CAIS Access and the requirements for using Manual CAIS Access. Specifically, the Commission solicits comment on the following:

104. The proposed amendments require Manual CAIS Access to be used if Regulatory Staff, having identified Customers of regulatory interest through regulatory efforts, require additional information from the CAT regarding such Customers. Are the circumstances in which Manual CAIS Access will be used clearly defined? If not, what additional detail would be helpful? Are

there any other circumstances in which Manual CAIS Access might be appropriate? Please be specific in your response.

105. The proposed amendments establish that additional information about Customers may be accessed through Manual CAIS Access by (1) using identifiers available in the transaction database to identify Customer and Account Attributes associated with the Customer-IDs or industry member Firm Designated IDs, as applicable; or (2) using Customer Attributes in CAIS to identify Customer-IDs or industry member Firm Designated IDs, as applicable, associated with the Customer Attributes, in order to search the transaction database. Should requirements be added in relation to accessing additional information about Customers through Manual CAIS Access, *e.g.*, limiting the number of records that may be accessed? What limitation would be appropriate? Please be specific and describe the impact that any limitation on record numbers would have on regulatory value.

106. The proposed amendments prohibit open-ended searching of parameters not specific to Customers in Manual CAIS Access. Is it clear to Commenters what an open-ended search is? Please explain what commenters understand the term to mean. Should open-ended searches be limited by other conditions in addition to the condition that it be specific to a Customer? Please be specific in your response and explain why any change to the proposed prohibition on open-ended searching would be appropriate.

107. The proposed amendments require Manual CAIS Access to provide Regulatory Staff with the ability to retrieve data in CAIS via the CAIS/CCID Subsystem Regulator Portal. Is the CAIS/CCID Subsystem Regulator Portal an appropriate mechanism by which to require Regulatory Staff to retrieve data in CAIS? Are there any other appropriate means of providing Manual CAIS Access? If so, please explain how those other means would operate and be implemented.

108. The proposed amendments require query parameters for Manual CAIS Access to be based on data elements including Customer and Account Attributes and other identifiers available in the transaction database (*e.g.*, Customer-IDs or Firm Designated IDs). Should the query parameters for Manual CAIS Access be based on these data elements? If not, why not? Are there other query parameters that are more appropriate? If so, why? Please be specific in your response.

109. The proposed amendments require the Performance Requirements for Manual CAIS Access to be consistent with the criteria set out in Appendix D, Functionality of the CAT System, Online Targeted Query Tool Performance Requirements. Is there another more appropriate performance requirement in the CAT NMS Plan that should apply to Manual CAIS Access? Why would alternative performance requirements more appropriate? Please be specific in your response.

5. Manual CCID Subsystem Access

The Commission also proposes to amend the CAT NMS Plan to include requirements for manual access to the CCID Subsystem. "Manual CCID Subsystem Access" would be defined to mean "when used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to manually query the CCID Subsystem, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in Section 6.5(g)." ²⁹⁸ In addition, the Commission proposes to amend the CAT NMS Plan to state that if Regulatory Staff have the ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of regulatory interest identified through regulatory efforts outside of the CAT and now require additional information from the CAT regarding such Customer(s), then they may use Manual CCID Subsystem Access.²⁹⁹ The proposed amendments also state that Manual CCID Subsystem Access must allow Regulatory staff to convert ITIN(s)/SSN(s)/EIN(s) into Customer-ID(s) using the CCID Subsystem, and that Manual CCID Subsystem Access will be limited to 50 ITIN(s)/SSN(s)/EIN(s) per query.³⁰⁰ The Commission also proposes to amend the CAT NMS Plan to state that Manual CCID Subsystem Access must allow Regulatory Staff to retrieve data from the CCID Subsystem via the CAIS/CCID Subsystem Regulator Portal based on ITIN(s)/SSN(s)/EIN(s) ³⁰¹ where the CCID Transformation Logic is embedded in the client-side code of the CAIS/CCID Regulator Portal.³⁰² The Commission also proposes to require that the performance requirements for the conversion of ITIN(s)/SSN(s)/EIN(s) to Customer-ID(s) shall be consistent with the criteria set out in Appendix D,

²⁹⁸ See proposed Section 1.1.

²⁹⁹ See proposed Appendix D, Section 4.1.6 (Manual CCID Subsystem Access).

³⁰⁰ See *id.*

³⁰¹ *Id.*

³⁰² See proposed Appendix D, Section 4.1.6 (Manual CCID Subsystem Access).

²⁹⁷ See *supra* Part II.E.1; see also proposed Appendix D, Section 4.1.6 (Manual CAIS Access).

Functionality of the CAT System, Online Targeted Query Tool Performance Requirements.³⁰³

The Commission preliminarily believes the proposed amendments to adopt Manual CCID Subsystem Access are appropriate because such access would provide a way for Regulatory Staff that have the ITIN(s)/SSN(s)/EIN(s) of a natural person or legal entity Customer as a result of regulatory efforts outside of the CAT (e.g., from regulatory data, a tip, complaint, referral, or from other data in the possession of Regulatory Staff) to transform such ITIN(s)/SSN(s)/EIN(s) into Customer-ID(s) and subsequently obtain other information identifying a Customer that is associated with the Customer-ID, if that is in furtherance of a regulatory purpose. The Commission also preliminarily believes that limiting Manual CCID Subsystem Access to the submission of 50 SSN(s)/ITIN(s)/EIN(s) per query is appropriate because in the Commission's experience, 50 SSN(s)/ITIN(s)/EIN(s) is sufficient to accommodate the needs of most regulatory examinations or investigations involving SSN(s)/ITIN(s)/EIN(s).

The Commission also preliminarily believes that it is appropriate to specify, as the proposed amendments would, that Manual CCID Subsystem access must be enabled through the CAIS/CCID Subsystem Regulator Portal, and that Transformation Logic must be embedded in the client-side code of the CAIS/CCID Subsystem Regulator Portal. By embedding the Transformation Logic in the client-side code of the CAIS/CCID Subsystem Regulator Portal, the proposed amendments would help to prevent the ITIN/SSN/EIN of a Customer from entering any component of the CAT System.

Finally, the Commission is amending the CAT NMS Plan to adopt performance requirements for Manual CCID Subsystem Access so that there is a baseline performance metric to assess the operation of Manual CCID Subsystem Access, and to facilitate the return of query results within a timeframe that facilitates the usefulness of the data obtained by Regulatory Staff from the CCID Subsystem.³⁰⁴ The Manual CCID Subsystem Access performance requirements are based on the Online Targeted Query Tool Performance Requirements because the Online Targeted Query Tool, which provides Regulatory Staff with the ability to retrieve transactional CAT Data using an on-line query screen and

includes the ability to choose from a variety of pre-defined selection criteria, is most similar in operation to Manual CCID Subsystem Access. In addition, the Commission believes that the query performance requirement for the Online Targeted Query Tool is a reasonable performance requirement for Manual CCID Subsystem Access because that the Online Targeted Query Tool performance requirement of a one minute query response time is drawn from targeted queries that return less than 1 million rows of data based on a dataset covering less than a day for a single CAT Reporter whereas the Manual CCID Subsystem Access is transforming no more than 50 ITIN(s)/SSN(s)/EIN(s) per query.

The Commission requests comment on the proposed amendments to define Manual CCID Subsystem Access and the requirements for using Manual CCID Subsystem Access. Specifically, the Commission solicits comment on the following:

110. The proposed amendments require that Manual CCID Subsystem Access will be used when Regulatory Staff have the ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of regulatory interest obtained through regulatory efforts outside of CAT and now require additional information from CAT regarding such Customer(s). Are the circumstances in which Manual CCID Subsystem Access will be used clearly defined? If not, what additional detail would be helpful? Are there any other circumstances in which Manual CCID Subsystem Access might be appropriate? Please be specific in your response.

111. The proposed amendments require that Manual CCID Subsystem Access will be limited to 50 ITIN(s)/SSN(s)/EIN(s) per query. Is this limitation appropriate? If not, what number limitation would be appropriate and why? Please be specific in your response and please explain how a different threshold would not compromise the security of the CCID Transformation Logic algorithm.

112. The proposed amendments require that Manual CCID Subsystem Access must provide Regulatory Staff with the ability to retrieve data from the CCID Subsystem via the CAIS/CCID Subsystem Regulator Portal with the ability to query based on ITIN(s)/SSN(s)/EIN(s) where the CCID Transformation Logic is embedded in the client-side code of the CAIS/CCID Subsystem Regulator Portal. Are there any other appropriate means of providing Manual CCID Subsystem Access that also would not require

ITIN(s)/SSN(s) being reported to CAT? Please be specific in your response.

113. For Manual CCID Subsystem Access, should the CCID Transformation Logic be embedded in the client-side code of the CAIS/CCID Subsystem Regulator Portal? If not, where should it be embedded and how would that prevent the reporting and collection of ITIN(s)/SSN(s) to CAT?

114. Is it appropriate to require that the performance requirements for Manual CCID Subsystem Access be consistent with the criteria set out in the Online Targeted Query Tool Performance Requirements set out in Appendix D, Functionality of the CAT System? Is there another more appropriate performance requirement in the CAT NMS Plan that should apply to Manual CCID Subsystem Access? Why is that alternative performance requirement more appropriate? Please be specific in your response.

6. Programmatic Access—Authorization for Programmatic CAIS Access and Programmatic CCID Subsystem

While the Commission believes that manual access to both CAIS and the CCID Subsystem will satisfy the vast majority of Participant use cases, the Commission preliminarily believes that certain regulatory inquiries based on the investigation of potential rule violations and surveillance patterns depend on more complex queries of Customer and Account Attributes and transactional CAT Data. Such inquiries could involve regulatory investigations of trading abuses and other practices proscribed by Rule 10b–5 under the Exchange Act,³⁰⁵ Section 17(a) of the Securities Act,³⁰⁶ Rule 30(a) of Regulation SP³⁰⁷ and Rule 201 of Regulation S–ID,³⁰⁸ and Sections 206 and 207 of the Advisers Act.³⁰⁹ Detecting and investigating trading based on hacked information in violation of Rule 10b–5 and Section 17(a) of the Exchange Act, for example, will often require the inclusion of transactional and customer criteria in misconduct detection queries with transactional and customer attributes in query result sets. With CAT Data, determining the scope and nature of hacking and associated trading misconduct could depend on tailored programmatic access to transactional CAT Data and information identifying a Customer collected in the CAT. Similar forms of complex queries and query result sets also will facilitate detection

³⁰³ See *id.*

³⁰⁴ See *supra* note 294.

³⁰⁵ 17 CFR 240.10b–5.

³⁰⁶ 15 U.S.C.77q.

³⁰⁷ 17 CFR 248.30(a).

³⁰⁸ 17 CFR 248.201.

³⁰⁹ 15 U.S.C.80b–6; 15 U.S.C.80b–7.

and investigation of insider trading, including identifying potential illegal tipplers. Complex query result sets that include transactional data and customer attributes also can advance regulatory investigations of unfair trade allocation practices (“cherry-picking”). In order to address these needs, the Commission preliminarily believes it is appropriate to require the Plan Processor to provide programmatic access to the Customer Identifying Systems, as further described below.

In order to enable Regulatory Staff to carry out the regulatory responsibilities to enforce the statutes and rules noted above, among others, and to be consistent with and extend the “least privileged” practice of limiting access to Customer and Account Attributes, the Commission preliminarily believes it is appropriate to limit use of programmatic access to CAIS and the CCID Subsystem only to those Participants that receive Commission approval for programmatic access to those systems. Accordingly, the Commission is proposing to amend Appendix D, Section 4.1.6 of the CAT NMS Plan to require a Participant to submit an application, approved by the Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) to the Commission for authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access if a Participant requires programmatic access.³¹⁰

The application would seek three sets of information: (1) Identification of the system for which programmatic access is being requested (*i.e.*, Programmatic CAIS Access and/or Programmatic CCID Subsystem Access); (2) discussion of the need for programmatic access; and (3) specifics on the regulatory purpose and systems that require programmatic access, including: (a) The Participant’s rules that require programmatic access for surveillance and regulatory purposes; (b) the regulatory purpose of the inquiry or set of inquiries requiring programmatic access;³¹¹ (c) a detailed description of the functionality of the Participant’s system(s) that will use data from CAIS or the CCID Subsystem; (d) a system diagram and description indicating architecture and access controls to the Participant’s system that will use data from CAIS or the CCID

Subsystem; and (e) the expected number of users of the Participant’s system that will use data from CAIS or the CCID Subsystem.

The Commission also proposes amendments that would provide the process for Commission consideration of the application for Programmatic CAIS Access or Programmatic CCID Subsystem Access. Specifically, the Commission proposes that SEC staff shall review the application and may request supplemental information to complete the review prior to Commission action.³¹² Once the application is completed, the proposed amendments would provide that the Commission shall approve Programmatic CAIS Access or Programmatic CCID Subsystem Access if it finds that such access is generally consistent with one or more of the following standards: That such access 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 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.³¹³ The proposed amendments further would provide that the Commission shall issue an order approving or disapproving a Participant’s application for Programmatic CAIS Access or Programmatic CCID Subsystem Access within 45 days of receipt of a Participant’s application, which can be extended for an additional 45 days if the Commission determines that such longer period of time is appropriate and provides the Participant the reasons for such determination.³¹⁴

The Commission preliminarily believes that each requirement proposed for the application would elicit the essential information that the Commission needs in order to assess whether to grant programmatic access to CAIS or the CCID Subsystem, as further discussed below. As such, the application requirements are designed to require each Participant that applies for programmatic access to provide detailed and thorough information that is tailored to explain why programmatic access is required by such Participant in order to achieve that Participant’s unique regulatory and surveillance

purposes, and why such access to transactional CAT Data and Customer and Account Attributes will be responsive to a Participant’s inquiry or set of inquiries. These requirements are designed to set a high bar for granting an application for programmatic access so that such access is only granted when there is a demonstrated need and ability to use such access responsibly.

The Commission preliminarily believes that approval of the application process by the Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) is appropriate because the Participant’s Chief Regulatory Officer has the best understanding of how programmatic access to CAIS or the CCID Subsystem fits into the overall regulatory program and surveillance needs of the Participant. Approval by the Chief Regulatory Officer also would help to ensure that the need for programmatic access is assessed without any undue business pressures or concerns.³¹⁵

Because there are two systems that contain information identifying Customers, the Commission also preliminarily believes that it is appropriate to require the Participant to indicate whether it is seeking Programmatic CAIS Access and/or Programmatic CCID Subsystem Access. Such identification would also enable the Commission to assess whether the type of access being requested by the Participant is consistent with the regulatory purpose of the inquiry or set of inquiries being pursued by the Participant’s Regulatory Staff. The Commission preliminarily believes that given the different functionality of the two systems, separate applications and demonstrations of need and the ability to secure the data are required.

As previously discussed, the CAT NMS Plan adheres to the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible. Therefore, the Commission believes that it is appropriate to require the Participant’s application for programmatic access to indicate why manual access to CAIS and the CCID Subsystem cannot achieve the regulatory purpose of an inquiry or set of inquiries being pursued by Regulatory Staff before permitting programmatic access to CAIS and the CCID Subsystem. Requiring this information also would help the Participant’s Chief Regulatory Officer (or similarly designated head(s) of

³¹⁰ See proposed Appendix D, Section 4.1.6.

³¹¹ *Id.* While the application addresses the inquiries or set of inquiries that will be performed using programmatic access, the Customer Identifying Systems Workflow applies at the query level. Each query must be designed such that query results would contain only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Importantly, the Chief Regulatory Office is subject to oversight by the Regulatory Oversight Committee, which provides a governance structure for the Chief Regulatory Officer.

regulation) to conduct a fulsome analysis of his or her Regulatory Staff's need for programmatic access. The Commission preliminarily believes manual access will be sufficient in many cases and that need for programmatic access must be justified based on current and intended practices.

The Commission also preliminarily believes that it is appropriate to require the Participant's application to identify the Participant's specific rules that necessitate Programmatic Access for surveillance and regulatory purposes. For example, programmatic access to CAIS might be reasonable if the investigation into the potential violation of such rule would require knowledge of Customer and Account Attributes and transactional CAT Data to identify misconduct. The Participants should be specific in their justification for Programmatic Access; generally stating that programmatic access is required for member regulation, for example, would not be sufficient to justify Programmatic Access. The Participants must identify the nature of the specific rules or surveillance patterns that they believe require programmatic access. The Commission preliminarily believes that many forms of misconduct can be addressed using manual access and that programmatic access will not be necessary.

After considering the specific rule(s) that the Participant represents necessitates programmatic access, the Commission preliminarily believes that the next logical step in the assessment of whether programmatic access should be granted is to consider the regulatory purpose of the inquiry or set of inquiries being conducted by Regulatory Staff; if a regulatory purpose for the inquiry or set of inquiries cannot be articulated, programmatic access cannot be justified. Therefore, the Commission preliminarily believes that a clear statement by a Participant that explicitly articulates the reasons that access should be granted and for what purposes, in light of the Participant's rule(s) that required programmatic access, is appropriate. If SEC staff believes that sufficient detail is lacking, staff may request additional information, as described below.

While all access and analysis of Customer and Account Attributes must occur within the SAW, the Commission must be assured that Customer and Account Attributes will be incorporated securely into the Participant's system before granting programmatic access. Therefore, the Commission also preliminarily believes that sufficient information about how a Participant

intends to incorporate data from the Customer Identifying Systems into the Participant's system is needed in order to assess whether programmatic access should be granted. The Commission preliminarily believes that in addition to detailed description of functionality, requiring a system diagram and description indicating architecture and access controls at the Participant's system would provide a sufficient starting point to assess whether access should be granted; if needed, SEC staff would request additional information from the Participant. The Commission preliminarily believes that only Participants who demonstrate they have the surveillance and technical expertise to use programmatic access in a secure manner may be granted programmatic access.

While the Commission does not believe there is a number of users that is appropriate for all Participants and all regulatory inquiries, the number of users at a Participant that are performing inquiries can be relevant to data security concerns (*i.e.*, the ability to protect the data in the Customer Identifying Systems can be affected by the number of users with access to the data in the Customer Identifying Systems). Therefore, the Commission preliminarily believes that information about the expected number of users for the Participant's system that would use data from CAIS or the CCID Subsystem is an appropriate data point to solicit from the Participants.

The Commission also believes it is appropriate to amend the CAT NMS Plan to provide that SEC staff may request supplemental information to complete the review prior to Commission action. Given the scope of data that can be accessed from the Customer Identifying Systems under programmatic access, the Commission believes that it is vital to the approval process that the Participant clearly assess and articulate its need for programmatic access, and that the Commission receive and understand the Participant's need for programmatic access. The information solicited by the application process would help to ensure that programmatic access follows the "least privileged" practice of limiting access to Customer Identifying Systems as much as possible, is based on a "need to know" the data in the Customer Identifying Systems, and contains only the data from the Customer Identifying Systems that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries; however, should SEC staff require additional information, the Commission believes

that the CAT NMS Plan should allow SEC staff to request additional information about the programmatic application from the submitting Participant.³¹⁶

As proposed, Programmatic CAIS Access and Programmatic CCID Subsystem Access would be used by certain approved Regulatory Staff in the Participant's SAW, subject to specific conditions, and focused on a defined regulatory purpose of an inquiry or set of inquiries. A Participant's application would be approved if it is generally consistent with one or more of the criteria. The Commission believes that this approval standard allows for flexibility and the ability to tailor access to specific regulatory needs.

The Commission also believes that requiring the Commission to issue an order approving or disapproving a Participant's application for programmatic access within 45 days is appropriate in order to facilitate a timely decision on the application. However, it is also appropriate to allow for an extension of time for Commission action if the Commission needs more time to consider whether the application is appropriate and provides its reasons for the extension to the Participant. Allowing extensions of time should help to facilitate a thorough review of the application by the Commission.

The Commission understands that a Participant's programmatic access may evolve over time. As such, the Commission believes that it is appropriate to require that policies be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D, such that Participants must be able to demonstrate that a Participant's ongoing use of programmatic access adheres to the restrictions of the Customer Identifying Systems Workflow, as set forth in a Participant's Data Confidentiality Policies governing programmatic access, as required by Section 6.5(g)(i)(I) of the CAT NMS Plan, described below.³¹⁷ Such policies also are subject to an annual independent examination, which will help ensure ongoing effectiveness of a Participant's Data Confidentiality Policies as they relate to that Participant's programmatic

³¹⁶ Should a Participant receive approval for Programmatic Access, such Participant would not be precluded from incorporating in its analytical tools the ability to manually query CAIS and the CCID Subsystem.

³¹⁷ See *infra* Part II.G.3.c (Policies and Procedures Relating to Customer and Account Attributes).

access.³¹⁸ In addition and as described above, other proposed amendments to the Plan will also protect transactional CAT Data and Customer and Account Attributes accessed through programmatic access; notably, access would be within the SAW and governed by the CISP, the organization-wide and system-specific controls and related policies and procedures required by NIST SP 800–53 and applicable to all components of the CAT System. Such requirements will enable ongoing oversight of each approved Participant's programmatic access by the Plan Processor and the Commission, and will help limit programmatic access to appropriate use cases initially and on an ongoing basis.

The Commission requests comment on the proposed amendments to set forth the approval process for Programmatic CAIS and Programmatic CCID Subsystem Access. Specifically, the Commission solicits comment on the following:

115. The proposed amendments require that the Participant's application for programmatic access be approved by the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation). Is the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) the appropriate person to approve the application? If not, why not? Is there another person or entity that should approve the Participant's application?

116. Is it appropriate for the application to require the Participant to indicate which programmatic access is being requested: Programmatic CAIS Access and/or Programmatic CCID Subsystem Access? Why or why not?

117. The proposed amendments require the Participant to detail in an application to the Commission why Programmatic CAIS Access or Programmatic CCID Subsystem is required, and why Manual CAIS Access or Manual CCID Subsystem Access cannot achieve the regulatory purpose of an inquiry or set of inquiries. Is this information sufficient to explain why programmatic access is required? Should Participants have to provide more than an explanation of why manual access cannot achieve the regulatory purpose or an inquiry or set of inquiries? What other information should be solicited? Please be specific in your response.

118. The proposed amendments require that the application explain the Participant's rules that require Programmatic Access for surveillance and regulatory purposes. Should any

other aspect of the Participant rules to be explained in the application? If so, please explain.

119. The proposed amendments require that the application explain the regulatory purpose of the inquiry or set of inquiries requiring programmatic access. Is there additional detail that could be added to this standard? If so, what provisions could be added to clarify this standard? Please be specific in your response.

120. The proposed amendments require that an application to the Commission provide a detailed description of the functionality of the Participant's system(s) that will use data from CAIS or the CCID Subsystem. Is there anything in addition to the functionality of the Participant's system(s) that will use the data from CAIS and the CCID Subsystem that should be provided by the Participant? Please provide detail about why this additional information is necessary and how it would be appropriate for the Commission to consider in its assessment of whether to provide programmatic access to the Participant.

121. The proposed amendments require that the application provide a system diagram and description indicating architecture and access controls to the Participant's system that will use data from CAIS or the CCID Subsystem. Is there any other information regarding the Participant's system and the architecture and access controls that should be provided? Please describe that additional information in detail and explain how this will be useful in the Commission's assessment of whether to provide programmatic access to the Participant.

122. The proposed amendments require the application to indicate the expected number of users of the Participant's system that will use data from CAIS or the CCID Subsystem. Is there any other information about users in the Participants' system that will use the data that should be required? Please be specific and explain why it would be appropriate to add such a requirement.

123. The proposed amendments provide that the Commission shall approve Programmatic CAIS Access or Programmatic CCID Subsystem Access if it finds that such access is generally consistent with one or more of the following standards: That such access 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 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. Are there other standards that should be used by the Commission to assess whether to grant a Participant's application for Programmatic CAIS Access or Programmatic CCID Subsystem Access? Please be specific and explain why such other standards would be more appropriate.

124. Under the proposed amendments, the Commission shall issue an order approving or disapproving a Participant's application for programmatic access within 45 days, which can be extended by the Commission for an additional 45 days, if the Commission determines that such longer period of time is appropriate and provides the Participant with the reasons for such determination. Do commenters believe that 45 days is an appropriate amount of time for Commission action? Is another time period for Commission action more appropriate? Is another time period for the extension of time for Commission action more appropriate? If so, what time would that be? Please be specific and explain why a different time period would be more appropriate.

125. Once Commission approval of an application is granted, an approved Participant would be permitted to use programmatic access subject to the ongoing restrictions identified in Appendix D, Section 4.1.6 and Article VI, Section 6.5(g), as well as those related to use of a SAW; however, the proposed amendments would not require an approved Participant to submit updated applications as its use of programmatic access evolves. Should updates to application materials be required in order for Participants to maintain their programmatic access, or should Participants have to re-apply to maintain their programmatic access? Or is it sufficient that the policies and procedures in Section 6.5(g)(i) require the Participants to establish, maintain and enforce their policies and procedures? If Participants were required to re-apply to maintain their programmatic access, what criteria should be used for requiring re-application? For example, should approval for programmatic access expire after a set amount of time, so that Participants would have to re-apply at regular intervals in order to maintain their programmatic access? If so, what time period would be reasonable? For example, should Participants be required to re-apply every two years to maintain their programmatic access?

³¹⁸ See *infra* Part II.G.4.

Alternatively, should Participants be required to re-apply for programmatic access only if there is a material change in their use of programmatic access?

7. Programmatic CAIS Access

The Commission believes that it is appropriate to set forth the circumstances and requirements for Programmatic CAIS Access. The proposed amendments will define Programmatic Access, when used in connection with the Customer Identifying Systems Workflow, to mean the Plan Processor functionality to programmatically query, and return results that include, data from the CAIS and transactional CAT Data, in support of the regulatory purpose of an inquiry or set of inquiries, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in Section 6.5(g).³¹⁹ The Commission proposes to amend the CAT NMS Plan to state that Programmatic CAIS Access may be used when the regulatory purpose of the inquiry or set of inquiries by Regulatory Staff requires the use of Customer and Account Attributes and other identifiers (e.g., Customer-ID(s) or Industry Member Firm Designated ID(s)) to query Customer and Account Attributes and transactional CAT Data.³²⁰ In addition, the Commission proposes to require that the Plan Processor provide Programmatic CAIS Access by developing and supporting an API that allows Regulatory Staff to use analytical tools and ODBC/JDBC drivers to access the data in CAIS, and that the Performance Requirements for Programmatic CAIS Access shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, User-Defined Direct Query Performance Requirements.³²¹

The Commission preliminarily believes that these proposed amendments are appropriate because they set forth the parameters for Programmatic CAIS access, which would permit a programmatic interface that facilitates the submission of complex queries for both the transactional CAT Database and the Customer Identifying Systems. For example, if the regulatory purpose of an inquiry or set of inquiries being pursued by Regulatory Staff involved insider trading before a company news release, Programmatic CAIS Access could be an appropriate method for accessing CAIS because Regulatory Staff could search the transactional CAT Database for

consistently profitable trading activity and filter the data using the parameters of name and zip code—part of Customer and Account Attributes—to find Customer-IDs or other information identifying Customers that might be responsive to the inquiry or set of inquiries.

As discussed above, Programmatic CAIS Access must be within the SAW, adhere to the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible, is based on a “need to know” the data in the Customer Identifying Systems, and must contain only the data from the Customer Identifying Systems that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries. In addition, as required by Article VI, Section 6.5(g)(i)(I), the policies of the Participants must be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow, which will enable an ongoing analysis of whether Programmatic CAIS Access is being used by an approved Participant appropriately.³²² Therefore, the Commission believes that these are appropriate limitations on Programmatic CAIS Access.

Finally, the Commission preliminarily believes that it is appropriate to amend the CAT NMS Plan to adopt performance requirements for Programmatic CAIS Access so that there is a baseline performance metric to assess the operation of such access, and to facilitate the return of query results within a timeframe that facilitates the usefulness of the data obtained by Regulatory Staff from CAIS. The Commission also believes that it is appropriate to base the Programmatic CAIS Access performance requirements on the User-Defined Direct Query Performance Requirements because User-Defined Direct Queries are the most similar to Programmatic CAIS Access and thus would provide Regulatory Staff with programmatic interfaces that would enable and support, for example, complex queries, including the ability to provide query results that are extractable/

downloadable, multistage queries; and concurrent queries.

The Commission requests comment on the proposed amendments to define and set forth the requirements for Programmatic CAIS Access. Specifically, the Commission solicits comment on the following:

126. The proposed amendments establish that Programmatic CAIS Access may be used when the regulatory purpose of the inquiry or set of inquiries by Regulatory Staff requires the use of Customer and Account Attributes and other identifiers (e.g., Customer-ID(s) or Firm Designated ID(s)) to query the Customer and Account Attributes and transactional CAT Data. Are the circumstances in which Programmatic CAIS Access may be used clearly defined? If not, what additional detail would be helpful? Are there any other circumstances in which Programmatic CAIS Access might be appropriate? Please be specific in your response.

127. The proposed amendments require the Plan Processor to provide Programmatic CAIS Access by developing and supporting an API that allows Regulatory Staff to use analytical tools and ODBC/JDBC drivers to access the data in CAIS. Is there another more appropriate method to allow Regulatory Staff to access the data in CAIS? Please be specific in your response.

128. The proposed amendments require that the performance requirements for Programmatic CAIS Access be consistent with the criteria in the User-Defined Direct Query Performance Requirements set out in Appendix D, Functionality of the CAT System. Is there another more appropriate performance requirement in the CAT NMS Plan that should apply to Programmatic CAIS Access? Why is that alternative performance requirement more appropriate? Please be specific in your response.

8. Programmatic CCID Subsystem Access

The Commission believes that it is appropriate to amend the CAT NMS Plan to set forth the circumstances and requirements for Programmatic CCID Subsystem Access. The proposed amendments would define CCID Subsystem Access when used in connection with the Customer Identifying Systems Workflow, to mean the Plan Processor functionality to programmatically query the CCID Subsystem to obtain Customer-ID(s) from Transformed Value(s), in support of the regulatory purpose of an inquiry or set of inquiries, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in

³¹⁹ See CAT NMS Plan, Section 6.5(g)(1).

³²⁰ See proposed Appendix D, Section 4.1.6 (Programmatic CAIS Access).

³²¹ See *id.*

³²² See Part II.G.3.c, *infra*, for a discussion of the policies relating to Customer and Account Attributes.

Section 6.5(g).³²³ The Commission proposes to amend the CAT NMS Plan to state that Programmatic CCID Subsystem Access allows Regulatory Staff to submit multiple ITIN(s)/SSN(s)/EIN(s)³²⁴ for a Customer(s) of regulatory interest identified through regulatory efforts outside of the CAT to obtain Customer-ID(s) in order to query CAT Data regarding such Customer(s).³²⁵ The Commission also proposes to amend the CAT NMS Plan to explicitly state that the Plan Processor must provide Programmatic CCID Subsystem Access by developing and supporting the CCID Transformation Logic and an API to facilitate the submission of Transformed Values to the CCID Subsystem for the generation of Customer-ID(s).³²⁶ The proposed amendments would also state that Performance Requirements for the conversion of ITIN(s)/SSN(s)/EIN(s) to Customer-ID(s) shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, User-Defined Direct Query Performance Requirements.³²⁷

The Commission believes that it is appropriate to provide for Programmatic CCID Subsystem Access because such access would facilitate the ability of Regulatory Staff, who may be in possession of the ITIN(s)/SSN(s)/EIN(s) of multiple Customers as a result of their regulatory efforts outside of the CAT, to obtain the Customer-IDs of such Customers and query CAT Data, including Customer and Account Attributes and CAT transactional data using an application that accommodates the input of multiple ITIN(s)/SSN(s)/EIN(s). In addition, as required by Article VI, Section 6.5(g)(i)(I), the policies of the Participants must be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow, which will enable an ongoing analysis of whether

Programmatic CCID Subsystem Access is being used by an approved Participant appropriately. Finally, the Commission believes that it is appropriate to amend the CAT NMS Plan to adopt the performance requirements applicable to User-Defined Direct queries because such queries provide Regulatory Staff with programmatic interfaces to enable complex queries in a manner most similar to Programmatic CCID Subsystem Access.

The Commission requests comment on the proposed amendments to define and set forth the requirements for Programmatic CCID Subsystem Access. Specifically, the Commission solicits comment on the following:

129. The proposed amendments require the Plan Processor to provide Programmatic CCID Subsystem Access by developing and supporting the CCID Transformation Logic and an API to facilitate the submission of Transformed Values to the CCID Subsystem for the generation of Customer-ID(s). Is there another more appropriate method to facilitate the development and support for the Programmatic CCID Subsystem Access? Please be specific in your response.

130. The proposed amendments require Programmatic CCID Subsystem access to allow Regulatory Staff to submit multiple ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of regulatory interest identified through regulatory efforts outside of CAT to obtain Customer-ID(s) in order to query CAT Data regarding such Customer(s). Is this an appropriate way to facilitate Regulatory Staff obtaining Customer-IDs in order to query CAT Data? If not, is there another more appropriate way to facilitate obtaining Customer-IDs for Regulatory Staff?

131. The proposed amendments that require the performance requirements for Programmatic CCID Subsystem Access be consistent with the criteria in the User-Defined Direct Query Performance Requirements set out in Appendix D, Functionality of the CAT System. Is there another more appropriate performance requirement in the CAT NMS Plan that should apply to Programmatic CCID Subsystem Access? Why would an alternative performance requirement more appropriate? Please be specific in your response.

G. Participants' Data Confidentiality Policies

1. Data Confidentiality Policies

When adopting Rule 613, the Commission recognized the importance of maintaining the confidentiality of all

CAT Data reported to the Central Repository.³²⁸ The Commission noted at the time that the purpose and efficacy of the CAT would be compromised if the Commission, the SROs, and their members could not rely on the integrity, confidentiality, and security of the information stored in the Central Repository, noting that the Central Repository would contain confidential and commercially valuable information.³²⁹ Rule 613 required the CAT NMS Plan to include policies and procedures that are designed to ensure implementation of the privacy protections that are necessary to assure regulators and market participants that the CAT NMS Plan provides for rigorous protection of confidential information reported to the Central Repository.³³⁰ Furthermore, Rule 613 required the Participants and their employees to agree to not use CAT Data for any purpose other than surveillance and regulatory purposes, provided that a Participant is permitted to use the data that it reports to the Central Repository for regulatory, surveillance, commercial, or other purposes as otherwise permitted by applicable law, rule or regulation.³³¹

The CAT NMS Plan has several provisions designed to protect the confidentiality of CAT Data. Specifically, Section 6.5(f)(ii) of the CAT NMS Plan requires Participants to adopt and enforce policies and procedures that: (1) Implement "effective information barriers" between the Participant's regulatory and non-regulatory staff with regard to access and use of CAT Data stored in the Central Repository; (2) permit only persons designated by Participants to have access to the CAT Data stored in the Central Repository; and (3) impose penalties for staff non-compliance with any of its or the Plan Processor's policies or procedures with respect to information security. Section 6.5(f)(iii) of the CAT NMS Plan requires each Participant to, as promptly as reasonably practicable, and in any event

³²⁸ See e.g., Rule 613 Adopting Release, *supra* note 2, at 45781–83.

³²⁹ See *id.* at 45783.

³³⁰ 17 CFR 242.613(e)(4)(i).

³³¹ 17 CFR 242.613(e)(4)(i)(A). In addition, the CAT NMS Plan specifies that usage of the CAT Data is provided to Participants solely for the purpose of performing their respective regulatory and oversight responsibilities pursuant to federal securities laws, rules and regulations or any contractual obligations. CAT NMS Plan Section 6.5(g). As noted in the CAT NMS Plan Approval Order, regulatory purposes include, among other things, analysis and reconstruction of market events, market analysis and research to inform policy decisions, market surveillance, examinations, investigations, and other enforcement functions. See CAT NMS Plan Approval Order, *supra* note 3, at 84724 note 586.

³²³ See proposed Section 1.1.

³²⁴ The CCID Subsystem will contain the functionality to facilitate the efficient and accurate conversion of multiple legal entity's EIN(s) into a Transformed Value(s) and a subsequent Customer-ID. However, because an EIN(s) will be reported to CAIS as a Customer Attribute for association with a Customer-ID, the need for Regulatory Staff to utilize the CCID Subsystem to convert multiple EIN(s) into a Transformed Value and a subsequent Customer-ID will be minimized.

³²⁵ See proposed Appendix D, Section 4.1.6 (Programmatic CCID Subsystem Access).

³²⁶ See *id.*

³²⁷ See *id.*

within 24 hours, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee, any instance, of which such Participant becomes aware, of: (1) Noncompliance with the policies and procedures adopted by such Participant pursuant to Section 6.5(e)(ii); or (2) a breach of the security of the CAT. Section 6.5(g) requires the Participants to establish, maintain, and enforce written policies and procedures reasonably designed to: (1) Ensure the confidentiality of the CAT Data obtained from the Central Repository; and (2) limit the use of CAT Data obtained from the Central Repository solely for surveillance and regulatory purposes. The CAT NMS Plan further requires each Participant to periodically review the effectiveness of the policies and procedures required by Section 6.5(g), and to take prompt action to remedy deficiencies in such policies and procedures.³³²

The Commission believes that while the existing provisions discussed above are designed to protect the security and confidentiality of CAT Data, the CAT NMS Plan should be modified and supplemented to provide additional specificity concerning data usage and confidentiality policies and procedures, and to strengthen such policies and procedures with expanded and new requirements designed to protect the security and confidentiality of CAT Data.

First, the Commission proposes to combine the existing CAT NMS Plan provisions applicable to Participants discussed above, specifically Sections 6.5(f)(ii), (f)(iii) and (g), into a single section of the CAT NMS Plan.³³³ The Commission also proposes to modify these provisions so that they would apply to the Proposed Confidentiality Policies and procedures and usage restriction controls³³⁴ in accordance with these policies, as required by proposed Section 6.5(g)(i).³³⁵ This

single section, Section 6.5(g)(i), would set forth the provisions that must be included in each Participant's confidentiality and related policies ("Proposed Confidentiality Policies"). Provisions that are applicable to Participants would be contained in one place and separated from those applicable to the Plan Processor. As proposed, Section 6.5(f) of the CAT NMS Plan would continue to relate to data confidentiality and related policies and procedures of the Plan Processor, while Section 6.5(g) would relate to data confidentiality and related policies and procedures of the Participants.

Second, the Commission proposes to amend the CAT NMS Plan to require the Proposed Confidentiality Policies to be identical across Participants, which would result in shared policies that govern the usage of CAT Data by Participants and apply to all Participants equally. Currently, the CAT NMS Plan requires each individual Participant to establish, maintain, and enforce policies and procedures relating to the usage and confidentiality of CAT Data. The Commission preliminarily believes that having policies that vary across Participants could result in the creation of policies that differ substantively even for the same regulatory role. For example, pursuant to Section 6.5(f)(ii) of the CAT NMS Plan, a Participant could establish policies that grant broad access to CAT Data to regulatory staff that are assigned to a particular regulatory role, even if such broad access is not necessary for that regulatory role, while another Participant could more appropriately establish policies limiting access to CAT Data for the same regulatory role to CAT Data necessary to perform the role. The Commission preliminarily believes that to the extent SROs have regulatory staff with roles that serve a consistent purpose across SROs, that SROs generally should be accessing CAT Data pursuant to identical policies. The Commission further believes that requiring one identical set of policies would allow for input and expertise of all Participants to be used in the

development of such policies, and should reasonably be expected to result in more comprehensive Proposed Confidentiality Policies that incorporate the full range of regulatory activities performed by the SROs and are designed in a manner that is consistent with how SROs operate in practice.³³⁶ As proposed, while the Proposed Confidentiality Policies would be identical across Participants, the policies would incorporate different regulatory and surveillance roles and goals of the Participants and would apply to the whole scope of CAT Data usage by Participants, including use within a SAW, excepted non-SAW environment, or any other Participant environment.³³⁷

The Commission recognizes, though, that the internal organization structures, reporting lines, or other operations may differ across the Participants. Accordingly, the Commission preliminarily believes that it is appropriate to permit Participants to develop their own procedures relating to the Proposed Confidentiality Policies. In this regard, proposed Section 6.5(g)(i) would require each Participant to establish, maintain, and enforce procedures in accordance with the policies required by proposed Section 6.5(g)(i). The Commission also preliminarily believes that it is not necessary to subject such Participant procedures to the same requirements as those policies that are discussed below, including the requirements that such procedures are approved by the CAT Operating Committee and subject to annual examination and publication, because Participant procedures will differ based on individual Participants' organizational, technical, and structural uniqueness.³³⁸

2. Access to CAT Data and Information Barriers

As noted above, current Sections 6.5(f)(ii)(A) and (B) of the CAT NMS Plan require each Participant to adopt and enforce policies and procedures that implement effective information barriers between such Participant's

³³² See CAT NMS Plan, *supra* note 3, at Section 6.5(g).

³³³ Specifically, the Commission proposes to move Sections 6.5(f)(ii)(A) and (C), to Sections 6.5(g)(i)(D) and (H) respectively, and Section 6.5(f)(iii) to Section 6.5(g)(iii). Section 6.5(f)(ii)(B) would be deleted and replaced by a new provision regarding access to CAT Data in proposed Section 6.5(g)(i)(C), as discussed below. See *infra* Part II.G.2.a. Due to the proposed deletions, paragraphs (f)(iv) and (f)(v) in Section 6.5 would be re-designated as (f)(ii) and (f)(iii).

³³⁴ See, *infra*, Part II.G.3.a.

³³⁵ Revising these provisions to cover the Proposed Confidentiality Policies would apply these existing safeguards to the identical Proposed Confidentiality Policies. For example, proposed Section 6.5(g)(iii) would be modified to reference the policies, procedures and usage restriction controls required by Section 6.5(g)(i) instead of

Section 6.5(e)(ii). The Commission believes the provision is supposed to reference Section 6.5(f)(ii), because there is no Section 6.5(e)(ii) and because Participant policies and procedures are addressed in Section 6.5(f)(ii). In addition, the Commission proposes to revise the language of some of these provisions for clarity. Proposed Section 6.5(g)(iii) would thus require Participants to, as promptly as reasonably practicable, and in any event within 24 hours of becoming aware, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee: (A) Any instance of noncompliance with the policies, procedures and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i); or (B) a breach of the security of the CAT.

³³⁶ The Commission understands that the Participants have established policies and procedures pursuant to Section 6.5(f)(ii), and preliminarily believes that Participants can use these existing policies and procedures in order to help prepare, review, and approve the policies and procedures required by proposed Section 6.5(g)(i). The Commission also understands Participants have policies and procedures outside of CAT, such as insider trading policies and non-public data policies, which could be used to help develop both the Proposed Confidentiality Policies and the related procedures.

³³⁷ See *infra* Part II.G.2.

³³⁸ See *infra* Part II.G.4.

regulatory and non-regulatory staff with regard to access and use of CAT Data stored in the Central Repository and permit only persons designated by Participants to have access to CAT Data stored in the Central Repository.³³⁹

a. Regulatory Staff and Access to CAT Data

Current Section 6.5(f)(ii)(A) and (B) do not impose specific restrictions or requirements for Participants in determining which staff are considered regulatory staff. The existing provisions also do not address whether there may be limited instances in which non-regulatory staff—particularly technical staff—may have legitimate reasons to access CAT Data for regulatory purposes. The Commission believes that providing specificity regarding which staff are considered regulatory staff in the current CAT NMS Plan, and thus may have access to CAT Data, and specific limitations on access to CAT Data by both regulatory and non-regulatory staff may help better protect CAT Data and result in it being accessed and used appropriately.

To address these issues, the Commission proposes to replace existing Section 6.5(f)(ii)(B)³⁴⁰ with Section 6.5(g)(i)(C) to the CAT NMS Plan. Section 6.5(g)(i)(C) would limit access to CAT Data to persons designated by Participants, which persons must be: (1) Regulatory Staff; or (2) technology and operations staff that require access solely to facilitate access to and usage of CAT Data stored in the Central Repository by Regulatory Staff. In contrast to existing Section 6.5(f)(ii)(B), the proposed requirement in Section 6.5(g)(i)(C) would apply more broadly to CAT Data, rather than “CAT Data stored in the Central Repository,” and the Commission preliminarily believes that this expansion is appropriate because access to CAT Data should be limited to appropriate Participant personnel whether or not the data is being accessed directly from the Central Repository. The Commission further believes that deleting Section 6.5(f)(ii)(B) is appropriate because proposed Section 6.5(g)(i)(C) provides greater clarity and more specificity on which Participant staff are permitted to access CAT Data.

The Commission proposes to define “Regulatory Staff,” for the purposes of the Proposed Confidentiality Policies and the CAT NMS Plan. Specifically, “Regulatory Staff” would be defined in Section 1.1 of the CAT NMS Plan as the Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) and staff within the Chief Regulatory Officer’s (or similarly designated head(s) of regulation’s) reporting line.³⁴¹ In addition, the proposed definition would require that Regulatory Staff be specifically identified and approved in writing by the Chief Regulatory Officer (or similarly designated head(s) of regulation). In addition to creating the definition, the Commission proposes to amend references throughout the CAT NMS Plan that refer to “Participant regulatory staff” or “Participants’ regulatory staff” to “Participants’ Regulatory Staff,” in Sections 6.5(b)(i) and 6.5(f)(iv)(B) and in Appendix D, Sections 6.1, 6.2, 8.1, 8.2.1, 8.3, 9.1, 10.2 and 10.3 of the CAT NMS Plan.³⁴²

The Commission preliminarily believes that the proposed definition of Regulatory Staff is reasonably designed to result in the identification of those with a legitimate regulatory role and such staff would be the only Participant staff that are generally provided access to CAT Data. The Commission preliminarily believes considering a Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) as Regulatory Staff is appropriate because generally that role with a Participant is regulatory in function and reports directly to a Participant’s board of directors and/or a Participant’s Regulatory Oversight Committee.³⁴³ The Commission is including staff within the Chief Regulatory Officer’s (or similarly designated head(s) of regulation’s) reporting line because the Commission believes that such Participant staff will

have a primarily regulatory function. By contrast, Participant staff with other reporting lines and who primarily perform other functions for Participants, such as commercial or business functions generally should not have access to CAT Data. The Commission further believes that requiring the Chief Regulatory Officer (or similarly designated head(s) of regulation) to identify and approve which personnel are considered Regulatory Staff should help prevent staff with primarily non-regulatory obligations from being categorized as Regulatory Staff. A Chief Regulatory Officer (or similarly designated head(s) of regulation) may determine that some Regulatory Staff should not have access to CAT Data. The Commission believes that this proposal would further clarify which Participant staff can access CAT Data outside of the CAT infrastructure. For example, in addition to the staff who are directly accessing CAT Data inside the CAT infrastructure, Participant regulatory staff assisting examination staff in analyzing data extracted by a Participant for a particular examination or participating in an enforcement matter would be accessing CAT Data and thus would need to be identified and approved for access to CAT Data.

Participants may have staff with the technical or operational expertise necessary to implement systems to access CAT Data within other departments or that otherwise fall outside of the proposed definition of Regulatory Staff. Limiting access solely to Regulatory Staff could make it difficult for Participants to adequately develop, monitor, test, improve, or fix technical and operational systems developed or designed to access, review, or analyze CAT Data. Accordingly, the Commission proposes to require that the Proposed Confidentiality Policies allow technology and operations staff access to CAT Data only insofar as it is necessary to facilitate access by Regulatory Staff. To better protect CAT Data however, the Commission believes that such staff should not be granted access to CAT Data as a matter of course, and further believes that such staff should be subject to affidavit and training requirements and other requirements applicable to regulatory users of CAT Data.

The Commission understands that with regard to CAT responsibilities, certain Participants may choose to enter into regulatory services agreements (“RSAs”) or allocate regulatory responsibilities pursuant to Rule 17d–2 (through “17d–2 agreements”) to other Participants to operate their surveillance and regulatory functions, and in

³⁴¹ See proposed CAT NMS Plan Section 1.1.

³⁴² The term “regulatory staff” appears in other existing provisions of the CAT NMS Plan, and in particular Appendix C, and the Commission is not proposing to amend these references. The Commission is not changing references to “regulatory staff” which clearly refer to both Participant and Commission staff, in Section 6.10 of the CAT NMS Plan. In addition, the Commission is not amending the term in Appendix C because, as discussed in Part II.L below, Appendix C was not intended to be continually updated once the CAT NMS Plan was approved.

³⁴³ The Commission is proposing to allow “similarly designated head(s) of regulation” to act as the Chief Regulatory Officer in the proposed definition because certain Participants do not have a “Chief Regulatory Officer.” With respect to FINRA, the Commission understands that it does not have a Chief Regulatory Officer and that it may have multiple Executive Vice Presidents that fit within the definition.

³³⁹ See *supra* Part II.G.1.

³⁴⁰ Current Section 6.5(f)(ii)(B) of the CAT NMS Plan states that each Participant shall adopt and enforce policies and procedures that: “Permit only persons designated by Participants to have access to the CAT Data stored in the Central Repository.” The Commission believes that proposed Section 6.5(g)(i)(C) more clearly defines what Participant staff may have access to CAT Data.

particular cross-market regulation and surveillance.³⁴⁴ Under an RSA an SRO contracts to perform certain regulatory functions on behalf of another SRO, but the outsourcing SRO maintains ultimate legal responsibility for the regulation of its members and market. In contrast, under a Commission approved plan for the allocation of regulatory responsibilities pursuant to Rule 17d-2, the SRO does not maintain ultimate legal responsibility.³⁴⁵ The amendment would not prohibit the outsourcing SRO from permitting its Regulatory Staff to access CAT Data to carry out their regulatory responsibilities. In addition, the Commission preliminarily believes it would be appropriate for Regulatory Staff to access CAT Data to oversee and audit the performance of the SRO under an RSA, since the ultimate regulatory responsibility remains with the outsourcing SRO.

The Commission further believes that restricting access to CAT Data as proposed above would not foreclose 17d-2 agreements and RSAs, but that the Proposed Confidentiality Policies, 17d-2 agreements and RSAs would address access to CAT Data in light of these agreements. For example, the Commission preliminarily believes that the role of the relevant SROs' Chief Regulatory Officers, and designation of employees who may access CAT Data, may depend on the nature of the arrangement between the SROs. However, the proposed amendment would not foreclose SROs from considering both the outsourcing SRO's and the counterparty SRO's Chief Regulatory Officer (or similarly designated head(s) of regulation) as a relevant Chief Regulatory Officer (or similarly designated head(s) of regulation) for purposes of proposed Sections 1.1 and 6.5(g)(i), and thus allowing each Chief Regulatory Officer (or similarly designated head(s) of regulation) to identify Regulatory Staff in a manner consistent with the Proposed Confidentiality Policies.

b. Information Barriers

Current Section 6.5(f)(ii)(A) of the CAT NMS Plan requires Participants to

adopt and enforce policies and procedures that implement effective information barriers between such Participant's regulatory and non-regulatory staff with regard to access and use of CAT Data stored in the Central Repository. The Commission proposes to move this requirement to Section 6.5(g)(i)(D), and modify the provision to replace the references to "regulatory and non-regulatory staff," with the new defined term to state "Regulatory Staff and non-Regulatory Staff," and correct the grammar of the provision.

Because the CAT is intended to be a regulatory system, the Commission continues to believe that requiring effective information barriers between regulatory and non-regulatory Staff is appropriate. The Commission believes that proposed Section 6.5(g)(i)(D) improves upon existing Section 6.5(f)(ii) by requiring such information barriers to be implemented in the identical set of policies required by Section 6.5(g)(i), and because it more clearly defines between which types of staff effective information barriers must be established. Regulatory Staff, depending on their roles and regulatory responsibilities, will have access to transactional data and/or access to CAIS or CCID Subsystem data, and there should be effective information barriers that prevent disclosure of such data to non-Regulatory Staff. Effective information barriers would help restrict non-Regulatory Staff access to CAT Data to the limited circumstances in which such staff could access CAT Data, as described below.

c. Access by Non-Regulatory Staff

The Commission understands that there might be limited circumstances in which non-Regulatory Staff access to CAT data may be appropriate. Accordingly, the Commission proposes new Section 6.5(g)(i)(E), which would require that the Confidentiality Policies limit non-Regulatory Staff access to CAT Data to limited circumstances in which there is a specific regulatory need for such access and a Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation), or designee, provides written approval for each instance of access by non-Regulatory Staff.³⁴⁶

The Commission believes that it is appropriate to provide this specific exception to allow for access to CAT Data by non-Regulatory Staff where

there is a specific regulatory need. The Commission preliminarily believes there could be circumstances that justify allowing non-Regulatory Staff to view limited CAT Data. For example, in the case of a market "flash crash," Regulatory Staff may need to brief an exchange's Chief Executive Officer (who may not otherwise be considered Regulatory Staff) regarding the causes of such an event or share raw CAT Data about specific orders and trades. Another example in which non-Regulatory Staff access could be appropriate is if major market participant misconduct warrants a briefing to a Participant's board of directors because it presents a risk to the continued operation of an exchange. The Commission believes requiring approval and documentation of such approval by the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) should obligate the Chief Regulatory Officer (or similarly designated head(s) of regulation) to determine whether a specific regulatory need exists. As proposed, and described further below, such approval and the access of CAT Data by non-Regulatory Staff would be subject to an annual examination.³⁴⁷

d. Training and Affidavit Requirements

The CAT NMS Plan currently has provisions relating to training and affidavit requirements for individuals who access CAT Data, enforced by the Plan Processor. Section 6.1(m) of the CAT NMS Plan requires the Plan Processor to develop and, with the prior approval of the Operating Committee, implement a training program that addresses the security and confidentiality of all information accessible from the CAT, as well as the operational risks associated with accessing the Central Repository. The training program must be made available to all individuals who have access to the Central Repository on behalf of the Participants or the SEC, prior to such individuals being granted access to the Central Repository. Section 6.5(f)(i)(B) states that the Plan Processor shall require all individuals who have access to the Central Repository (including the respective employees and consultants of the Participants and the Plan Processor, but excluding employees and Commissioners of the SEC) to execute a personal "Safeguard of Information Affidavit" in a form approved by the Operating Committee

³⁴⁴ See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2.

³⁴⁵ See Section 17(d)(1) of the Act and Rule 17d-2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

³⁴⁶ The Commission notes that this would not apply to certain technology and operations staff pursuant to proposed Section 6.5(g)(i)(C) discussed above.

³⁴⁷ See *infra* Part II.G.4.

providing for personal liability for misuse of data.³⁴⁸

The Commission proposes in new Section 6.5(g)(i)(F) that the Proposed Confidentiality Policies require all Participant staff who are provided access to CAT Data to: (1) Sign a “Safeguard of Information” affidavit as approved by the Operating Committee pursuant to Section 6.5(f)(i)(B); and (2) participate in the training program developed by the Plan Processor that addresses the security and confidentiality of information accessible in the CAT pursuant to Section 6.1(m), provided that Participant staff may be provided access to CAT Data prior to meeting these requirements in exigent circumstances.³⁴⁹ This affidavit and training requirement is already required by the Plan Processor before individuals can access the Central Repository, pursuant to Sections 6.1(m) and 6.5(f)(i)(B) of the CAT NMS Plan, but this proposal would require the Proposed Confidentiality Policies to access to CAT Data.

The Commission preliminarily believes it is important that any Participant staff with access to CAT Data, whether or not that staff has access to the Central Repository itself, should undergo appropriate training and sign the Safeguard of Information affidavit.³⁵⁰ The Commission further believes that an exception for exigent circumstances is appropriate to provide for the rare circumstance where non-Regulatory Staff, who has not yet completed the training and affidavit requirements required by Section 6.5(g)(i)(F), must receive access to limited CAT Data to address an exceptional emergency. Examples might include the Chief Executive Officer of a securities exchange receiving a briefing relating to a sudden market-wide

emergency or technical or operations staff being called upon to address an unanticipated threat to the continued functioning of a Participant’s system. Under proposed Section 6.5(g)(i)(F), any Participant staff who does receive access to CAT Data prior to satisfying the requirements of proposed Section 6.5(g)(i)(F), due to exigent circumstances, would have to fulfill such requirements thereafter.

3. Additional Policies Relating to Access and Use of CAT Data and Customer and Account Attributes

The Commission also proposes several additional requirements to the Proposed Confidentiality Policies to expand upon existing provisions as described below. The Commission preliminarily believes that these additional requirements, and providing a comprehensive list of requirements for the Proposed Confidentiality Policies, would help result in policies that are sufficiently robust to protect CAT Data and to effectively regulate Participant usage of such data.

a. Limitations on Extraction and Usage of CAT Data

Rule 613 and the CAT NMS Plan limit the usage of CAT Data solely to surveillance and regulatory purposes.³⁵¹ In this regard, the CAT NMS Plan requires Participants to adopt policies and procedures that are reasonably designed to limit the use of CAT Data obtained from the Central Repository solely for surveillance and regulatory purposes.³⁵² In order to broaden the scope of such policies, the Commission proposes to add Sections 6.5(g)(i)(B) to require that the policies limit the extraction of CAT Data to the minimum amount necessary to achieve a specific surveillance or regulatory purpose.³⁵³

³⁵¹ See, e.g., Rule 613(e)(4)(i)(A) and CAT NMS Plan, *supra* note 3, at Section 6.5(f)(i)(A), 6.5(g). However, a Participant may use data that it reports to the Central Repository for regulatory, surveillance, commercial, or other purposes as otherwise not prohibited by applicable law, rule or regulation. See CAT NMS Plan, *supra* note 3, at 6.5(h).

³⁵² See CAT NMS Plan, *supra* note 3, at Section 6.5(g). As proposed, the policies required by the Proposed Confidentiality Policies would still require this. See proposed Section 6.5(g)(i)(A). The Commission also proposes to modify this provision to state that the Proposed Confidentiality Policies must ensure the confidentiality of CAT Data and limit the use of CAT Data to solely surveillance and regulatory purposes, and not “CAT Data obtained from the Central Repository,” to avoid potential confusion and to make clear that requirements related to the Proposed Confidentiality Policies extend to CAT Data outside of the Central Repository.

³⁵³ This provision is consistent with proposed Section 6.13(a)(i)(C). See, *supra* Part II.C.2. This provision of the Proposed Confidentiality Policies, as well as the others, will be subject to an annual

The Commission recognizes the potential security risks that result from the extraction of CAT Data. At the same time, the Commission recognizes that there may be legitimate regulatory needs to extract CAT Data. Accordingly, the Commission believes that it is important for the CAT NMS Plan and the Participants’ policies to require that only the minimum amount of CAT Data necessary to achieve surveillance or regulatory purposes shall be downloaded. Such a requirement would apply to all CAT Data, including transactional data and Customer and Account Attributes, as well as means of access to CAT Data, such as the online targeted query tool or Manual and Programmatic CAIS and/or CCID Subsystem Access. The Commission preliminarily does not believe that such a requirement would impede Participant ability to perform surveillance, investigate potential violations, and bring enforcement cases, because Participant Regulatory Staff can view and analyze CAT Data without extraction, such as through the proposed SAW environments or in the online targeted query tool, and to the extent that any CAT Data must be downloaded this proposed provision would not limit a Participant’s ability to download the minimum amount of CAT Data necessary to achieve surveillance or regulatory purposes.

b. Individual Roles and Usage Restrictions

The Commission proposes to add Section 6.5(g)(i)(F) to the CAT NMS Plan to require the Proposed Confidentiality Policies to define the individual roles and regulatory activities of specific users, including those users requiring access to Customer and Account Attributes, of the CAT. This provision would require Participants to define roles and responsibilities on an individual level. For example, the policies could provide for a role in which a regulatory analyst accesses CAT Data to determine whether industry members complied with specific laws or SRO or Commission rules. The policies would be expected to define all individual roles and regulatory activities of users that Participants require to perform their regulatory and surveillance functions. For example, this would include roles and regulatory activities related to CAIS and CCID Subsystem access. The Commission also proposes to require in

examination of compliance by an independent auditor, which should help ensure that the provision is adhered to by Participants. See, *infra* Part II.G.4.

³⁴⁸ Although Commission personnel would be excluded from provisions such as Section 6.5(f)(i)(B), the rules and policies applicable to the Commission and its personnel will be comparable to those applicable to the Participants and their personnel. See CAT NMS Plan Approval Order, *supra* note 3, at 84765.

³⁴⁹ The Commission notes that the Safeguard of Information affidavit approved by the Operating Committee pursuant to Section 6.5(f)(i)(B) must provide for personal liability for the misuse of data.

³⁵⁰ In the CAT NMS Plan Approval Order, the Commission stated that it believed existing CAT NMS Plan provisions, including Section 6.1(m), “indicate that the Plan Processor will require that all persons that have access to CAT Data will be required to complete training prior to accessing CAT Data, and expects that only those persons that have been adequately trained will have access to CAT Data.” See CAT NMS Plan Approval Order, *supra* note 3, at 84755. The Commission believes that proposed Section 6.5(g)(i)(F) clarifies and affirms that these expectations regarding training should apply to all Participant staff with access to CAT Data, regardless of whether or not directly accessed through the Central Repository.

Section 6.5(f)(i) of the CAT NMS Plan that each Participant shall establish, maintain, and enforce usage restriction controls (e.g., data loss prevention controls within any environment where CAT Data is used) in accordance with the Proposed Confidentiality Policies.

The Commission preliminarily believes that requiring the Participants to define the individual roles and regulatory activities of specific users, including those requiring access to Customer and Account Attributes, will encourage the Participants to thoroughly consider the roles and regulatory activities that individual users at Participants will be engaged in when using CAT Data and to consider what roles and regulatory activities require CAT Data to accomplish Participants' regulatory goals. Clearly defined roles and regulatory activities for individual users would help Participants better develop appropriate policies, procedures and controls to appropriately limit access to CAT Data on an individual level, and in particular, to establish appropriate Participant-specific procedures and usage restriction controls as required by proposed Section 6.5(g)(i). Over time, if Participants develop new roles and regulatory activities, or modify existing roles and regulatory activities, the Participants would be required to update the Proposed Data Confidentiality Policies, and related procedures and usage restriction controls, as appropriate. The Commission also preliminarily believes that requiring the Participants to define individual roles and regulatory activities of specific users should provide clarity and transparency with regard to the use of CAT Data to achieve specific regulatory and surveillance roles and goals of the Participants.³⁵⁴

In particular, the Commission preliminarily believes that this provision would help provide clarity with regard to individual roles in the context of regulatory coordination. In addition, the provision would add accountability for Regulatory Staff based on their individual roles. Some individual roles that are appropriate for some Participants may not be appropriate for others, because of differences between markets and the functions of the SROs. For example, FINRA may need to define individual roles and regulatory responsibilities that would not be applicable to exchange SROs. Or, an SRO with a trading floor may have to define individual roles that specifically relate to regulation and surveillance of trading floor activity. An

SRO that has entered into an RSA with another SRO may need to define an individual role or roles for Regulatory Staff responsible for overseeing and monitoring the another SRO's performance under the RSA.

The Commission believes that requiring the establishment of usage restriction controls should help achieve the goal that individuals with access to CAT Data are using only the amount of CAT Data necessary to accomplish that individual's regulatory function. For example, Regulatory Staff with a regulatory role that only requires access to transactional data should not be given manual access to CAIS or CCID Subsystem. Additionally, limiting the access of an individual to only the specific data elements required for his or her surveillance or regulatory function reduces the potential of inappropriate receipt and misuse of CAT Data. The Commission believes that this requirement also leverages existing requirements of the CAT NMS Plan.³⁵⁵ The Commission further believes that the CAT NMS Plan's logging requirements would provide information that would help Participants to establish and refine usage restriction controls.³⁵⁶

c. Policies Relating to Customer and Account Attributes

Currently, the policies and procedures required by Section 6.5(f)(ii) of the CAT NMS Plan and (g) do not directly address PII or Customer and Account Attributes, CAIS or the CCID Subsystem. The Commission believes that requiring Participants to incorporate policies relating to the access of Customer and Account Attributes, Programmatic CAIS Access, and Programmatic CCID Subsystem Access in the Proposed Confidentiality Policies would help protect the security and confidentiality

of Customer and Account Attributes and CCIDs.

Specifically, the Commission proposes Section 6.5(g)(i)(I) of the CAT NMS Plan, which would require that the Proposed Confidentiality Policies be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of proposed Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow.³⁵⁷ As discussed above in Part II.F, the Commission is proposing to amend Section 4.1.6 of Appendix D to more clearly define a Customer Identifying Systems Workflow, which sets forth explicit restrictions designed to limit the access and usage of Customer and Account Attributes only to the extent necessary to accomplish surveillance and regulatory purposes. The Commission believes that requiring the Proposed Confidentiality Policies to incorporate and implement the proposed Customer Identifying Systems Workflow would result in consistent application of the Customer Identifying Systems Workflow because all Participants would be subject to the policies which apply to Customer and Account Data usage both within and outside of a SAW. Together with Participant-specific procedures and usage restriction controls, these policies would help protect the security and confidentiality of Customer and Account Attributes, which would yield insight into a specific Customer's trading activity if coupled with transaction data, and would be collected and maintained by the CAT system.³⁵⁸ These policies would also be subject to the approval, publication, and examination provisions discussed below.

The Commission also believes that it is appropriate to amend the CAT NMS Plan to highlight that the restrictions to a Participant's access to Customer and Account Attributes and Customer Identifying Systems through programmatic access continue to apply even after a Participant is initially approved for programmatic access. Thus, the proposed amendments state that the Proposed Confidentiality Policies must be reasonably designed to implement and satisfy the Customer and

³⁵⁵ Pursuant to the CAT NMS Plan, the CAT System must support an arbitrary number of roles with access to different types of CAT Data, down to the attribute level. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.14. In addition, the administration and management of roles must be documented by the Plan Processor. *Id.* As noted below, the Commission proposing to amend Appendix D, Section 4.14 to clarify what "arbitrary number" means, see, *infra*, note 380.

³⁵⁶ For example, the CAT NMS Plan requires the online targeted query tool to log "submitted queries and parameters used in the query, the user ID of the submitter, the date and time of the submission, as well as the delivery of results. The Plan Processor will use this logged information to provide monthly reports to each Participant and the SEC of its respective metrics on query performance and data usage of the online query tool. The Operating Committee must receive all monthly reports in order to review items, including user usage and system processing performance." See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1.1.

³⁵⁷ See *supra* Part II.E and Part II.F.

³⁵⁸ In addition, the Commission believes that the logging and reports required by Appendix D, Section 8.1.1 of the CAT NMS Plan would help Participants review whether the requirements of Section 4.1.6 of Appendix D are being followed. See, *supra* note 356.

³⁵⁴ See *infra* Part II.E.4.

Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow and the restrictions noted therein. As a result of these policies, Participants must be able to demonstrate that their ongoing use of programmatic access continues to be in compliance with the restrictions to Customer and Account Attributes. For example, a Participant could document the changes to the Participant's evolving use of the programmatic access, noting in particular how the Participant's programmatic access continues to comply with the restrictions around access to Customer and Account Attributes since the Commission's initial approval of the Participant's programmatic access.³⁵⁹ In light of this requirement, each Participant would be in a position to continually assess whether such ongoing programmatic access adheres to the restrictions of the Customer Identifying Systems Workflow. For example, if the functionality of a Participant's programmatic access changed to address a new regulatory purpose, the Participant must be able to demonstrate that the changed functionality remains consistent with all of the restrictions of the Customer Identifying Systems Workflow including (1) that the "least privileged" practice of limiting access to Customer Identifying Systems has been applied but that programmatic access to achieve the new regulatory purpose is still required; (2) that Regulatory Staff accessing Customer and Account Attributes through programmatic access is limited to only those individuals that maintain the appropriate regulatory role for such access; (3) that queries submitted by Regulatory Staff using programmatic access are based on a "need to know" data in the Customer Identifying Systems; and (4) that queries have been designed such that query results contain only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries. The Commission preliminarily believes that these requirements, in conjunction with other requirements of the Proposed Confidentiality Policies discussed above, including monitoring, usage

restriction controls and definitions of individual roles and regulatory activities of specific users, would help restrict Manual and Programmatic CAIS and/or CCID Subsystem Access to narrowly tailored circumstances when initially approved by the Commission and on an ongoing basis.

4. Approval, Publication, Review and Annual Examinations of Compliance

Currently, Section 6.5(g) of the CAT NMS Plan requires Participants to periodically review the effectiveness of the policies and procedures required by Section 6.5(g), and take prompt action to remedy deficiencies in such policies and procedures. However, the Commission believes that the highly sensitive nature of CAT Data and the importance of confidentiality warrants further oversight of the Proposed Confidentiality Policies, and in particular, the Commission believes it is appropriate to require approval of the Proposed Confidentiality Policies; require publication of these policies; provide specifics regarding Participant review of policies, procedures, and usage restriction controls; and require an annual examination of compliance with the Proposed Confidentiality Policies by independent accountants.

First, the Commission proposes to require that both the CISO and CCO of the Plan Processor be required to review the Proposed Confidentiality Policies.³⁶⁰ In addition, the Commission proposes to require that the CCO of the Plan Processor obtain assistance and input from the Compliance Subcommittee,³⁶¹ and require that the policies required by proposed Section 6.5(g)(i) of the CAT NMS Plan be subject to review by the Operating Committee, after review by the CISO and CCO.³⁶² Currently, no specific individual is responsible for reviewing or approving the Participant policies and procedures required by Section 6.5(f)(ii) or 6.5(g) of the CAT NMS Plan. The Commission preliminarily believes that these requirements will further help result in Proposed Confidentiality Policies that are consistent with the requirements of the CAT NMS Plan and proposed

changes herein, while providing for multiple opportunities for feedback and input while the Proposed Confidentiality Policies are being developed. It would allow the Plan Processor to have input in the creation of the Proposed Confidentiality Policies and would encourage consistency with policies and procedures created by the Plan Processor itself. The Commission preliminarily believes that it is appropriate to require the CCO to receive the assistance of the Compliance Subcommittee for broad input into the process of developing the Proposed Confidentiality Policies.³⁶³ The Commission believes that it is reasonable to require the Operating Committee to review and approve the Proposed Confidentiality Policies after review by the CCO and CISO to prevent such policies from going into effect until these relevant parties have had the opportunity to review and provide feedback if necessary. Similarly, it is important for the Operating Committee, CCO and CISO to review updates to the Proposed Confidentiality Policies, as Participants make changes over time, because such parties can provide feedback and identify any inconsistencies with requirements of the CAT NMS Plan.

Second, the Commission believes that public disclosure of the Proposed Confidentiality Policies would be beneficial to investors and the public. Currently, the policies and procedures created by Participants pursuant to Section 6.5(f)(ii) and (g) are not required to be publicly disseminated. The Commission believes that public disclosure could help encourage the Participants to thoroughly consider the Proposed Confidentiality Policies and encourage the Participants to create robust Proposed Confidentiality Policies because they will be subject to public scrutiny. Thus, the Commission proposes new Section 6.5(g)(iv) which would require the Participants to make the Proposed Confidentiality Policies publicly available on each of the Participants' websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information.³⁶⁴

³⁶⁰ See proposed Sections 6.2(a)(v)(R) and 6.2(b)(viii).

³⁶¹ See proposed Section 6.2(a)(v)(R). The CAT NMS Plan requires the Operating Committee to maintain a compliance Subcommittee (the "Compliance Subcommittee") whose purpose shall be to aid the Chief Compliance Officer as necessary. See CAT NMS Plan, *supra* note 3, at Section 4.12(b).

³⁶² See proposed Section 6.5(g)(vi). The Commission anticipates that the Participants will provide the draft Proposed Confidentiality Policies to the CISO and CCO sufficiently in advance of the Operating Committee vote to permit review.

³⁶³ Members of the Advisory Committee, composed of members that are not employed by or affiliated with any Participant or any of its affiliates or facilities, are currently on the Compliance Subcommittee. See CAT NMS Plan, *supra* note 3, at Section 4.13.

³⁶⁴ See *supra* note 362. As proposed, publication of the policies could occur on either each of the Participant websites or on the CAT NMS Plan website. The CAT NMS Plan website was created by the Participants shortly after the adoption of Rule 613 and has been used as a means to communicate information to the industry and the

³⁵⁹ The Commission generally believes that such documentation should at minimum have the same level of detail as the initial application material for programmatic access and should highlight how the Participant's programmatic access has changed over time.

The Commission also believes that such a requirement would allow other Participants, broker-dealers, investors, and the public to better understand and analyze the Proposed Confidentiality Policies that govern Participant usage of and the confidentiality of CAT Data, and, when updated by Participants, any changes to these policies. The Commission preliminarily believes that broker-dealers and investors that generate the order and trade activity that is reported to CAT should be able to access the policies governing usage of CAT Data. In addition, due to the sensitivity and importance of CAT Data, which may contain personally identifiable information, trading strategies, and other valuable or sensitive information, it is important for broker-dealers, investors and the public to understand how CAT Data will be used and confidentiality maintained by the Participants, and to know the policies that Participants are bound to follow to protect the confidentiality of such data. The Commission believes that this may be particularly important for policies relating to access to Customer Account Attributes, as well policies relating to Manual and Programmatic CAIS and/or CCID Subsystem Access, which will allow customer attribution of order flow. The Commission is proposing an exception for sensitive proprietary information in the Proposed Confidentiality Policies because certain information in the policies required in the Proposed Confidentiality Policies may jeopardize the security of CAT Data if publicly disclosed. However, the Commission preliminarily does not believe that the proposed requirements for the Proposed Confidentiality Policies would require the disclosure of any substantial amount of sensitive proprietary information, and expects that there would be no redactions of information specifically required in the Proposed Confidentiality Policies, such as the identification of the individual roles and regulatory activities of specific users. The Commission believes that Participant-specific procedures and usage restriction controls, that would not be required to be made public, are more likely to contain the type of sensitive information that is inappropriate for public disclosure.

Currently, the CAT NMS Plan requires Participants to periodically review the effectiveness of the policies and procedures required by Section 6.5(g), maintain such policies and procedures, and take prompt action to

remedy deficiencies in such policies and procedures, without further specifics regarding how this review is to occur. The Commission proposes changes to strengthen the review of the Proposed Confidentiality Policies in proposed Sections 6.5(g)(i)(J), 6.5(g)(ii) and 6.5(g)(v).

Proposed Section 6.5(g)(i)(J) would require that the Proposed Confidentiality Policies document monitoring and testing protocols that will be used to assess Participant compliance with the policies (*e.g.*, protocols monitoring CAT Data movement within any environment where CAT Data is used and associated testing to determine that such protocols are effective at identifying data leakage). In conjunction with this provision, proposed Section 6.5(g)(ii) would require the Participant to periodically review the effectiveness of the policies, procedures, and usage restriction controls required by Section 6.5(g)(i), including by using the monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and taking prompt action to remedy deficiencies in such policies, procedures and usage restriction controls.³⁶⁵

The Commission believes that these requirements are appropriate and should result in Proposed Confidentiality Policies, and Participant-specific procedures and usage restriction controls developed pursuant to the Proposed Confidentiality Policies, that are effective and complied with by each Participant across all environments where CAT Data is used. The Commission believes that review of implementation is important since even robust confidentiality policies could be circumvented or violated due to poor or improper implementation. Such periodic review will also help assure broker-dealers, investors and the public that the Participants are complying with the publicly disclosed Proposed Confidentiality Policies and related procedures and usage restriction controls. In addition, such review would assist Participants in meeting their requirement to maintain the Proposed Confidentiality Policies and related procedures and usage restriction controls as required by proposed

Section 6.5(g)(i), including updating and revising them as appropriate.

The Commission also proposes a new Section 6.5(g)(v) which would require that, on an annual basis, each Participant shall engage an independent accountant to perform an examination of compliance with the policies required by Section 6.5(g)(i) in accordance with attestation standards of the American Institute of Certified Public Accountants ("AICPA") (referred to as U.S. Generally Accepted Auditing Standards or GAAS) or the Public Company Accounting Oversight Board ("PCAOB"), and with Commission independence standards based on SEC Rule 2–01 of Regulation S–X.³⁶⁶ In addition, the examination results shall be submitted to the Commission upon completion, in a text-searchable format (*e.g.* a text-searchable PDF). The examination report shall be considered submitted to the Commission when electronically received by an email address provided by Commission staff. The Commission preliminarily believes that this additional oversight would help result in such data being used solely for surveillance and regulatory purposes.

The Commission preliminarily believes that requiring the annual examination to be performed by an independent accountant should result in an examination that is performed by experienced professionals who are subject to certain professional standards. The Commission believes that permitting the examination to be in accordance with either the attestation standards of the AICPA or the PCAOB should give Participants greater flexibility in choosing an independent accountant. The Commission preliminarily believes that either standard is sufficient for the annual examinations to be performed adequately in these circumstances and both are familiar to the Commission, Participants and other market participants. The Commission believes that the independence standard of SEC Rule 2–01 of Regulation S–X would require Participants to engage an independent accountant that is independent of the Participant. The Commission understands that under the proposed requirement, Participants can likely use their existing auditors to perform this task as long as the existing auditors meet the independence requirements. The Commission further believes that as proposed, Participants that are affiliated would be permitted to

³⁶⁵ The Commission would delete existing language in current Section 6.5(g)(i) that states: "Each Participant shall periodically review the effectiveness of the policies and procedures required by this paragraph, and take prompt action to remedy deficiencies in such policies and procedures." The Commission believes that this language would be replaced and enhanced in substance by proposed Section 6.5(g)(i)(J).

³⁶⁶ See 17 CFR 210.2–01. The Commission stresses that the proposed change relates only to a required "examination" by independent accountants, and has no relation to "examinations" performed by Commission staff.

public at large since that time. See CAT NMS Plan, *supra* note 3, at Appendix C–109.

use the same auditor for each affiliated entity.

The Commission believes that it is appropriate to require that the Participants provide the examination reports to the Commission. The Commission believes that this will allow the Commission to review the results of the examination, and to assess whether or not Participants are adequately complying with the Proposed Confidentiality Policies. The Commission believes that the examination reports should be protected from disclosure subject to the provisions of applicable law.³⁶⁷

The Commission requests comment on the amendments to consolidate and enhance Participants' data confidentiality policies and procedures. Specifically, the Commission solicits comment on the following:

132. Are current requirements relating to Participant data usage and confidentiality policies and procedures in Section 6.5(f)(ii), 6.5(f)(iii), and 6.5(g) in the CAT NMS Plan sufficient to protect the confidentiality and security of CAT Data?

133. Are the requirements of the Proposed Confidentiality Policies sufficiently robust to protect the confidentiality and security of CAT Data? Would additional or fewer requirements for such policies be beneficial?

134. Should the Proposed Confidentiality Policies be required to provide any other limitations on the extraction or usage of CAT Data? Do the proposed requirements sufficiently address concerns about policies and procedures related to the extraction and usage of CAT Data, including Customer and Account Attributes?

135. Should the Proposed Confidentiality Policies include specific data security requirements to help protect the confidentiality of CAT Data (e.g., data loss prevention controls that include data access controls, data encryption, specific availability restrictions, and controls on data movement for securing CAT Data within any environment where CAT Data is used)? Should the Proposed Confidentiality Policies require Participants to maintain a full technical audit log of all CAT Data movement within their own environments?

136. Should the Proposed Confidentiality Policies or the CAT NMS Plan itself be required to define what "surveillance and regulatory purposes" means?

137. Should the Participants be required to establish, maintain, and enforce identical written policies as proposed Section 6.5(g)(i)? Should Participants be required to create procedures and usage restriction controls in accordance with the Proposed Confidentiality Policies?

138. Should the Proposed Confidentiality Policies limit extraction of CAT Data to the minimum amount of data necessary to achieve a specific surveillance or regulatory purpose? Should other policies and/or procedures regarding the extraction of CAT Data be required?

139. Should the Proposed Confidentiality Policies do more than define the individual roles and regulatory activities of specific users, e.g., require documentation relating to each instance of access of CAT Data or define both appropriate and inappropriate usages of CAT Data?

140. The proposed amendments define Regulatory Staff. Is the proposed definition of Regulatory Staff appropriate and reasonable? Is the definition too broad or too narrow? Why or why not? For example, should the Commission limit the definition of Regulatory Staff to staff that *exclusively* report to the Chief Regulatory Officer (or similarly designated head(s) of regulation) or to persons within the Chief Regulatory Officer's (or similarly designated head(s) of regulation's) reporting line?

141. Is it reasonable and appropriate to require that the Proposed Confidentiality Policies limit access to CAT Data to Regulatory Staff and technology and operations staff that require access solely to facilitate access to and usage of the CAT Data by Regulatory Staff? Should any other Participant staff be permitted access to CAT Data?

142. The proposed amendments provide that the Proposed Confidentiality Policies require, absent exigent circumstances, that all Participant staff who are provided access to CAT Data must sign a "Safeguard of Information affidavit" and participate in the training program developed by the Plan Processor. Is this requirement appropriate and reasonable? Should Participants be permitted to allow access to CAT Data by staff that have not met the affidavit and training requirements if there are exigent circumstances? If so, how should exigent circumstances be defined? Who should determine what are exigent circumstances?

143. The proposed amendments provide that the Proposed Confidentiality Policies shall provide

for only one limited exception for access to CAT Data by non-Regulatory Staff (other than technology and operations staff as provided for in Section 6.5(g)(i)(B)), namely a "specific regulatory need for access." Is this exception clearly defined and easily understood? Is this exception too broad or too narrow? Should non-Regulatory Staff be permitted access to CAT Data in any other circumstance? Should non-Regulatory Staff be required to obtain written approval from a Participant's CRO for each instance of access to CAT Data? Should there be other requirements for non-Regulatory Staff to access CAT Data? Would this proposed requirement restrict the ability of certain non-Regulatory Staff, such as Chief Executive Officers, from carrying out their oversight over regulatory matters?

144. Is it appropriate and reasonable to require the Chief Information Security Officer of the Plan Processor, in collaboration with the Chief Compliance Officer of the Plan Processor, to review the Proposed Confidentiality Policies? Is it appropriate and reasonable to require the Operating Committee to approve the Proposed Confidentiality Policies? Should other individuals, entities, or the Commission be responsible for reviewing and/or approving these policies and procedures? Should such review and/or approval be subject to objective or subjective criteria, or explicit standards? If so, what should those criteria or standards be?

145. Are the proposed requirements for policies relating to Customer and Account Attributes, and CAIS and CCID Subsystem access, specifically proposed Section 6.5(g)(i)(I), appropriate and reasonable? Should other requirements relating to access or usage of Customer and Account Attributes be required? Is it appropriate and reasonable to have policy provisions that apply only to Customer and Account Attributes data instead of CAT Data more broadly?

146. Is it appropriate and reasonable to require that the Participants engage an independent accountant to examine on an annual basis each Participant's compliance with the policies required by proposed Section 6.5(g)(i)? Are the proposed attestation and independence standards appropriate?

147. Is it appropriate and reasonable to require that the Proposed Confidentiality Policies document monitoring and testing protocols that will be used to assess Participant compliance with the policies? Should additional specificity be added regarding the monitoring and testing requirements, such as requiring that these requirements include specific data loss prevention controls? Is it

³⁶⁷ See, e.g., 5 U.S.C. 552 *et seq.*; 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

appropriate and reasonable to require that Participants periodically review the effectiveness of the policies and procedures and usage restriction controls required by Section 6.5(g)(i)? Should more or fewer requirements regarding review of Participant compliance with the Proposed Confidentiality Policies or related procedures and/or usage restrictions be implemented?

148. Is it appropriate and reasonable to require that the Proposed Confidentiality Policies be made public? Is it appropriate and reasonable to provide that Participants have no obligation to disclose sensitive information? Should Participants be permitted to withhold any other type of information? Should the policies be published or made public in a form different than publication on the CAT NMS Plan website?

H. Regulator & Plan Processor Access

1. Regulatory Use of CAT Data

As noted earlier, Rule 613 and the CAT NMS Plan already limits the use of CAT Data to solely surveillance and regulatory purposes.³⁶⁸ The CAT NMS Plan also provides that the Plan Processor must provide Participants' regulatory staff and the Commission with access to CAT Data for regulatory purposes only.³⁶⁹ Examples of functions for which Participants' regulatory staff and the SEC could use CAT Data include economic analysis, market structure analyses, market surveillance, investigations, and examinations.³⁷⁰ The Commission has received letters stating that "surveillance and regulatory purposes" is too broad and vague a limit on the use of CAT Data and should be clarified to prohibit SROs from using CAT Data for any commercial purpose.³⁷¹ The Commission believes

that it is important that CAT Data be used only for surveillance and regulatory purposes. The Commission also believes it is important to prohibit Participants from using CAT Data in situations where use of CAT Data may serve both a surveillance or regulatory purpose, and commercial purpose, and, more specifically prohibit use of CAT Data for economic analyses or market structure analyses in support of rule filings submitted to the Commission pursuant to Section 19(b) of the Exchange Act ("SRO rule filings") in these instances.

The Commission proposes to amend Section 8.1 of Appendix D to add to the requirement that access to CAT Data would be only for surveillance and regulatory purposes that the access should be consistent with Proposed Confidentiality Policies as set forth in Section 6.5(g) of the CAT NMS Plan. The Commission also proposes to amend Section 8.1 of Appendix D to specify that Regulatory Staff and the SEC must be performing regulatory functions when using CAT Data, including for economic analyses, market structure analyses, market surveillance, investigations, and examinations, and may not use CAT Data in such cases where use of CAT Data may serve both a surveillance or regulatory purpose, and a commercial purpose. The Commission further proposes that in any case where the use of CAT Data may serve both a surveillance or regulatory purpose and a commercial purpose, such as economic analyses or market structure analyses in support of SRO rule filings with both a regulatory and commercial purpose, use of CAT Data is not permitted. This would be consistent with the existing requirement in Rule 613 the CAT NMS Plan that CAT Data must be used for *solely* regulatory and surveillance purposes.³⁷²

Commission should clarify the meaning of the term 'surveillance and regulatory purposes'. . . . In doing so, the Commission should ensure that the SROs will be clearly prohibited from using CAT Data for any commercial purpose"; letter dated December 16, 2019 from Ronald Newman, National Political Director, and Kate Ruane, Senior Legislative Counsel, American Civil Liberties Union, to the Honorable Jay Clayton, Chairman, Commission ("[t]his standard is far too broad and vague to assure that the data will only be acquired and used for specific and legitimate enforcement purposes. The SEC should provide a clearly defined standard that must be met in order to access and use information in the CAT and should specifically prohibit those with access from using the information for any commercial purpose").

³⁷² See 17 CFR 242.613(e)(4)(i)(A); CAT NMS Plan, *supra* note 3, Sections 6.5(c) and 6.5(g). Because the CAT NMS Plan requires CAT Data to be used for solely regulatory or surveillance purposes, Participants may not use CAT Data for any economic analyses or market structure analyses that do not have a solely regulatory or surveillance purpose.

The Commission preliminarily believes that the proposed amendments to Section 8.1 of Appendix D are appropriate because adding the requirement that surveillance and regulatory purposes be consistent with the Proposed Confidentiality Policies would establish a minimum standard for what constitutes regulatory use of CAT Data that is identical across the Participants. It would additionally help protect the security of CAT Data by limiting the extraction of CAT Data to, as proposed, the minimum amount of data necessary to achieve a specific surveillance or regulatory purpose. The Commission's proposed amendments concerning the functions for which CAT Data can be used reiterate that the CAT Data may only be used for solely surveillance and regulatory purposes.

The Commission believes that prohibiting the use of CAT Data for SRO rule filings with a regulatory and commercial purpose is important because exchange groups are no longer structured as mutual organizations that are owned, for the most part, by SRO members. Today, nearly all exchange SROs are part of publicly-traded exchange groups that are not owned by the SRO members, and, among other things, compete with broker-dealers and each other for market share and order flow.³⁷³ CAT Data includes data submitted by the SROs and broker-dealers.³⁷⁴ The Commission believes that SROs may want to use CAT Data for legitimate surveillance and regulatory purposes in conjunction with an SRO rule filing, but many exchange SRO rule filings have at least some commercial component. For example, CAT Data could be used to determine whether or not a particular order type is working as intended or if changes would be beneficial to market participants—however, exchange SROs compete for order flow by offering different types and variations of order types, therefore potential SRO rule filings in this context would not be *solely* related to surveillance or regulation. Prohibiting the use of CAT Data for such a rule change is consistent with the existing

³⁷³ See Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71125, 71132 (Dec. 8, 2004) (noting that SROs had been challenged by the trend to demutualize and that the "impact of demutualization is the creation of another SRO constituency—a dispersed group of public shareholders—with a natural tendency to promote business interests").

³⁷⁴ SROs compete for order flow with off exchange venues, including alternative trading systems (which also match buyers and sellers but are subject to a different regulatory framework and in many cases do not display pricing information to the general public) and other liquidity providers (e.g., broker-dealer internalizers).

³⁶⁸ See, e.g., Rule 613(e)(4)(i)(A) and CAT NMS Plan, *supra* note 3, at Section 6.5(f)(i)(A), 6.5(g). However, a Participant may use data that it reports to the Central Repository for regulatory, surveillance, commercial, or other purposes as otherwise not prohibited by applicable law, rule or regulation. See CAT NMS Plan, *supra* note 3, at Section 6.5(h).

³⁶⁹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1. Because this section currently only refers to "regulatory purposes," the Commission proposes to amend this section to clarify that such access is for surveillance and regulatory purposes only, to be consistent with Rule 613 and other sections of the CAT NMS Plan. See, *supra* note 368. This change would also be consistent with proposed changes discussed below, that would clarify the requirement that CAT Data should be used only for surveillance and regulatory purposes.

³⁷⁰ *Id.*

³⁷¹ See letter dated November 11, 2019 from Kenneth E. Bentsen, Jr., President and CEO, Securities Industry and Financial Markets Association ("SIFMA"), to the Honorable Jay Clayton, Chairman, Commission ("[t]he

requirement that CAT Data must be used for *solely* regulatory and surveillance purposes,³⁷⁵ and the proposed amendments make clear that this restriction on the usage of CAT Data applies to SRO rule filings that do not have solely regulatory or surveillance purposes.³⁷⁶ However, this prohibition would not restrict an SRO's ability to use CAT Data for SRO rule filings with a solely surveillance or regulatory purpose, such as monitoring for market manipulation or compliance with sales practice rules.³⁷⁷

2. Access to CAT Data

As described above, the Commission proposes to amend Appendix D, Section 8.1 of the CAT NMS Plan to add that access to CAT Data must be consistent with the Participants' Confidentiality Policies and Procedures as set forth in proposed Section 6.5(g). The Commission also continues to believe that access of Participants' Regulatory Staff and the Commission to CAT Data must be based on an RBAC model. RBAC is a mechanism for authentication in which users are assigned to one or many roles, and each role is assigned a defined set of permissions.³⁷⁸ An RBAC model specifically assigns the access and privileges of individual CAT users based on the individual's job responsibilities and need for access. Users would not be directly assigned specific access and privileges but would instead receive access and privileges based on their assigned role in the system.

The CAT NMS Plan currently provides that an RBAC model "must be used to permission user[s] with access

to different areas of the CAT System."³⁷⁹ The CAT NMS Plan further requires the CAT System to support an arbitrary number of roles with access to different types of CAT Data, down to the attribute level.³⁸⁰ The administration and management of roles must be documented, and Participants, the SEC, and the Operating Committee must be provided with periodic reports detailing the current list of authorized users and the date of their most recent access.³⁸¹ The Plan Processor is required to log every instance of access to Central Repository data by users.³⁸² The CAT NMS Plan, as part of its data requirements surrounding Customer and Account Attributes,³⁸³ further requires that using the RBAC model, access to Customer and Account Attributes shall be configured at the Customer and Account Attribute level, following the "least privileged" practice of limiting access to the greatest extent possible.

The Commission now believes that it is important to require that access of Participants' Regulatory Staff³⁸⁴ to all CAT Data must be through the RBAC model, and extend the practice of requiring "least privileged" access to all CAT Data, and not just to Customer and Account Attributes. Specifically, the Commission proposes to amend

³⁷⁹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.4. The Commission also proposed to correct certain grammatical errors. See Appendix D, Sections 4.1.4, 8.2.2.

³⁸⁰ The Commission proposes to amend Appendix D, Section 4.1.4 to state that the CAT System must support as many roles as required by Participants and the Commission to permit access to different types of CAT Data, down to the attribute level. The Commission believes that this change clarifies what "arbitrary number of roles" means in the context of the RBAC model required by the CAT NMS Plan and should result in the implementation of an RBAC model that will support the number of roles required by Participants and the Commission.

³⁸¹ The CAT NMS Plan provides that the reports of the Participants and the SEC will include only their respective list of users and that the Participants must provide a response to the report confirming that the list of users is accurate. The required frequency of this report would be defined by the Operating Committee. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.4. The Commission proposes to amend the language in Appendix D, Section 4.1.4 to make clear that the reports provided to the Participants and the SEC will include only their respective list of users and that the CAT NMS Plan obligates the Participants to provide a response to the report confirming that the list of users is accurate. The Commission believes that these changes are consistent with existing expectations and could help avoid potential confusion regarding obligations relating to these reports.

³⁸² *Id.*

³⁸³ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.6.

³⁸⁴ As noted earlier, the Commission proposes to amend Appendix D, Section 8.1 to remove references to "regulatory staff" and replace them with the defined term "Regulatory Staff." See *supra* note 342.

Appendix D, Section 8.1 of the CAT NMS Plan by adding that the Plan Processor must provide Participants' Regulatory Staff and the SEC with access to all CAT Data based on an RBAC model that follows "least privileged" practices.

The Commission preliminarily believes that this proposed amendment would strengthen the requirement that, in addition to requiring a regulatory purpose, access to CAT Data is also restricted by an RBAC model that follows "least privileged" practices. The Commission preliminarily believes that this proposed amendment would provide consistency across the CAT NMS Plan by requiring that the RBAC and "least privileged" practices requirement that applies to the CAT System and the Customer and Account Attributes also applies to accessing CAT Data. An RBAC model and "least privileged" practices requirement would provide access only to those who have a legitimate purpose in accessing CAT Data, and limit the privileges of those users to the minimum necessary to perform their regulatory roles and functions.

The Commission also proposes amendments to Appendix D, Section 4.1.4 to address the general requirements relating to access to Customer Identifying Systems and transactional CAT Data by Plan Processor employees and contractors. Specifically, the Commission proposes amendments to Appendix D, Section 4.1.4 to require that "[f]ollowing 'least privileged' practices, separation of duties, and the RBAC model for permissioning users with access to the CAT System, all Plan Processor employees and contractors that develop and test Customer Identifying Systems shall only develop and test with non-production data and shall not be entitled to access production data (*i.e.*, Industry Member Data, Participant Data, and CAT Data) in CAIS or the CCID Subsystem. All Plan Processor employees and contractors that develop and test CAT Systems containing transactional CAT Data shall use non-production data for development and testing purposes; if it is not possible to use non-production data, such Plan Processor employees and contractors shall use the oldest available production data that will support the desired development and testing, subject to the approval of the Chief Information Security Officer."³⁸⁵

The Commission believes that imposing the limitations on which Plan

³⁸⁵ See proposed Appendix D, Section 4.1.4 (Data Access).

³⁷⁵ See *supra* note 368.

³⁷⁶ The Commission preliminarily believes that this is consistent with the Participants' understanding of the CAT NMS Plan, and notes that the current CAT Reporter Agreement, which is between the Plan Processor and CAT Reporters, states that the signing parties acknowledge that the Consolidated Audit Trail, LLC, the Participants, and the Plan Processor "are not authorized by the CAT NMS Plan to use the submitted CAT Data for commercial purposes[.]" See "Consolidated Audit Trail Reporter Agreement," available at: https://www.catinmsplan.com/sites/default/files/2020-05/Consolidated-Audit-Trail-Reporter-Agreement-amended_0.pdf.

³⁷⁷ Although the Participants would be permitted to use CAT Data to support a rule filing with a solely surveillance or regulatory purpose, proposed Section 6.13(a)(i)(C) would permit only the extraction of the minimum amount of CAT Data necessary to achieve that specific regulatory purpose. However, the proposed amendment would not prevent a Participant from using the data that it reports to the Central Repository for regulatory, surveillance, commercial, or other purposes as otherwise not prohibited by applicable law, rule or regulation. See CAT NMS Plan, *supra* note 3, at 6.5(h).

³⁷⁸ See CAT NMS Plan, *supra* note 3, at Appendix C, note 250.

Processor employees and contractors can access Customer Identifying Systems is appropriate as the possibility of misuse of CAT Data exists with those individuals as with any Regulatory Staff. Therefore it is also appropriate to require that Plan Processor employees and contractors accessing Customer Identifying Systems must follow “least privileged” practices, separation of duties, and the RBAC model for permissioning users with access to the CAT System. The Commission also believes it is appropriate to limit the actual testing and development of Customer Identifying Systems to non-production data because such non-production data will not contain Customer and Account Attributes and other data that could be used to identify Customers and other market participants. With respect to transactional CAT Data, the Commission believes that is reasonable to require that Plan Processor employees and contractors use non-production data if possible; however, the Commission recognizes that for practical purposes, it may be difficult or impossible to generate non-production transactional CAT Data sufficient for desired development and testing. As a result, Plan Processor employees and contractors may use production data in the testing and development of CAT Systems that contains transactional CAT Data, but they must use the oldest available production data that will support the desired development and testing. Given that production data will be accessed in this specific circumstance, the Commission believes that the Chief Information Security Officer should approve such access.

The Commission requests comment on the proposed amendments concerning the access of regulators and the Plan Processor to CAT Data. Specifically, the Commission solicits comment on the following:

149. There is existing CAT NMS Plan language stating that CAT Data may be used solely for surveillance and regulatory purposes.³⁸⁶ Is it necessary to further provide that the use of CAT Data is prohibited in cases where it would serve both a regulatory or surveillance purpose, and a commercial purpose?

150. The Commission proposes to prohibit the use of CAT Data in SRO rule filings that have both a regulatory and commercial purpose. Are there instances where it is necessary to use CAT Data in an SRO rule filing that may have a commercial impact but is essential for regulatory purposes? Please provide examples. If so, what should be

the conditions or process by which SROs would be permitted to use CAT Data for SRO rule filings?

151. Does requiring that access to CAT Data be restricted by an RBAC model that follows “least privileged” practices, and adding the requirement that access must be consistent with the Proposed Confidentiality Policies enhance the security of CAT Data? Is adding the requirement that access to CAT Data must be consistent with the Proposed Confidentiality Policies necessary and appropriate? Should the proposed amendments be more prescriptive and define potential roles generally or specifically that would be used in an RBAC model or least privileged access model?

152. The proposed amendments require the Plan Processor employees and contractors that test and develop Customer Identifying Systems to follow “least privileged” practices, separation of duties, and the RBAC model for permissioning users with access to the CAT System. Do commenters agree that such employees and contractors should follow these principles and practices in order to access Customer Identifying Systems?

153. Should Plan Processor contractors supporting the development or operation of the CAT System be subject to certain additional access restrictions? For example, should Plan Processor contractors be required to access CAT system components through dedicated systems? Should Plan Processor contractors be subject to heightened personnel security requirements before being granted access to Customer Identifying Systems or any component of the CAT System?

154. The proposed amendment requires that all Plan Processor employees and contractors that develop and test Customer Identifying Systems shall only develop and test with non-production data and shall not be entitled to access production data (*i.e.*, Industry Member Data, Participant Data, and CAT Data) in CAIS or the CCID Subsystem. Do commenters agree that is appropriate? If data other than non-production data should be permitted to be used, what type of data should be used by Plan Processor employees and contractors to test and develop Customer Identifying Systems? Please be specific in your response.

155. The proposed amendments require that if non-production data is not available for Plan Processor employees and contractors to develop and test CAT Systems containing transactional CAT Data, then such employees and contractors shall use the oldest available production data that

will support the desired development and testing. Do commenters agree that Plan Processor employees and contractors should be permitted to use the oldest available production data that will support the desired development and testing?

156. The proposed amendments require that the Chief Information Security Officer approve access to the oldest available production data that will support the desired development and testing for Plan Processor employees and contractors that are testing and developing systems that contain transactional CAT Data. Do commenters agree that the Chief Information Security Officer should approve such access?

157. Should additional restrictions be required to enhance security, such as imposing U.S. citizenship requirements on all administrators or other staff with access to the CAT System and/or the Central Repository? Please explain the impact on the implementation and security of the CAT including costs and benefits. Should the Commission only apply these additional access restrictions to access the Customer Identifying Systems and associated data?

I. Secure Connectivity & Data Storage

The Commission proposes to amend the CAT NMS Plan to enhance the security of connectivity to the CAT infrastructure. Currently under the CAT NMS Plan, Appendix D, Section 4.1.1, the CAT System “must have encrypted internet connectivity” and CAT Reporters must connect to the CAT infrastructure, “using secure methods such as private lines or (for smaller broker-dealers) Virtual Private Network connections over public lines.” The Participants have stated that the CAT NMS Plan does not require CAT Reporters to use private lines to connect to the CAT due to cost concerns, particularly for small broker dealers.³⁸⁷ Because the CAT NMS Plan does not explicitly require private lines for any CAT Reporters and does not differentiate between Participants and Industry Members, the Commission now proposes to amend Section 4.1.1 of Appendix D to codify and enhance existing secure connectivity practices, and to differentiate between connectivity requirements for Participants and Industry Members.

First, the Commission proposes to amend Section 4.1.1 of Appendix D to require Participants to connect to CAT infrastructure using private lines. Since

³⁸⁶ See *supra* note 368.

³⁸⁷ See CAT NMS Plan Approval Order, *supra* note 3, at 84760.

the Commission approved the CAT NMS Plan and the Participants began implementing the CAT, the Participants have determined that they would connect to the CAT infrastructure using private lines only. The Commission preliminarily believes that it is appropriate for the CAT NMS Plan to reflect a current practice which provides additional security benefits over allowing Participants to connect to CAT infrastructure through public lines, even if through encrypted internet connectivity. The Commission preliminarily believes that this practice is warranted because public lines are shared with other users, including non-Participants, and usage of public lines could result in increased cybersecurity risks because traffic could be intercepted or monitored by other users. Private lines, managed by Participants themselves, could provide more robust and reliable connectivity to CAT infrastructure because such lines would not be shared with other users and could be tailored to bandwidth and stability requirements appropriate for connecting to CAT infrastructure.

Next, the Commission proposes to amend Appendix D, Section 4.1.1 to clarify the methods that CAT Reporters may use to connect to the CAT infrastructure and to make the provision consistent with existing practice. The Commission proposes to state that Industry Members must connect to the CAT infrastructure using secure methods such as private lines for machine-to-machine interfaces or encrypted Virtual Private Network connections over public lines for manual web-based submissions. “Machine-to-machine” interfaces mean direct communications between devices or machines, with no human interface or interaction, and in the CAT context would generally be automated processes that can be used to transmit large amounts of data. In contrast, manual web-based submissions would require human interaction and input. These proposed amendments would be consistent with existing requirements imposed by FINRA CAT, LLC (“FINRA CAT”) regarding connectivity, which has required that all machine-to-machine interfaces utilize private lines and only permits the use of public lines by establishing an authenticated, encrypted connection through the CAT Secure Reporting Gateway.³⁸⁸

The Commission preliminarily believes that codifying these existing FINRA CAT secure connectivity requirements for Industry Members is appropriate. The Commission preliminarily believes that all machine-to-machine interfaces, which facilitate the automated transfer of potentially large amounts of data, should only occur on private lines instead of public lines, and that it is only appropriate for public lines to be used for manual web-based submissions on an encrypted Virtual Private Network. The Commission preliminarily believes that private lines would be more robust and capable of handling the automated transfer of potentially large amounts of data, in comparison to public lines, because the private lines would not be shared with public users and the private lines could be designed to meet the bandwidth and stability requirements necessary for CAT reporting. In addition, as noted above, the Commission preliminarily believes that private lines are more secure than public lines, which may be shared with other users. However, the Commission believes that for manual web-based submissions, it is appropriate to codify FINRA CAT’s existing secure connectivity framework, which allows broker-dealers that do not need or use machine-to-machine connectivity to submit data to CAT using the CAT Secure Reporting Gateway.³⁸⁹ The Commission preliminarily believes that such an allowance is appropriate for Industry Members that can meet their reporting obligations through manual web-based submissions that do not contain an amount of data that justifies the expense and effort required to install and maintain private lines. Requiring manual web-based submissions to be submitted in an encrypted Virtual Private Network should result in submissions that remain secure, even if transmitted over public lines.

The Commission is also proposing to add specific requirements relating to connections to CAT infrastructure, specifically, to amend Appendix D, Section 4.1.1 to require “allow listing.” Specifically, the Commission proposes to require that for all connections to CAT infrastructure, the Plan Processor must implement capabilities to allow access (*i.e.*, “allow list”) only to those countries where CAT reporting or regulatory use is both necessary and expected. In addition, proposed

Appendix D, Section 4.1.1 would require, where possible, more granular “allow listing” to be implemented (*e.g.*, by IP address). Lastly, the Plan Processor would be required to establish policies and procedures to allow access if the source location for a particular instance of access cannot be determined technologically.

The Commission preliminarily believes that while this control will not eliminate threats pertaining to potential unauthorized access to the CAT system, this proposed requirement would enhance the security of CAT infrastructure and connections to the CAT infrastructure. While the CAT NMS Plan currently specifies certain connectivity requirements, it does not require the Plan Processor to limit access to the CAT infrastructure based on an authorized end user’s location. The Commission preliminarily believes that it is not generally appropriate for CAT Reporters or Participants to access the CAT System in countries where regulatory use is not both necessary and expected. As proposed, CAT Reporters or Participants would need to justify to the Participants and the Plan Processor the addition of a new country to the “allow list.” The Commission further believes that the Plan Processor has a detailed understanding of both authorized users and their organization’s IP address information and has the ability to restrict access accordingly. The Commission also preliminarily believes that the burden of maintaining an allowed list may be minimized by using the same set of allowed countries for both CAT Reporters and regulatory user access.

In cases where it is not possible to use multi-factor authentication technology to determine the location of a CAT Reporter or a regulatory user, the Commission preliminarily believes that a policies and procedures approach to compliance is appropriate. The proposed amendments would allow the Plan Processor to allow access in such circumstances under established policies and procedures that would improve the security of the CAT System. Similarly, when using bypass codes, the policies and procedures could mandate that Help Desk staff facilitating such access ask relevant questions on the location of the CAT Reporter or Regulatory Staff and remind them of CAT access geo-restrictions. Based on its experience during the implementation of CAT, the Commission believes that it is likely that the usage of bypass codes will be minimal compared to standard multi-factor authentication push technology or other technologies that allow for geo-

³⁸⁸ See FINRA CAT Connectivity Supplement for Industry Members, Version 1.5 (dated February 27, 2020), available at: https://www.catnmsplan.com/sites/default/files/2020-03/FINRA_CAT_Connectivity_Supplement_for_Industry_Members_1.5.pdf. The FINRA CAT Connectivity Supplement for Industry Members describes the methods

available for Industry Members and CAT Reporting Agents to connect to the CAT system. The CAT Secure Reporting Gateway enables end users with secure access to the CAT Reporter Portal via a web browser. FINRA CAT is the Plan Processor.

³⁸⁹ See *id.*

restrictions, and preliminarily believes that policies and procedures applicable to such circumstances would help protect the security of CAT Data.

The Commission recognizes that it may not always be possible to accurately detect the location of a CAT Reporter or Regulatory Staff given distributed networking, and that there is a potential for malicious spoofing of location or IP addresses. As discussed above, in situations where a CAT Reporter or Regulatory Staff is unable to be located, the proposed policies and procedures could address whether or not connectivity is possible and address how such connectivity is granted. With regard to malicious spoofing by third parties, the Commission preliminarily believes that existing protections, such as the private line connectivity described above, should help result in a framework where only authorized CAT Reporters or Regulatory Staff are able to connect to CAT infrastructure. In addition, in spite of these potential issues, the Commission believes that in comparison to existing requirements, the benefits of “allow listing,” and in particular identifying specific known access points such as specific countries and IP addresses, would enhance the security of connectivity to the CAT while not being substantially difficult to implement in available technologies.

Currently, the CAT NMS Plan imposes requirements on data centers housing CAT Systems (whether public or private), but does not impose any geographical restrictions or guidelines.³⁹⁰ The Commission now believes it is appropriate to enhance requirements applicable to data centers housing CAT Systems by imposing geographic restrictions. Specifically, the Commission proposes to amend Appendix D, Section 4.1.3 to require that data centers housing CAT Systems (whether public or private) must be physically located in the United States.

The Commission preliminarily believes that requiring CAT data centers to be physically located in the United States will help strengthen the security of CAT Data by ensuring that no data center housing CAT Systems with CAT

Data is located outside of the United States. Locating data centers housing the CAT System outside of the United States could subject such data centers, and the CAT System and CAT Data within, to security risks that may arise only because of their location. The Commission also preliminarily believes that requiring CAT data centers to be physically located in the United States would result in CAT data centers that are within the jurisdiction of both the Commission and the United States legal system. The Commission also preliminarily believes that any benefit, such as any cost advantages, of locating data centers housing the CAT System outside of the United States would not justify the increased risks associated with locating the data centers outside of the United States.

158. Should the current secure connectivity practices in place for the Participants to connect to the CAT infrastructure using only private lines be codified in the CAT NMS Plan?

159. Is it appropriate to clarify when private line and Virtual Private Network connections should be used?

160. Should the CAT NMS Plan be amended to require the Plan Processor to allow access based on countries and where possible, based on IP addresses? Is it too restrictive or should the restriction be more granular? Should the CAT NMS Plan specify which countries are or are not acceptable to be allowed access or provide specific guidance or standards on how the Plan Participant can select countries to be allowed access? Do CAT Reporters have business or regulatory staff or operations in countries outside of the United States? Should Participant access be restricted to specific countries, *e.g.*, the United States, Five Eyes? If so, which countries and why? Should Plan Processor access be restricted to specific countries, *e.g.*, the United States, Five Eyes? If so, which countries and why?

161. Is it appropriate to require the Plan Processor to establish policies and procedures governing access when the location of a CAT Reporter or Regulatory Staff cannot be determined technologically? Do commenters believe that such a provision is necessary, or would it be more appropriate for the CAT NMS Plan to prohibit access if the location of a CAT Reporter or Regulatory Staff cannot be determined technologically?

162. Should the CAT NMS Plan specifically prescribe what types of multi-factor authentication are permissible? Should the CAT NMS Plan prohibit the usage of certain methods of multi-factor authentication, such as usage of one-time passcodes?

163. Should the CAT NMS Plan require data centers housing CAT Systems (whether public or private) to be physically located within the United States? Would it be appropriate to locate data centers housing CAT Systems in any foreign countries?

164. Currently, the CAT NMS Plan states that the CAT databases must be deployed within the network infrastructure so that they are not directly accessible from external end-user networks. If public cloud infrastructures are used, virtual private networking and firewalls/access control lists or equivalent controls such as private network segments or private tenant segmentation must be used to isolate CAT Data from unauthenticated public access. Should additional isolation requirements be added to the CAT NMS Plan to increase system protection? For example, should the Commission require that the CAT System use dedicated cloud hosts that are physically isolated from a hardware perspective? Please explain the impact on the implementation of the CAT including costs and benefits.

165. Should the use of multiple dedicated hosts be required so that development is physically isolated from production? Should all development and production be done on a separate dedicated host or should only Customer Identifying Systems development and/or production be done on its own dedicated cloud host? Please explain the impact on the implementation and security of the CAT including costs and benefits.

J. Breach Management Policies and Procedures

Appendix D, Section 4.1.5 of the CAT NMS Plan requires the Plan Processor to develop policies and procedures governing its responses to systems or data breaches, including a formal cyber incident response plan and documentation of all information relevant to breaches.³⁹¹ The CAT NMS Plan further specifies that the cyber incident response plan will provide guidance and direction during security incidents, but otherwise states that the cyber incident response plan *may* include several items.³⁹² The Commission believes that due to the importance of the security of CAT Data and the CAT System, and the potential

³⁹⁰ See CAT NMS Plan, *supra* note 3, Appendix D, Section 4.1.3. While the CAT NMS Plan does not impose geographical restrictions on CAT Systems, Regulation SCI, which applies to the Central Repository, *see supra* note 54, requires SCI entities to establish, maintain, and enforce written policies and procedures that, among other things, shall include business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve two-hour resumption of critical SCI systems following a wide-scale disruption. *See* 17 CFR 242.1001(a)(2)(v).

³⁹¹ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.5. The cyber incident response plan is subject to review by the Operating Committee. *See id.*

³⁹² See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.5. The CAT NMS Plan also lists a series of items that documentation of information relevant to breaches should include. *Id.*

for serious harm should a system or data breach (e.g., any unauthorized entry into the CAT System or indirect SCI systems)³⁹³ occur, that more specific requirements for the formal cyber incident response plan required by Appendix D, Section 4.1.5 of the CAT NMS Plan would be beneficial.³⁹⁴ Specifically, as discussed below, the Commission believes that requiring the formal cyber incident response plan to incorporate corrective actions and breach notifications, modeled after similar provisions in Regulation SCI, is appropriate.

The Commission believes that the cyber incident response plan should require the Plan Processor to take appropriate corrective action in response to any data security or breach (e.g., any unauthorized entry into the CAT System or indirect SCI systems). Specifically, the Commission proposes to modify Appendix D, Section 4.1.5 of the CAT NMS Plan to require that the formal cyber incident response plan must include “taking appropriate corrective action that includes, at a minimum, mitigating potential harm to

investors and market integrity, and devoting adequate resources to remedy the systems or data breach as soon as reasonably practicable.” This language relating to taking corrective action and devoting adequate resources mirrors the similar requirement applicable to SCI entities for SCI events³⁹⁵ in Rule 1002(a) of Regulation SCI.³⁹⁶ This requirement would obligate the Plan Processor to respond to systems or data breaches with appropriate steps necessary to remedy each systems or data breach and mitigate the negative effects of the breach, if any, on market participants and the securities markets more broadly.³⁹⁷ The specific steps that the Plan Processor would need to take to mitigate the harm will be dependent on the particular systems or data breach, its causes, and the estimated impact of the breach, among other factors. To the extent that a systems or data breach affects not only just the users of the CAT System, but the market as a whole, the Plan Processor would need to consider how it might mitigate any potential harm to the overall market to help protect market integrity. In requiring “appropriate” corrective action, this provision would not prescribe with specificity the types of corrective action that must be taken, but instead would afford flexibility to the Plan Processor in determining how to best respond to a particular systems or data breach in order to remedy the issue and mitigate

the resulting harm after the issue has already occurred.³⁹⁸ In addition, as with Rule 1002(a) of Regulation SCI, the proposed provision does not require “immediate” corrective action, but instead would require that corrective action be taken “as soon as reasonably practicable,” which would allow for appropriate time for the Plan Processor to perform an initial analysis and preliminary investigation into a potential systems or data breach before beginning to take corrective action.

In addition, the Commission believes that the Plan Processor should be required to provide breach notifications of systems or data breaches, and that such notifications should be incorporated into the formal cyber incident response plan. Specifically, the Commission proposes to modify Appendix D, Section 4.1.5 of the CAT NMS Plan to require the Plan Processor to provide breach notifications of systems or data breaches to CAT Reporters that it reasonably estimates may have been affected, as well as to the Participants and the Commission, promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred.³⁹⁹ The Commission also proposes to require that the cyber incident response plan provide for breach notifications. As proposed, such breach notifications could be delayed, as described in greater detail below, if the Plan Processor determines that dissemination of such information would likely compromise the security of the CAT System or an investigation of the systems or data breach, and would not be required if the Plan Processor reasonably estimates the systems or data breach would have no or a de minimis impact on the Plan Processor’s operations or on market participants.

The Commission believes that in the case of systems or data breaches, impacted parties should receive notifications, including CAT Reporters affected by the systems or data breaches, such as the SROs or Industry Members, as well as the Participants and Commission, which use the CAT System for regulatory and surveillance purposes. The Commission notes that these breach notifications could

³⁹³ “Indirect SCI systems” are defined as “any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.” 17 CFR 242.1000.

³⁹⁴ The Commission adopted Regulation SCI in November 2014 to strengthen the technology infrastructure of the U.S. securities markets. See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014). Regulation SCI is designed to reduce the occurrence of systems issues in the U.S. securities markets, improve resiliency when systems problems occur, and enhance the Commission’s oversight of securities market technology infrastructure. Regulation SCI applies to certain core technology systems (“SCI systems”) of key market participants called “SCI entities” which include, among others, the Participants. The CAT System is an SCI system of the Participants. Regulation SCI imposes corrective action and breach management obligations on SCI entities, but also includes requirements for SCI entities to, among other things: Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their key automated systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets; operate such systems in accordance with the Exchange Act and the rules and regulations thereunder and the entities’ rules and governing documents, as applicable; provide certain notifications and reports to the Commission regarding systems problems and systems changes; inform members and participants about systems issues; conduct business continuity and disaster recovery testing and penetration testing; conduct annual reviews of their automated systems; and make and keep certain books and records.

The Commission notes that the proposed changes to Appendix D, Section 4.1.5, would apply separately and independently to the Participants, but would not in any way increase, reduce or otherwise change the Plan Processor and Participants’ responsibilities applicable under Regulation SCI.

³⁹⁵ An “SCI event” is an event at an SCI entity that constitutes a system disruption, a systems compliance issue, or a systems intrusion. A “systems disruption” means an event in an SCI entity’s SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system. A “systems compliance issue” means “an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity’s rules or governing documents, as applicable.” A “systems intrusion” means any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.” See Rule 1000 of Regulation SCI, 17 CFR 242.1000.

³⁹⁶ See Rule 1002(a) of Regulation SCI, 17 CFR 242.1002(a).

³⁹⁷ The CAT NMS Plan already requires the Plan Processor to develop policies and procedures that include “documentation of all information relevant to breaches,” which “should include,” among other things, a chronological timeline of events, relevant information related to the breach, response efforts and the impact of the breach. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.5. In addition, to the extent that a systems or data breach meets the definition of an SCI Event, see *supra* note 395, Regulation SCI would require written notification to the Commission that includes, among other things: (i) The SCI entity’s assessment of the impact of the SCI event on the market; (ii) the steps the SCI entity has taken, is taking, or plans to take with respect to the SCI event; (iii) the time the SCI event was resolved; (iv) the SCI entity’s rule(s) and or governing document(s), as applicable, that relate to the SCI event; and (v) any other pertinent information known by the SCI entity about the SCI event. See 242.1002(b)(4)(ii)(A).

³⁹⁸ For example, appropriate corrective action to a CAT Data breach could include the rotation of CCIDs, to limit the potential harm of inadvertent disclosure of CCIDs. See also Regulation SCI Adopting Release, *supra* note 54, at 72307–08.

³⁹⁹ CAT Reporter means each national securities exchange, national securities association, and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c). See CAT NMS Plan *supra* note 3, Section 1.1.

potentially allow affected CAT Reporters, the Participants, and the Commission to proactively respond to the information in a way to mitigate any potential harm to themselves, customers, investors, and the public. The Commission preliminarily believes that requiring breach notifications promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred should result in breach notifications that are not delayed for inappropriate reasons once the conclusion that a systems or data breach has occurred is made, but the proposed requirement would not require breach notifications to be prematurely released before Plan Processor personnel have adequate time to investigate potential systems or data breaches and consider whether or not such dissemination would likely compromise the security of the CAT System or an investigation of the systems or data breach.

Pursuant to proposed Appendix D, Section 4.1.5 of the CAT NMS Plan, these breach notifications would be required to include a summary description of the systems or data breach, including a description of the corrective action taken and when the systems or data breach was or is expected to be resolved. This requirement mirrors the information dissemination requirement in Rule 1002(c)(2) of Regulation SCI for systems intrusions. Notably, in contrast to other types of “SCI events” for which more detailed information is required to be disseminated, only summary descriptions are required for systems intrusions under Regulation SCI. The Commission recognizes that information relating to systems or data breaches in many cases may be sensitive and could raise security concerns, and thus preliminarily believes that it is appropriate that the required breach notifications be provided in a summary form. Even so, the proposal would still require a summary description of the systems or data breach, which would be required to describe the impacted data, and which must also include a description of the corrective action taken and when the systems or data breach has been or is expected to be resolved.

In addition, as proposed, the Plan Processor would be allowed to delay breach notifications “if the Plan Processor determines that dissemination of such information would likely compromise the security of the CAT System or an investigation of the systems or data breach, and documents the reasons for such determination,” which mirrors the similar provision in

Rule 1002(c)(2) of Regulation SCI. The Commission preliminarily believes this proposed provision is appropriate so that breach notifications do not expose the CAT System to greater security risks or compromise an investigation into the breach. The proposal would require the affirmative documentation of the reasons for the Plan Processor’s determination to delay a breach notification, which would help prevent the Plan Processor from improperly invoking this exception. In addition, the breach notification may only be temporarily, rather than indefinitely, delayed; once the reasons for the delay no longer apply, the Plan Processor must provide the appropriate breach notification to affected CAT Reporters, the Participants, and the Commission.

Finally, proposed Appendix D, Section 4.1.5 of the CAT NMS Plan would provide an exception to the requirement for breach notifications for systems or data breaches “that the Plan Processor reasonably estimates would have no or a de minimis impact on the Plan Processor’s operations or on market participants” (“de minimis breach”), which also mirrors the Commission’s approach relating to information dissemination for de minimis events under Rule 1002(c) of Regulation SCI. Importantly, the Plan Processor would be required to document all information relevant to a breach the Plan Processor believes to be de minimis. The Plan Processor should have all the information necessary should its initial determination that a breach is de minimis prove to be incorrect, so that it could promptly provide breach notifications as required. In addition, maintaining documentation for all breaches, including de minimis breaches, would be helpful in identifying patterns among systems or data breaches.⁴⁰⁰

The Commission requests comment on the proposed amendments to the breach management policies and procedures. Specifically, the Commission solicits comment on the following:

166. Are the proposed modifications to the breach notification provision of the CAT NMS Plan necessary and appropriate? Should specific methods of

notifying affected CAT Reporters, the Participants, and the Commission be required? Should specific corrective action measures be required, such as the provision of credit monitoring services to impacted parties or rotation of CCIDs in the event of a breach of CAT Data? If so, under what circumstances should such corrective actions be required?

167. Should the Plan Processor be required to provide breach notifications of systems or data breaches to CAT Reporters that it reasonably estimates may have been affected, as well as to the Participants and the Commission? Is it necessary and appropriate to require such breach notifications promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred? Should any disclosure to the public be required? For example, should breach notifications of systems or data breaches be reported by the Plan Processor on a publicly accessible website (such as the CAT NMS Plan website)? Should other requirements or direction regarding the breach notifications be adopted? Should there be an exception for de minimis breaches?

168. Is it reasonable to require that breach notifications be part of the formal cyber incident response plan? Should any currently optional items of the cyber incident response plan be required to be in the cyber incident response plan?

169. The proposed modifications to the breach notification provision of the CAT NMS Plan are modeled, in part, after Regulation SCI. Should other industry standards or objective criteria (e.g., NIST) be used to determine when and how breach notifications will be required?

K. Firm Designated ID and Allocation Reports

Prior to approval of the CAT NMS Plan, the Commission granted exemptive relief to the SROs, for, among other things, relief related to allocations of orders.⁴⁰¹ Specifically, the Commission, pursuant to Section 36(a)(1) of the Act,⁴⁰² exempted the SROs from Rule 613(c)(7)(vi)(A),⁴⁰³ which requires the Participants to require each CAT Reporter to record and report the account number for any subaccounts to which an execution is allocated. As a condition to this exemption, the SROs must require that

⁴⁰⁰ Importantly, the proposed exception to breach notifications for de minimis breaches would apply specifically to the proposed breach notification requirement under the CAT NMS Plan. It would not apply to any obligations of the Plan Processor with respect to Regulation SCI, and thus, for example, would not obviate the need for the Plan Processor to immediately share information for all SCI events, including systems or data breaches that are systems intrusions, with those SCI SROs for which the CAT System is an SCI system and which themselves are independently subject to Regulation SCI.

⁴⁰¹ See Securities and Exchange Act Release No. 77265 (March 1, 2016), 81 FR 11856 (March 7, 2016) (“2016 Exemptive Order”).

⁴⁰² 15 U.S.C. 78mm(A)(1).

⁴⁰³ 17 CFR 242.613(c)(7)(vi)(A).

(i) CAT Reporters submit an “Allocation Report” to the Central Repository, which would at minimum contain several elements, including the unique firm-designated identifier assigned by the broker-dealer of the relevant subaccount (*i.e.*, the Firm Designated ID), and (ii) the Central Repository be able to link the subaccount holder to those with authority to trade on behalf of the account.⁴⁰⁴ This approach was incorporated in the CAT NMS Plan that was approved by the Commission.⁴⁰⁵

Under the Allocation Report approach there is no direct link in the Central Repository between the subaccounts to which an execution is allocated and the execution itself. Instead, CAT Reporters are required to report the Firm Designated ID of the relevant subaccount on an Allocation Report, which could be used by the Central Repository to link the subaccount holder to those with authority to trade on behalf of the account. However, the Commission believes that because the CAT NMS Plan does not currently explicitly require Customer and Account Attributes be reported for Firm Designated IDs that are submitted in Allocation Reports, as it does for Firm Designated IDs associated with the original receipt or origination of an order, there is a potential for confusion with regard to reporting requirements for Firm Designated IDs.

The Commission proposes to amend Section 6.4(d)(ii)(C) of the CAT NMS Plan to require that Customer and Account Attributes be reported for Firm Designated IDs submitted in connection with Allocation Reports, and not just for Firm Designated IDs submitted in connection with the original receipt or origination of an order. Specifically, the Commission proposes to amend Section 6.4(d)(ii)(C) of the CAT NMS Plan to state that each Participant shall, through its Compliance Rule, require its Industry Members to record and report, for original receipt or origination of an order and Allocation Reports, the Firm Designated ID for the relevant Customer, and in accordance with Section 6.4(d)(iv), Customer and Account Attributes for the relevant Customer.

The Commission believes that if Industry Members do not provide Customer and Account Attributes for the relevant Firm Designated ID submitted in an Allocation Report, then there would be no ability for the Central

Repository to link the subaccount holder to those with authority to trade on behalf of the account. The Commission preliminarily believes that amending the language in Section 6.4(d)(ii)(C) to implement the previously approved exemptive relief is appropriate.

In addition, the Commission believes that these proposed amendments do not substantively change the obligations of Industry Members, who, through Participant Compliance Rules, are already required to submit customer information for all Active Accounts pursuant to the CAT NMS Plan.⁴⁰⁶ Specifically, Section 6.5(d)(iv) states that Participant Compliance Rules must require Industry Members to, among other things, submit an initial set of Customer information required in Section 6.4(d)(ii)(C) for Active Accounts to the Central Repository upon the Industry Member’s commencement of reporting, and submit updates, additions or other changes on a daily basis for all Active Accounts. Active Accounts are defined as “an account that has activity in Eligible Securities within the last six months,” and the Commission believes that “activity” would include the allocation of shares to an account, reflected in Allocation Reports.⁴⁰⁷ Thus, Section 6.5(d)(iv) already requires the information required by proposed Section 6.4(d)(ii)(C), but the Commission preliminarily believes that amending the language in Section 6.4(d)(ii)(C) would help avoid confusion regarding when Customer and Account Attributes are required to be submitted for Firm Designated IDs.

170. Is it reasonable and appropriate to clarify that Industry Members, for Allocation Reports, are required to report the Firm Designated ID for the relevant Customer, and in accordance with Section 6.4(d)(iv) of the CAT NMS Plan, Customer Account Information and Customer Identifying Information for the relevant Customer?

L. Appendix C of the CAT NMS Plan

Rule 613(a)⁴⁰⁸ required the Participants to discuss various

considerations related to how the Participants propose to implement the requirements of the CAT NMS Plan, cost estimates for the proposed solution, and the costs and benefits of alternate solutions considered but not proposed.⁴⁰⁹ Appendix C of the CAT NMS Plan generally contains a discussion of the considerations enumerated in Rule 613,⁴¹⁰ which were required to be addressed when the CAT NMS Plan was filed with the Commission, prior to becoming effective.⁴¹¹ The Rule 613 Adopting Release stated that the additional information and analysis generated by discussing these considerations was intended to ensure that the Commission and the Participants had sufficiently detailed information to carefully consider all aspects of the NMS plan that would ultimately be submitted by the Participants.⁴¹² Therefore the Commission believes that the discussion of these considerations was not intended to be continually updated once the CAT NMS Plan was approved.⁴¹³ However, in addition to the discussion of considerations, Appendix C of the CAT NMS Plan also contains provisions such as those that set forth objective milestones with required completion dates to assess the Participants’ progress toward the implementation of the CAT.⁴¹⁴ Therefore, the Commission proposes to amend Appendix C of the CAT NMS Plan to insert introductory language to clarify that Appendix C has not been updated to reflect subsequent amendments to the CAT NMS Plan and Appendix D.⁴¹⁵

M. Proposed Implementation

As discussed below, the Commission proposes to allow additional time beyond the effective date for the Participants to comply with certain requirements in the proposed amendments.

1. Proposed 90-Day Implementation Period

The Commission proposes that requirements related to developing and implementing certain policies and procedures, design specifications, and changes to logging in the proposed amendments must be met no later than

⁴⁰⁴ See 2016 Exemptive Order, *supra* note 401, at 11868.

⁴⁰⁵ See, e.g., CAT NMS Plan, *supra* note 3, at Section 1.1 (defining “Allocation Report”) and Section 6.4(d)(ii)(A)(i) (requiring an Allocation Report if an order is executed in whole in or in part).

⁴⁰⁶ See CAT NMS Plan, *supra* note 3, at Section 6.4(d)(ii)(C).

⁴⁰⁷ Section 6.5(d)(iv) of the CAT NMS Plan was amended in the CAT NMS Plan Approval Order “to clarify that each Industry Member must submit an initial set of customer information for Active Accounts at the commencement of reporting to the Central Repository, as well as any updates, additions, or other changes in customer information, including any such customer information for any new Active Accounts.” See CAT NMS Plan Approval Order, *supra* note 3, at 84868–69.

⁴⁰⁸ 17 CFR 242.613(a).

⁴⁰⁹ See Rule 613 Adopting Release, *supra* note 2, at 45789.

⁴¹⁰ 17 CFR 242.613(a)(1).

⁴¹¹ See Rule 613 Adopting Release, *supra* note 2, at 45789–90.

⁴¹² See *id.*

⁴¹³ See *id.* The CAT NMS Plan was approved on November 15, 2016. See *supra* note 3.

⁴¹⁴ See Appendix C of the CAT NMS Plan, at Section C.10.

⁴¹⁵ See proposed Appendix C.

90 days from the effective date of the amendment. Specifically, the Commission believes that this timeframe would provide sufficient time for the Participants to collectively develop and approve the Proposed Confidentiality Policies⁴¹⁶ pursuant to proposed Section 6.5(g)(i), as well as to develop and establish their own procedures and usage restrictions related to these policies. The Commission also believes that a 90-day timeframe would provide sufficient time for the Plan Processor to implement SAW-specific policies and procedures for the CISP⁴¹⁷ pursuant to proposed Sections 6.12 and 6.13(a), and to develop detailed design specifications for the SAWs⁴¹⁸ pursuant to proposed Section 6.13(b), because the Plan Processor is already familiar with the security requirements necessary to protect CAT Data and would merely be extending these requirements to the SAWs for the purposes of implementation and creating a roadmap for Participants to follow via the design specifications. In addition, the Commission believes that the 90-day timeframe would provide sufficient time for the Plan Processor to make necessary programming changes to implement the new logging requirements contained in proposed Appendix D, Section 8.1.1.

2. Proposed 120-Day Implementation Period

The Commission proposes that requirements related to the Plan Processor providing the SAWs to Participants⁴¹⁹ contained in proposed Section 6.1(d)(v) must be met no later than 120 days from the effective date of the amendment. The Commission believes that this timeframe would provide sufficient time for the Plan Processor to establish the Participants' SAWs because the Plan Processor has already been authorized to build similar environments for some of the Participants since November 2019.⁴²⁰ In addition, to the extent that the Plan Processor has already developed design specifications and implemented the policies and procedures for the SAWs within the 90-day timeframe following the effective date of the amendment, the Plan Processor will already have achieved interim elements of SAW implementation.

3. Proposed 180-Day Implementation Period

The Commission proposes that requirements related to the Participants complying with SAW access and usage⁴²¹ pursuant to proposed Section 6.13(a), or having received an exception,⁴²² pursuant to proposed Section 6.13(d), must be met no later than 180 days from the effective date of the amendment. The Commission believes that this timeframe would provide sufficient time for the Participants to (1) build internal architecture for their SAWs and customize their SAWs with the desired analytical tools, (2) import external data into their SAWs as needed, and (3) demonstrate their compliance with the SAW design specifications. The Commission also believes that this timeframe would provide sufficient time for Participants seeking an exception from the requirement to use the SAW to access CAT Data through the user-defined direct query and bulk extract tools to go through the required process. Specifically, these Participants would have 30 days after the SAW design specifications have been provided to prepare their application materials for submission to the Plan Processor's CISO, CCO, and the Security Working Group. Then, the CISO and CCO would be required to issue a determination to the requesting Participant within 60 days of receiving the application materials, with the result that the requesting Participant should have a response by the compliance date 180 days from the effective date of the amendment.

The Commission requests comment on the proposed implementation timeframes. Specifically, the Commission solicits comment on the following:

171. Does the proposed 90-day implementation period with respect to the requirement for the Participants to develop and approve the Proposed Confidentiality Policies strike an appropriate balance between timely implementation and the time needed for the Participants to develop these policies and related procedures?

172. Does the proposed 90-day implementation period with respect to the requirement for the Plan Processor to implement SAW-specific policies and procedures for the CISP and to develop detailed design specifications for the SAWs strike an appropriate balance between timely implementation and the time needed for the Plan Processor to

complete these tasks? Does the proposed 90-day implementation period with respect to the requirement for the Plan Processor to make programming changes to implement the new logging requirements strike an appropriate balance between timely implementation and the time needed for the Plan Processor to complete the necessary coding to its systems?

173. Does the proposed 120-day implementation period with respect to the requirement for the Plan Processor to provide the SAWs to Participants strike an appropriate balance between timely implementation and the time needed for the Plan Processor to achieve implementation of the SAWs?

174. Does the proposed 180-day implementation period with respect to the requirements for the Participants to either comply with SAW access and usage, or receive an exception, strike an appropriate balance between timely implementation and the time needed for the Participants to either complete their components of the SAW, or seek and receive an exception from the CISO and CCO?

N. Application of the Proposed Amendments to Commission Staff

The Commission takes very seriously concerns about maintaining the security and confidentiality of CAT Data and believes that it is imperative that all CAT users, including the Commission, implement and maintain a robust security framework with appropriate safeguards to ensure that CAT Data is kept confidential and used only for surveillance and regulatory purposes. However, the Commission is not a party to the CAT NMS Plan.⁴²³ By statute, the Commission is the regulator of the Participants, and the Commission oversees and enforces their compliance with the CAT NMS Plan.⁴²⁴ To impose obligations on the Commission under the CAT NMS Plan would invert this structure, raising questions about the Participants monitoring their own regulator's compliance with the CAT NMS Plan.⁴²⁵ Accordingly, the Commission does not believe that it is appropriate for its security and confidentiality obligations, or those of its personnel, to be reflected through CAT NMS Plan provisions. Accordingly, the Commission is not including its staff within the definition of Regulatory Staff in the proposed amendments. Rather, the obligations of the Commission and

⁴¹⁶ See Part II.G.1–2 *supra*.

⁴¹⁷ See Part II.C.2–3 *supra*.

⁴¹⁸ See Part II.C.4 *supra*.

⁴¹⁹ See Part II.C.2 *supra*.

⁴²⁰ See *supra* note 52 and accompanying text.

⁴²¹ See Parts II.C.2 and II.C.4 *supra*.

⁴²² See Part II.C.5 *supra*.

⁴²³ See 17 CFR 242.608(a)(1) (stating that NMS plans are filed by two or more SROs).

⁴²⁴ See 17 CFR 242.608(b)(2), (c), (d); 17 CFR 242.613(b).

⁴²⁵ See CAT NMS Plan Approval Order, *supra* note 3, at 84764–65.

its personnel with respect to the security and confidentiality of CAT Data should be reflected through different mechanisms from those of the Participants. The Commission reiterates that in each instance the purpose of excluding Commission personnel from these provisions is not to subject the Commission or its personnel to more lenient data security or confidentiality standards. Despite these differences in the origins of their respective obligations, the rules and policies applicable to the Commission and its personnel will be comparable to those applicable to the Participants and their personnel.⁴²⁶

Consistent with the CAT Approval Order,⁴²⁷ a cross-divisional steering committee of senior Commission Staff was formed that has designed and continue to maintain comparable policies and procedures regarding Commission and Commission Staff access to, use of, and protection of CAT Data. These policies and procedures also must comply with the Federal Information Security Modernization Act of 2014 and the NIST standards required thereunder,⁴²⁸ and are subject to audits by the SEC Office of Inspector General and the Government Accountability Office. The Commission will review and update, as necessary, its existing confidentiality and data use policies and procedures to account for access to the CAT, and, like the Participants, will periodically review the effectiveness of these policies and procedures and take prompt action to remedy deficiencies in such policies and procedures.

For example, with respect to restrictions on the use of Manual and Programmatic CCID Subsystem and CAIS Access, the Commission intends to have comparable policies and restrictions as the Participants but as adopted and enforced by the Commission. In addition, under the restrictions set forth in the proposed amendments, Commission personnel would also be permitted to extract only

the minimum amount of CAT Data necessary to achieve a specific surveillance or regulatory purpose—which could include supporting discussions with a regulated entity regarding activity that raises concerns, filing a complaint against a regulated entity, or supporting an investigation or examination of a regulated entity. Consistent with what the Commission stated when the CAT NMS Plan was approved, the Commission will ensure that its policies and procedures impose protections upon itself and its personnel that are comparable to those required under the proposed provisions in the CAT NMS Plan from which the Commission and its personnel are excluded, which includes reviewing and updating, as necessary, existing confidentiality and data use policies and procedures.⁴²⁹

III. Paperwork Reduction Act

As discussed above, the Commission is proposing to make various changes to the CAT NMS Plan, and certain provisions of the proposed amendment contain “collection of information requirements” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).⁴³⁰ The Commission is requesting public comment on the new collection of information requirements in this proposed amendment to the CAT NMS Plan. The Commission is submitting these collections of information to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.⁴³¹ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number.⁴³² The title of the new collection of information is “CAT NMS Plan Data Security Amendments.”

A. Summary of Collections of Information

The proposed amendments to the CAT NMS Plan include several obligations that would require a collection of information within the meaning of the PRA.

1. Evaluation of the CISP

The CAT NMS Plan currently requires the CCO to oversee the regular written assessment of the Plan Processor’s performance, which must be provided to the Commission at least annually and which must include an evaluation of the

existing information security program “to ensure that the program is consistent with the highest industry standards for the protection of data.”⁴³³ The proposed amendments would require the CCO to evaluate the newly-defined CISP. This change would newly require the CCO to evaluate elements of the CISP that relate to the SAWs provided by the Plan Processor.⁴³⁴ The proposed amendments would also require the CCO, in collaboration with the CISO, to include in this evaluation a review of the quantity and type of CAT Data extracted from the CAT System to assess the security risk of permitting such CAT Data to be extracted and to identify any appropriate corrective measures.⁴³⁵ The Participants, under the existing provisions of the CAT NMS Plan, would be entitled to review and comment on these new elements of the written assessment of the Plan Processor’s performance.⁴³⁶

2. Security Working Group

The proposed amendments would require the Security Working Group to advise the CISO and the Operating Committee, including with respect to issues involving: (1) Information technology matters that pertain to the development of the CAT System; (2) the development, maintenance, and application of the CISP; (3) the review and application of the confidentiality policies required by proposed Section 6.5(g); (4) the review and analysis of third-party risk security assessments conducted pursuant to Section 5.3 of Appendix D, including the review and analysis of results and corrective actions arising from such assessments; and (5) emerging cybersecurity topics.⁴³⁷ The proposed amendments would also require the CISO to apprise the Security Working Group of relevant developments and to provide it with all

⁴³³ See Section 6.6(b)(i)(A)–(B); Section 6.6(b)(ii)(B)(3).

⁴³⁴ See *id.*; see also proposed Section 1.1, definition of “Comprehensive Information Security Program” and “Secure Analytical Workspace.” The Commission preliminarily believes that all other elements of the CISP are currently required by the CAT NMS Plan.

⁴³⁵ See proposed Section 6.6(b)(ii)(B)(3). These requirements are also enshrined in proposed Section 6.2. See also proposed Section 6.2(a)(v)(T) (requiring the CCO to determine, pursuant to Section 6.6(b)(ii)(B)(3), to review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted); proposed Section 6.2(b)(x) (requiring the CISO to determine, pursuant to Section 6.6(b)(ii)(B)(3), to review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted).

⁴³⁶ See CAT NMS Plan, *supra* note 3, at Section 6.6(b)(i)(B).

⁴³⁷ See proposed Section 4.12(c).

⁴²⁶ See *id.* at 84765. In addition, Commission and SEC staff are subject to federal and Commission rules and policies that address security and confidentiality obligations. For example, disclosure or misuse of CAT Data would potentially subject Commission personnel to criminal penalties (including fines and imprisonment), disciplinary action (including termination of employment), civil injunction, and censure by professional associations for attorneys and accountants. *Id.*

⁴²⁷ See *id.* at 84765.

⁴²⁸ See *id.* See also Public Law 113–283 (Dec. 18, 2014); NIST, Security and Privacy Controls for Federal Information Systems and Organizations, Special Publication 800–53, revision 4 (Gaithersburg, Md.: April 2013); NIST, Contingency Planning Guide for Federal Information Systems, Special Publication 800–34, revision 1 (Gaithersburg, Md.: May 2010).

⁴²⁹ See *id.* at 84765–66.

⁴³⁰ 44 U.S.C. 3501 *et seq.*

⁴³¹ 44 U.S.C. 3507; 5 CFR 1320.11.

⁴³² 5 CFR 1320.11(l).

information and materials necessary to fulfill its purpose.⁴³⁸

3. SAWs

There are a number of information collections related to the proposed SAW requirements, including collections related to the following categories: (a) Policies, Procedures, and Detailed Design Specifications; (b) Implementation and Operation Requirements; and (c) Non-SAW Environment Requirements. These collections are explained in more detail below.

a. Policies, Procedures, and Detailed Design Specifications

The proposed definition for the CISP would define the scope of the existing information security program. However, the proposed amendments would add one new element to this information security program or CISP—the SAWs provided by the Plan Processor.⁴³⁹ The proposed amendments would therefore require the Plan Processor to develop and maintain a CISP that would include SAWs⁴⁴⁰ and, more specifically, that would include data access and extraction policies and procedures and security controls, policies, and procedures for SAWs.⁴⁴¹

In addition, the proposed amendments would require the Plan Processor to develop, maintain, and make available to the Participants detailed design specifications for the technical implementation of the access, monitoring, and other controls required for SAWs by the CISP.

b. Implementation and Operation Requirements

The proposed amendments would require the Plan Processor to notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications required by proposed Section 6.13(b)(i) before that SAW may connect to the Central Repository.⁴⁴²

The proposed amendments would also require the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i), for compliance with the CISP and the detailed design specifications only, and

to notify the Participant of any identified non-compliance with the CISP or the detailed design specifications.⁴⁴³

c. Non-SAW Environments

There are a number of information collections related to the proposed requirements for non-SAW environments, including collections related to the following categories: (i) Application Materials; (ii) Exception Determinations; and (iii) Non-SAW Implementation and Operation Requirements. These collections are explained in more detail below.

i. Application Materials

The proposed amendments would require the Participant requesting an exception from the proposed SAW usage requirements to provide the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group with various application materials. First, the Participant would be required to provide a security assessment of the non-SAW environment, conducted within the prior twelve months by a named, independent third party security assessor, that (a) demonstrates the extent to which the non-SAW environment complies with the NIST SP 800–53 security controls and associated policies and procedures required by the CISP pursuant to Section 6.13(a)(ii), (b) explains whether and how the Participant's security and privacy controls mitigate the risks associated with extracting CAT Data to the non-SAW environment through the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan, and (c) includes a Plan of Action and Milestones document detailing the status and schedule of any corrective actions recommended by the assessment.⁴⁴⁴ Second, the Participant would be required to provide detailed design specifications for the non-SAW environment demonstrating: (a) The extent to which the non-SAW environment's design specifications adhere to the design specifications developed by the Plan Processor for SAWs pursuant to proposed Section 6.13(b)(i), and (b) that the design specifications will enable the operational requirements set forth for non-SAW environments in proposed Section 6.13(d)(iii), which include,

among other things, Plan Processor monitoring.⁴⁴⁵

Under the proposed amendments, Participants who are denied an exception or who want to apply for a continuance must submit a new security assessment that complies with the requirements of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials required by proposed Section 6.13(d)(i)(A)(2).⁴⁴⁶

ii. Exception and Revocation Determinations

The proposed amendments would require the CISO and the CCO to review initial application materials submitted by requesting Participants, in accordance with policies and procedures developed by the Plan Processor, and to simultaneously notify the Operating Committee and the requesting Participant of their determination.⁴⁴⁷ If the exception is granted, the proposed amendments would require the CISO and the CCO to provide the requesting Participant with a detailed written explanation setting forth the reasons for that determination.⁴⁴⁸ For applications that are denied, the proposed amendments would require the CISO and the CCO to specifically identify the deficiencies that must be remedied before an exception could be granted.⁴⁴⁹ The proposed amendments would also require the CISO and the CCO to follow the same procedures when reviewing applications for a continued exception and issuing determinations regarding those applications.⁴⁵⁰

For Participants that are denied a continuance, or for Participants that fail to submit the proper application materials, the CISO and the CCO would also be required to revoke the exception and require such Participants to cease using their non-SAW environments to access CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan, in accordance with the remediation timeframes developed by the Plan Processor.⁴⁵¹

iii. Non-SAW Implementation and Operation Requirements

The proposed amendments would prevent an approved Participant from employing a non-SAW environment to access CAT Data through the user-

⁴³⁸ See *id.*

⁴³⁹ See proposed Section 1.1, definition of "Comprehensive Information Security Program" and "Secure Analytical Workspace."

⁴⁴⁰ See proposed Section 6.12. The Commission preliminarily believes that all other elements of the CISP are currently required by the CAT NMS Plan.

⁴⁴¹ See proposed Section 6.13(a).

⁴⁴² See proposed Section 6.13(b)(ii).

⁴⁴³ See proposed Section 6.13(c)(i).

⁴⁴⁴ See proposed Section 6.13(d)(i)(A)(1).

⁴⁴⁵ See proposed Section 6.13(d)(i)(A)(2).

⁴⁴⁶ See proposed Section 6.13(d)(i)(C), (d)(ii)(C).

⁴⁴⁷ See proposed Section 6.13(d)(i)(B).

⁴⁴⁸ See proposed Section 6.13(d)(i)(B)(1).

⁴⁴⁹ See proposed Section 6.13(d)(i)(B)(2).

⁴⁵⁰ See proposed Section 6.13(d)(ii)(B).

⁴⁵¹ See proposed Section 6.13(d)(ii)(A), (C).

defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 until the Plan Processor notifies the Operating Committee that the non-SAW environment has achieved compliance with the detailed design specifications submitted by that Participant as part of its application for an exception (or continuance).⁴⁵²

The proposed amendments would also require the Plan Processor to monitor the non-SAW environment in accordance with the detailed design specifications submitted with the exception (or continuance) application, for compliance with those detailed design specifications only, and to notify the Participant of any identified non-compliance with such detailed design specifications.⁴⁵³ Furthermore, the proposed amendments would require the Participant to simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment.⁴⁵⁴

4. Online Targeted Query Tool and Logging of Access and Extraction

The CAT NMS Plan currently requires the targeted online query tool to log submitted queries, query parameters, the user ID of the submitter, the date and time of the submission, and the delivery of results.⁴⁵⁵ The CAT NMS Plan further requires that the Plan Processor provides monthly reports based on this information to each Participant and the SEC of its respective metrics on query performance and data usage, and that the Operating Committee receive the monthly reports to review items, including user usage and system processing performance. The Commission proposes to modify these requirements by defining the term “delivery of results” as “the number of records in the result(s) and the time it took for the query to be performed” and requiring that access and extraction of CAT Data be logged.⁴⁵⁶ This change would also require the same logging of access and extraction of CAT Data from the user-defined direct queries and bulk extraction tools.

5. CAT Customer and Account Attributes

The CAT NMS Plan currently requires that Industry Members report a

Customer's SSN or ITIN as part of the information necessary for the Plan Processor to create a Customer-ID.⁴⁵⁷ The Commission is proposing to amend the Plan to modify the information that Industry Members must report to CAT to be consistent with the CCID Alternative for creating Customer-IDs outlined in the PII Exemption Request and the PII Exemption Order. First, in lieu of reporting a Customer's SSN or ITIN to CAT, the Commission is proposing that Industry Members would use the CCID Transformation Logic⁴⁵⁸ in conjunction with an API provided by the Plan Processor to transform their Customer's SSN/ITIN using the CCID Transformation Logic to create a Transformed Value and then report that Transformed Value to the CCID Subsystem.⁴⁵⁹ Once the Transformed Value is reported to the CCID Subsystem, the CCID Subsystem would perform another transformation of the Transformed Value to create a globally unique Customer-ID for each Customer.

The CAT NMS Plan currently requires the CCO to oversee the Regular Written Assessment of the Plan Processor's performance, which must be provided to the Commission at least annually and which must include an evaluation of the performance of the CAT.⁴⁶⁰ As proposed, the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s) must be included in the annual Regular Written Assessment of the Plan Processor, as required by Article VI, Section 6.6(b)(ii)(A).

6. Customer Identifying Systems Workflow

The CAT NMS Plan currently requires Industry Members to report PII⁴⁶¹ to the CAT, and states that such “PII can be gathered using the ‘PII workflow’ described in Appendix D, Data Security, PII Data Requirements.”⁴⁶² However, the “PII workflow” was neither defined nor established in the CAT NMS Plan.⁴⁶³ The Commission is therefore proposing to amend the CAT NMS Plan to define the PII workflow for accessing

Customer and Account Attributes, and to apply the existing provisions of the CAT NMS Plan to Customer and Account Attributes going forward.⁴⁶⁴

The current CAT NMS Plan requires that a full audit trail of PII access (who accessed what data, and when) be maintained, and that the CCO and the CISO have access to daily PII reports that list all users who are entitled to PII access, as well as the audit trail of all PII access that has occurred for the day.⁴⁶⁵ The Commission is proposing to amend the Plan to require that the Plan Processor maintain a full audit trail of access to Customer Identifying Systems by each Participant and the Commission (who accessed what data within each Participant, and when), and to require that the Plan Processor provide to each Participant and the Commission the audit trail for their respective users on a monthly basis. The CCO and the CISO will continue to have access to daily reports that list all users who are entitled to Customer Identifying Systems access, as is the case today; however, the Commission is proposing that such reports also be provided to the Operating Committee on a monthly basis.⁴⁶⁶

The proposed Customer Identifying Systems Workflow would permit regulators to use Programmatic CAIS Access or Programmatic CCID Subsystem Access to query those databases. The Commission is proposing to require that each Participant submit an application that has been approved by the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) to the Commission for authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access if a Participant requires programmatic access. The application must explain:

- Which programmatic access is being requested: Programmatic CAIS Access and/or Programmatic CCID Subsystem Access;
- Why Programmatic CAIS Access or Programmatic CCID Subsystem is required, and why Manual CAIS Access or Manual CCID Subsystem Access cannot achieve the regulatory purpose of an inquiry or set of inquiries;
- The Participant's rules that require Programmatic Access for surveillance and regulatory purposes;
- The regulatory purpose of the inquiry or set of inquiries requiring programmatic access;

⁴⁵⁷ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 9.1

⁴⁵⁸ The Commission is proposing that the CCID Transformation Logic will be embedded in the CAT Reporter Portal or used by the Industry Member in machine-to-machine-processing. See proposed Appendix D, Section 9.1.

⁴⁵⁹ See proposed Section 6.4(D)(ii)(d), Appendix D, Section 9.1 and 9.2. See also notes 168–173, *supra* and accompanying text.

⁴⁶⁰ See CAT NMS Plan, *supra* note 3, Section 6.6(b)(ii)(A).

⁴⁶¹ See *supra* note 10.

⁴⁶² See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.6.

⁴⁶³ *Id.*

⁴⁶⁴ See Part II.F., *supra* and accompanying text for a complete description of the Customer Identifying Systems Workflow.

⁴⁶⁵ See CAT NMS Plan, *supra* note 3, Appendix D, Section 4.1.6 (PII Data Requirements).

⁴⁶⁶ See proposed Appendix D, Section 4.1.6.

⁴⁵² See proposed Section 6.13(d)(iii)(A).

⁴⁵³ See proposed Section 6.13(d)(iii)(B).

⁴⁵⁴ See proposed Section 6.13(d)(iii)(C).

⁴⁵⁵ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1.1.

⁴⁵⁶ See proposed Appendix D, Section 8.1.1.

- A detailed description of the functionality of the Participant's SAW system(s) that will use data from CAIS or the CCID Subsystem;
- A system diagram and description indicating architecture and access controls to the Participant's SAW system(s) that will use data from CAIS or the CCID Subsystem; and
- The expected number of users of the Participant's system(s) that will use data from CAIS or the CCID Subsystem.

7. Proposed Confidentiality Policies, Procedures and Usage Restrictions

The Commission is proposing to amend Section 6.5(g)(i) of the CAT NMS Plan to require the Participants to create and maintain identical confidentiality and related policies ("Proposed Confidentiality Policies"). Proposed Section 6.5(g)(i) would require each Participant to establish, maintain and enforce procedures and usage restriction controls in accordance with the Proposed Confidentiality Policies. As proposed, the Proposed Confidentiality Policies must: (i) Be reasonably designed to (1) ensure the confidentiality of the CAT Data; and (2) limit the use of CAT Data to solely surveillance and regulatory purposes; (ii) limit extraction of CAT Data to the minimum amount of data necessary to achieve a specific surveillance or regulatory purpose; (iii) limit access to CAT Data to persons designated by Participants, who must be (1) Regulatory Staff or (2) technology and operations staff that require access solely to facilitate access to and usage of the CAT Data by Regulatory Staff;⁴⁶⁷ (iv) implement effective information barriers between such Participants' Regulatory Staff and non-Regulatory Staff with regard to access and use of CAT Data; (v) limit access to CAT Data by non-Regulatory Staff, by allowing such access only where there is a specific regulatory need for such access and requiring that a Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation), or his or her designee, document his or her written approval of each instance of access by non-Regulatory Staff; (vi) require that, in the absence of exigent circumstances, all Participant staff who are provided access to CAT Data, or have been provided access to CAT Data, must (1) sign a "Safeguard of Information" affidavit as approved by

the Operating Committee pursuant to Section 6.5(f)(i)(B); and (2) participate in the training program developed by the Plan Processor that addresses the security and confidentiality of information accessible in the CAT pursuant to Section 6.1(m); (vii) define the individual roles and regulatory activities of specific users; (viii) impose penalties for staff non-compliance with Participants' or the Plan Processor's policies or procedures with respect to information security, including, the policies required by Section 6.5(g)(i); (ix) be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow; and (x) document monitoring and testing protocols that will be used to assess Participant compliance with the policies.

Proposed Section 6.5(g)(ii) would require the Participant to periodically review the effectiveness of the policies and procedures and usage restriction controls required by Section 6.5(g)(i), including by using the monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and take prompt action to remedy deficiencies in such policies, procedures and usage restriction controls. In addition, proposed Section 6.5(g)(iii) would require that each Participant, as reasonably practicable, and in any event within 24 hours of becoming aware, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee: (A) any instance of noncompliance with the policies, procedures, and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i); or (B) a breach of the security of the CAT.

Proposed Section 6.5(g)(iv) would require that the Proposed Confidentiality Policies be made publicly available on each of the Participants' websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information.⁴⁶⁸

Proposed Section 6.5(g)(v) would require that, on an annual basis, each Participant engage an independent accountant to perform an examination of compliance with the policies required by Section 6.5(g)(i) in accordance with attestation standards of the American Institute of Certified Public Accountants ("AICPA") (referred to as U.S. Generally

Accepted Auditing Standards or GAAS) or the Public Company Accounting Oversight Board ("PCAOB"), and with Commission independence standards based on SEC Rule 2-01 of Regulation S-X.⁴⁶⁹ In addition, the examination results shall be submitted to the Commission upon completion, in a text-searchable format (e.g. a text-searchable PDF). The examination report shall be considered submitted to the Commission when electronically received by Commission staff at the Commission's principal office in Washington DC.⁴⁷⁰

The Commission proposes Sections 6.2(a)(v)(R) and 6.2(b)(viii) in the CAT NMS Plan to require that both the CISO and CCO of the Plan Processor be required to review the Proposed Confidentiality Policies. In addition, the Commission proposes to require that the CCO of the Plan obtain assistance and input from the Compliance Subcommittee,⁴⁷¹ and require that the policies required by proposed Section 6.5(g)(i) of the CAT NMS Plan be subject to review and approval by the Operating Committee, after review by the CISO and CCO.⁴⁷²

8. Secure Connectivity—"Allow Listing"

The Commission is proposing to amend Appendix D, Section 4.1.1 of the CAT NMS Plan to require "allow listing." Specifically, the Commission proposes to require that for all connections to CAT infrastructure, the Plan Processor must implement capabilities to allow access (i.e., "allow list") only to those countries where CAT reporting or regulatory use is both necessary and expected. In addition, proposed Appendix D, Section 4.1.1 would require, where possible, more granular "allow listing" to be implemented (e.g., by IP address). Lastly, the Plan Processor would be required to establish policies and procedures to allow access if the source location for a particular instance of access cannot be determined technologically.

9. Breach Management Policies and Procedures

Appendix D, Section 4.1.5 of the CAT NMS Plan requires the Plan Processor to

⁴⁶⁷ The Commission proposes to define Regulatory Staff as the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) and staff within the Chief Regulatory Officer's (or similarly designated head(s) of regulation's) reporting line. See proposed Section 1.1.

⁴⁶⁸ See proposed Section 6.5(g)(iv).

⁴⁶⁹ See 17 CFR 210.2-01.

⁴⁷⁰ See proposed Section 6.5(g)(v).

⁴⁷¹ See proposed Section 6.2(a)(v)(R). The CAT NMS Plan requires the Operating Committee to maintain a compliance Subcommittee (the "Compliance Subcommittee") whose purpose shall be to aid the Chief Compliance Officer as necessary. See CAT NMS Plan, *supra* note 3, at Section 4.12(b).

⁴⁷² See proposed Section 6.5(g)(vi).

develop policies and procedures governing its responses to systems or data breaches, including a formal cyber incident response plan, and documentation of all information relevant to breaches.⁴⁷³ The CAT NMS Plan further specifies that the cyber incident response plan will provide guidance and direction during security incidents, but otherwise states that the cyber incident response plan *may* include several items.⁴⁷⁴ The Commission proposes to require that the formal cyber incident response plan incorporate corrective actions and breach notifications.⁴⁷⁵

Specifically, the Commission is proposing to modify Appendix D, Section 4.1.5 of the CAT NMS Plan to require that the formal cyber incident response plan must include “taking appropriate corrective action that includes, at a minimum, mitigating potential harm to investors and market integrity, and devoting adequate resources to remedy the systems or data breach as soon as reasonably practicable.” In addition, the Commission is proposing to modify Appendix D, Section 4.1.5 of the CAT NMS Plan to require the Plan Processor to provide breach notifications of systems or data breaches to CAT Reporters that it reasonably estimates may have been affected, as well as to the Participants and the Commission, promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred. The Commission also proposes to state that the cyber incident response plan must provide for breach notifications. As proposed, these breach notifications would be required to include a summary description of the systems or data breach, including a description of the corrective action taken and when the systems or data breach has been or is expected to be resolved.

As proposed, the Plan Processor would be allowed to delay breach notifications “if the Plan Processor determines that dissemination of such information would likely compromise the security of the CAT System or an investigation of the systems or data breach, and documents the reasons for such determination.” The proposal would further require affirmative

documentation of the reasons for the Plan Processor’s determination to delay a breach notification. In addition, breach notifications would not be required for systems or data breaches “that the Plan Processor reasonably estimates would have no or a de minimis impact on the Plan Processor’s operations or on market participants.”⁴⁷⁶ For a breach that the Plan Processor believes to be a de minimis breach, the Plan Processor would be required to document all information relevant to such breach.

10. Customer Information for Allocation Report Firm Designated IDs

Proposed Section 6.4(d)(ii)(C) would explicitly require that Customer and Account Attributes be reported for Firm Designated IDs submitted in connection with Allocation Reports, and not just for Firm Designated IDs submitted in connection with the original receipt or origination of an order. Specifically, proposed Section 6.4(d)(ii)(C), as amended, of the CAT NMS Plan would state that each Participant shall, through its Compliance Rule, require its Industry Members to record and report, for original receipt or origination of an order and Allocation Reports, the Firm Designated ID for the relevant Customer, and in accordance with Section 6.4(d)(iv), Customer and Account Attributes for the relevant Customer.

B. Proposed Use of Information

1. Evaluation of the CISP

The Commission preliminarily believes that the proposed review of CAT Data extracted from the CAT System will facilitate Commission oversight of the security risks posed by the extraction of CAT Data. The proposed review would be part of the evaluation of the CISP attached by the Participants to the written assessment of the Plan Processor’s performance and provided to the Commission at least annually.⁴⁷⁷ The Commission preliminarily believes the proposed review should enable the Commission to better assess whether the current security measures should be enhanced or lightened and whether any planned corrective measures are appropriate. The proposed amendments require the CCO to evaluate the CISP, which includes SAWs, and the evaluation would be included in the regular written assessment.

2. Security Working Group

The proposed amendments require the CISO to keep the Security Working

Group apprised of relevant developments, and to provide it with all information and materials necessary to fulfill its purpose, which will help to keep the Security Working Group adequately informed about issues that fall within its purview. The Commission further preliminarily believes that the Security Working Group will be able to provide the CISO and the Operating Committee with valuable feedback regarding the security of the CAT.

3. SAWs

a. Policies, Procedures, and Detailed Design Specifications

By requiring the Plan Processor to develop and maintain a CISP that would include SAWs and, more specifically, that will include specified data access and extraction policies and procedures and security controls, policies, and procedures for SAWs, the Commission preliminarily believes that the proposed amendments would better protect CAT Data by keeping it within the CAT System and therefore subject to the security controls, policies, and procedures of the CISP when accessed and analyzed by the Participants. In addition, the Commission preliminarily believes that requiring the Plan Processor to develop, maintain, and make available to the Participants detailed design specifications for the technical implementation of the access, monitoring, and other controls required for SAWs may increase the likelihood that the CISP is implemented consistently across the SAWs and at a high standard.

b. Implementation and Operation Requirements

Requiring the Plan Processor to notify the Operating Committee that each Participant’s SAW has achieved compliance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i) before that SAW may connect to the Central Repository will protect the CAT, because this process will confirm that the CISP has been implemented properly before any Participant is permitted to use its SAW to access CAT Data.

Requiring the Plan Processor to monitor each Participant’s SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i) should enable the Plan Processor to conduct such monitoring, including automated monitoring, consistently and efficiently across SAWs. It should also help the Plan Processor to identify and to escalate any non-compliance events,

⁴⁷³ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.5. The cyber incident response plan is subject to review by the Operating Committee. See *id.*

⁴⁷⁴ See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1.5. The CAT NMS Plan also lists a series of items that documentation of information relevant to breaches should include. *Id.*

⁴⁷⁵ See *supra* Part II.J.

⁴⁷⁶ See proposed Appendix D, Section 4.1.5.

⁴⁷⁷ See Section 6.6(b)(ii)(B)(3).

threats, and/or vulnerabilities as soon as possible, thus reducing the potentially harmful effects of these matters. Likewise, requiring the Plan Processor to notify the Participant of any identified non-compliance will likely speed remediation of such non-compliance by the Participant.

c. Non-SAW Environments

i. Application Materials

The Commission preliminarily believes that requiring the Participants to submit new and/or up-to-date versions of the specified application materials in connection with an initial application, a re-application, or a continuance will help the CISO and the CCO to determine whether it is appropriate to grant an exception (or continuance) to the proposed SAW usage requirements. For example, the proposed requirement that the Participant produce a security assessment conducted within the last twelve months by an independent and named third party security assessor should give these decision-makers access to up-to-date, accurate, and unbiased information about the security and privacy controls put in place for the relevant non-SAW environment, including reliable information about risk mitigation measures and recommended corrective actions.⁴⁷⁸ The Commission preliminarily believes that this information will help the CISO and the CCO to determine whether the non-SAW environment is sufficiently secure to be granted an exception (or continuance) from the SAW usage requirements set forth in proposed Section 6.13(a)(i)(B). Similarly, the Commission preliminarily believes that requiring the requesting Participant to provide detailed design specifications for its non-SAW environment that demonstrate the extent of adherence to the SAW design specifications developed by the Plan Processor pursuant to Section 6.13(b)(i) and that the detailed design specifications will support required non-SAW environment operations will help the CISO and the CCO to assess the security-related infrastructure of the non-SAW environment and to determine whether the non-SAW environment will support the required functionality.

ii. Exception and Revocation Determinations

For both initial applications and applications for a continued exception, the proposed amendments would require the CISO and the CCO to notify

the Operating Committee and the requesting Participant and to provide the Participant with a detailed written explanation setting forth the reasons for their determination and, for denied Participants, specifically identifying the deficiencies that must be remedied before an exception could be granted. The Commission preliminarily believes that this kind of feedback could be quite valuable—not only because it should prevent the CISO and the CCO from denying applications without basis, but also because it should provide denied Participants with the information needed to effectively bring their non-SAW environments into compliance with the proposed standards. The Commission also preliminarily believes it is valuable to require that the Operating Committee be notified of determinations related to non-SAW environments, because this should enhance the ability of the Operating Committee to oversee the security of CAT Data.

iii. Non-SAW Implementation and Operation Requirements

By requiring the Plan Processor to notify the Operating Committee that a non-SAW environment has achieved compliance with the detailed design specifications submitted by a Participant in connection with its application for an exception (or continuance), the Commission preliminarily believes that the proposed amendments will protect the security of the CAT.⁴⁷⁹ The Commission preliminarily believes that it is important for approved Participants to adhere to and implement the detailed design specifications that formed a part of their application packages, because such detailed design specifications will have been reviewed and vetted by the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group.⁴⁸⁰ Therefore, the Commission preliminarily believes that non-SAW environments that implement their submitted design specifications should be sufficiently secure, and, for an additional layer of protection and oversight, the proposed amendments require the Plan Processor to determine and notify the Operating Committee that the non-SAW environment has achieved compliance with such detailed design specifications before CAT Data can be

accessed via the user-defined direct query or bulk extraction tools.

Similarly, the Commission preliminarily believes that the proposed monitoring and notification requirements will improve the security of the non-SAW environments that are granted an exception by the CISO and the CCO and, therefore, the overall security of the CAT. Requiring the Plan Processor to monitor each non-SAW environment that has been granted an exception will help the Plan Processor to identify any non-compliance events, threats, and/or vulnerabilities, thus reducing the potentially harmful effects these matters could have if left unchecked and uncorrected. The Commission also preliminarily believes that it is appropriate to require approved Participants to simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to the security controls for the non-SAW environment. If the security controls reviewed and vetted by the CISO, the CCO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group change in any material way, the Commission preliminarily believes it is appropriate to require the simultaneous escalation of this information to the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group.

4. Online Targeted Query Tool and Logging of Access and Extraction

The Commission preliminarily believes the proposed definition of “delivery of results” would result in logs that provide more useful information to the Plan Processor and Participants and will assist in the identification of potential issues relating to the security or access to CAT Data. The Commission also preliminarily believes that the requirement to log access and extraction of CAT Data is appropriate because the monthly reports of information relating to the query tools will permit the Operating Committee and Participants to review information concerning access and extraction of CAT Data regularly and to identify issues related to the security of CAT Data.

5. CAT Customer and Account Attributes

The Commission preliminarily believes that it is appropriate to amend the CAT NMS Plan to eliminate the

⁴⁷⁸ See proposed Section 6.13(d)(i)(A)(1).

⁴⁷⁹ The proposed amendments do not specify a particular format for this notification; the Commission preliminarily believes that such notification could be made with a phone call or through email.

⁴⁸⁰ See proposed Section 6.13(d)(i)(A), (d)(ii)(A).

requirement that Industry Members report SSNs/ITINs and instead require that they report a Transformed Value. As proposed, the Transformed Value will be reported to the CCID Subsystem, which will perform another transformation to create the Customer-ID.⁴⁸¹ The Plan Processor will then link the Customer-ID to the Customer and Account Attributes for use by Regulatory Staff for regulatory and surveillance purposes. Replacing the reporting of ITIN(s)/SSN(s) of a natural person Customer with the reporting of Transformed Values obviates the need for the CAT to collect certain sensitive pieces of identifying information associated with a natural person Customer.⁴⁸²

The Commission preliminarily believes that the proposed language in Appendix D, Section 9.1 requires that the Participants must assess the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s) as part of each annual Regular Written Assessment of the Plan Processor, as required by Article VI, Section 6.6(b)(ii)(A). The Commission preliminarily believes the assessment should enable the Commission to better assess the overall performance and design of the CCID Subsystem, including the ingestion of the Transformed Value and the subsequent creation of an accurate Customer-ID, to confirm the CCID Subsystem is operating as intended, or whether any additional measures should be taken to address the creation and protection of Customer-IDs.

6. Customer Identifying Systems Workflow

The Commission preliminarily believes it is appropriate to require the Plan Processor to maintain a full audit trail of access to Customer Identifying Systems by each Participant and the Commission (who accessed what data and when), and to require the Plan Processor to provide to each Participant and the Commission the audit trail for their respective users on a monthly basis. The information contained in the audit trail and the reports could help the Participants, the Commission, and the Operating Committee develop and implement internal policies, procedures and control systems that allow only Regulatory Staff who are entitled to access to Customer Identifying Systems to have such access.

The Commission preliminarily believes that requiring each Participant to submit an application that has been approved by the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) to use Programmatic CAIS Access or Programmatic CCID Subsystem Access will help the Commission to determine whether it is appropriate for a particular Participant to have authorization to use programmatic access. The Commission preliminarily believes that some Participants may not require programmatic access to either CAIS or the CCID Subsystem in order to carry out their regulatory and oversight responsibilities. However, the Commission recognizes that in some circumstances, *e.g.*, determining the scope and nature of hacking and associated trading misconduct may require programmatic access. The specific information required in the application will assist the Commission in evaluating on a case-by-case basis whether programmatic access is needed for a Participant.

7. Proposed Confidentiality Policies, Procedures and Usage Restrictions

The Commission believes that the proposed amendments to Section 6.5(g)(i), which would require the Participants to create and maintain identical confidentiality and related policies, and individualized procedures and usage restrictions, would help protect the security and confidentiality of CAT Data and help ensure that CAT Data is used only for appropriate regulatory and surveillance purposes.

The Commission preliminarily believes that requiring the Participants to periodically review the effectiveness of the policies and procedures and usage restriction controls required by Section 6.5(g)(i), including by using the monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and take prompt action to remedy deficiencies in such policies, procedures and usage restriction controls, should help ensure that the Proposed Confidentiality Policies, as well as the Participant-specific procedures and usage restriction controls developed pursuant to the Proposed Confidentiality Policies, are effective and being complied with by each Participant.

The Commission preliminarily believes that requiring each Participant, as reasonably practicable, and in any event within 24 hours of becoming aware, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee: (A) Any instance of noncompliance

with the policies, procedures, and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i); or (B) a breach of the security of the CAT should help ensure that Participants comply with the Proposed Confidentiality Policies and related procedures, and help ensure the security of CAT Data.

The Commission preliminarily believes that requiring that the Proposed Confidentiality Policies be made publicly available on each of the Participants' websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information, could help ensure that the Proposed Confidentiality Policies are robust and thoroughly considered by Participants. The Commission also believes that such a requirement will allow other Participants, broker-dealers, investors and the public to better understand and analyze the Proposed Confidentiality Policies that govern Participant usage of and the confidentiality of CAT Data. The Commission preliminarily believes that broker-dealers and investors that generates the order and trade activity that is reported to CAT should have some insight on the policies governing usage of CAT Data, particularly due to the sensitivity and importance of CAT Data, which may contain personally identifiable information, trading strategies and other valuable or sensitive information.

The Commission preliminarily believes that requiring each Participant to engage an independent accountant to perform an examination of compliance with the policies required by Section 6.5(g)(i) would provide additional oversight which should enhance confidence that Participants are complying with policies designed to ensure the confidentiality of CAT Data and would help ensure that such data is used solely for surveillance and regulatory purposes. The Commission preliminarily believes that requiring the Participants to submit the examination reports to the Commission would allow the Commission to review the results of the examination that was performed, and to assess whether or not Participants are adequately complying with the Proposed Confidentiality Policies.

The Commission preliminarily believes that requiring the policies required by proposed Section 6.5(g)(i) be subject to review and approval by the Operating Committee, after review by the CISO and CCO, will further help ensure that the Proposed Confidentiality Policies are consistent with the requirements of the CAT NMS Plan and proposed changes herein, while

⁴⁸¹ See proposed Section 6.1(v) and proposed Appendix D, Section 9.1 of the CAT NMS Plan.

⁴⁸² See PII Exemption Order, *supra* note 5, at 16156.

providing for multiple opportunities for feedback and input while the Proposed Confidentiality Policies are being developed. It would allow the Plan Processor to have input in the creation of the Proposed Confidentiality Policies and help ensure consistency with policies and procedures created by the Plan Processor itself. The Commission preliminarily believes that it is appropriate to require the CCO to receive the assistance of the Compliance Subcommittee because the Compliance Subcommittee's purpose is to aid the CCO and because it would further allow for more input into the process of developing the Proposed Confidentiality Policies.⁴⁸³

8. Secure Connectivity—"Allow Listing"

The Commission preliminarily believes that requiring "allow listing," which would require the Plan Processor to allow access only to those countries or more granular access points where CAT reporting or regulatory use is both necessary and expected would enhance the security of CAT infrastructure and connections to the CAT infrastructure by requiring the Plan Processor to limit access to the CAT infrastructure based on an authorized end user's geolocation of the IP addresses of CAT Reporters. Similarly, the Commission preliminarily believes that requiring the Plan Processor to establish policies and procedures to allow access if the source location for a particular instance of access cannot be determined technologically would improve the security of the CAT System, by addressing whether or not connectivity is possible and how such connectivity could be granted.

9. Breach Management Policies and Procedures

The Commission preliminarily believes that requiring the Plan Processor's cyber incident response plan to include "taking appropriate corrective action that includes, at a minimum, mitigating potential harm to investors and market integrity, and devoting adequate resources to remedy the systems or data breach as soon as reasonably practicable," would obligate the Plan Processor to respond to systems or data breaches with appropriate steps necessary to remedy each system or data breach and mitigate the negative effects of the breach, if any, on market

participants and the securities markets more broadly.

The Commission preliminarily believes that requiring the Plan Processor's cyber incident response plan to incorporate breach notifications, and requiring the Plan Processor to provide breach notifications, would inform affected CAT Reporters, and the Participants and the Commission, in the case of systems or data breaches. The Commission preliminarily believes that it is appropriate for these breach notifications to include a summary description of the systems or data breach, including a description of the corrective action taken and when the systems or data breach has been or is expected to be resolved. These breach notifications could potentially allow affected CAT Reporters, Participants and/or the Commission to proactively respond to the information in a way to mitigate any potential harm to themselves, customers, investors and the public. Furthermore, requiring the Plan Processor to document all information relevant to de minimis breaches should ensure that the Plan Processor has all the information necessary should its initial determination that a breach is de minimis prove to be incorrect, so that it could promptly provide breach notifications as required, and would be helpful in identifying patterns among systems or data breaches.

10. Customer Information for Allocation Report Firm Designated IDs

The Commission preliminarily believes proposed Section 6.4(d)(ii)(c) would explicitly require that Customer and Account Attributes be reported for Firm Designated IDs submitted in connection with Allocation Reports, and will require Industry Members to report such information. The Commission preliminarily believes that this proposed amendment is consistent with previously granted exemptive relief, which requires the Central Repository to have the ability to use elements of Allocation Reports to link the subaccount holder to those with authority to trade on behalf of the account.⁴⁸⁴ The Commission preliminarily believes that if Industry Members do not provide Customer and Account Attributes for the relevant Firm Designated ID submitted in an Allocation Report, then there would be

no ability for the Central Repository to link the subaccount holder to those with authority to trade on behalf of the account. The Commission preliminarily believes that amending the language in Section 6.4(d)(ii)(C) to implement the previously approved exemptive relief is appropriate. However, the Commission does not believe that the proposed amendment substantively changes the obligations of Industry Members, who, through Participant Compliance Rules, are already required to submit customer information for all Active Accounts pursuant to the CAT NMS Plan.⁴⁸⁵

C. Respondents

1. National Securities Exchanges and National Securities Associations

The respondents to certain proposed collections of information would be the 25 Participants (the 24 national securities exchanges and one national securities association (FINRA)) currently registered with the Commission.⁴⁸⁶

2. Members of National Securities Exchanges and National Securities Association

The respondents for certain information collection are the Participants' broker-dealer members, that is, Industry Members. The Commission understands that there are currently 3,734 broker-dealers; however, not all broker-dealers are expected to have CAT reporting obligations. The Commission estimates that approximately 1,500 broker-dealers currently quote or execute transactions in NMS Securities, Listed Options or OTC Equity Securities and would likely have CAT reporting obligations.⁴⁸⁷

D. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission's total burden estimates in this Paperwork Reduction Act section reflect the total burden on

⁴⁸⁵ See *supra*, note 407.

⁴⁸⁶ The Participants are: BOX Options Exchange LLC, Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange Inc., Long-Term Stock Exchange, Inc., MEMX, LLC, Miami International Securities Exchange LLC, MIAx PEARL, LLC, MIAx Emerald, LLC, NASDAQ BX, Inc., NASDAQ GEMX, LLC, NASDAQ ISE, LLC, NASDAQ MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., NYSE Chicago Stock Exchange, Inc., NYSE National, Inc.

⁴⁸⁷ The Commission understands that the remaining 2,234 registered broker-dealers either trade in asset classes not currently included in the definition of Eligible Security or do not trade at all (e.g., broker-dealers for the purposes of underwriting, advising, private placements).

⁴⁸³ Members of the Advisory Committee, composed of members that are not employed by or affiliated with any Participant or any of its affiliates or facilities, are currently on the Compliance Subcommittee. See CAT NMS Plan, *supra* note 3, at Section 4.13.

⁴⁸⁴ See Securities and Exchange Act Release No. 77265 (March 1, 2016), 81 FR 11856, 11868 (March 7, 2016); see also CAT NMS Plan, *supra* note 3, at Section 1.1 (defining "Allocation Report") and Section 6.4(d)(ii)(A)(i) (requiring an Allocation Report if an order is executed in whole in or in part).

all Participants and Industry Members. The burden estimates per Participant or Industry Member are intended to reflect the average paperwork burden for each Participant or Industry Member, but some Participants or Industry Members may experience more burden than the Commission's estimates, while others may experience less. The burden figures set forth in this section are based on a variety of sources, including Commission staff's experience with the development of the CAT and estimated burdens for other rulemakings.

Many aspects of the proposed amendment to the CAT NMS Plan would require the Plan Processor to do certain activities. However, because the CAT NMS Plan applies to and obligates the Participants and not the Plan Processor, the Commission preliminarily believes it is appropriate to estimate the Participants' external cost burden based on the estimated Plan Processor staff hours required to comply with the proposed obligations. The Commission derives these estimated costs associated with Plan Processor staff time based on per hour figures from SIFMA's *Management & Professional Earnings in the Securities Industry 2013*, modified by Commission staff to account for an 1800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation based on Bureau of Labor Statistics data on CPI-U between January 2013 and January 2020 (a factor of 1.12).⁴⁸⁸

1. Evaluation of the CISP

The CAT NMS Plan already requires the Participants to submit to the Commission, at least annually, a written assessment of the Plan Processor's performance that is prepared by the CCO. As part of this assessment, the Participants are required to include an evaluation of the information security program "to ensure that the program is consistent with the highest industry standards for the protection of data," which the Participants may review and comment on before providing the assessment to the Commission.

The proposed amendments would newly require the CCO to evaluate elements of the CISP that relate to SAWs and, in collaboration with the CISO, to include a review of CAT Data extracted from the CAT System to assess the

security risk of permitting such CAT Data to be extracted. In connection with these new requirements, the Commission preliminarily estimates that the Participants would incur an ongoing aggregate expense of \$129,900 per year, or that each Participant would incur an annual expense of \$5,196, in connection with these proposed amendments, based on a preliminary estimate that Plan Processor staff would need approximately 250 hours per year to comply with these new requirements.⁴⁸⁹

Under the CAT NMS Plan, the Participants would also have the right to review and comment on these new elements of the written assessment. The Commission preliminarily estimates that each Participant would spend approximately 25 hours reviewing and commenting on these new elements⁴⁹⁰ and that all Participants would incur an aggregate burden of approximately 625 hours.⁴⁹¹ In addition, the Commission preliminarily estimates that each Participant would spend approximately \$1,000 on external legal consulting costs⁴⁹² or that all Participants would spend approximately \$25,000 on external legal consulting costs.⁴⁹³

⁴⁸⁹ The estimated 250 hours of Plan Processor staff time include 100 hours by the CCO, 100 hours by the CISO, and 50 hours for an attorney. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$129,900. (100 hours for CCO = \$54,300) + (100 hours for CISO = \$54,300) + (50 hours for Attorney = \$21,300). Each Participant would therefore incur an ongoing annual expense of \$5,196. \$129,900/25 Participants = \$5,196 per Participant.

⁴⁹⁰ The Commission is basing these estimates on the CAT NMS Plan Approval Order, which estimated that each Participant would incur a burden of 171.43 hours to review and comment on the entire written assessment required by Section 6.6(b)(ii). See CAT NMS Plan Approval Order, *supra* note 3, at 84925 note 3409. The written assessment is made up of many components, and the Commission preliminarily believes the proposed amendments would only require a portion of the time that was originally estimated for the entire assessment. The Commission therefore preliminarily believes that each Participant would incur a burden of 25 hours to review and comment on the new elements of the written assessment. 15 hours for attorney + 10 hours for chief compliance officer = 25 hours.

⁴⁹¹ 25 hours per Participant * 25 Participants = 625 hours.

⁴⁹² The Commission is basing these estimates on the CAT NMS Plan Approval Order, which estimated that each Participant would spend \$1,000 on external legal consulting costs in order to review and comment on the entire written assessment required by Section 6.6(b)(ii). See CAT NMS Plan Approval Order, *supra* note 3, at 84925–26. The Commission preliminarily believes this is an appropriate estimate for the amount the Participants might spend on the proposed elements of the written assessment.

⁴⁹³ \$1,000 per Participant * 25 Participants = \$25,000.

2. Security Working Group

The Commission preliminarily believes that each Participant would incur an ongoing annual burden of 364 hours to comply with the proposed requirement that the Security Working Group aid the CISO and the Operating Committee or that the Participants will incur an aggregated annual burden of 9,100 hours.⁴⁹⁴

The Commission preliminarily believes that requiring the CISO to keep the Security Working Group apprised of relevant developments, to provide it with all information and materials necessary to fulfill its purpose, and to prepare for and attend meetings of the Security Working Group will take the CISO approximately 570 hours per year. Accordingly, the Commission preliminarily estimates that the Participants would incur an ongoing aggregate expense of approximately \$309,510 per year, or that each Participant would incur an ongoing annual expense of \$12,380, in connection with these proposed amendments.⁴⁹⁵

3. SAWs

a. Policies, Procedures, and Detailed Design Specifications

The burdens associated with the development and maintenance of the CISP are already largely accounted for in the CAT NMS Plan Approval Order.⁴⁹⁶ For the Plan Processor to develop a CISP that incorporates the SAW-specific additions that would be

⁴⁹⁴ The Commission preliminarily believes, based on the activity of the current group established by the Operating Committee to discuss the security of the CAT, that the Security Working Group will meet weekly. The Commission preliminarily estimates that the chief or deputy chief information security officer of each Participant will likely spend approximately 5 hours per week, on average, to prepare for this meeting and 2 hours to attend this meeting. 7 hours * 52 weeks = 364 hours per Participant. 364 hours per Participant * 25 Participants = 9,100 hours.

⁴⁹⁵ The Commission preliminarily estimates that the Security Working Group will meet weekly and that the CISO will spend 8 hours preparing for each meeting of the Security Working Group and 2 hours to attend each meeting. 10 hours * 52 weeks = 520 hours. In addition, the Commission preliminarily estimates that the CISO will spend approximately 50 hours per year to keep the Security Working Group apprised of relevant developments and to provide it with all information and materials necessary to fulfill its purpose. 520 hours + 50 hours = 570 hours for CISO. 570 hours for CISO = \$309,510. \$309,510/25 Participants = \$12,380.40 per Participant. The Commission does not believe that any initial or one-time burdens would be incurred in association with these proposed amendments.

⁴⁹⁶ See CAT NMS Plan Approval Order, *supra* note 3, at 84219–20. In addition, to the extent that the CISO consults with the Security Working Group regarding the development and maintenance of the CISP, those costs have already been detailed elsewhere. See Part III.D.2. *supra*.

⁴⁸⁸ For example, the 2020 inflation-adjusted effective hourly wage rate for attorneys is estimated at \$426 (\$380 × 1.12). For purposes of this Paperwork Reduction Act analysis, the Commission has preliminarily estimated the per hour cost of a Chief Information Security Officer to be identical to the per hour cost of a Chief Compliance Officer (\$543 per hour).

required under the proposed amendments,⁴⁹⁷ the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$89,020, or that each Participant would incur an initial, one-time annual expense of approximately \$3,561, based on a preliminary estimate that Plan Processor staff would need approximately 270 hours to comply with these new requirements.⁴⁹⁸ The Commission also preliminarily estimates that the Participants would incur an initial, one-time burden of approximately \$27,000 in external legal and consulting costs⁴⁹⁹ or that each Participant would incur an initial, one-time burden of \$1,080.⁵⁰⁰ Furthermore, to maintain a CISP that incorporated the SAW-specific additions that would be required under the proposed amendments, the Commission preliminarily estimates that the Participants would incur an ongoing expense of approximately \$56,648 per year, or that each Participant would incur an ongoing, annual expense of approximately \$2,266, based on a preliminary estimate that Plan Processor staff would need approximately 175 hours per year to maintain those elements of the CISP that relate to SAWs.⁵⁰¹

⁴⁹⁷ See proposed Section 1.1, “Comprehensive Information Security Program” and “Secure Analytical Workspace.” See also proposed Section 6.12; proposed Section 6.13(a).

⁴⁹⁸ The estimated 270 hours of Plan Processor staff time include 200 hours by a senior systems analyst, 40 hours by a compliance attorney, 20 hours by the chief compliance officer, and 10 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$89,020. (200 hours for senior systems analyst = \$58,200) + (40 hours for compliance attorney = \$14,960) + (20 hours for chief compliance officer = \$10,860) + (10 hours for director of compliance = \$5,000) = \$89,020. Each Participant would therefore incur an ongoing annual expense of \$3,560.80. \$89,020/25 Participants = \$3,560.80 per Participant. This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of systems compliance policies and procedures. See Securities Exchange Act Release No. (November 19, 2014), 79 FR 72252, at 72378 (December 5, 2014) (“Regulation SCI Adopting Release”).

⁴⁹⁹ This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of systems compliance policies and procedures. See Regulation SCI Adopting Release, *supra* note 498, at 72378.

⁵⁰⁰ \$27,000/25 Participants = \$1,080 per Participant.

⁵⁰¹ The estimated 175 hours of Plan Processor staff time include 134 hours by a senior systems analyst, 26 hours by a compliance attorney, 10 hours by the chief compliance officer, and 5 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$56,648. (134 hours for senior systems analyst = \$38,994) + (26 hours for compliance attorney = \$9,724) + (10 hours for chief

For the Plan Processor to develop detailed design specifications for the technical implementation of the access, monitoring, and other controls required for SAWs,⁵⁰² the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$56,180, or that each Participant would incur an initial, one-time annual expense of approximately \$2,247, based on a preliminary estimate that Plan Processor staff would need approximately 160 hours to comply with these new requirements.⁵⁰³ The Commission also preliminarily estimates that the Participants would incur an initial, one-time burden of approximately \$47,000 in external legal and consulting costs⁵⁰⁴ or that each Participant would incur an initial, one-time burden of \$1,880.⁵⁰⁵ In addition, the Commission believes that the Participants would incur an initial, one-time expense of approximately \$2,965 to make the required detailed design specifications available to the Participants⁵⁰⁶ or that each Participant

compliance officer = \$5,430) + (5 hours for director of compliance = \$2,500) = \$56,648. Each Participant would therefore incur an ongoing annual expense of \$2,265.92. \$56,648/25 Participants = \$2,265.92 per Participant. This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of systems compliance policies and procedures. See Regulation SCI Adopting Release, *supra* note 498, at 72378.

⁵⁰² See proposed Section 6.13(b)(i).

⁵⁰³ The estimated 160 hours of Plan Processor staff time include 100 hours by a senior systems analyst, 30 hours by a compliance attorney, 20 hours by the chief compliance officer, and 10 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$56,180. (100 hours for senior systems analyst = \$29,100) + (30 hours for compliance attorney = \$11,220) + (20 hours for chief compliance officer = \$10,860) + (10 hours for director of compliance = \$5,000) = \$56,180. Each Participant would therefore incur an ongoing annual expense of \$2,247.20. \$56,180/25 Participants = \$2,247.20 per Participant. This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of policies and procedures related to the design, development, testing, maintenance, operation, and surveillance of systems. See Regulation SCI Adopting Release, *supra* note 498, at 72377. To the extent that the CISO consults with the Security Working Group regarding the development and maintenance of the required detailed design specifications, those costs have already been accounted elsewhere. See Part III.D.2. *supra*.

⁵⁰⁴ This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of policies and procedures related to the design, development, testing, maintenance, operation, and surveillance of systems. See Regulation SCI Adopting Release, *supra* note 498, at 72377.

⁵⁰⁵ \$47,000/25 Participants = \$1,880 per Participant.

⁵⁰⁶ The Commission’s estimate includes 5 hours by a senior systems analyst, 2 hours by a compliance attorney, and 3 hours by a webmaster. (5 hours for senior systems analyst = \$1,455) + (2

would incur an initial, one-time expense of approximately \$119.⁵⁰⁷ Furthermore, to maintain the required detailed design specifications, the Commission preliminarily estimates that the Participants would incur an ongoing expense of approximately \$48,250 per year, or that each Participant would incur an ongoing, annual expense of approximately \$1,930, based on a preliminary estimate that Plan Processor staff would need approximately 145 hours per year to maintain the required detailed design specifications.⁵⁰⁸

b. Implementation and Operation Requirements

For the Plan Processor to evaluate each Participant’s SAW to confirm that the SAW has achieved compliance with the detailed design specifications required by proposed Section 6.13(b)(i), the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$463,750, or that each Participant would incur an initial, one-time expense of \$18,550, based on a preliminary estimate that Plan Processor staff would need approximately 45 hours per SAW to perform the required evaluation and notification of the Operating Committee.⁵⁰⁹

hours for compliance attorney = \$748) + (3 hours for webmaster = \$762) = \$2,965.

⁵⁰⁷ \$2,965/25 Participants = \$118.60 per Participant.

⁵⁰⁸ The estimated 145 hours of Plan Processor staff time include 100 hours by a senior systems analyst, 30 hours by a compliance attorney, 10 hours by the chief compliance officer, and 5 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$48,250. (100 hours for senior systems analyst = \$29,100) + (30 hours for compliance attorney = \$11,220) + (10 hours for chief compliance officer = \$5,430) + (5 hours for director of compliance = \$2,500) = \$48,250. Each Participant would therefore incur an ongoing annual expense of \$1,930. \$48,250/25 Participants = \$1,930 per Participant. This estimate is based on burdens estimated in the adopting release for Regulation SCI for the development of policies and procedures related to the design, development, testing, maintenance, operation, and surveillance of systems. See Regulation SCI Adopting Release, *supra* note 498, at 72377. To the extent that the CISO consults with the Security Working Group regarding the development and maintenance of the required detailed design specifications, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵⁰⁹ The estimated 45 hours of Plan Processor staff time include 20 hours by a senior systems analyst, 20 hours by the chief information security officer, and 5 hours by a compliance attorney. Assuming each Participant will only have one SAW, the Commission therefore preliminarily estimates that the Participants would together incur an initial, one-time expense of \$18,550 per SAW, or an initial, one-time expense of \$463,750. (20 hours for senior systems analyst = \$5,820) + (20 hours for chief information security officer = \$10,860) + (5 hours

Continued

For the Plan Processor to build automated systems that will enable monitoring of the SAWs, the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of \$52,350, or that each Participant would incur an initial, one-time expense of \$2,094, based on a preliminary estimate that Plan Processor staff would need approximately 170 hours to build the required systems.⁵¹⁰ For the Plan Processor to maintain such systems and to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i), the Commission preliminarily estimates that the Participants would incur an ongoing annual expense of approximately \$629,220, or that each Participant would incur an ongoing annual expense of approximately \$25,169, based on a preliminary estimate that Plan Processor staff would need approximately 2,150 hours to maintain the required systems and to conduct such monitoring.⁵¹¹ For the

for compliance attorney = \$1,870) = \$18,550 per SAW. \$18,550 * 25 Participants = \$463,750. Each Participant would therefore incur an initial, one-time expense of \$18,550. \$463,750/25 Participants = \$18,550 per Participant. To the extent that the CISO consults with the Security Working Group regarding the evaluation or validation of the SAWs, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵¹⁰ Because the SAWs should all be implementing the CISP according to the detailed design specifications developed by the Plan Processor, the Commission preliminarily believes that much of the monitoring required by the proposed amendments could be automated. To build a system that would enable such monitoring, the Commission preliminarily believes that Plan Processor would require 170 hours, including 40 hours by a senior programmer, 40 hours by 3 programmers, and 10 hours by the CISO. Accordingly, the Commission preliminarily estimates that the Participants would together incur an initial, one-time expense of \$52,350. (40 hours for senior programmer = \$13,560) + (40 hours for programmer = \$11,120) + (40 hours for programmer = \$11,120) + (40 hours for programmer = \$11,120) + (10 hours for CISO = \$5,430) = \$52,350. Each Participant would therefore incur an initial, one-time expense of \$2,094. \$52,350/25 Participants = \$2,094. To the extent that the CISO consults with the Security Working Group regarding the build of such monitoring systems, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵¹¹ The Commission preliminarily believes that one senior systems analyst working 40 hours per week could conduct the required monitoring for all SAWs. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$605,280. 40 hours * 52 weeks = 2,080 hours. 2,080 hours for senior systems analyst = \$605,280. Each Participant would therefore incur an ongoing annual expense of \$24,211.20. \$605,280/25 Participants = \$24,211.20. In addition, to maintain the automated monitoring systems, the Commission preliminarily estimates that Plan Processor staff would need 70 hours, including 30 hours for a senior programmer, 30 hours for a programmer, and 10 hours for the CISO. Accordingly, the Commission preliminarily

estimates that the Participants would together incur an ongoing annual expense of \$23,940. (30 hours for senior programmer = \$10,170) + (30 hours for programmer = \$8,340) + (10 hours for CISO = \$5,430) = \$23,940. Each Participant would therefore incur an ongoing annual expense of \$957.60. \$23,940/25 Participants = \$957.60 per Participant. Altogether, the ongoing annual expenses to the Participants as a whole would be \$629,220, or \$25,168.80 for each individual Participant. \$605,280 + \$23,940 = \$629,220. \$629,220/25 Participants = \$25,168.80 per Participant. To the extent that the CISO consults with the Security Working Group regarding SAW monitoring or the results of such monitoring, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

c. Non-SAW Environments

i. Application Materials

The Commission preliminarily estimates that 6 Participants will apply for an exception to the SAW usage requirements, based on the assumption that one exchange family will seek an exception.⁵¹³ In connection with the

estimates that the Participants would together incur an ongoing annual expense of \$23,940. (30 hours for senior programmer = \$10,170) + (30 hours for programmer = \$8,340) + (10 hours for CISO = \$5,430) = \$23,940. Each Participant would therefore incur an ongoing annual expense of \$957.60. \$23,940/25 Participants = \$957.60 per Participant. Altogether, the ongoing annual expenses to the Participants as a whole would be \$629,220, or \$25,168.80 for each individual Participant. \$605,280 + \$23,940 = \$629,220. \$629,220/25 Participants = \$25,168.80 per Participant. To the extent that the CISO consults with the Security Working Group regarding SAW monitoring or the results of such monitoring, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵¹² The Commission preliminarily estimates that the Plan Processor would identify 5 non-compliance events per year for each SAW or, assuming that each Participant only has one SAW, 125 non-compliance events across all SAWs. 5 events per SAW * 25 SAWs = 125 events. For each non-compliance event, the Commission preliminarily estimates that the Plan Processor will spend 1.5 hours notifying the Participant of the identified non-compliance, including 0.5 hours by a senior systems analyst, 0.25 hours by a compliance manager, 0.25 hours by an attorney, and 0.5 hours by a senior business analyst. (0.5 hours for senior systems analyst = \$145.50) + (0.25 for compliance manager = \$79.25) + (0.25 for attorney = \$106.50) + (0.5 hours for senior business analyst = \$140.50) = \$471.75 per event. This estimate is based on estimates set forth in the Regulation SCI Adopting Release for oral notifications of SCI events, as the Commission preliminarily expects that such notifications would typically be provided orally on a phone call or in a short email. See Regulation SCI Adopting Release, *supra* note 498, at 72384. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$58,968.75. 125 events * \$471.75 = \$58,968.75. Each Participant would therefore incur an ongoing annual expense of \$2,358.75. \$58,968.75/25 Participants = \$2,358.75. To the extent that the CISO consults with the Security Working Group regarding any non-compliance events, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵¹³ For example, there are six Participants in the Cboe Global Markets, Inc. exchange group, six Participants in the Nasdaq, Inc. exchange group, and five Participants in the Intercontinental

initial application for an exception, the Commission further estimates that each of these Participants would spend an initial, one-time amount of approximately \$250,000 on external consulting costs to obtain the required security assessment from a named and independent third party security assessor and approximately 270 hours to provide the required detailed design specifications.⁵¹⁴ The Commission further estimates that the each Participant would spend 5 hours submitting these materials to the CCO, the CISO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group.⁵¹⁵ Accordingly, with respect to initial application materials, the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$1,500,000⁵¹⁶ and an initial, one-time burden of approximately 1,650 hours.⁵¹⁷

Under the proposed amendments, Participants that are denied an exception or that want to apply for a continuance must submit a new security assessment that complies with the requirement of proposed Section 6.13(d)(i)(A)(1) and up-to-date versions of the design specifications required by proposed Section 6.13(d)(i)(A)(2). The Commission preliminarily believes that the cost to obtain a new security assessment would still be \$250,000 in these scenarios, because the Participants would have to obtain the security assessment from a named and independent third party security assessor that might not be able to leverage previous work. However, the Commission preliminarily believes that each Participant would only incur about half of the hourly burdens associated with preparation of initial application materials to prepare the updated detailed design specifications needed to support a re-application or an application for a continuance, because

Exchange, Inc. exchange group. All estimates in this section represent an average; the Commission believes that some Participants may incur greater costs and some lesser costs due to variances in economies of scale for Participants who share a common corporate parent.

⁵¹⁴ The estimated 270 hours include 200 hours by a senior systems analyst, 40 hours by a compliance attorney, 20 hours by the chief compliance officer, and 10 hours by a director of compliance. These estimates mirror the estimated hours for the Plan Processor to perform the similar task of developing the detailed design specifications for the SAWs.

⁵¹⁵ The estimated 5 hours include 5 hours by a compliance attorney.

⁵¹⁶ \$250,000 per non-SAW environment * 6 non-SAW environments = \$1,500,000.

⁵¹⁷ 270 hours + 5 hours = 275 hours per non-SAW environment. 275 hours per non-SAW environment * 6 non-SAW environments = 1,650 hours.

the Commission believes that each Participant would be able to significantly leverage its previous work. Accordingly, the Commission preliminarily estimates that each of these Participants would spend an ongoing annual⁵¹⁸ amount of approximately \$250,000 on external consulting costs to obtain the required security assessment from a named and independent third party and approximately 135 hours to provide the required detailed design specifications.⁵¹⁹ The Commission further estimates that each Participant would spend 5 hours submitting these materials to the CCO, the CISO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group.⁵²⁰ Accordingly, with respect to updated application materials submitted in connection with a re-application or an application for a continuance, the Commission preliminarily estimates that the Participants would incur an ongoing annual expense of approximately \$1,500,000⁵²¹ and an ongoing annual burden of approximately 840 hours.⁵²²

ii. Exception and Revocation Determinations

In connection with the requirement that the Plan Processor develop policies and procedures governing the review of applications for exceptions to the proposed SAW usage requirements, the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of \$63,400, or that each Participant would incur an initial, one-time expense of \$2,536,

based on a preliminary estimate that Plan Processor staff would need approximately 130 hours to develop such policies and procedures.⁵²³ The Commission also preliminarily estimates that the Participants would incur an ongoing annual expense of \$31,700, or that each Participant would incur an ongoing annual expense of approximately \$1,268, based on a preliminary estimate that Plan Processor staff would need approximately 65 hours to maintain and update such policies and procedures as needed.⁵²⁴

As noted above, the Commission preliminarily estimates that 6 Participants will apply for an exception to the SAW usage requirements. In connection with initial applications for an exception, the Commission also preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$550,560, or that each Participant would incur an initial, one-time expense of \$22,022, based on a preliminary estimate that Plan Processor staff would need approximately 200 hours per initial application to review the application and issue the required determination and supporting written statement.⁵²⁵ The Commission

preliminarily believes that the ongoing annual expenses associated with each application for a continued exception would be the same, as the process for continued exceptions is the same as the process for initial applications. Therefore, in connection with applications for a continued exception, the Commission preliminarily estimates that the Participants would incur an ongoing annual expense of approximately \$550,560, or that each Participant would incur an ongoing annual expense of \$22,022, based on a preliminary estimate that Plan Processor staff would need approximately 200 hours per application to review the application and issue the required determination and supporting written statement.⁵²⁶

The Commission is unable to estimate in advance whether Participants would submit their application materials for a continued exception on time or whether Participants would be denied a continued exception by the CISO and the CCO. For each such instance, however, the Commission preliminarily believes that the Participants would incur an ongoing annual expense of approximately \$17,510, or that each Participant would incur an ongoing annual expense of approximately \$700, based on a preliminary estimate that Plan Processor staff would need approximately 40 hours to revoke an exception and to determine on which remediation timeframe the Participant should be required to cease using its non-SAW environment to access CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 of the CAT NMS Plan.⁵²⁷

costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵²⁶ The estimated 200 hours of Plan Processor staff time include 60 hours by the CCO, 60 hours by the CISO, 40 hours by a senior systems analyst, and 40 hours by a compliance attorney. Assuming that 6 Participants will apply for a continued exception to use a non-SAW environment, and that 6 Participants will submit their application materials on time, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$550,560. (60 hours by the CCO = \$32,580) + (60 hours by the CISO = \$32,580) + (40 hours for senior systems analyst = \$11,640) + (40 hours for compliance attorney = \$14,960) = \$91,760 per application. \$91,760 * 6 Participants = \$550,560. Each Participant would therefore incur an ongoing annual expense of \$22,022.40. \$550,560/25 Participants = \$22,022.40 per Participant. To the extent that the CISO consults with the Security Working Group regarding these applications, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*. To the extent that Participants fail to submit their continuance application materials on time, the costs associated with continuance determinations would be lower.

⁵²⁷ The estimated 40 hours of Plan Processor staff time include 10 hours by the CCO, 10 hours by the

⁵¹⁸ Participants that are denied an exception and re-apply may incur these ongoing costs more quickly than Participants that are initially granted an exception and subsequently seek a continuance. For example, a denied Participant might incur these ongoing costs approximately 90 days after submitting its initial application materials, whereas a Participant that is initially granted an exception may not incur these costs for 11 months. Nevertheless, the Commission preliminarily believes these costs and burdens will most likely be incurred annually in both scenarios, in part because Participants that re-apply are unlikely to be denied an exception twice. The proposed amendments require the CISO and the CCO to detail the deficiencies in a denied Participant's application, thus making it easier for the Participant to correct such deficiencies. See proposed Section 6.13(d)(i)(B)(2); proposed Section 6.13(d)(ii)(B)(2).

⁵¹⁹ The estimated 135 hours include 100 hours by a senior systems analyst, 20 hours by a compliance attorney, 10 hours by the chief compliance officer, and 5 hours by a director of compliance.

⁵²⁰ The estimated 5 hours include 5 hours by a compliance attorney.

⁵²¹ \$250,000 per non-SAW environment * 6 non-SAW environments = \$1,500,000.

⁵²² 135 hours + 5 hours = 140 hours per non-SAW environment. 140 hours per non-SAW environment * 6 non-SAW environments = 840 hours.

⁵²³ The estimated 130 hours of Plan Processor staff time include 40 hours by the CISO, 40 hours by the CCO, 40 hours by a compliance attorney, and 10 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$63,400. (40 hours for CISO = \$21,720) + (40 hours for CCO = \$21,720) + (40 hours for compliance attorney = \$14,960) + (10 hours for director of compliance = \$5,000) = \$63,400. Each Participant would therefore incur an ongoing annual expense of \$2,536. \$63,400/25 Participants = \$2,536 per Participant.

⁵²⁴ The estimated 65 hours of Plan Processor staff time include 20 hours by the CISO, 20 hours by the CCO, 20 hours by a compliance attorney, and 5 hours by a director of compliance. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$31,700. (20 hours by the CISO = \$10,860) + (20 hours by the CCO = \$10,860) + (20 hours for compliance attorney = \$7,480) + (5 hours for director of compliance = \$2,500) = \$31,700. Each Participant would therefore incur an ongoing annual expense of \$1,268. \$31,700/25 Participants = \$1,268 per Participant.

⁵²⁵ The estimated 200 hours of Plan Processor staff time include 60 hours by the CCO, 60 hours by the CISO, 40 hours by a senior systems analyst, and 40 hours by a compliance attorney. Assuming only 6 Participants will apply for an exception to use a non-SAW environment, the Commission preliminarily estimates that the Participants would together incur an initial, one-time expense of \$550,560. (60 hours by the CCO = \$32,580) + (60 hours by the CISO = \$32,580) + (40 hours for senior systems analyst = \$11,640) + (40 hours for compliance attorney = \$14,960) = \$91,760 per initial application. \$91,760 * 6 Participants = \$550,560. Each Participant would therefore incur an initial, one-time expense of \$22,022.40. \$550,560/25 Participants = \$22,022.40 per Participant. To the extent that the CISO consults with the Security Working Group regarding these applications, those

iii. Non-SAW Environment Implementation and Operation Requirements

The requirement that the Plan Processor notify the Operating Committee that a non-SAW environment has achieved compliance with the detailed design specifications submitted by a Participant as part of its application for an exception (or continuance) largely mirrors the proposed requirements set forth for SAWs.⁵²⁸ However, as noted above, the Commission preliminarily believes that only 6 Participants will apply for an exception to use a non-SAW environment, such that the Plan Processor will only need to evaluate 6 non-SAW environments.⁵²⁹ As the above estimates set forth for SAWs assume that the Plan Processor will need to perform this task for 25 SAWs,⁵³⁰ instead of for 6 environments, the Commission has correspondingly reduced the preliminary estimates described above for the Plan Processor to evaluate each Participant's SAW and notify the Operating Committee. Accordingly, the Commission preliminarily estimates that the Participants would incur an initial, one-time expense of approximately \$111,300, or that each Participant would incur an initial, one-time expense of \$4,452, based on a preliminary estimate that Plan Processor staff would need approximately 45 hours per non-SAW environment to perform the required evaluation and notification.⁵³¹

CISO, 10 hours by a senior systems analyst, and 10 hours by a compliance attorney. The Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$17,510. (10 hours by the CCO = \$5,430) + (10 hours by the CISO = \$5,430) + (10 hours for senior systems analyst = \$2,910) + (10 hours for compliance attorney = \$3,740) = \$17,510 per application. Each Participant would therefore incur an ongoing annual expense of \$700.40. \$17,510/25 Participants = \$700.40 per Participant. To the extent that the CISO consults with the Security Working Group regarding such a decision, those costs have already been accounted for elsewhere. *See* Part III.D.2. *supra*. To the extent that Participants that are denied a continuance, or that fail to submit their continuance application materials on time, do not re-apply for an exception, the ongoing annual costs detailed above for preparation of application materials and for exception determinations would be lower.

⁵²⁸ *See, e.g.,* proposed Section 6.13(b); *see also* Part III.D.3.b. *supra*.

⁵²⁹ *See* note 513 and associated text *supra*.

⁵³⁰ *See* note 509 and associated text *supra*.

⁵³¹ The estimated 45 hours of Plan Processor staff time include 20 hours by a senior systems analyst, 20 hours by the chief information security officer, and 5 hours by a compliance attorney. Assuming only 6 Participants will apply for an exception to use a non-SAW environment, the Commission preliminarily estimates that the Participants would together incur an initial, one-time expense of \$111,300. (20 hours for senior systems analyst = \$5,820) + (20 hours for chief information security

The requirement that the Plan Processor monitor the non-SAW environment in accordance with the detailed design specifications submitted with the exception (or continuance) application and notify the Participant of any identified non-compliance with such detailed design specifications largely mirrors the proposed requirements set forth for SAWs.⁵³² However, as explained above, the Commission preliminarily believes that only 6 Participants will apply for an exception to use a non-SAW environment and has correspondingly reduced the preliminary estimates described above for the Plan Processor to monitor each SAW and notify Participants of any identified non-compliance.⁵³³ Accordingly, for the Plan Processor to monitor non-SAW environments for compliance with the detailed design specifications submitted with the exception (or continuance) application, the Commission preliminarily estimates that the Participants would incur an ongoing annual expense of approximately \$302,640, or that each Participant would incur an ongoing annual expense of approximately \$12,106, based on a preliminary estimate that Plan Processor staff would need approximately 1,040 hours to conduct such monitoring.⁵³⁴ For the Plan Processor to notify the Participant of any identified non-compliance with the detailed design

officer = \$10,860) + (5 hours for compliance attorney = \$1,870) = \$18,550 per non-SAW environment. \$18,550 * 6 Participants = \$111,300. Each Participant would therefore incur an initial, one-time expense of \$4,452. \$111,300/25 Participants = \$4,452 per Participant. To the extent that the CISO consults with the Security Working Group regarding the evaluation of the non-SAW environments, those costs have already been accounted for elsewhere. *See* Part III.D.2. *supra*.

⁵³² *See* proposed Section 6.13(c)(i); *see also* Part III.D.3.b. *supra*.

⁵³³ For the purposes of this section, the Commission preliminarily estimates that all Participants will choose to utilize a SAW in some capacity, but that only 6 Participants will choose to apply for an exception to use a non-SAW environment to access CAT Data through the user-defined direct query and bulk extraction tools. *See* note 513 and associated text *supra*.

⁵³⁴ Because Participants seeking an exception are required to demonstrate the extent to which non-SAW environments are consistent with the detailed design specifications developed by the Plan Processor for SAWs, the Commission preliminarily believes that much of the monitoring required by the proposed amendments could be automated. Therefore, the Commission preliminarily believes that a senior systems analyst working 20 hours per week could perform the required monitoring for all non-SAW environments. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$302,640. 20 hours * 52 weeks = 1,040 hours. 1,040 hours for senior systems analyst = \$302,640. Each Participant would therefore incur an ongoing annual expense of \$12,106.60. \$302,640/25 Participants = \$12,106.60.

specifications, the Commission preliminarily estimates that the Participants would incur an ongoing annual expense of approximately \$14,153, or that each Participant would incur an ongoing annual expense of approximately \$566, based on a preliminary estimate that Plan Processor staff would need approximately 1.5 hours for each notification of non-compliance.⁵³⁵

Finally, with respect to the requirement that each Participant using a non-SAW environment simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment, the Commission preliminarily believes that 6 Participants would apply for an exception to use a non-SAW environment and that each of these Participants would need to simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of a material change to its security controls approximately 4 times a year. The Commission also preliminarily believes that each such notification would require 15 burden hours.⁵³⁶

⁵³⁵ The Commission preliminarily estimates that the Plan Processor would identify 5 non-compliance events per year for each non-SAW environment, or, assuming that only 6 Participants have non-SAW environments, 30 non-compliance events across all non-SAW environments. 5 events per non-SAW environment * 6 non-SAW environments = 30 events. For each non-compliance event, the Commission preliminarily estimates that the Plan Processor will spend 1.5 hours notifying the Participant of the identified non-compliance, including 0.5 hours by a senior systems analyst, 0.25 hours by a compliance manager, 0.25 hours by an attorney, and 0.5 hours by a senior business analyst. (0.5 hours for senior systems analyst = \$145.50) + (0.25 for compliance manager = \$79.25) + (0.25 for attorney = \$106.50) + (0.5 hours for senior business analyst = \$140.50) = \$471.75 per event. This estimate is based on estimates set forth in the Regulation SCI Adopting Release for oral notifications of SCI events, as the Commission preliminarily believes that such notifications would typically be provided orally on a conference call or in a short email to all relevant parties. *See* Regulation SCI Adopting Release, *supra* note 498, at 72384. Accordingly, the Commission preliminarily estimates that the Participants would together incur an ongoing annual expense of \$14,152.50. 30 events * \$471.75 = \$14,152.50. Each Participant would therefore incur an ongoing annual expense of \$566.10. \$14,152.50/25 Participants = \$566.10. To the extent that the CISO consults with the Security Working Group regarding any non-compliance events, those costs have already been accounted for elsewhere. *See* Part III.D.2. *supra*.

⁵³⁶ This estimate includes 10 hours by a senior systems analyst, 3 hours by a compliance attorney, and 2 hours by the chief information security officer.

Accordingly, the Commission preliminarily estimates that the Participants would incur an ongoing annual burden of approximately 360 hours, or that each Participant would incur an ongoing annual burden of approximately 60 hours.⁵³⁷

4. Online Targeted Query Tool and Logging of Access and Extraction

The CAT NMS Plan currently states that the logs required by Appendix D, Section 8.1.1 of the CAT NMS Plan are to be submitted to the Operating Committee on a monthly basis. The Commission preliminarily estimates that the ongoing burden of Participants to review the newly required information in these logs, through the Operating Committee, would be an estimated 10 aggregate internal burden hours each month. The Commission preliminarily believes it is reasonable to estimate aggregate internal burden hours because the obligation to receive and review the logs required by Appendix D, Section 8.1.1 is with the Operating Committee itself and is not an obligation of individual Participants. This results in an estimated annual ongoing total burden of 120 burden hours for Participants,⁵³⁸ or an annual burden of 4.8 burden hours for each Participant.⁵³⁹

The Commission preliminarily estimates that the Participants would incur an initial, one-time external expense of \$87,960, or a per Participant expense of \$3,518.40⁵⁴⁰ for Plan Processor staff time required to make the initial necessary programming and systems changes to log delivery of results and the access and extraction of CAT Data, based on a preliminarily estimate that it would take 260 hours of Plan Processor staff time to implement these changes.⁵⁴¹ The Commission

preliminarily estimates that the Participants would incur an annual ongoing external expense of \$5,100, or \$204 per Participant,⁵⁴² for Plan Processor staff time required to generate and provide the additional information required by proposed Section Appendix D, Section 8.1.1, which the Commission preliminarily estimates to be 2 hours for each monthly report or 24 hours annually.⁵⁴³

5. CAT Customer and Account Attributes

The Commission preliminarily estimates that the one-time burden to Industry Members to modify systems to report a Transformed Value to the CAT instead of SSNs or ITINs per the proposed amendment to Section 6.4(d)(ii)(D), will be minimal. However, the Commission preliminarily believes there will be a cost to install and test the transformation logic. As proposed, Industry Members would use the CCID Transformation Logic in conjunction with an API provided by the Plan Processor and the only cost to Industry Members will be installation and testing of the transformation logic. The Commission estimates that the one-time burden to each Industry Member to install and test this technology will be 80 staff burden hours per Industry Member or 120,000 hours in the aggregate.⁵⁴⁴ The Commission believes that the on-going annual burden to report the Transformed Value will be the same as the burden to report a SSN or ITIN once the CCID Transformation Logic is installed.

The Commission estimates that the modifications necessary to the CAT System to develop the CCID Subsystem

to generate Customer-IDs using Transformed Values, as opposed to SSNs or ITINs, would result in an initial, one-time aggregate external cost of \$650,052 for the Participants,⁵⁴⁵ or \$26,002 for each Participant.⁵⁴⁶ This estimated one-time aggregate external cost represents ten percent of Commission's estimate in the CAT NMS Approval Order to develop the Central Repository, of which the CCID Subsystem is a part.⁵⁴⁷

The CAT NMS Plan, Article VI, Section 6.6(b)(ii)(A), currently requires the CCO to oversee the Regular Written Assessment of the Plan Processor's performance, which must be provided to the Commission at least annually and which must include an evaluation of the performance of the CAT.⁵⁴⁸ As proposed, Appendix D, Section 9.1 requires an evaluation of the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s) to be included in each such annual Regular Written Assessment of the Plan Processor's Performance.

In the CAT NMS Plan Adopting Release, the Commission estimated that the annual on-going cost of preparing the Regular Written Assessment would be 171.43 ongoing burden hours per Participant, plus \$1,000 of external costs for outsourced legal counsel per Participant per year, for an estimated aggregate annual ongoing burden of approximately 3,600.03 hours and an estimated aggregate ongoing external cost of \$21,000.⁵⁴⁹ The amendments propose a new method for creating a Customer-ID that involve a new CCID

To the extent that the CISO consults with the Security Working Group regarding notifications of material changes to security controls, those costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵³⁷ 15 hours per notification * 4 notifications per year = 60 hours per year. 60 hours per year * 6 non-SAW environments = 360 hours.

⁵³⁸ 12 months * 10 hours = 120 burden hours.

⁵³⁹ 120 burden hours/25 Participants = 4.8 burden hours per Participant.

⁵⁴⁰ \$87,960/25 Participants = \$3,518.40 per Participant.

⁵⁴¹ The estimated 260 hours of Plan Processor staff time include 160 hours by a Senior Programmer, 40 hours by a Senior Database Administrator, 40 hours for a Senior Business Analyst and 20 hours for an Attorney. The Commission is basing this figure on the estimated internal burden for a broker-dealer that handles orders subject to customer specific disclosures required by Rule 606(b)(3) to both update its data capture systems in-house and format the report required by Rule 606. See Securities Exchange Act Release No. 84528 (November 2, 2018), 83 FR 58338, 58383 (November 19, 2018) ("Rule 606

Adopting Release"). The Commission preliminarily estimates that the initial, one-time external expense for Participants will be \$87,960 = (Senior Programmer for 160 hours at \$339 an hour = \$54,240) + (Senior Database Administrator for 40 hours at \$349 an hour = \$13,960) + (Senior Business Analyst for 40 hours at \$281 an hour = \$11,240) + (Attorney for 20 hours at \$426 an hour = \$8,520).

⁵⁴² \$5,100/25 Participants = \$204 per Participant.

⁵⁴³ The estimated 2 hours of Plan Processor staff time include 1 hour by a Programmer Analyst and 1 hour by a Junior Business Analyst. This estimate would apply monthly, meaning the annual ongoing estimate would be 24 hours of Plan Processor staff time, which would include 12 hours by a Programmer Analyst and 12 hours by a Junior Business Analyst. The Commission is basing this figure on the estimated internal burden for broker-dealer that handle relevant orders and respond in-house to a customer request under Rule 606(b)(3). See Rule 606 Adopting Release, *supra* note 541, at 58385. The Commission preliminarily estimates the annual ongoing external cost to generate and provide the proposed information on logs would be \$5,100 = (Programmer Analyst for 12 hours at \$246 per hour = \$2,952) + (Junior Business Analyst for 12 hours at \$179 an hour = \$2,148).

⁵⁴⁴ 80 burden hours * 1,500 Industry Members = 120,000.

⁵⁴⁵ The Commission preliminarily estimates the one-time aggregate external cost to update the CAT System to ingest and use the Transformed Value reported by Industry Members would be \$650,052. The Commission preliminarily believes that this modification will take an estimated 2,101 hours of Plan Processor staff time including 130 hours by the CCO, 130 hours by the CISO, 602 hours by a Senior Programmer and 1239 hours by a Program Analyst. Accordingly, the Commission preliminarily estimates that the Participants would together incur a one-time aggregated external cost \$650,052. (Chief Compliance Officer for 130 hours at \$543 per hour = \$70,590) + (Chief Information Security Officer for 130 hours at \$543 per hour = \$70,590) + (Senior Programmer for 602 hours at \$339 = \$204,078) + (Program Analyst for 1239 hours at \$246 = \$304,794) = \$650,052. \$650,052/25 Participants = \$26,002/Participant.

⁵⁴⁶ \$650,052/25 Participants = \$26,002 per Participant.

⁵⁴⁷ See CAT NMS Approval Order, *supra* note 3, at 84918. ("[T]he Commission estimates that the initial one-time cost to develop the Central Repository would be an aggregate initial external cost to the Participants of \$65 million, or \$3,095,238.09 per Participant.")

⁵⁴⁸ See CAT NMS Plan, *supra* note 3, Section 6.6(b)(ii)(A).

⁵⁴⁹ See CAT NMS Plan Approval Order, *supra* note 3, at 84925–6

Subsystem, which performs a two-phase transformation of a Customer's ITIN/SSN in order to create a Customer-ID; thus, the Commission preliminarily believes there is added complexity to the process for creating a Customer-ID. Due to this increase in complexity, the Commission preliminarily estimates that assessment the CCID subsystem require an additional 50 ongoing burden hours of internal legal, compliance, business operations, and information technology, per Participant, for an aggregate ongoing burden of approximately 1,250 hours.⁵⁵⁰

6. Customer Identifying Systems Workflow

The Commission preliminarily believes that the requirement that the Plan Processor maintain a full audit trail of access to Customer Identifying Systems by each Participant and the Commission (who accessed what data within each Participant, and when) and provide such audit trail of each Participant's and the Commission's access to each the Participant and the Commission for their respective users on a monthly basis, and the requirement to provide the Operating Committee with the daily reports that list all users who are entitled to Customer Identifying Systems access on a monthly basis⁵⁵¹ will require 4 hours of Plan Processor Staff time per report and will result in an aggregate ongoing annual external cost to the Participants of \$373,464 per year or \$14,939 per Participant.⁵⁵² This cost represents approximately \$700 per monthly report—one monthly report to the Operating Committee, and the daily reports of all users to the Operating Committee on a monthly basis. This estimate recognizes that Plan Processor currently is required to collect the audit trail information and create the daily reports of all users entitled to access Customer and Account Attributes. The Commission does not believe that the compilation of new reports will require the Plan Processor to gather any new information, but would however require the re-packaging of information to provide to the Participants and the

Operating Committee according to the amended requirements of Appendix D, Section 9.1.⁵⁵³

The Commission cannot precisely estimate the number of Participants that will apply for authorization to use Programmatic CAIS Access and/or Programmatic CCID Subsystem Access.⁵⁵⁴ As noted above, the Commission does not believe that all the Participants require programmatic access to conduct effect surveillance. The Commission preliminarily believes that number of Participants that may apply for such access will range from 1 to 25 Participants. The Commission is taking a conservative approach and preliminarily estimating that 25 Participants will submit an application.

In connection with the application for authorization, the Commission preliminarily estimates that each of these Participants would incur a one-time burden of 50 burden hours to prepare each application for authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access and have that application approved by the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation).⁵⁵⁵ Accordingly, with respect to preparation and review of the application that seeks Programmatic CAIS and/or Programmatic CCID Subsystem Access, the Commission preliminarily estimates that the Participants would incur a one-time burden of approximately 1,250 hours per application.⁵⁵⁶

7. Proposed Confidentiality Policies, Procedures and Usage Restrictions

The Commission preliminarily believes that proposed Section 6.5(g) creates three different types of paperwork burdens: (i) A third-party

disclosure burden relating to preparation, review and public disclosure of the Proposed Confidentiality Policies; (ii) a recordkeeping burden associated with the related documentation, procedures, and usage restriction controls required by the Proposed Confidentiality Policies; and (iii) a reporting burden associated with the annual requirement to provide the Commission an examination report in Section 6.5(g)(v).

Data Confidentiality Policies—Identical Policies

The Commission preliminarily estimates that the hourly burden of preparing, reviewing and approving the Proposed Confidentiality Policies would be an aggregate 500 hours for the Participants, or 20 hours for each individual Participant.⁵⁵⁷ This estimation includes burden hours associated with: (i) Preparing and reviewing the identical policies required by Section 6.5(g)(i); (2) making the policies publicly available on each of the Participant websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information as required by Section 6.5(g)(iv); and (3) Operating Committee review and approval as required by Section 6.5(g)(vi).⁵⁵⁸ The Commission believes that Participants already have individual policies and procedures relating to the confidentiality of CAT Data, as required by existing provisions of the CAT NMS Plan, and Participants can use these existing policies and procedures in order to help prepare, review and approve the policies and procedures required by proposed Section 6.5(g)(i).

The Commission preliminarily estimates that it would require 10 hours by the CCO and 10 hours by the CISO, both employees of the Plan Processor and not the Participants, to review the Proposed Confidentiality Policies, as required by proposed Sections 6.2(a)(v)(R) and 6.2(b)(viii). The Commission preliminarily estimates that this would result in a one-time external cost of \$10,860 for Participants,⁵⁵⁹ or \$434.40 for each Participant.⁵⁶⁰ The Commission also

⁵⁵⁰ 50 burden hours × 25 Participants = 1,250 hours.

⁵⁵¹ See proposed Appendix D, Section 4.1.6.

⁵⁵² The Commission estimates that each monthly report will require 2 hours by an Operations Specialist, 1 hour by an Attorney, and 1 hour by the Chief Compliance Officer. The ongoing aggregate cost for Participants is preliminarily estimated to be \$373,464. (2 hours for Operational Specialist × \$140 = \$280) + (1 hours for compliance attorney × \$374 = \$374) + (1 hour for chief compliance officer × \$543 = \$543) = \$1,197. \$1,197 × 12 months = \$14,364. \$14,364 × 25 Participants + the Commission = \$373,464. Each Participant would therefore incur an ongoing annual expense of \$14,939 (\$373,464/25 Participants).

⁵⁵³ The Commission preliminarily believes that creation of the monthly reports documentation necessary for "allow listing" could require legal advice, discussions with staff familiar with CAT security and higher level discussions and analysis. The estimated 30 hours of Plan Processor staff time include 5 hours by an Attorney, 5 hours by an Operations Specialist, 10 hours by the Chief Compliance Officer and 10 hours by the Chief Information Security Officer. The initial, one-time aggregate external cost for Participants is preliminarily estimated to be \$13,690 = (Attorney for 5 hours at \$426 per hour = \$2,130) + (Operations Specialist for 5 hours at \$140 per hour = \$700) + (Chief Compliance Officer for 10 hours at \$543 per hour = \$5,430) + (Chief Information Security Officer for 10 hours at \$543 per hour = \$5,430).

⁵⁵⁴ See proposed Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

⁵⁵⁵ This estimate of 50 burden hours include 15 hours by an Attorney, 10 hours by a Compliance Manager, 10 hours by an Operations Specialist, 15 hours by a Chief Compliance Officer.

⁵⁵⁶ 50 hours per application × 25 Participants = 1,250 hours.

⁵⁵⁷ 500 hours/25 Participants = 20 hours per Participant.

⁵⁵⁸ To the extent that the CISO consults with the Security Working Group regarding the development and approval of the Proposed Confidentiality Policies, those burdens and costs have already been accounted for elsewhere. See Part III.D.2. *supra*.

⁵⁵⁹ \$10,860 = (Chief Compliance Officer for 10 hours at \$543 per hour = \$5,430) + (Chief Information Security Officer for 10 hours at \$543 per hour = \$5,430).

⁵⁶⁰ \$10,860/25 Participants = \$434.40 per Participant.

preliminarily believes that the Participants will consult with outside legal counsel in the drafting of the Proposed Confidentiality Policies, and estimates this external cost to be \$50,000, or \$2,000⁵⁶¹ for each Participant.⁵⁶² The Commission believes that the total initial one-time external cost burden for each Participant will be \$2,434.40, or \$60,860 for all Participants.⁵⁶³

The Commission preliminarily estimates that Participants will require 100 burden hours annually to comply with proposed Section 6.5(g)(ii), which requires the Participants to periodically review the effectiveness of the policies required by Section 6.5(g)(i), including by using the monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and take prompt action to remedy deficiencies in such policies. The Commission preliminarily believes it is appropriate to estimate that review of and updates to the Proposed Confidentiality Policies should be one-fifth the burden hours necessary for initially creating and approving the Proposed Confidentiality Policies because the Commission preliminarily believes it should take substantially less time and effort to review and update the Proposed Confidentiality Policies than in initially creating and approving them. This estimated burden includes any updates to the Proposed Confidentiality Policies initiated by the Participants, based on their review pursuant to proposed Section 6.5(g)(ii) or based on changed regulatory needs.

For purposes of this Paperwork Reduction Act analysis only, the Commission preliminarily estimates that the Participants would revise the Proposed Confidentiality Policies once a year, which would require review by the CCO and CISO of the Plan Processor, as required by proposed Sections 6.2(a)(v)(R) and 6.2(b)(viii). The Commission preliminarily believes that the CCO and CISO would require less time to review subsequent updates to the Proposed Confidentiality Policies, so the Commission preliminarily estimates that it would require 5 hours of review by the CCO and 5 hours of review by the CISO, which would result in an external cost of \$5,430 for the Participants,⁵⁶⁴

and \$217.20 for each Participant annually.⁵⁶⁵ In addition, the Commission preliminarily estimates that Participants will consult with outside legal counsel in updating the Proposed Confidentiality Policies, and preliminarily estimates this external cost to be \$5,000.⁵⁶⁶ In total, the Commission preliminarily estimates an aggregate external cost of \$10,430 for all Participants related to reviewing and updating the Proposed Confidentiality Policies, or \$417.20 per Participant.⁵⁶⁷

Data Confidentiality Policies— Procedures and Usage Restriction Controls

The Commission preliminarily estimates that each Participant would require an average of 282 burden hours to initially develop and draft the procedures and usage restriction controls required by proposed Section 6.5(g)(i).⁵⁶⁸ The Commission preliminarily believes that this estimation should include all initial reporting burdens associated with the procedures and usage restriction controls required by Section 6.5(g)(i), such as the requirement to implement effective information barriers between such Participants' Regulatory Staff and non-Regulatory Staff with regard to access and use of CAT Data, the requirement to document each instance of access by non-Regulatory Staff as proposed in Section 6.5(g)(i)(E) and the requirement that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer

Security Officer for 5 hours at \$543 per hour = \$2,715).

⁵⁶⁵ \$5,430/25 Participants = \$217.20 per Participant.

⁵⁶⁶ \$5,000 = (outside legal counsel for 10 hours at \$500 an hour).

⁵⁶⁷ \$10,430/25 Participants = \$417.20 per Participant.

⁵⁶⁸ This estimate of 282 burden hours include 96 hours by an Attorney, 96 hours by a Compliance Manager, 30 hours by a Senior Systems Analyst, 30 hours by an Operations Specialist, 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance. The Commission is basing this estimate on the estimated burden for SCI entities, that participated in the "ARP Inspection Program," to initially develop and draft the policies and procedures required by Rule 1001(a) (except for the policies and procedures for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a matter that facilitates the successful collection, processing, and dissemination of market data). See Regulation SCI Adopting Release, *supra* note 54 at 72377. The Commission believes this comparison is appropriate because Participants should already have some internal policies and procedures that could be enhanced to comply with the new proposed requirements of Section 6.5(g)(i).

Identifying Systems Workflow as proposed in Section 6.5(g)(i)(I).

The Commission preliminarily estimates that the ongoing annual burden of maintaining and reviewing the procedures and usage restriction controls required by Section 6.5(g)(i), including by using monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and taking prompt action to remedy deficiencies in such policies, procedures and usage restriction controls as required by proposed Section 6.5(g)(ii), would be 87 burden hours for each Participant,⁵⁶⁹ or 2,175 burden hours for all Participants.⁵⁷⁰ The Commission preliminarily believes that this estimation includes all ongoing reporting burdens associated with the procedures and usage restriction controls required by Section 6.5(g)(i), such as the requirement to document each instance of access by non-Regulatory Staff as proposed in Section 6.5(g)(i)(E) or the requirement that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow as proposed in Section 6.5(g)(i)(I). This estimation also includes the hourly burden associated with proposed Section 6.5(g)(iii), which requires each Participant, as reasonably practicable, and in any event within 24 hours of becoming aware, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee, any instance of noncompliance with the policies, procedures, and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i).⁵⁷¹

⁵⁶⁹ This estimate of 87 hours includes 28 hours by an Attorney, 28 hours by a Compliance Manager, 8 hours by a Senior Systems analyst, 8 hours by an Operations Specialist, 10 hours by a Chief Compliance Officer and 5 hours by a Director of Compliance. This estimate of 87 hours annually is based on the estimated burden for SCI entities, that participated in the "ARP Inspection Program," to review and update policies and procedures required by Rule 1001(a) (except for the policies and procedures for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a matter that facilitates the successful collection, processing, and dissemination of market data). See Regulation SCI Adopting Release, *supra* note 54, at 72377.

⁵⁷⁰ 87 burden hours × 25 Participants = 2,175 burden hours.

⁵⁷¹ Proposed Section 6.5(g)(iii) also requires reporting of any instance a Participant becomes aware of a breach of the security of the CAT, but this obligation is a pre-existing obligation and not a new information collection requirement. See CAT NMS Plan, *supra* note 3, at Section 6.5(f)(iii).

⁵⁶¹ \$50,000/25 Participants = \$2,000 per Participant.

⁵⁶² \$50,000 = (100 hours at \$500 an hour). For purposes of this Paperwork Reduction Act analysis, the Commission is estimating the cost of outside legal counsel to be \$500 an hour.

⁵⁶³ \$2,434.40 × 25 Participants = \$60,860.

⁵⁶⁴ \$5,430 = (Chief Compliance Officer for 5 hours at \$543 per hour = 2,715) + (Chief Information

Data Confidentiality Policies— Examination Report

The Commission preliminarily believes that Participants will incur annual hour burdens to comply with proposed Section 6.5(g)(v), which the Commission preliminarily estimates to be 15 hours for each Participant, or 375 hours for all Participants.⁵⁷² The Commission believes that this burden hour estimation includes the staff time necessary to engage an independent accountant, staff time required to allow the independent auditor to review compliance and prepare the examination report and the staff time required to submit the examination report to the Commission. The Commission believes that proposed Section 6.5(g)(v) does not require Participants to review and respond to the examination report, and only requires a Participant to submit the prepared examination report to the Commission. However, the Commission notes that such examination report may require Participants to take action pursuant to proposed Section 6.5(g)(ii) or Section 6.5(g)(iii), including updating policies, procedures and usage restrictions, but such burdens are accounted for in other areas of this Paperwork Reduction Act analysis.⁵⁷³

The Commission preliminarily estimates that the external cost of compliance with Section 6.5(g)(v), which requires each Participant to engage an independent accountant to perform an examination of compliance with the policies required by Section 6.5(g)(i) and submit the examination report to the Commission, would be \$57,460 for each Participant,⁵⁷⁴ or \$1,436,500 for all Participants.⁵⁷⁵ The Commission preliminarily believes that this would be the average cost of engaging an independent accountant to perform the necessary examination on an annual basis.

8. Secure Connectivity—“Allow Listing”

The Commission estimates that the proposed amendment to Appendix D, Section 4.1.1 of the CAT NMS Plan, requiring the Plan Processor to implement capabilities to allow access (*i.e.*, “allow list”) only to those countries or more granular access points where CAT reporting or regulatory use is both necessary and expected would result in an initial, one-time aggregate external cost of \$13,690 for the Participants, or \$547.60 for each Participant.⁵⁷⁶ This cost represents expenses associated with Plan Processor staff time required to develop the list of discrete access points that are approved for use, which the Commission estimates would be 30 hours of staff time.⁵⁷⁷ In addition, the Commission estimates that Participants will incur an aggregate ongoing external cost burden of \$1,226, or \$49.04 for each Participant,⁵⁷⁸ for Plan Processor staff time required to maintain and update the list of discrete access points, which the Commission estimates would be 3 hours of staff time.⁵⁷⁹

The Commission estimates that the proposed requirement that the Plan Processor develop policies and procedures to allow access if the source location for a particular instance of access cannot be determined technologically, as required by proposed Appendix D, Section 4.1.1 of the CAT NMS Plan, would require an aggregate one-time initial external cost of \$19,430

⁵⁷⁶ \$13,690/25 Participants = \$547.60 per Participant.

⁵⁷⁷ The Commission preliminarily believes that creation of the documentation necessary for “allow listing” could require legal advice, discussions with staff familiar with CAT security and higher level discussions and analysis. The estimated 30 hours of Plan Processor staff time include 5 hours by an Attorney, 5 hours by an Operations Specialist, 10 hours by the Chief Compliance Officer and 10 hours by the Chief Information Security Officer. The initial, one-time aggregate cost for Participants is preliminarily estimated to be \$ = \$13,690 (Attorney for 5 hours at \$426 per hour = \$2,130) + (Operations Specialist for 5 hours at \$140 per hour = \$700) + (Chief Compliance Officer for 10 hours at \$543 per hour = \$5,430) + (Chief Information Security Officer for 10 hours at \$543 per hour = \$5,430).

⁵⁷⁸ \$1,226/25 Participants = \$49.04 per Participant.

⁵⁷⁹ The Commission believes it is appropriate to estimate that the Plan Processor staff time required to maintain and update the list as approximately one-tenth the staff time required to initially create the list. Specifically, the estimated aggregate ongoing external cost is based on an estimate of 3 hours of Plan Processor staff time include 1 hour by an Operations Specialist, 1 hour by the Chief Compliance Officer and 1 hour by the Chief Information Security Officer. The estimated aggregate ongoing external cost is preliminarily estimated to be \$1,226 = (Operations Specialist for 1 hour at \$140) + (Chief Compliance Officer for 1 hour at \$543) + (Chief Information Security Officer for 1 hour at \$543).

for the Participants, or \$777.20 for each individual Participant.⁵⁸⁰ This cost represents expenses associated with Plan Processor staff time required to create these policies and procedures, which the Commission estimates would be 50 hours of staff time.⁵⁸¹ Further, the Commission estimates that the Participants will incur an aggregate ongoing external cost of \$1,943, or \$77.72 for each individual Participant,⁵⁸² for Plan Processor staff time required to maintain, update and enforce these policies and procedures, which the Commission estimates would be 5 hours of staff time.⁵⁸³

9. Breach Management Policies and Procedures

The Commission preliminarily believes that the proposed changes to Section 4.1.5 of the CAT NMS Plan creates new information collections associated with revising, maintaining and enforcing the policies and procedures and the cyber incident response plan in a manner consistent with the proposed requirements of Section 4.1.5 and the breach notification requirement.

The Plan Processor is already required to establish policies and procedures and a cyber incident response plan pursuant to Section 4.1.5 of the CAT NMS Plan, so the Commission believes it is appropriate to estimate a burden of revising breach management policies and procedures and the cyber incident response plan relate to the new

⁵⁸⁰ \$19,430/25 Participants = \$777.20 per Participant.

⁵⁸¹ The estimate 50 hours of Plan Processor staff time include 10 hours by an Attorney, 10 hours by a Senior Systems Analyst, 10 hours by an Operations Specialist, 10 hours by the Chief Compliance Officer and 10 hours by the Chief Information Security Officer. The initial, one-time aggregate cost for Participants is preliminarily estimated to be \$19,430 = (Attorney for 10 hours at \$426 per hour = \$4,260) + (Senior Systems Analyst for 10 hours at \$291 per hour = \$2,910) + (Operations Specialist for 10 hours at \$140 per hour = \$1,400) + (Chief Compliance Officer for 10 hours at \$543 per hour = \$5,430) + (Chief Information Security Officer for 10 hours at \$543 per hour = \$5,430).

⁵⁸² \$1,943/25 Participants = \$77.72 per Participant.

⁵⁸³ The Commission believes it is appropriate to estimate that the Plan Processor staff time required to maintain, update and enforce these policies and procedures should be approximately one-tenth the staff time required to initially create these policies and procedures. Specifically, the Commission estimates 5 hours of Plan Processor staff time that includes 1 hour by an Attorney, 1 hour by a Senior Systems Analyst, 1 hour by an Operations Specialist, 1 hour by the Chief Compliance Officer and 1 hour by the Chief Information Security Officer. The ongoing external cost is preliminarily estimated to be \$1,943 = (Attorney for 1 hour at \$426) + (Senior Systems Analyst for 1 hour at \$291) + (Operations Specialist for 1 hour at \$140) + (Chief Compliance Officer for 1 hour at \$543) + (Chief Information Security Officer for 1 hour at \$543).

⁵⁷² 15 hours × 25 Participants = 375 hours.

⁵⁷³ See *supra* Part III.D.5.

⁵⁷⁴ The Commission is basing this estimate based on the number of estimated hours of work by a Manager Internal Audit would be required to comply with Rule 1003(b)(1) of Regulation SCI, which requires each SCI entity to conduct an SCI review of its compliance with Regulation SCI not less than once each calendar year, with certain exceptions. See Regulation SCI Adopting Release, *supra* note 54, at 72391. Specifically, the Commission preliminarily estimates it would require 170 hours by a Manager Internal Audit to perform the examination. The preliminary estimated cost of engaging an independent accountant to perform the examination of compliance and submit an examination report is \$57,460 (Manager Internal Audit at \$338 an hour for 170 hours).

⁵⁷⁵ \$57,460 × 25 Participants = \$1,436,500.

elements required by proposed Section 4.1.5 of the CAT NMS Plan. The Commission preliminarily believes that these requirements would result in a one-time external cost of \$49,805 for Participants, or \$1,992.20 per Participant,⁵⁸⁴ based on the Commission's estimation that it would require approximately 124 Plan Processor staff hours to incorporate the new elements required by proposed Section 4.1.5 of the CAT NMS Plan.⁵⁸⁵ The Commission believes that there would be an initial internal burden of 25 hours for the Participants, or 1 hour per Participant⁵⁸⁶ for review and approval of the updated cyber incident response plan by the Operating Committee.

Further, the Commission estimates that the Participants will incur an aggregate ongoing external cost of \$42,205, or \$1,688.20 for each individual Participant,⁵⁸⁷ for Plan Processor staff time required to maintain, update and enforce these policies and procedures and the cyber incident response plan, which the Commission estimates would be 103 hours of Plan Processor staff time annually.⁵⁸⁸ This external cost estimate

⁵⁸⁴ \$49,805/25 Participants = \$1,992.20 per Participant.

⁵⁸⁵ The estimate of 124 hours of Plan Processor staff time include 32 hours by an Attorney, 32 hours by a Compliance Manager, 10 hours by a Senior Systems Analyst, 10 hours by an Operations Specialist, 20 hours by the Chief Compliance Officer and 20 hours by the Chief Information Security Officer. The Commission is basing this estimation on the estimated initial burden to implement corrective action processes required by Rule 1002(a) of Regulation SCI. See Regulation SCI Adopting Release, *supra* note 54, at 72393. The total estimated one-time external cost for Participants is \$49,805 = (Attorney for 32 hours at \$426 per hour = \$13,631) + (Compliance Manager for 32 hours at \$317 per hour = \$10,144) + (Senior Systems Analyst for 10 hours at \$291 per hour = \$2,910) + (Operations Specialist for 10 hours at \$140 per hour = \$1,400) + (Chief Compliance Officer for 20 hours at \$543 per hour = \$10,860) + (Chief Information Security Officer for \$543 per hour = \$10,860).

⁵⁸⁶ 25 hours/25 Participants = 1 hour per Participant.

⁵⁸⁷ \$42,205/25 Participants = \$1,688.20 per Participant.

⁵⁸⁸ The estimated aggregate ongoing external cost is based on an estimate of 103 hours of Plan Processor staff time that includes 23 hours by an Attorney, 23 hours by a Compliance Manager, 16 hours by a Senior Systems Analyst, 3 hours by an Operations Specialist, 9 hours by an Assistant General Counsel, 17 hours by the Chief Compliance Officer and 12 hours by the Chief Information Security Officer. The Commission is basing this estimate on the ongoing burden to implement corrective action processes required by Rule 1002(a) of Regulation SCI and estimated burden for providing written notifications of Regulation SCI events under Rule 1002(b)(2). See Regulation SCI Adopting Release, *supra* note 54 at 72384 and 72393–94. The estimated aggregate ongoing external cost is preliminarily estimated to be \$42,205 = (Attorney for 23 hours at \$426 per hour = \$9,798) + (Compliance Manager for 23 hours at \$317 per

includes enforcement of the requirements of the cyber incident response plan relating to the proposed breach notification requirement,⁵⁸⁹ as well as staff time for documenting breaches that the Plan processor reasonably estimates would have no impact or a de minimis impact on the Plan Processor's operations or on market participants.⁵⁹⁰

Cumulatively, the Commission preliminarily estimates that to implement the changes proposed in Section 4.1.5 of the CAT NMS Plan, each Participant will incur an initial hourly burden of 1 hour, or 25 hours for all Participants, an initial one-time external cost burden of \$1,992.20, or \$49,805 for all Participants, and an ongoing annual external cost burden of \$42,205 for all Participants, or \$1,688.20 for each individual Participant.⁵⁹¹

hour = \$7,291) + (Senior Systems Analyst for 16 hours at \$291 per hour = \$4,656) + (Operations Specialist for 3 hours at \$140 per hour = \$420) + (Assistant General Counsel for 9 hours at \$477 per hour = \$4,293) + (Chief Compliance Officer for 17 hours at \$543 per hour = \$9,231) + (Chief Security Officer for 12 hours at \$543 per hour = \$6,516).

⁵⁸⁹ The Commission preliminarily estimates that this requirement will require 34 hours of staff time annually from the Plan Processor, resulting in an ongoing annual external cost burden of \$13,756 for the Participants, or \$550.24 for each Participant (\$13,756/25 Participants). The 34 hours include 8 hours by an Attorney (Attorney for 8 hours at \$426 an hour = \$3,408), 8 hours by a Compliance Manager (Compliance Manager for \$317 an hour = \$2,536), 7 hours by a Senior Systems Analyst (Senior Systems Analyst for 7 hours at \$291 an hour = \$2,037), 3 hours by an Assistant General Counsel (Assistant General Counsel for 3 hours at \$477 per hour = \$1,431), 4 hours by a Chief Compliance Officer (Chief Compliance Officer for 4 hours at \$543 per hour = \$2,172) and 4 hours by the Chief Information Security Officer (Chief Information Security Officer for 4 hours at \$543 per hour = \$2,172) = \$13,756. This estimate relates only to the proposed requirement that the Plan Processor provide breach notifications and does not include other costs related to breaches, such as determination of whether a breach has occurred or assessing the scope of any breach, which is already required by the CAT NMS Plan.

⁵⁹⁰ The Commission preliminarily estimates that this requirement will require 30 hours of staff time annually from the Plan Processor, resulting in an ongoing annual external cost of \$12,324 to the Participants, or \$492.96 per Participant (\$12,324/25 Participants). The 30 hours include 6 hours by an Attorney, 6 hours by a Compliance Manager, 6 hours by a Senior Systems Analyst, 6 hours by an Assistant General Counsel, 3 hours by the Chief Compliance Officer and 3 hours by the Chief Information Security Officer. The ongoing external cost of this obligation is preliminarily estimated to be \$12,324 = (Attorney for 6 hours at \$426 per hour = \$2,556) + (Compliance Manager for 6 hours at \$317 per hour = \$1,902) + (Senior Systems Analyst for 6 hours at \$291 per hour = \$1,746) + (Assistant General Counsel for 6 hours at \$477 per hour = \$2,862) + (Chief Compliance Officer for 3 hours at \$543 per hour = \$1,629) + (Chief Information Security Officer for 3 hours at \$543 per hour = \$1,629).

⁵⁹¹ \$42,205/25 Participants = \$1,688.20 per Participant.

10. Customer Information for Allocation Report Firm Designated IDs

The Commission preliminarily believes that this requirement is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235–0671.⁵⁹² Specifically, the CAT NMS Plan Approval Order takes into account requirements on broker-dealer members to record and report CAT Data to the Central Repository in accordance with specified timelines, including customer information.

E. Collection of Information Is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

F. Confidentiality of Responses to Collection of Information

The Commission preliminarily believes that all information required to be submitted to the Commission under the proposed amendments, including the evaluation of the Plan Processor's performance under proposed Section 6.6(b)(ii)(B)(3), the examination reports required by proposed Section 6.5(g)(v), the application materials for non-SAW environments as required under proposed Section 6.13(d), the annual Regular Written Assessment of the Plan Processor under proposed Section 6.6(b)(ii)(A) and the application for Programmatic CAIS Access and Programmatic CCID Subsystem Access under proposed Appendix D, Section 4.1.6 should be protected from disclosure subject to the provisions of applicable law.⁵⁹³

Public disclosure of other collections of information could raise concerns about the security of the CAT and therefore the Commission preliminarily believes that the Plan Processor and the Participants, as applicable, would keep these materials confidential.⁵⁹⁴ Such

⁵⁹² See, CAT NMS Plan Approval Order, *supra* note 3, at 84911–43.

⁵⁹³ See, e.g., 5 U.S.C. 552 *et seq.*; 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

⁵⁹⁴ The Participants must comply with the security plan developed by the Plan Processor pursuant to Appendix D, Section 4.1 of the CAT NMS Plan and any security-related policies and procedures developed pursuant to Regulation SCI. See CAT NMS Plan, *supra* note 3, at Appendix D, Section 4.1 (requiring the Plan Processor to provide to the Operating Committee a comprehensive security plan, including a process for responding to security incidents and reporting of such incidents); 17 CFR 242.1001 (requiring each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that

Continued

collections of information include the development of SAW-specific provisions for the CISP and related policies, procedures, and security controls required pursuant to proposed Section 6.13(a); the development of the detailed design specifications required pursuant to proposed Section 6.13(b)(i); the evaluation of each Participant's SAW and related notification to the Operating Committee under proposed Section 6.13(b)(ii), the monitoring of SAWs and non-SAW environments and notification of non-compliance events required by proposed Section 6.13(c)(i) and proposed Section 6.13(d)(iii); the collection of application materials for an exception to the proposed SAW usage requirements pursuant to proposed Section 6.13(d); the development of policies and procedures for review of such applications and the issuance of exceptions to the SAW usage requirements by the CISO and the CCO pursuant to proposed Section 6.13(d); and the audit trail of access to Customer Identifying Systems and the daily reports of users entitled to access Customer Identifying Systems as required by the proposed amendments to Section 4.1.6 of Appendix D.

Finally, the policies required by proposed Section 6.5(g)(i) would not be confidential. Rather, the proposed rule would require Participants to make the policies required by Section 6.5(g)(i) publicly available on each of the Participant websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information.

G. Retention Period for Recordkeeping Requirements

National securities exchanges and national securities associations would be required to retain records and information pursuant to Rule 17a-1 under the Exchange Act.⁵⁹⁵ The Plan Processor would be required to retain the information reported to Rule 613(c)(7) and (e)(6) for a period of not less than five years.⁵⁹⁶

its SCI systems have levels of security adequate to maintain operational capabilities and promote the maintenance of fair and orderly markets). In some cases, non-member invitees of the Security Working Group may be given access to otherwise confidential information, but the Commission believes that the CISO and the Operating Committee should consider requiring any non-member invitees sign a non-disclosure agreement or adhere to some other protocol designed to prevent the release of confidential information regarding the security of the CAT System. Members of the Security Working Group (and their designees) would be subject to the confidentiality obligations set forth in Section 9.6 of the CAT NMS Plan.

⁵⁹⁵ See 17 CFR 242.17a-1.

⁵⁹⁶ See 17 CFR 242.613.

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

175. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

176. Evaluate the accuracy of our estimates of the burden of the proposed collection of information;

177. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

178. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File Number 4-698. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number 4-698 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549-2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IV. Economic Analysis

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and 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 would promote efficiency, competition, and capital formation.⁵⁹⁷ In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.⁵⁹⁸

⁵⁹⁷ 15 U.S.C. 78c(f).

⁵⁹⁸ 15 U.S.C. 78w(a)(2).

Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The discussion below addresses the likely economic effects of the proposed rule, including the likely effect of the proposed rule on efficiency, competition, and capital formation.

The Commission is proposing amendments to the CAT NMS Plan that would (1) define the scope of the current information security program; (2) require the Operating Committee to establish and maintain a security-focused working group; (3) require the Plan Processor to create SAWs, direct Participants to use such workspaces to access and analyze PII and CAT Data obtained through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) of the CAT NMS Plan, set forth requirements for the data extraction, security, implementation and operational controls that will apply to such workspaces, and provide an exception process that will enable Participants to use the user-defined direct query and bulk extract tools in other environments; (4) limit the amount of CAT Data that can be extracted from the Central Repository outside of a secure analytical workspace through the online targeted query tool described in Section 6.10(c)(i)(A) of the CAT NMS Plan and require the Plan Processor to implement more stringent monitoring controls on such data; (5) impose requirements related to the reporting of certain PII; (6) define the workflow process that should be applied to govern access to customer and account attributes that will still be reported to the Central Repository; (7) modify and supplement existing requirements relating to Participant policies and procedures regarding the confidentiality of CAT Data; (8) refine the existing requirement that CAT Data be used only for regulatory or surveillance purposes; (9) codify existing practices and enhance the security of connectivity to the CAT infrastructure; (10) require the formal cyber incident response plan to incorporate corrective actions and breach notifications; (11) amend reporting requirements relating to Firm Designated IDs and Allocation Reports; and (12) clarify that Appendix C of the CAT NMS Plan has not been updated to reflect subsequent amendments to the CAT NMS Plan.

A. Analysis of Baseline, Costs and Benefits

The Commission preliminarily believes the proposed amendments would improve the security of CAT Data through a number of mechanisms. The amendments are likely to reduce the attack surface of CAT by further limiting the extraction of CAT Data beyond the security perimeter of the CAT System. In addition, the proposed amendments may increase the uniformity of security monitoring across environments from which CAT Data is accessed and

analyzed by facilitating centralized monitoring by the Plan Processor. In addition, the Commission preliminarily believes that provisions allowing for exceptions to the SAW usage requirement may allow Participants to achieve or maintain the security standards required by the CAT NMS Plan more efficiently. Additional effects upon efficiency and competition are discussed in Part IV.B.

The Commission preliminarily believes that provisions of the proposed amendments outside of the SAW use requirement will result in one-time

costs of approximately \$2.0MM.⁵⁹⁹ In addition, these provisions of the proposed amendments would result in ongoing annual costs of approximately \$5.9MM.⁶⁰⁰ The Commission also preliminarily estimates that depending on the number of Participants that choose to work within SAWs, the SAW or exception requirement will entail \$4.9MM to \$61.6MM in initial costs and \$4.7MM to \$32.8MM in ongoing annual costs. These costs are summarized in Table 1 and Table 2⁶⁰¹ below, and discussed further in the sections that follow.

TABLE 1—SUMMARY OF COSTS OTHER THAN SAW COSTS (\$)

Activity	Participants		Plan Processor	
	Labor	External	Labor	External
Initial				
OTQT logging			88,000	
CAIS programmatic access			620,200	
Policies and procedures	1,155,900	50,000	10,900	
Regulator and Plan Processor access			10,300	
Secure connectivity			33,100	
Breach management policies and procedures	9,500		49,800	
Total One-Time Costs	1,165,400		812,300	
Annual				
CISP	106,400	9,000	129,900	
Security Working Group	2,056,600		310,000	
OTQT logging	970,200		5,100	
Customer Identifying Systems Workflow			373,500	
Policies and procedures	480,600	1,442,500	5,400	
Secure connectivity			3,100	
Breach management policies and procedures			42,200	
Total ongoing annual costs	3,613,800	1,451,500	869,200	

1. CISP

In Section 6.12, the Plan requires the Plan Processor to develop and maintain an information security program for the Central Repository. Section 4 of Appendix D sets out information security requirements that cover “all components of the CAT System” and is not limited to the Central Repository.⁶⁰²

To more explicitly define the scope of the information security program referenced in Section 6.12, the proposed amendments would define the term “Comprehensive Information Security Program”⁶⁰³ (CISP) to encompass the Plan Processor and the CAT System, including any systems provided or managed by external contractors, organizations or other sources.

Additionally, the scope of the CISP would include the SAWs.⁶⁰⁴

The Commission preliminarily believes that the benefit of this provision of the proposed amendments is a potential improvement to the efficiency of CAT implementation by specifically defining the scope of the information security program required by the CAT NMS Plan to the extent that the Participants did not understand that these requirements applied to the Plan Processor, the entire CAT System, and external parties. Section 6.12 of the CAT NMS Plan requires the Plan Processor to develop and maintain an information security program for the Central Repository that, at a minimum, meets the security requirements set forth in Section 4 of Appendix D to the CAT

NMS Plan.⁶⁰⁵ If Participants do not apply the Plan Processor’s information security program to the Plan Processor and the entire CAT System, including any components of the CAT System managed by external providers, the proposed amendments may increase the efficiency by which the CAT is implemented by preventing Participants from investing in initial implementations that do not meet CAT NMS Plan requirements.

The proposed amendments would newly require the CCO to evaluate elements of the CISP that relate to SAWs as part of the regular written assessment and, in collaboration with the CISO, to include a review of the quantity and type of CAT Data extracted from the CAT System to assess the security risk

⁵⁹⁹ (\$1,165,400 + \$812,300) = \$1,977,700.

⁶⁰⁰ (\$3,613,800 + \$1,451,500 + \$869,200) = \$5,934,500.

⁶⁰¹ See *infra* Part IV.A.3.

⁶⁰² See *supra* Part II.A.

⁶⁰³ “Comprehensive Information Security Program” includes the organization-wide and system-specific controls and related policies and procedures required by NIST SP 800–53 that address information security for the information and information systems that support the operations of the Plan Processor and the CAT

System, including those provided or managed by an external organization, contractor, or source, inclusive of Secure Analytical Workspaces. See *supra* Part II.A.

⁶⁰⁴ *Id.*

⁶⁰⁵ See *supra* Part II.A.

of permitting such CAT Data to be extracted.⁶⁰⁶ The Commission preliminarily believes that the Plan Processor⁶⁰⁷ will incur expenses of \$129,900⁶⁰⁸ annually to execute this requirement.

The Plan provides for the Participants to review and comment on the regular written assessment provided by the Plan Processor.⁶⁰⁹ The proposed amendments newly require the CCO to evaluate the CISP, which includes SAWs, as part of the regular written assessment which the Participants must review each year.⁶¹⁰ The Commission preliminarily believes that Participants that are part of a larger exchange group will perform this task at the group ("Participant Group") level of organization because doing so will reduce duplication of effort.⁶¹¹ The Commission preliminarily believes that Participants would spend \$106,400⁶¹² in labor costs to perform this review, as well as incurring \$9,000 in external legal costs in performing this review and providing comments upon it.

2. Security Working Group

Although the Plan does not require formation of a Security Working Group, the Operating Committee has established such a group, which currently includes the CISO, and chief information security officers and/or other security experts from each Participant.⁶¹³ The extant Security Working Group makes recommendations to the Operating

Committee regarding technical issues related to the security of the CAT, but has no formal charter or mandate outlining its responsibilities or ensuring its continued existence.

To provide support and additional resources to the CISO, the proposed amendments would require the Operating Committee to establish and maintain a security working group composed of the CISO and the chief information security officer or deputy chief information security officer of each Participant.⁶¹⁴ Currently, the Plan does not include a requirement for the Security Working Group. The Plan also does not require that the membership of this group will have a sufficient level of security expertise. Further, without language in the Plan describing the group's role, there is no requirement that the group will participate in decisions that will affect CAT Data security, such as in evaluating exception requests. Consequently, the Commission preliminarily believes that the degree to which this group will improve decisions affecting CAT Data at present and in the future is uncertain. The Commission preliminarily believes that the provisions of the proposed amendments that codify the existence of the Security Working Group and describe its role will improve the security of CAT Data in several ways.

First, although a security working group has been established by the Participants already, its existence is not codified in the Plan. Including these provisions in the Plan will assure the group's continued activity.

Second, the Commission preliminarily believes that these proposed amendments may improve CAT Data security because they provide the Security Working Group with a broad mandate to advise the CISO and the Operating Committee on critical security-related issues. Further, defining the membership of the Security Working Group may improve the quality of recommendations emanating from the Security Working Group, as the group already established by the Operating Committee does not currently require the participation of the chief information security officer or deputy chief information security officer of each Participant. The proposed amendments also permit the CISO to invite non-Security Working Group members to attend. Including subject matter experts outside of the Participants and Plan Processor that are knowledgeable about security may broaden or deepen the level of expertise brought to bear.

Because the Security Working Group is not required by the Plan, the Plan has no defined role as it would under the proposed amendments. For example, the proposed amendments require that the Security Working Group advise the CISO and the Operating Committee with information technology matters that pertain to the development of the CAT System. Such issues are likely to be complex and technical. To the extent that the proposed amendments result in the involvement of a range of individuals with expertise in assessing organizational-level security issues for complex information systems, the proposed amendments may result in additional security issues being considered and considered more thoroughly by the CISO and Operating Committee.

The Commission preliminarily believes however, that there are potential conflicts of interest in involving the Security Working Group in the review of certain issues. For example, the proposed amendments call for the members of the Security Working Group (and their designees) to receive application materials for exceptions to the requirement that Participants use Plan Processor provided SAWs to access and analyze CAT Data using the user defined direct query tool and bulk extract tools. To the extent that the Participant members of the Security Working Group (and their designees) also plan to obtain or maintain exceptions to the SAW requirement, they may be less critical of other Participants' application materials. Alternatively, to the extent that Participant members of the Security Working Group (and their designees) plan to use the Plan Processor's SAWs, they may be more critical of other Participants' exception application materials. Competitive relationships between Participants may also affect how Security Working Group members (and their designees) evaluate such applications. The Commission preliminarily believes that this concern is largely mitigated by its preliminary belief that Participants will adopt a variety of approaches to complying with the SAW usage requirement,⁶¹⁵ so reviews of these application materials are likely to reflect a variety of viewpoints. To the extent that Participants' decisions do not reflect a variety of approaches, the Commission recognizes that the potential conflicts of interest may be more pronounced. Furthermore, the exception application procedure does not require a vote of the Security Working Group, so the

⁶⁰⁶ See *supra* Part III.D.1.

⁶⁰⁷ Costs attributed to the Plan Processor will be passed on to Participants and Industry Members according to a fee schedule that has not yet been approved by the Commission. See CAT NMS Plan, *supra* note 3, at Section 11.3.

⁶⁰⁸ See *supra* note 489.

⁶⁰⁹ *Id.*

⁶¹⁰ See *supra* Part II.A.

⁶¹¹ See *infra* Part IV.B.1 for a discussion of organization of exchanges into groups. There are nine Participant Groups. Four of these groups operate a single exchange while four control multiple exchanges. FINRA, the sole national securities association, comprises the final Participant Group.

⁶¹² Throughout this Economic Analysis, the Commission derives estimated costs associated with staff time based on per hour figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation based on Bureau of Labor Statistics data on CPI-U between January 2013 and January 2020 (a factor of 1.12). Labor costs include 15 hours of attorney labor and 10 hours of chief compliance officer labor per Participant Group. (15 hours × \$426/hour + 10 hours × \$543/hour) = \$11,820. (\$11,820 per group × 9 groups) = \$106,380. (\$1,000 per group × 9 groups) = \$9,000.

⁶¹³ See https://www.catnmsplan.com/sites/default/files/2020-01/FINRA-CAT-Security-Approach-Overview_20190828.pdf.

⁶¹⁴ See *supra* Part II.B.

⁶¹⁵ See *infra* Part IV.A.3.a.

Commission preliminarily believes that in the Security Working Group's advisory role to the CISO and Operating Committee, a conflict of interest in providing feedback on a competitor's SAW exception application is less likely to be a significant factor in a Participant's ability to secure an exception. Finally, the Commission believes that the Participants are incentivized to avoid security problems in all environments from which CAT Data is accessed and analyzed. Consequently, the Commission preliminarily believes that even if exceptions are widely sought by Participants, their Security Working Group members are likely to bring forward any problems they identify in their review of exception application materials because a data breach concerning CAT Data irrespective of its source is likely to be costly to all Participants both in remediation costs and reputation.

The Commission preliminarily estimates Participants will incur costs of approximately \$2,056,600⁶¹⁶ annually to comply with provisions of the proposed amendments related to participation in the Security Working Group. In addition, requiring the Plan Processor CISO to keep the Security Working Group apprised of relevant developments, to provide it with all information and materials necessary to fulfill its purpose, and to prepare for and attend meetings of the Security Working Group will cause the Plan Processor to incur approximately \$310,000⁶¹⁷ per year in labor costs.

3. Secure Analytical Workspaces

The Commission understands that the Participants have recently authorized the Plan Processor to build analytic

environments for the Participants.⁶¹⁸ Use of such environments is currently optional; the Participants are not required to use the analytic environments built by the Plan Processor when accessing and analyzing Customer and Account Attributes and, without the proposed amendments, could continue to access large amounts of CAT Data outside of these controlled environments.⁶¹⁹ The Commission also understands that the security controls for these analytic environments would not be implemented by one centralized party. Rather, each Participant would be responsible for the selection and implementation of security controls for its own analytic environment(s).⁶²⁰

The central repository is hosted in an Amazon Web Services ("AWS") cloud environment.⁶²¹ The Commission is aware of two Participant Groups that have presences in this environment.⁶²²

The CAT NMS Plan requires that the Plan Processor CISO "review the information security policies and procedures of the Participants that are related to the CAT to ensure that such policies and procedures are comparable to the information security policies and procedures applicable to the Central Repository."⁶²³ If the CISO finds that a Participant is not meeting this standard and if the deficiency is not promptly addressed, the CISO, in consultation with the CCO, is required by the CAT NMS Plan to notify the Operating Committee. Consequently, security within the Participants' analytic environments that access CAT Data is expected to be comparable to that of the Central Repository.

The Commission preliminarily believes that provisions of the proposed amendments that require Participants to work within SAW or non-SAW environments that have been granted an exception for the proposed SAW usage requirements set forth in proposed Section 6.13(a)(i)(B) ("Excepted Environments") would provide a number of benefits. First, to the extent that the Plan Processor implements common security controls for SAWs more uniformly than they would be under the current approach, wherein each Participant would be allowed to

implement selected security controls for its own analytic environment(s), security may improve by reducing variability in security control implementation, potentially preventing relatively weaker implementations. Second, because implementation of common security controls will be uniform, the proposed amendments may increase the ability of the Plan Processor to conduct centralized and uniform monitoring across all environments from which CAT Data is accessed and analyzed. Third, the Commission preliminarily believes that exceptions to the proposed SAW usage requirements may allow Participants to achieve or maintain the security standards required by the Plan more efficiently. Fourth, the Commission preliminarily believes that provisions in the proposed amendments that provide for a third-party annual review process for the continuance of any exceptions that are granted would provide a procedure and timeline for remedying security deficiencies in Excepted Environments.

Finally, to the extent that policies and procedures governing data security⁶²⁴ are less rigorous in application than the security provisions for SAWs in the proposed amendments, data downloaded to SAWs would be more secure than it might be in other analytic environments permitted under the CAT NMS Plan.

As discussed below, each Participant will choose whether to access CAT Data from the Plan Processor provided SAW accounts or to obtain an exception from the SAW usage requirement.⁶²⁵ The Commission cannot predict how each Participant will approach this decision, but it preliminarily believes approaches will vary across Participants due to differences in size, operations, use of RSAs and 17d-2 agreements to satisfy regulatory responsibilities, current AWS cloud presence, and membership in a Participant Group that controls multiple exchanges. Consequently, in its cost estimates the Commission includes the Plan Processor's costs of designing and implementing the SAWs, but estimates ongoing operational costs to the Participants as a range. At one end of the range, the Commission assumes that all Participants obtain exceptions to the SAW usage requirements. At the other end, the Commission assumes that all Participants work within the Plan Processor's SAWs.

The Commission recognizes that the costs the Participants incur due to the requirements of the proposed amendment is likely an overestimate

⁶¹⁶ The proposed amendments require the CISO to participate in the Security Working Group. Because the Participants have already formed a security working group that the Commission preliminarily believes meets weekly, some of the labor costs associated with this group are in the baseline. To estimate the costs attributable to the proposed amendments, the Commission assumes that on average the current security working groups' participants have hourly labor rates equivalent to a Compliance Manager (\$317 per hour). To the extent that the current Security Working Group participants have hourly labor rates that are greater than this rate, the estimated additional costs of the amendments would be reduced. Consequently, the Commission preliminarily estimates that the incremental hourly labor cost of the proposed amendments would be the difference between the estimated hourly rate of the CISO and a Compliance Manager (\$543/hour – \$317/hour) = \$226 per hour. For the CISO hourly rate calculations, the Commission uses the hourly rate for Chief Compliance Officer. 7 hours per week × 52 weeks = 364 hours of CISO labor per Participant. (364 hours per Participant × 25 Participants × \$226/hour) = \$2,056,600.

⁶¹⁷ See *supra* note 495.

⁶¹⁸ See Simon Letter, *supra* note 52, at 4–5.

⁶¹⁹ See *id.*

⁶²⁰ See *id.*

⁶²¹ See <https://aws.amazon.com/blogs/publicsector/finra-cat-selects-aws-for-consolidated-audit-trail/>.

⁶²² See <http://technology.finra.org/articles/video/trade-analytics-and-surveillance-on-aws.html> and <https://aws.amazon.com/solutions/case-studies/nasdaq-data-lake/>.

⁶²³ See CAT NMS Plan, *supra* note 3 at Section 6.2(b)(vii).

⁶²⁴ See *supra* text accompanying note 623.

⁶²⁵ See *infra* Part IV.A.3.a.

because the Commission is unable to identify costs included in the analysis that would be incurred in the absence of the proposed amendments. For example, some Participants would likely work in the Plan Processor's planned analytic environments without the proposed amendments. For those Participants, some of the costs they incur to implement their operations within the SAWs under the proposed amendments would be incurred in the baseline case, as would at least some of their ongoing costs of using SAWs. Similarly, the Plan Processor's costs to implement SAWs under the proposed amendments may include costs that would have been incurred to implement similar analytic environments without the proposed amendments.

The Commission further believes that this range does not encompass the costs

that Participants incur to perform their regulatory duties using CAT Data because Participants that seek exceptions will perform those duties in another manner, such as by working within their current analytic environments or through RSAs and 17d-2 agreements. Both of those approaches carry costs, but those costs are not consequences of the proposed amendments because the Participants currently perform their regulatory duties in a non-SAW environment. Consequently, those costs are part of the baseline.

Table 2 presents a summary of estimated costs for compliance with the proposed amendments' requirement that Participants work within a Plan Processor provided SAW or obtain an exception. The table summarizes \$274,600⁶²⁶ in initial base costs and

\$860,200 in ongoing annual base costs that are required to develop and implement the SAWs; these costs must be incurred regardless of whether any Participants choose to work within SAWs. The table then presents marginal costs for all Participants working within SAWs versus all Participants working within Excepted Environments. The Commission preliminarily estimates a range of costs for the SAW or exception requirements.⁶²⁷ All Participants working within a SAW would entail \$61.6MM⁶²⁸ in initial costs and \$32.8MM⁶²⁹ in ongoing annual costs including base costs. All Participants working in Excepted Environments would entail \$4.9MM⁶³⁰ in initial costs and \$4.7MM⁶³¹ in ongoing annual costs. These costs are broken down and discussed further in the sections that follow.

TABLE 2—COSTS FOR SAW OR EXCEPTION REQUIREMENT (\$)

Activity	Participants		Plan processor	
	Labor	External	Labor	External
Initial base costs				
Incorporate SAW requirements into CISP			89,000	27,000
Develop detailed design specifications for SAWs			56,200	47,000
Provide Participants with detailed design specifications			3,000	
Develop automated monitoring systems			52,400	
Total base initial costs			200,600	74,000
Annual Base Costs				
Maintain and monitor CISP SAW requirements			56,600	
Maintain detailed design specifications			48,300	
Additional costs for third party annual audit			150,000	
Maintain automated monitoring systems and monitor			605,300	
Total base annual costs			860,200	
Additional Costs for All Participants in SAWs				
Initial.				
Technical development costs	39,500,000			
Evaluate nine SAWs for compliance			167,000	
SAW operations implementation costs	21,700,000			
Total Additional Initial Costs	61,200,000		167,000	
Annual.				
SAW usage costs		12,900,000		
Technical maintenance costs	19,000,000			
Total Annual Additional Costs	19,000,000	12,900,000		
Additional Costs for All Participants Excepted				
Additional Initial Costs	1,289,600	2,250,000	1,048,800	
Additional Ongoing Costs	417,400	2,250,000	1,160,100	

⁶²⁶ \$200,600 + \$74,000 = \$274,600.

⁶²⁷ It is possible that this range may overestimate the costs Participants incur if some Participants can comply with the proposed amendments at a lower cost by employing 17d-2 or RSAs to avoid obtaining an exception or contracting for a SAW.

⁶²⁸ (\$61,200,000 + \$167,000 + \$200,600 + \$74,000) = \$61,641,600.

⁶²⁹ (\$19,000,000 + \$12,900,000 + \$860,200) = \$32,760,200.

⁶³⁰ (\$1,289,600 + \$2,250,000 + \$1,048,800 + \$200,600 + \$74,000) = \$4,863,000.

⁶³¹ (\$417,400 + \$2,250,000 + \$1,160,100 + \$860,200) = \$4,687,700.

a. SAW Versus Exception Decisions

Under the proposed amendments, each Participant will be required to limit some of its use of CAT Data to SAWs provided by the Plan Processor unless it obtains an exception to certain SAW usage requirements.⁶³²

Consequently, each Participant will likely meet its regulatory obligations using one or more of three approaches. First, the Participant may decide to use the Plan Processor provided SAWs that would be established under the proposed amendments. Second, the Participant may decide to apply for an exception to allow it to use a different analytic environment to access and analyze CAT Data. Third, the Participant may decide to employ a 17d-2 or RSA to discharge its regulatory responsibilities. Each of these potential approaches has direct and indirect costs to the Participant that are discussed below.

In the first approach, a Participant may elect to use a SAW provided by the Plan Processor. The costs of operating and maintaining this SAW would be paid by the Participant, and the magnitude of these costs would be dependent on the resources used by the Participant within the SAW.⁶³³ If a Participant adopts this approach, it may have lower expenses associated with maintaining its private analytic environment. However, to the degree that the Participant currently uses IT resources that it also uses for operational activities to perform its regulatory activities, this may create inefficiencies because those resources may be less utilized during hours when operational demands are lower, such as when exchanges are not operating, if it performs regulatory activities in the SAW. Under this approach, to the degree that the lack of excess operational resources limit the Participant's ability to perform its regulatory activities in-house, the Participant may be able to insource more of its regulatory activities when working in the SAW, reducing its dependence on and costs associated with 17d-2s and RSAs.⁶³⁴ Utilizing a SAW may also open competitive opportunities to the Participant to perform regulatory services for other

Participants within its SAW.⁶³⁵ Moving regulatory activities to the SAW is likely to entail significant implementation costs: the Participant would need to develop or license analytic tools for that environment or adapt its current analytical tools to that environment, and train its regulatory staff in using the SAW environment. The Commission preliminarily believes this approach is more likely to be adopted by Participants in Participant Groups that operate multiple exchanges because these costs might be spread over more exchanges,⁶³⁶ and by Participants that already have a significant cloud presence because their implementation costs would likely be lower than those for a Participant that did not have a cloud presence.

In the second approach, a Participant may apply to use a private analytical environment through the exception procedure. In this approach, the Participant would incur costs to document that its private analytic environment meets the security requirements of the proposed amendments, and to adapt its analytic tools to those requirements. Further, the Participant would incur costs associated with applying for and obtaining the exception, and complying with annual renewal requirements. The Participant may also encounter certain inefficiencies in accessing CAT Data to the extent that download speeds between the Central Repository and the private analytic environment are inferior to those within the SAW.⁶³⁷ A Participant that adopts this approach may also choose to change the scope of its use of 17d-2s and RSAs as a provider or user of regulatory services through such agreements. For example, a Participant may choose to pursue an exception to the SAW use requirement and add additional 17d-2 and RSA coverage for functions that are more difficult to perform within its private analytic environment. Alternatively, there may be analytic tools that are more efficient to use outside of SAWs, allowing a Participant to provide regulatory services to other Participants that would be less efficient to provide in the SAWs. The Commission preliminarily believes this approach is more likely to be adopted by Participants that have a significant investment in private analytic workspaces, and proprietary tools for

regulatory activities that are optimized for those workspaces.

In the third approach, a Participant would change its use of RSAs and 17d-2 agreements to avoid using a SAW or obtaining an exception to the SAW use requirement. This approach is likely to increase a Participant's expenses associated with RSAs and 17d-2 agreements, but may allow a Participant to avoid SAW expenses entirely. It is possible that even with maximal use of RSAs and 17d-2 agreements, a Participant may want to perform some regulatory functions that would not be possible with only use of the online targeted query tool. In this case, a minimal SAW would also have to be supported if the Participant did not wish to seek an exception to the SAW use requirement. The Commission preliminarily believes that this approach is most likely to be adopted by Participants that operate a single venue, and Participants that currently outsource much of their regulatory activities to other Participants. The Commission recognizes it is possible that many Participants will take this approach considering that many Participants make broad use of RSAs and 17d-2 agreements to discharge their regulatory responsibilities.

Finally, the Commission recognizes that a Participant may take a mixed approach to this decision. A Participant may elect to use the SAW for some regulatory activities, and outsource other activities that would significantly increase its use of resources in the SAW, and thus its costs of using the SAW. It is also possible that a Participant may choose to invest heavily in the SAW to compete in the market for regulatory services as an RSA provider, while also obtaining an exception to the SAW use requirement to allow it to capitalize on its current infrastructure.

b. Amendments for SAWs

The Commission is proposing amendments to the CAT NMS Plan that will require (1) the provision of SAW accounts; (2) data access and extraction policies and procedures, including SAW usage requirements; (3) security controls, policies, and procedures for SAWs; (4) implementation and operational requirements for SAWs.⁶³⁸ The Commission preliminarily believes that the proposed amendments may improve the security of CAT Data in two ways.

First, to the extent that CISP security controls are implemented more uniformly than they would be under the CAT NMS Plan, security may improve

⁶³² Participants will be able to use the online direct query tool from their own analytic environments under certain restrictions, but the number of records of CAT Data they extract, and their access to Customer Information, would be limited for this manner of access. See *supra* Part II.C and Part II.D.

⁶³³ The estimated costs of SAWs are discussed further below.

⁶³⁴ RSAs are discussed further below.

⁶³⁵ See *infra* Part IV.B.1.

⁶³⁶ Participants that operate multiple exchanges often have commonalities in data structures and rules across their exchanges that allow economies of scale in performing regulatory activities.

⁶³⁷ See *infra* Part IV.B.2.

⁶³⁸ See *supra* Part II.C.

by reducing variability in security control implementation.⁶³⁹ Currently, each Participant would be responsible for implementing security controls in their analytic environments and their approaches are likely to vary if each Participant designs those implementations to accommodate their current operations and analytic environments. This variability might result in some environments being more secure than others.⁶⁴⁰ To the extent that having the Plan Processor provide SAWs that implement common security controls reduces this variability,⁶⁴¹ these provisions may increase CAT Data security by preventing relatively weaker implementations. The Commission recognizes it is also possible that the Plan Processor's implementation might be relatively less secure than an implementation designed by an individual Participant under the current CAT NMS Plan. The Commission preliminarily believes these provisions should improve security by reducing the variability of implementations as long as the Plan Processor's implementation of common security controls is relatively secure compared to other possible approaches. Further, the Commission preliminarily believes that the requirement that the Plan Processor must evaluate and notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications before that SAW may connect to the Central Repository will further increase uniformity of security control implementations.⁶⁴²

Second, the proposed amendments may increase the uniformity of security monitoring across all environments

from which CAT Data is accessed and analyzed.⁶⁴³ By assigning this duty to a single entity, the Plan Processor, and making provisions for the uniformity of this monitoring through detailed design specifications, the proposed amendments may enhance the security of CAT Data by ensuring that security monitoring is uniform. Currently under the CAT NMS Plan, most security monitoring of environments other than the Central Repository would fall to the Participants that controlled those environments.⁶⁴⁴ To the extent that the rigor of this monitoring and the manner in which requirements were implemented varied across Participants and the Plan Processor, some environments might be more robustly monitored than others, potentially delaying the identification of security issues within less robustly monitored environments. In addition, having a single entity perform this security monitoring may improve its quality by facilitating development of expertise of the single entity performing the monitoring. To the extent that the Security Working Group participates in the development of this monitoring, expertise from the wider group of Participants might also improve the quality of monitoring. Further, the Commission preliminarily believes that standardizing implementation of security protocols through the common detailed design specifications may be more efficient than having each Participant that implements a SAW or private environment for CAT Data do so independently because it avoids duplication of effort. This may also improve efficiency by reducing the

complexity of security monitoring of environments from which CAT Data is accessed and analyzed because the detailed design specifications will include provisions that facilitate this central monitoring.

Finally, the Commission preliminarily believes that provisions of the proposed amendments that establish security controls, policies, and procedures for SAWs may improve CAT Data security. Currently, under the CAT NMS Plan, Participants must establish security protocols comparable to those required for the central repository for all environments from which Participants access CAT Data.⁶⁴⁵ The proposed amendments require that SAWs comply with the same security standards as the Central Repository, including compliance with and common implementation of certain NIST SP 800–53 security controls, policies, and procedures. To the extent that the security controls, policies and procedures required for SAWs in the proposed amendments are more rigorous than what the Participants would implement under the current CAT NMS Plan, the security of CAT Data may be improved.

Table 3 summarizes the Commission's preliminarily cost estimates if all Participants were to work within SAWs. The Commission estimates that Participants would collectively incur \$61.2MM in initial costs and \$31.9MM⁶⁴⁶ in ongoing annual costs, while the Plan Processor would incur \$441,600⁶⁴⁷ in initial costs and \$860,200 in ongoing annual costs. These costs are discussed further in the analysis that follows.

TABLE 3—COSTS FOR ALL PARTICIPANTS TO USE SAWS (\$)

Activity	Participants		Plan processor	
	Labor	External	Labor	External
Initial				
Incorporate SAW requirements into CISP			89,000	27,000
Develop detailed design specifications for SAWs			56,200	47,000
Provide Participants with detailed design specifications			3,000	
Evaluate nine SAWs for compliance			167,000	
Technical development costs	39,500,000			
Develop automated monitoring system			52,400	
SAW operations implementation costs	21,700,000			
Total initial costs	61,200,000		367,600	74,000
Annual				
Maintain and monitor CISP SAW requirements			56,600	

⁶³⁹ See *supra* Part II.C.3.

⁶⁴⁰ The Commission preliminarily believes that different environments that satisfy the CISP might vary in their overall level of security due to differences in implementation, third-party software and policies and procedures for monitoring the security of the environments. To the extent that a

bad actor would focus an incursion attempt upon the least secure environment, reducing variability between environments may improve CAT Data security by reducing vulnerabilities within environments from where CAT Data is accessed and analyzed.

⁶⁴¹ See *supra* Part II.C.1.

⁶⁴² See *supra* Part II.C.4

⁶⁴³ See *supra* Part II.C.4.

⁶⁴⁴ See *supra* Part IV.A.3.a.

⁶⁴⁵ See *supra* text accompanying note 623.

⁶⁴⁶ (\$19,000,000 + \$12,900,000) = \$31,900,000.

⁶⁴⁷ (\$367,600 + \$74,000) = \$441,600.

TABLE 3—COSTS FOR ALL PARTICIPANTS TO USE SAWS (\$)—Continued

Activity	Participants		Plan processor	
	Labor	External	Labor	External
Maintain detailed design specifications .....	.....	.....	48,300	.....
Maintain automated monitoring system and monitor .....	.....	.....	605,300	.....
Additional costs for third party annual audit .....	.....	.....	150,000	.....
Technical maintenance of SAWS	19,000,000	.....	.....	.....
SAW usage costs .....	.....	12,900,000	.....	.....
Total ongoing costs	19,000,000	12,900,000	860,200	.....

Under the proposed amendments, the Plan Processor would be required to incorporate SAW-specific additions into the CISP.⁶⁴⁸ The Commission preliminarily estimates the Plan Processor will incur approximately \$89,000⁶⁴⁹ in initial labor and \$27,000⁶⁵⁰ in external consulting costs to fulfill this requirement. The Commission preliminarily estimates the Plan Processor will also incur \$56,600⁶⁵¹ in recurring annual costs to meet those provisions.

The Commission preliminarily estimates that the Plan Processor will incur initial, one-time costs of approximately \$56,200⁶⁵² in labor costs and \$47,000⁶⁵³ in external legal and consulting costs to develop detailed design specifications for the technical implementation of the access, monitoring and other controls required for SAWS.⁶⁵⁴ The Commission preliminarily believes the Plan Processor will incur \$3,000⁶⁵⁵ in labor costs to make the required detailed design specifications available to the Participants, and will incur an additional \$48,300⁶⁵⁶ per year to maintain those detailed design specifications.

For the Plan Processor to evaluate each Participant Group's⁶⁵⁷ SAW to confirm that the SAW has achieved compliance with the detailed design specifications and to notify the Operating Committee, the Commission preliminarily estimates that the Plan Processor would incur an initial, one-

time expense of approximately \$167,000.⁶⁵⁸

For the Plan Processor to build automated systems that will enable monitoring of the SAWS and Excepted Environments, the Commission preliminarily estimates that the Plan Processor would incur an initial, one-time expense of \$52,400.⁶⁵⁹ For the Plan Processor to maintain such systems and to monitor each Participant's SAW in accordance with the detailed design specifications, the Commission preliminarily estimates the Plan Processor would incur annual recurring costs of \$605,300.⁶⁶⁰ For each instance of non-compliance with the CISP or detailed design specifications, the Plan Processor would incur costs of \$500 to notify the non-compliant Participant.⁶⁶¹

The Plan currently requires that the Plan Processor conduct a third-party annual security audit.⁶⁶² The Commission preliminarily estimates the proposed amendments would increase the cost of that security assessment by \$150,000 per year because of its increased scope and complexity due to the addition of the SAWS.

The Participants would incur additional technical implementation costs to set-up and configure their SAWS, develop tools for interacting with CAT Data, develop and implement cluster computing capabilities if applicable,⁶⁶³ and implement technical monitoring. The Commission estimates the Participants will incur labor costs of \$39.5MM⁶⁶⁴ for these one-time

development costs. These activities will also entail ongoing labor costs to the Participants that the Commission preliminarily estimates at \$19.0MM⁶⁶⁵ annually.

interact with CAT Data, and implementation of technical monitoring. Costs for transitioning from a private analytic environment to the SAW are accounted for separately below. *See infra* note 674. Labor estimates include 900 hours from operations specialists and 900 hours from systems analysts. Labor estimates to develop tools include 2,700 hours from senior programmers and 2,700 hours from senior systems analysts. Labor costs to implement cluster computing capabilities include 7,200 hours from senior programmers and 7,200 hours from senior systems analysts. Labor estimates to implement technical monitoring include 2,700 hours from operations specialists. $((900 + 2,700) \text{ hours} \times \$140/\text{hour} + (900 \times \$269/\text{hour}) + (2,700 + 7,200) \text{ hours} \times \$339/\text{hour} + (2,700 + 7,200) \times \$291/\text{hour} = \$6,983,100$. The Commission preliminarily believes that Participant Groups that operate a single exchange are unlikely to implement cluster computing capabilities. Consequently, the Commission preliminarily estimates these single exchange Participant Groups will have technical development costs of $(\$6,983,100 - (7,200 \text{ hours} \times \$339/\text{hour} + 7,200 \text{ hours} \times \$291/\text{hour})) = \$2,447,100$. The Commission preliminarily believes that FINRA has already completed most of this technical development work because FINRA is already working within an AWS analytic cloud. Thus, the Commission preliminarily believes that FINRA's technical development costs will be approximate 25% of those of a Participant Group that operates multiple exchanges. Consequently, the Commission's estimate of total technical development costs for the nine Participant Groups is $((4 \text{ single exchange groups} \times \$2,447,100/\text{group}) + (4 \text{ multiple exchange groups} \times \$6,983,100/\text{group}) + (\$6,983,100 \times 25\%)) = \$39,466,575$.

⁶⁶⁵ Ongoing labor estimates to maintain the SAW's technical environment include 1 senior programmer and 1 senior systems analyst. Ongoing labor costs to maintain cluster computing capabilities include 1 senior programmer and 2 senior systems analysts. Labor estimates to maintain technical monitoring include 1.25 operations specialists. Assuming an 1,800 hour work year, for a Participant Group with multiple exchanges, these costs would total $(1.25 \times 1,800 \text{ hours} \times \$140/\text{hour} + 2 \times 1,800 \text{ hours} \times \$339/\text{hour} + 3 \times 1,800 \text{ hours} \times \$291) = \$3,106,800$ annually. For a Participant Group with a single exchange that does not implement cluster computer capabilities, these costs would total $(1.25 \times 1,800 \text{ hours} \times \$140/\text{hour} + 1 \times 1,800 \text{ hours} \times \$339/\text{hour} + 1 \times 1,800 \text{ hours} \times \$291) = \$1,449,000$ annually. The Commission preliminarily believes that FINRA is already maintaining most of this functionality in its current AWS environment, and thus believes its additional annual costs associated with maintaining its SAW technical environment would be approximate 25% of those incurred by a Participant Group that

Continued

⁶⁴⁸ See *supra* Part III.D.3.a.

⁶⁴⁹ See *supra* note 498.

⁶⁵⁰ See *supra* Part III.D.3.a.

⁶⁵¹ See *supra* note 501.

⁶⁵² See *supra* note 503.

⁶⁵³ See *supra* Part III.D.3.a.

⁶⁵⁴ *Id.*

⁶⁵⁵ See *supra* note 506.

⁶⁵⁶ See *supra* note 508.

⁶⁵⁷ The Commission preliminarily believes that each Participant Group will contract for a single SAW because it preliminarily believes that each Participant Group largely centralizes its regulatory functions that would require CAT Data.

⁶⁵⁸ See *supra* note 509. $\$18,550 \text{ per group} \times 9 \text{ groups} = \$166,950$.

⁶⁵⁹ See *supra* note 510.

⁶⁶⁰ See *supra* note 511.

⁶⁶¹ See *supra* note 512.

⁶⁶² See CAT NMS Plan, *supra* note 3, at Section 6.2(a).

⁶⁶³ The Commission preliminarily believes Participant Groups that operate a single exchange are unlikely to use cluster computing capabilities because these Participants tend to use RSA and 17d-2 agreements to satisfy their regulatory responsibilities that would require CAT Data.

⁶⁶⁴ Setting up and configuring SAWS includes license procurement, development of the SAW environment, development of cluster computing capabilities if applicable, development of tools to

The Participants would incur additional costs from their usage of the SAWs.⁶⁶⁶ The Commission preliminarily believes these estimates may overestimate actual costs the Participants might incur in moving their operations to SAWs because it does not recognize cost savings that might be obtained by retiring redundant resources that they would no longer require for operations being conducted in SAWs.⁶⁶⁷ The Commission preliminarily believes that the Plan Processor would be billed for SAW usage and would pass those costs on to Participants directly such that each Participant Group's SAW costs would

reflect its own usage of SAW resources. To the extent that the Plan Processor marks up those costs before passing them on to Participant Groups, actual costs would exceed what the Commission estimates. To estimate the magnitude of these costs, the Commission assumes three scenarios of SAW use that vary in the types of instances employed within the SAW.⁶⁶⁸ These estimates assume that supporting more advanced instances increases costs due to greater demands on computing resources. Certain general⁶⁶⁹ and technical⁶⁷⁰ assumptions are common across all SAW usage cost estimates.

The Commission assumes three levels of usage for its estimates. Participant Groups can be classified in their SAW usage as single-exchange, exchange group or association.⁶⁷¹ Table 4 presents preliminarily estimated Participant Group SAW use costs.⁶⁷² Consequently, the Commission preliminarily estimates that Participants will incur \$12.9MM⁶⁷³ annually in SAW use costs. The Commission further estimates that Participants will incur one-time costs of \$21.7MM⁶⁷⁴ to adapt current systems and train personnel to perform regulatory duties in the SAWs.

TABLE 4—ESTIMATED PARTICIPANT GROUP INCREMENTAL SAW USE COSTS (\$)

	Single exchange		Exchange group		Association	
	Instances	Cost	Instances	Cost	Instances	Cost
Basic instance	5	6,000	25	26,000	150	154,000
Cluster compute instance	0	0	30	1,169,000	120	4,676,000
Advanced instance	0	0	15	942,000	30	1,912,000
Shared services & common charge	5	30,000	70	420,000	300	1,800,000
SAW storage	100 TB	31,000	2 PB	589,000	5 PB	1,463,000
Total		67,000		3,146,000		10,005,000

The Commission preliminarily believes that some provisions of the proposed amendments will entail indirect costs that regulators will incur to access and use CAT Data. The

requirements that Participants work within SAWs and only access Customer and Account Attributes data through SAWs may raise the costs of regulatory access to CAT Data, or cause

Participants to make operational changes to how they perform their regulatory duties in response to the decreased flexibility of the Plan under the proposed amendments. By

operates multiple exchanges. Consequently, to maintain their SAW's technical environment, the Commission preliminarily estimates that the nine Participant Groups would incur annual ongoing costs of ((4 single exchange groups × \$1,449,000/group) + (4 multiple exchange groups × \$3,106,800/group) + (\$3,106,800 × 25%)) = \$18,999,900.

⁶⁶⁶ The Commission estimated SAW usage costs through the AWS Simple Monthly Cost estimator at <https://calculator.s3.amazonaws.com/index.html>.

⁶⁶⁷ For example, Participants may maintain servers, cloud environments, and IT personnel that support operations such as surveillance and investigations. If these functions are performed within a SAW, such IT resources may be retired and personnel may be reassigned to support SAW technical operations. If Participants perform these functions using resources that cannot be retired, such as the servers they use to operate exchanges, such savings may be limited. The Commission notes that such savings would not apply to FINRA because its ongoing SAW costs are considered to be baseline costs.

⁶⁶⁸ For its cost estimates, the Commission assumes different virtual computers: a basic instance involves a single node on a AWS EC2-t2.xlarge virtual computer; a cluster computing instance involves a group of AWS EC2—p2.16xlarge virtual computers; an advanced instance involves a AWS EC2- x1e.32xlarge virtual computer; and each instance is associated with a shared services and common charge of \$6,000 per year.

⁶⁶⁹ Data transfers cost eliminated by hosting the SAWs in the same region as the Central Repository. AWS usage based on minimum and peak instance with daily spike traffic for 8.5 hours Monday through Friday using Compute Savings Plan. One

AWS instance can support more than one user depending on the complexity of work when leveraging cluster computing.

⁶⁷⁰ The following technical options were used in all scenario estimates: Operating system (Linux), Storage for each EC2 instance (General Purpose SSD (gp2)), Snapshot Frequency (2x Daily), Data transfer cost (0), Pricing strategy (Compute Savings Plans 3 Year None upfront).

⁶⁷¹ Single exchange usage assumes 5 basic instances and 100 terabytes of SAW storage. Exchange group assumes 25 basic instances, 30 cluster computing instances, and 15 advanced instances as well as 2 petabytes of SAW storage; 10 of these cluster instances and 10 of these advanced instances proxy for exchange groups' expected higher use of computing resources to conduct surveillance activities. Association assumes 150 basic instances, 120 cluster computing instances and 30 advanced instances as well as 5 petabytes of SAW storage. The Commission preliminarily believes FINRA, the sole national securities association, will have significantly higher CAT usage than exchange groups because the CAT NMS Plan anticipates the retirement of OATS, which is the data source FINRA currently uses to perform many of its regulatory activities, and many of those regulatory activities involve cross market data. With the retirement of OATS, FINRA will be unable to perform these activities without CAT Data.

⁶⁷² The Commission preliminarily believes that the four Participant Groups that operate single exchanges are likely to outsource regulatory duties that would regularly require external data and thus use RSAs to fulfill those requirements. Consequently, their use of the SAW would be situational. The Commission preliminarily believes

its cost estimate for FINRA is a significant overestimate because FINRA already has established and is working in an AWS environment. Consequently, the Commission preliminarily believes that FINRA's SAW usage costs would be in the baseline because FINRA is already performing its regulatory duties in an AWS workspace. Although FINRA's use might increase with the retirement of OATS, the Commission preliminarily believes this would be a consequence of the CAT NMS Plan rather than the proposed amendments.

⁶⁷³ (4 × \$67,000 + 4 × \$3,146,000) = \$12,852,000.

⁶⁷⁴ In its economic analysis of the Plan, the Commission estimated the cost of the Plan as approximately \$2.4 billion in initial aggregate implementation costs and recurring annual costs of \$1.7 billion. See CAT NMS Plan Approval Order, *supra* note 3, at Part V.B. The Commission preliminarily estimates SAW implementation costs for all Participant Groups other than FINRA by using the same ratio of implementation to ongoing costs as estimated for the Plan. (2.4/1.7 × \$12,852,000) = \$18,144,000. The Commission preliminarily believes this approach is likely to significantly overestimate FINRA's implementation costs because FINRA is already working in an AWS environment and is thus unlikely to face many of the implementation costs that other Participants will face in implementing SAWs. Consequently, the Commission is reducing its estimate of FINRA's implementation costs by 75%. FINRA's share of implementation costs is (2.4/1.7 × \$10,005,000 × 25%) = \$3,531,176. Thus the Commission preliminary estimate of implementation costs would be \$18,144,000 + \$3,531,176 = \$21,675,176.

restricting the use of most data access methods to SAWs or Excepted Environments, the CAT NMS Plan may make it more difficult or impossible for Participants to perform certain functions in the manner they currently do, for example by limiting the set of regulatory tools that are available to perform surveillance or enforcement investigations. This may result in some Participants developing new tools to perform these functions, or entering into RSAs and 17d–2 agreements with another regulator to avoid incurring such costs.

c. Amendments for Excepted Environments

The proposed amendments add provisions to the CAT NMS Plan that set forth a process by which Participants may be granted an exception from the requirement that Participants use their respective SAWs to access CAT Data through the user-defined direct query and bulk extract tools.⁶⁷⁵ The Commission also proposes to add provisions to the CAT NMS Plan that would set forth implementation and operational requirements for any Excepted Environments.

The Commission preliminarily believes that providing for exceptions for the SAW usage requirements offers three benefits. First, the Commission preliminarily believes that provisions allowing for exceptions to the SAW usage requirements may allow Participants to achieve or maintain the security standards required by the CAT NMS Plan⁶⁷⁶ more efficiently. Some Participants may have significant investments in private analytic environments and regulatory tools that they currently use or are developing to conduct regulatory activities in their analytic environments. To the extent that it would be impossible, impractical, or inefficient to adapt these processes to the SAWs, a mechanism for an exception to this policy may allow Participants to achieve the security standards required by the CAT NMS Plan without bearing the expense of redeveloping or implementing these processes within the SAWs. Further, if a Participant is able to conduct these activities with IT resources that would otherwise be idle if the Participant moved its activities to the SAW, an exception process may prevent the

inefficiency of underutilizing existing resources.

Second, the Commission preliminarily believes that provisions in the proposed amendments that provide for an annual review process for the continuance of any exceptions that are granted would provide a procedure and timeline for remedying security deficiencies in Excepted Environments.⁶⁷⁷ Although the CAT NMS Plan currently requires the CISO to review information security policies and procedures of the Participants that are related to the CAT, under the proposed amendments, this review will include a third-party security assessment and documentation of detailed design specifications of the Participant's security implementation. The Commission preliminarily believes that this additional information is likely to improve the quality of the review of the Participant's data security because it extends beyond information in the Participant's policies and procedures related to CAT. This may allow identification and remediation of security deficiencies that might not have been identified under the CAT NMS Plan. To the extent that these provisions identify security deficiencies that would otherwise not be identified, or identifies these deficiencies more rapidly, they may improve the security of CAT Data because the CAT NMS Plan does not currently establish procedures for periodic third-party review of Participants' private analytic environments, nor does it provide timelines for addressing any security deficiencies identified within these environments.

Third, the Commission preliminarily believes that provisions in the proposed amendments that require the Plan Processor to monitor some elements of security within Excepted Environments may improve CAT Data security by providing additional monitoring in Excepted Environments. The proposed amendments require Participants operating Excepted Environments to facilitate security monitoring within those environments by the Plan Processor. To the extent that this provides additional monitoring in Excepted Environments rather than substituting for monitoring by Participants with Excepted Environments, security monitoring of those environment may increase in effectiveness under the proposed amendments.

Finally, the Commission preliminarily believes that provisions of the proposed amendments that establish third-party security audits for Exempted Environments may improve CAT Data security. Currently, under the CAT NMS Plan, Participants are expected to establish comparable security protocols to those required for the central repository for all environments from which Participants access CAT Data. While the CAT NMS Plan currently requires the Plan Processor CISO to review Participants' policies and procedures to verify they are comparable to those for the central repository, the proposed amendments require that Exempted Environments undergo third-party security audits when they are first approved, and annually thereafter. Because these audits have a broader scope than the policy and procedure review required by the CAT NMS Plan, the Commission preliminarily believes they may provide a more comprehensive review of Participant security. To the extent that these third-party audits identify potential security concerns that would otherwise persist, security of CAT Data may improve.

The Commission preliminarily believes that Participants will make the decision to seek exceptions or work within the SAW at the Participant Group level.⁶⁷⁸ The Commission estimates that if all nine Participant Groups were to obtain exceptions to the SAW use requirements, the Participants would incur initial costs of \$3.5MM⁶⁷⁹ to apply for exceptions and the Plan Processor would incur initial costs of \$1.0MM to evaluate those applications and validate Excepted Environments. The Commission further estimates Participants would incur \$2.7MM⁶⁸⁰ in annual ongoing costs to update exception applications and the Plan Processor would incur \$1.2MM in annual ongoing costs to process those applications and monitor Excepted Environments. Cost estimates are presented in Table 5 and discussed below.

⁶⁷⁸ The Commission preliminarily believes that Participant Groups that operate multiple exchanges perform most regulatory duties that would require CAT Data centrally. Consequently, the Commission expects that application costs for multiple exchange Participant Groups would not be substantially more complex than those for a Participant Group that does not operate multiple exchanges.

⁶⁷⁹ (\$1,289,600 + \$2,250,000) = \$3,539,600.

⁶⁸⁰ (\$417,400 + \$2,250,000) = \$2,667,400.

⁶⁷⁵ See *supra* Part II.C.5.

⁶⁷⁶ See *supra* text accompanying note 623.

⁶⁷⁷ See *supra* Part II.C.5.

TABLE 5—COSTS FOR NINE PARTICIPANT GROUPS TO OBTAIN EXCEPTIONS (\$)

Activity	Participants		Plan processor
	Labor	External	Labor
Initial			
Third party security assessment		2,250,000	
Prepare detailed design specification	801,200		
Submit materials to CCO, CISO, SWG	16,800		
Develop policies and procedures to review applications			56,000
Plan Processor review of exception application			825,800
Plan Processor validation of Excepted Environment			167,000
Implement Participant systems to enable monitoring	471,600		
Total initial costs for nine Participant Groups	1,289,600	2,250,000	1,048,800
Annual			
Third party security assessment		2,250,000	
Update application materials	400,600		
Submit materials to CCO, CISO, SWG	16,800		
Maintain and update application review policies			31,700
Plan Processor review of application			825,800
Plan Processor monitoring of Excepted Environments			302,600
Total ongoing costs for nine Participant Groups	417,400	2,250,000	1,160,100

The Commission estimates that each Participant Group would incur an initial, one-time cost of approximately \$250,000⁶⁸¹ in external consulting costs to obtain the required security assessment from a named and independent third party security assessor. Providing the required detailed design specifications would result in an additional \$89,000⁶⁸² in labor costs. Submitting those materials to the CCO, CISO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group would entail an additional \$1,900⁶⁸³ in labor costs. Participants would face additional costs to implement processes required by the detailed design specifications that facilitate the Plan Processor's monitoring of Excepted Environments. The Commission preliminarily estimates each Participant Group seeking an exception would incur labor costs of approximately \$52,400⁶⁸⁴ to implement those processes.

⁶⁸¹ See *supra* Part II.D.3.d.i. (\$250,000 per group × 9 groups) = \$2,250,000.

⁶⁸² Labor costs include 200 hours by a senior systems analyst, 40 hours by a compliance attorney, 20 hours by the chief compliance officer, and 10 hours by a director of compliance. (200 hours × \$291/hour + 40 hours × \$374/hour + 20 hours × \$543 + 10 hours × \$500) = \$89,020. (\$89,020 per group × 9 groups) = \$801,180.

⁶⁸³ Labor costs include 5 hours by a compliance attorney. (5 hours × \$374/hour) = \$1,870. (\$1,870 per group × 9 groups) = \$16,830.

⁶⁸⁴ The Commission preliminarily believes that development costs for the processes that produce log files that support Plan Processor monitoring would require similar development activities to developing the automated monitoring processes themselves. See *supra* note 510. (\$52,400 per group × 9 groups) = \$471,600.

In order to maintain the SAW exception, the Commission preliminarily believes that each Participant Group would incur costs of \$250,000⁶⁸⁵ to obtain an updated security assessment. The Commission preliminarily estimates that the costs associated with updating application materials would be approximately \$44,500,⁶⁸⁶ which is half of the cost to initially prepare the materials to support the exception application.⁶⁸⁷ The Commission further estimates that each Participant Group would spend \$1,900⁶⁸⁸ in labor costs submitting these materials to the CCO, the CISO, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group.

The Plan Processor would incur costs to develop policies and procedures governing the review of applications for exceptions to the SAW use requirement. The Commission preliminarily estimates that the Plan Processor will incur labor costs of \$56,000⁶⁸⁹ to develop these policies and procedures, and annual ongoing costs of \$31,700⁶⁹⁰ to maintain and update these policies and procedures.

⁶⁸⁵ See *supra* Part III.D.3.c.i.

⁶⁸⁶ Costs for initial application materials are \$89,020 to prepare detailed design specifications. \$44,510 is half of this total. (\$44,510 per group × 9 groups) = \$400,590.

⁶⁸⁷ See *supra* Part III.D.3.d.i.

⁶⁸⁸ Labor costs include 5 hours by a compliance attorney. (5 hours × \$374/hour) = \$1,870. (\$1,870 per group × 9 groups) = \$16,830.

⁶⁸⁹ See *supra* note 523.

⁶⁹⁰ See *supra* note 524.

The Plan Processor will incur costs to review exception applications.⁶⁹¹ Each initial exception application would cause the Plan Processor to incur one-time labor costs of approximately \$91,760.⁶⁹² Review of materials for continuation of exceptions would cause the Plan Processor to incur the same review costs annually.

The Plan Processor will incur costs to notify the Operating Committee that each Excepted Environment is compliant with the detailed design specifications that Participants provide as part of their application materials for an exception.⁶⁹³ The Commission preliminarily estimates that the Plan Processor will incur \$18,550⁶⁹⁴ in labor costs to evaluate each Excepted Environment and notify the Operating Committee. Should the Plan Processor need to notify a Participant Group of an identified non-compliance with the detailed design specifications, additional costs would be incurred.⁶⁹⁵

The Plan Processor will incur costs to monitor the Excepted Environments in accordance with the detailed design

⁶⁹¹ See *supra* Part III.D.3.d.ii.

⁶⁹² See *supra* Part III.D.3.d.ii. The PRA estimates that the Plan Processor would incur \$91,760 in labor costs to review each application. In this analysis, the Commission assumes all nine Participant Groups would apply for exceptions. (9 Participant Groups × \$91,760 per application) = \$825,840.

⁶⁹³ *Id.*

⁶⁹⁴ See *supra* note 531. The PRA estimates that the Plan Processor would incur \$18,550 in labor costs to validate each Excepted Environment. In this analysis, the Commission assumes all nine Participant Groups would apply for exceptions. (9 Participant Groups × \$18,550 per validation) = \$166,950.

⁶⁹⁵ *Id.*

specifications and notify the Participant of any identified non-compliance. The Commission preliminarily estimates the Plan Processor will incur annual ongoing costs of \$302,600⁶⁹⁶ to perform these tasks.

The proposed amendments require that each Participant using a non-SAW environment simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment. The Commission cannot predict how many such changes would occur because the Commission does not know how often each Participant Group would make changes to its Excepted Environment that would necessitate material changes to its security controls, but for each such instance, the Commission preliminarily estimates the notifying Participant Group would incur labor costs of approximately \$5,200.⁶⁹⁷

The Commission recognizes that by providing an exception procedure to the requirement that Participants employ the user-defined direct query and bulk extract tools to access CAT Data within SAWs, variability across environments from where CAT Data is accessed and analyzed will necessarily increase. The amendments will provide for a level of security in Excepted Environments that will be similar but not identical to security within SAWs because Excepted Environments may implement security controls, policies, and procedures differently than SAWs. The Commission preliminarily believes the risk of individual Excepted Environments being less secure than SAWs is mitigated by the review process of applications for exceptions and Plan Processor verification and monitoring steps required by the proposed amendments.

4. OTQT and Logging

The CAT NMS Plan does not limit the amount of CAT Data a regulator can extract or download through the online targeted query tool (“OTQT”); the CAT NMS Plan only states that the Plan Processor must define the maximum number of records that can be viewed in the OTQT as well as the maximum number of records that can be downloaded.⁶⁹⁸

The proposed amendments would remove the ability of the Plan Processor to define the maximum number of records that can be downloaded via the OTQT, and instead limit the maximum number of records that can be downloaded via the OTQT to no more than 200,000 records per query request.⁶⁹⁹ The Plan does not explicitly prevent use of the OTQT to download significant quantities of CAT Data, although the OTQT does not provide access to all fields in transactional CAT Data that are available through the user defined direct query tool, (“UDDQ”). Because the Plan does not currently distinguish between what types of analytic environments (SAWs versus Excepted Environments) may access particular tools (*i.e.*, OTQT versus UDDQ), this may not be a significant security distinction under the Plan because downloading such data through the OTQT would be merely less efficient than doing so with other data extraction tools if either approach were available in a given analytic environment. However, with the proposed amendments’ provisions that restrict the use of the UDDQ and bulk extract methods to Plan Processor provided SAWs and Excepted Environments, some regulatory users may be incentivized to use a succession of queries to download larger samples of CAT Data using the OTQT to avoid the need to work within the SAWs or Excepted Environments.

The Commission preliminarily believes that by limiting the number of records of CAT Data that can be extracted from the OTQT, the proposed amendments are likely to result in more regulatory analysis of CAT Data being performed within the security perimeter established by the CISP of the Plan Processor because regulatory activities that require extraction of more than 200,000 records would need to be performed using the UDDQ or by bulk extraction, activities that would be limited to Plan Processor provided SAWs or Excepted Environments under the proposed amendments. The Commission preliminarily believes that this is likely to reduce the attack surface of CAT by reducing the magnitude of CAT Data accessed outside of these potentially more secure environments. The Commission recognizes, however, that limiting the use of the OTQT to queries that extract fewer than 200,000 records may also reduce regulatory use of CAT Data to the extent that a regulatory user may not have the

technical skills that would be required to use other access methods.⁷⁰⁰

The proposed amendments extend the information in log files that the Participants are required under the Plan to submit to the Operating Committee monthly, specifically, by defining the term “delivery of results” and requiring the logging of access and extraction of CAT Data.⁷⁰¹ The Commission estimates that the Plan Processor will incur one-time labor costs of \$87,960⁷⁰² to make the initial necessary programming and systems changes to log delivery of results of queries of CAT Data and the access and extraction of CAT Data. In addition, the Plan Processor would incur an annual ongoing expense of \$5,100⁷⁰³ to generate and provide the additional information in monthly reports required by the proposed amendments. The Commission preliminarily estimates that the Participants would incur ongoing annual labor costs of \$970,200⁷⁰⁴ for the Operating Committee to review the additional information in the monthly reports. Further, the requirement that limits the number of records that can be extracted through use of the OTQT may make it impossible for some regulatory functions that are required only situationally (such as ad hoc queries to investigate trading by a single trader in all symbols or by multiple traders in a single symbol) to be performed outside the SAW (or Excepted Environments). This restriction may cause some Participants to establish SAWs, obtain an exception, or extend their use of RSAs for activities that are performed infrequently. This outcome may be more costly to these Participants than working less efficiently through the OTQT in ad hoc situations because it may be less costly to Participants to use the OTQT inefficiently than to make these alternative arrangements for only occasional use.

5. CAT Customer and Account Attributes

As noted above, the Commission granted the Participants’ PII Exemption

⁷⁰⁰ The Commission preliminarily believes that access to CAT Data through the UDDQ would require greater technical skills on the part of the user such as knowledge of a structured query language and an understanding of structured databases.

⁷⁰¹ See *supra* Part III.D.4.

⁷⁰² See *supra* Part III.D.4.

⁷⁰³ See *supra* Part III.D.4.

⁷⁰⁴ Cost estimate assumes each Participant would annually incur 12 hours of Operating Committee Member labor and 108 hours of Compliance Manager labor. (12 hours × \$381/hour + 108 hours × \$317/hour) = \$38,808 per Participant. Collectively, Participants would incur (\$38,808 per Participant × 25 Participants) = \$970,200.

⁶⁹⁶ See *supra* note 534.

⁶⁹⁷ Labor costs include 10 hour of Senior Systems Analyst labor, 3 hours by a compliance attorney, and 2 hours by the CISO. For the CISO, hourly rate calculations use the hourly rate for a Chief Compliance Officer. (10 hours × \$291/hour + 3 hours × \$374/hour + 2 hours × \$543/hour) = \$5,118.

⁶⁹⁸ See *supra* Part II.D.

⁶⁹⁹ See *supra* Part II.D.

Request to allow for an alternative approach to generating a Customer-ID and to allow for an alternative approach which would exempt the reporting of dates of birth and account numbers associated with retail customers who are natural persons.⁷⁰⁵ This exemptive relief allows the Participants to implement an alternative approach to generating Customer-ID(s), subject to certain conditions set forth in the exemptive relief, but does not bar the Participants from implementing the Plan's original Customer-ID approach.

The baseline for customer and account information availability in CAT assumes the implementation of the alternative approach described in the PII Exemption Order and the creation of the CCID Subsystem. The exemptive relief includes certain conditions that also are included in the baseline for the proposed amendments.⁷⁰⁶ First, the exemptive relief requires that the Participants "ensure the timeliness, accuracy, completeness, and integrity of interim value[s]" in the CCID Subsystem.⁷⁰⁷ Second, the Participants must assess the overall performance and design of the CCID Alternative process and the CCID Subsystem as part of each annual Regular Written Assessment of the Plan Processor.

The Commission proposes to amend the CAT NMS Plan to: (1) Delete the Industry Member reporting of ITINs/SSNs, dates of birth and account numbers for natural persons and require the reporting of year of birth; (2) establish a process for creating Customer-ID(s); (3) impose specific obligations on the Plan Processor that will support the revised reporting requirements and creation of Customer-ID(s); and (4) amend existing provisions of the CAT NMS Plan to reflect the new reporting requirements and process for creating Customer-ID(s), as further discussed below.⁷⁰⁸ These provisions reflect the PII exemptive relief previously granted by the Commission.

The Commission preliminarily believes that the provisions of the proposed amendments discussed in this section largely reflect exemptive relief and current implementation specifications of the Participants, with the exception of the requirement that customer addresses reported to the CAIS have separate fields for street numbers and names. Because the specifications are still in development, the Commission preliminarily believes that

the cost impact of this provision on Participants is likely to be de minimis. The Commission further preliminarily believes that CAT Reporters have not implemented an alternative street address specification and the costs to CAT Reporters to implement this change will be de minimis because the requirement does not require additional information to be reported.

The proposed amendments include provisions that by design, reduce certain options for future development of the Plan. For example, the Participants would not be able to decide at a later date to no longer use their exemptive relief and instead change the CAT implementation to conform to the Plan as it stands at that time. Although the Commission believes that the Participants would be unlikely to take such an approach in the future after incurring the costs to secure exemptive relief and implement alternative approaches required by such relief, it recognizes that the proposed amendments curtail that option to the Participants.

6. Customer Identifying Systems Workflow

The Commission is proposing to amend the CAT NMS Plan to define the workflow for accessing Customer and Account Attributes, and to establish access restrictions.⁷⁰⁹ Accordingly, the Commission proposes to amend the CAT NMS Plan to (1) specify how existing data security requirements apply to Customer and Account Attributes; (2) define the Customer Identifying Systems Workflow and the General Requirements for accessing Customer Identifying Systems; (3) establish general requirements that must be met by Regulatory Staff before accessing the Customer Identifying Systems, which access will be divided between two types of access—manual access and programmatic access; and (4) establish the specific requirements for each type of access to the Customer Identifying Systems. Some of these provisions would reflect the PII exemptive relief previously granted by the Commission, making the alternative approach described in the PII Exemption Order a requirement of the Plan. The Commission discusses potential benefits of the proposed new provisions of the Plan relative to the baseline below.

The proposed amendments would replace the term "PII" with "Customer and Account Attributes" and to reflect that Customer Identifying Systems, including CAIS, now contain the

information that identifies a Customer; prohibit Customer and Account Attributes from being included in the result sets to queries of transactional CAT Data; and update requirements related to the PII access audit trail to reflect the CAIS approach. These requirements mirror requirements for access to customer information already contained in the Plan or the PII Exemptive Order.⁷¹⁰ The Commission preliminarily believes that these provisions may avoid inefficiencies in implementation to the extent that Participants might make investments in implementation activities that do not reflect the approach to customer information and account attributes outlined in the exemptive relief.

The proposed amendments include provisions that limit access to the Customer Identifying Systems to two types of access—manual and programmatic. The Commission preliminarily believes that this may improve the security of CAT Data by limiting access to CAIS data to two defined access methods. The Commission preliminarily believes that by doing so the likelihood that customer information might be compromised in a potential breach will be decreased. To the extent that a bad actor would be limited in his or her ability to access customer information in a manner other than these two access pathways, customer information within the CAT System should be more secure.

The proposed amendments include provisions that establish that access to Customer Identifying Systems are subject to certain restrictions, including requiring that authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access be requested and approved by the Commission.⁷¹¹ The Commission preliminarily believes that this authorization step may reduce the risk of inappropriate use of customer and account information by ensuring that programmatic access that can potentially return information about a large group of customers is only granted when an appropriate regulatory use exists. Further, the Commission preliminarily believes this requirement may reduce the amount of CAT Data exposed to regulators as they perform their duties because it may increase regulatory use of manual as opposed to programmatic access to the CCID Subsystem and CAIS when manual access is sufficient for a regulatory purpose.

⁷⁰⁵ See *supra* Part II.E.

⁷⁰⁶ See PII Exemption Order, *supra* note 164, at 16157.

⁷⁰⁷ See *id.*

⁷⁰⁸ See *supra* Part II.E.

⁷⁰⁹ See *supra* Part II.F.

⁷¹⁰ See *supra* Part II.F.1.

⁷¹¹ See *supra* Part II.F.5.

The proposed amendments would establish programmatic access as a required element of the CAT NMS Plan.⁷¹² The provision of programmatic access enables authorized Regulatory Staff to query the CAIS and CCID Subsystems to access information on multiple customers or accounts simultaneously.⁷¹³ The Commission recognizes that allowing programmatic access to CAIS and CCID data by authorized users potentially will allow Regulatory Staff to be exposed to a greater quantity of Customer and Account Attributes. To the extent that this exposure provides more opportunities for this data to be used inappropriately, this may reduce the confidentiality of CAIS and CCID data. However, the Commission preliminarily believes the Commission authorization step required before programmatic access can be exercised mitigates this risk because the application review process requires documentation establishing the regulatory purpose of the programmatic access, and provides for an approval process based on such access being generally consistent with specific standards that would justify such access.⁷¹⁴

The Commission preliminarily estimates that the Plan Processor will incur labor costs of \$620,200⁷¹⁵ to establish programmatic access to the CCID Subsystem and CAIS.

Under the proposed amendments, Participants that require programmatic access to the CAIS or CCID Subsystems would need to apply for authorization from the Commission.⁷¹⁶ The Commission cannot estimate how many Participants would need to apply for authorization, or how many applications might be required for each Participant that would access these subsystems. The Commission preliminarily estimates that each application for authorization would cause a Participant to incur \$19,100⁷¹⁷ in labor costs.

The Commission preliminarily estimates that the requirements to maintain and provide to Participants, the Commission, and the Operating

Committee monthly audit reports that track permissions for and access to Customer Identifying Systems will result in an aggregate ongoing annual cost to the Plan Processor of \$373,500⁷¹⁸ per year.

In addition, the requirement that regulators obtain Commission approval before exercising programmatic access to the CCID Subsystem or the CAIS may reduce or delay regulatory use of the customer data contained in these databases. The Commission recognizes that a possible indirect cost of the proposed amendments is less overall regulatory use of CAT Data. In the CAT NMS Plan Approval Order, the Commission discussed certain benefits that were likely to result from CAT, including benefits from analysis and reconstruction of market events.⁷¹⁹ To the extent that provisions of the proposed amendments complicate access to CAT Data, prohibit its use for purposes that are both regulatory and commercial, or make use of CAT Data more expensive to regulators, fewer of these benefits may accrue to investors.

7. Participants' Data Confidentiality Policies

To maintain CAT Data confidentiality, the Plan requires the Participants to implement policies related to information barriers, restricts access only to designated persons for regulatory purposes, and imposes penalties for non-compliance to these requirements.⁷²⁰ The Plan currently requires each Participant to periodically review the effectiveness of these policies and procedures, and that they take prompt action to remedy deficiencies in such policies and procedures. The Plan does not require the Participants to make their policies related to data confidentiality publicly available. Although Participants may disclose data confidentiality policies relating to information collected from customers in the course of business, these policies do not generally extend to policies and procedures in place to deal with CAT Data.

As discussed below, the Commission is proposing amendments to modify and supplement the Plan to provide additional specificity concerning data usage and confidentiality policies and

procedures and to make the policies publicly available.⁷²¹

The proposed amendments would modify the existing Plan provisions designed to protect the confidentiality of CAT Data so that they apply to the Proposed Confidentiality Policies, and Participant-specific procedures and usage restriction controls.⁷²² As a result of this change, Participants would be required to report any instance of noncompliance with the data confidentiality policies, procedures, and usage restrictions adopted by such Participant to the Chief Compliance Officer within 24 hours of becoming aware. While the Plan currently requires reporting of a CAT security breach within 24 hours, it does not require reporting instances of noncompliance with the Proposed Confidentiality Policies or procedures and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i). The Commission preliminarily believes that this requirement will improve the security of CAT Data in two ways. First, bringing any instance of noncompliance to the attention of the Chief Compliance Officer would provide an opportunity for such a weakness to be addressed and reduce the risk of future instances of noncompliance to the extent that an instance of noncompliance may demonstrate a weakness in the Proposed Confidentiality Policies, procedures, or usage restrictions, and such a weakness can then be addressed when it would not have otherwise been. Second, the Commission preliminarily believes that the notification requirement may elevate the profile of the Proposed Confidentiality Policies among the Participants because an instance of noncompliance could not be handled through solely internal channels, instead triggering review by the Chief Compliance Officer. This may incentivize the Participants to more effectively implement these policies to avoid instances of noncompliance.

The proposed amendments would require the Proposed Confidentiality Policies to be identical across Participants. While the proposed amendments allow for each Participant to establish its own procedures and usage restrictions to operationalize these policies, accommodating the Participants' organizational, technical and structural uniqueness, the overarching policies would be centrally established and common across Participants. The Commission preliminarily believes that having common data confidentiality policies

⁷¹² See *supra* Part II.

⁷¹³ See *supra* Part II.F.7.

⁷¹⁴ See *supra* Part II.F.6.

⁷¹⁵ The estimates assumes 640 hours each of labor by a Senior Database Administrator, a Senior Programmer and a Senior Business Analyst. (640 hours × \$349/hour + 640 hours × \$339/hour + 640 hours × \$281/hour) = \$620,160.

⁷¹⁶ *Id.*

⁷¹⁷ Labor cost estimate assumes 15 hours of attorney labor, 10 hours of compliance manager labor, 10 hours of operations specialist labor and 15 hours by a chief compliance officer. (15 hours × \$426/hour + 10 hours × \$317/hour + 10 hours × \$140/hour + 15 hours × \$543/hour) = \$19,105.

⁷¹⁸ See *supra* note 552.

⁷¹⁹ See CAT NMS Plan Approval Order, *supra* note 3, at Part V.E.2. For example, in the wake of a market event, a regulator might perform an analysis of cross-market trading before the event. To the extent that making such an analysis public is a commercial as well as regulatory activity under the proposed amendments, fewer such analyses are likely to be performed.

⁷²⁰ See *supra* Part II.G.

⁷²¹ See *id.*

⁷²² See *supra* Part II.G.1.

across Participants may avoid unnecessary variation across Participants in how they meet the data confidentiality requirements of the Plan. However, the Commission recognizes it is also possible that the Participants could adopt relatively weak central policies that would ultimately reduce the security of CAT Data. The Commission preliminarily believes this outcome is unlikely because central development of these policies allows the Participants to access their collective expertise in creation of these policies. The Commission recognizes that in situations where policies are centrally developed, it is possible that an individual Participant might have developed stronger policies and procedures in the absence of the proposed amendments. However, the Commission believes this potential outcome is mitigated by the fact that having multiple Participants involved in the development of these policies is likely to result in more robust policies because more expertise can be incorporated into their development.

The proposed amendments would define "Regulatory Staff" and limit access to CAT Data to persons designated by Participants, which persons must be Regulatory Staff or technology and operations staff that require access solely to facilitate access to and usage of CAT Data stored in the Central Repository by Regulatory Staff.⁷²³ Currently, the CAT NMS Plan has numerous references to "regulatory staff," and outlines benefits and limitations on such regulatory staff, including the ability to access all CAT Data, but does not define the term or provide any guidance or limitations on how Participants may identify "regulatory staff."⁷²⁴ The Commission preliminarily believes that defining Regulatory Staff may improve the confidentiality of CAT Data by preventing expansive interpretations of this term (such as classifying staff members that have primarily business functions as Regulatory Staff) that could result in non-Regulatory Staff of Participants having exposure to CAT Data that might be used inappropriately.

The proposed amendments would require that the Proposed Confidentiality Policies limit non-Regulatory Staff access to CAT Data to circumstances in which there is a specific regulatory need for such access and a Participant's Chief Regulatory Officer (or similarly designated head(s)

of regulation), or designee, provides written approval for each instance of access by non-Regulatory Staff. The Plan has no provision that bars non-Regulatory Staff from accessing CAT Data, though it does limit the use of CAT Data to only regulatory or surveillance purposes. The Commission preliminarily believes that the proposed amendments would further limit the number of individuals that have access to CAT Data by barring access to non-Regulatory Staff members (subject to proposed exceptions) and that limiting the number of individuals that have access to CAT Data reduces the risk that it would ultimately be used inappropriately because fewer people would have the opportunity to engage in an inappropriate use. However, while the requirement that non-Regulatory Staff not have access to CAT Data may reduce the risk of CAT Data being used inappropriately, the Commission also recognizes that this restriction may slow a Participant's ability to respond to urgent situations such as a market event. A provision to allow a Participant's Chief Regulatory Officer to allow such access may mitigate inefficiencies such as a slowed response to a market event that could result from an absolute prohibition of staff other than Regulatory Staff accessing CAT Data. For example, in the case of a market event, a Participant's analysis of events may need access to expert staff in operations or business functions of the Participant, and the need for rapid analysis of CAT Data may warrant such an exception to further this regulatory purpose. The Commission recognizes that providing this access to staff other than Regulatory Staff may increase the risk that CAT Data would be used inappropriately because additional Participant Staff would necessarily be exposed to CAT Data in such a case. However, the Commission preliminarily believes this risk is mitigated by the requirement that the Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation) provide written permission for such access because it is likely to limit its use to exceptional situations because ensuring the confidentiality of CAT Data is among the Chief Regulatory Officer's (or similarly designated head(s) of regulation's) primary responsibilities and because the CAT NMS Plan requires CAT Data only to be accessed for surveillance or regulatory purposes. Furthermore, establishing documentation of such instances will facilitate the Plan Processor's and

independent accountant's⁷²⁵ review of the Participant's compliance with the Proposed Confidentiality Policies. This may further limit the use of and any additional risk posed by this provision only to exceptional circumstances because such use is likely to be reviewed by the independent auditor.

The proposed amendments would limit the extraction of CAT Data to the minimum amount necessary to achieve specific surveillance or regulatory purposes.⁷²⁶ The Commission preliminarily believes that this provision may improve CAT Data security by reducing the attack surface of CAT because extracted data would reside outside of the scope of the CAT security provisions and would be beyond the Plan Processor's security monitoring scope.

The proposed amendments would require the Proposed Confidentiality Policies to define the individual roles and regulatory activities of specific users, including those users requiring access to Customer and Account Attributes, of the CAT.⁷²⁷ The Commission preliminarily believes that this provision may improve the security of CAT Data by allowing the Participants to identify regulatory users whose roles do not regularly require access to more sensitive information stored in the CCID Subsystem and CAIS and restrict that access. To the extent that fewer users have access to this more sensitive data, the risk of inappropriate use of customer information may be reduced.

The proposed amendments require that Participants incorporate policies relating to the access of Customer and Account Attributes, Programmatic CAIS Access, and Programmatic CCID Subsystem Access in the Proposed Confidentiality Policies.⁷²⁸ This requirement would result in the adoption of a common policy for access to Customer and Account Attributes across Participants. The Commission preliminarily believes that this may improve security of CAT Data by reducing variation among policies across Participants.⁷²⁹ The proposed amendments also require that the Proposed Confidentiality Policies be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate

⁷²³ See *supra* Part II.G.2.

⁷²⁴ See, e.g., CAT NMS Plan, *supra* note 3, at Section 6.5(f)(ii) and Appendix D, Sections 6.1, 6.2, 8.1.

⁷²⁵ The role of independent accountants in reviewing Participants' compliance is discussed further below.

⁷²⁶ See *supra* Part II.G.3.a.

⁷²⁷ See *supra* Part II.G.3.b.

⁷²⁸ See *supra* Part II.G.3.c.

⁷²⁹ See *supra* note 640.

that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow.⁷³⁰

The proposed amendments would require that each Participant shall engage an independent accountant annually to perform an examination of compliance with the policies required by the Proposed Confidentiality Policies.⁷³¹ The Commission

preliminarily believes that this provision may improve the security of CAT Data by facilitating external review of the Participants' compliance with the Proposed Confidentiality Policies by an independent third party. To the extent that this independent third party identifies deficiencies in the Participants' compliance with the Proposed Confidentiality Policies that would not otherwise be identified and the identification of such deficiencies

leads to remediation that makes such deficiencies less likely to recur, the Commission preliminarily believes these provisions may improve CAT Data security.

The Commission preliminarily believes that provisions of the proposed amendments discussed in this section would entail one-time costs of \$1.2MM,⁷³² and ongoing annual costs of \$1.9MM.⁷³³ These costs are summarized in Table 6 and discussed further below.

TABLE 6—SUMMARY OF COSTS FOR POLICIES AND PROCEDURES (\$)

Activity	Participants		Plan processor	
	Labor	External	Labor	External
<i>Initial</i>				
Develop central Proposed Confidentiality Policies	254,900	50,000	.....	.....
Review and approve Proposed Confidentiality Policies .....	.....	.....	10,900	.....
Develop procedures to implement the PCP	901,000	.....	.....	.....
Total	1,155,900	50,000	10,900	.....
<i>Annual</i>				
Review Proposed Confidentiality Policies and remediate	51,000	5,000	.....	.....
Review and approve Proposed Confidentiality Policies .....	.....	.....	5,400	.....
Maintain and remediate procedures	289,700	.....	.....	.....
Annual third party audit	139,900	1,437,500	.....	.....
Total	480,600	1,442,500	5,400	.....

The proposed amendments would require that the Participants jointly develop the Proposed Confidentiality Policies. The Commission preliminarily estimates the Participants will incur labor costs of \$254,900⁷³⁴ to develop these policies.⁷³⁵

The Commission preliminarily estimates that it would require 10 hours by the CCO and 10 hours by the CISO, both employees of the Plan Processor, to review the Proposed Confidentiality Policies. The Commission preliminarily estimates that this would result in the Plan Processor incurring \$10,900⁷³⁶ in labor costs.⁷³⁷ The Commission also preliminarily believes that the Participants will consult with outside legal counsel in the drafting of the Proposed Confidentiality Policies, and

estimates this external cost to be \$50,000.⁷³⁸

The proposed amendments would require the Participants to jointly review the effectiveness of the Proposed Confidentiality Policies annually and take prompt action to remedy deficiencies in such policies.⁷³⁹ The Commission preliminarily estimates that this review would require approximately 20% of the labor of the initial effort to jointly draft those policies because presumably many of the policies would not need revision annually. Consequently, the Commission preliminarily estimates that the Participants would annually incur \$51,000⁷⁴⁰ in labor costs and outside legal costs of \$5,000⁷⁴¹ to complete these tasks. In addition, the Commission preliminarily estimates the

Plan Processor would incur annual labor costs of \$5,400⁷⁴² to review updates to the Proposed Confidentiality Policies.⁷⁴³

After the Participants jointly develop the Proposed Confidentiality Procedures, each Participant would incur costs to develop procedures and usage restriction controls to implement those policies. The Commission preliminarily believes that Participants will perform this task at the Participant Group level of organization: For example, a Participant Group that controls four exchanges will centrally develop those policies and then individualize them as necessary across its exchanges.

⁷³⁰ See *supra* Part II.F.7 and Part II.F.8.

⁷³¹ See *supra* Part II.G.4.

⁷³² $(\$1,115,900 + \$50,000 + \$10,900) = \$1,216,800$.

⁷³³ $(\$480,600 + \$1,442,500 + \$5,400) = \$1,928,500$.

⁷³⁴ Labor cost estimate assumes 150 hours by Chief Regulatory Officers, 150 hours by Chief Compliance Officers, 100 hours by Compliance Managers, 50 hours by Compliance Attorneys, 20 hours by Sr. Operations Managers and 10 hours by Deputy General Counsels. An additional 20 hours would be required for Operating Committee members to review and approve the policies. Labor costs for Operating Committee members assume an hourly rate for a Vice President of Operations.

Hourly rate estimated by using the median annual salary from www.payscale.com, multiplying by 5.35 to account for other compensation, benefits and overhead and adjusting for 1800 hours of labor per year. $(\$128,159 \times 5.35/1800 = \$381/\text{hour})$. The Commission estimates the hourly rate of a Chief Regulatory Officer as 125% of the rate of a Chief Compliance Officer, or $\$543/\text{hour} \times 1.25 = \$679/\text{hour}$. $(150 \text{ hours} \times \$679/\text{hour} + 150 \text{ hours} \times \$543/\text{hour} + 100 \text{ hours} \times \$317/\text{hour} + 50 \text{ hours} \times \$374/\text{hour} + 20 \times \$374/\text{hour} + 10 \text{ hours} \times \$612/\text{hour} + 20 \text{ hours} \times \$381/\text{hour}) = \$254,920$.

⁷³⁵ See *supra* Part III.D.7.

⁷³⁶ Labor cost estimate assumes 10 hours of CCO labor and 10 hours of CISO labor. $(10 \text{ hours} \times \$543/\text{hour} + 10 \times \$543/\text{hour}) = \$10,860$.

⁷³⁷ See *supra* Part III.D.7.

⁷³⁸ *Id.*

⁷³⁹ *Id.*

⁷⁴⁰ $\$254,900 \times 20\% = \$50,980$.

⁷⁴¹ See *supra* Part III.D.7.

⁷⁴² See *supra* Part III.D.7. The Commission assumes review of the Proposed Confidentiality Policies would require half the labor of initial review of the policies. See *supra* note 736. $\$10,860 \times 50\% = \$5,430$.

⁷⁴³ See *supra* Part III.D.7. The Commission is assuming that such updates would occur annually. If updates were more frequent, costs would be proportionately higher.

The Commission preliminarily estimates that the Participants collectively would incur labor costs of \$901,000⁷⁴⁴ to initially develop and draft the procedures and usage restriction controls. The Commission preliminarily estimates that the ongoing annual labor cost to Participants of maintaining and reviewing the procedures and usage restriction controls and taking prompt action to remedy deficiencies in such policies, procedures and usage restriction controls would be approximately \$289,700.⁷⁴⁵

The proposed amendments would require each Participant to engage an independent accounting firm annually to perform an examination of compliance with the policies required by Section 6.5(g)(i) and submit the examination report to the Commission.⁷⁴⁶ The Commission preliminarily estimates that each Participant would incur labor costs of \$5,600⁷⁴⁷ to satisfy this requirement, as well as \$57,500⁷⁴⁸ in external consulting costs.

8. Regulator & Plan Processor Access

The Plan does not specify any restrictions on data sources used in the development of CAT systems, tools and applications. Currently, Plan Processor

staff and contractors are not prohibited from using any CAT Data during development and testing activities.

The proposed amendments would restrict such development and testing activities to non-production data in all cases for CAIS data. Further, they would restrict such development activities to non-production data for transactional data, unless it were not possible to do so. In such a case, development work could access the oldest available production data. The Commission preliminarily believes that these provisions may improve the confidentiality of CAT Data by preventing Plan Processor employees and contractors having exposure to CAT Data that might be used inappropriately.

The Commission preliminarily believes that test transactional data has already been prepared and used in the implementation of CAT reporting. However, the Plan Processor may need to prepare test data to be used in development work for systems, tools and applications that would access the CAIS. The Commission preliminarily estimates that the Plan Processor will incur costs of \$10,270⁷⁴⁹ to create this data and make it available to Plan Processor staff and contractors performing this development and testing work.

The Commission preliminarily believes that provisions of the proposed amendments that prohibit any use of CAT Data that has both regulatory and other uses may reduce Participants' use of CAT Data. While the Plan already prohibits commercial use of CAT Data, it does not specifically prohibit a regulatory use that also serves a non-regulatory purpose. This proposed amendment may prevent some Participants from using CAT Data in a rule filing that might lead the Commission to approve or disapprove a filing that could reduce trading costs to some investors. The Commission preliminarily believes that it is unlikely that such a rule filing would be approved or disapproved due to the Participants' inability to support their rule filings with CAT Data because Participants retain the ability to analyze their own in-house data in support of their rule filings, and to provide both quantitative arguments based on that in-house data as well as qualitative arguments that support those rule filings.

⁷⁴⁹ Estimate assumes 20 hours of Senior Programmer labor and 10 hours of Senior Database Administrator labor. (20 hours × \$339/hour + 10 hours × \$349/hour) = \$10,270.

9. Secure Connectivity

The Plan allows CAT Data reporters and users to connect over private lines or secured public lines.⁷⁵⁰ There is no specific requirement that any reporters use private lines and connectivity requirements do not differentiate between Participants and Industry Members in this regard.⁷⁵¹ Since approval of the Plan, the Participants have determined that they will connect to the CAT infrastructure using only private lines. However, the Commission recognizes that no language in the Plan requires that Participants will use only private lines in the future.

The Plan Processor requires two-factor authentication for connection to CAT. Authentication incorporates a geolocation blacklist including 16 countries.⁷⁵²

Currently, the CAT NMS Plan imposes requirements on data centers housing CAT Systems (whether public or private), but does not impose any geographical restrictions or guidelines. The Commission believes that all current CAT Data centers are located in the United States.

The proposed amendments would require Participants to connect to CAT infrastructure using private lines, and Industry Members to connect to CAT using secure methods such as private lines for machine-to-machine interfaces or encrypted Virtual Private Network connections over public lines for manual web-based submissions.⁷⁵³ The proposed amendments would also require the Plan Processor to implement capabilities to restrict access through an "allow list" that would only allow access to CAT from countries where CAT reporting or regulatory use is both necessary and expected.⁷⁵⁴ In addition, the proposed amendments would require that CAT Data centers be located in the United States.⁷⁵⁵

The Commission preliminarily believes these provisions of the proposed amendments will improve the security of CAT Data in two ways. First, although all Participants currently plan to connect to CAT using private lines,

⁷⁵⁰ See *supra* Part II.I.

⁷⁵¹ The distinction between Industry Members and Participants may be significant because while Participants are reporters of CAT Data, they are also users of CAT Data in their regulatory roles and thus have the ability to access and extract CAT Data. Industry Members are not potential users of CAT Data.

⁷⁵² See FINRA CAT Industry Member Onboarding Guide at <https://www.catnmsplan.com/sites/default/files/2020-02/FINRA-CAT-Onboarding-Guide-v1.5.pdf>, item 7, page 19.

⁷⁵³ See *supra* Part II.I.

⁷⁵⁴ An "allow list" could be based on geography, server or IP. This is discussed further below.

⁷⁵⁵ See *supra* Part II.I.

⁷⁴⁴ See *supra* note 568. Labor cost estimate includes 96 hours by an Attorney, 96 hours by a Compliance Manager, 30 hours by a Senior Systems Analyst, 30 hours by an Operations Specialist, 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance. (96 hours × \$426/hour + 96 hours × \$317/hour + 30 hours × \$291/hour + 30 hours × \$140/hour + 20 hours × \$543/hour + 10 hours × \$500/hour) = \$100,118. (\$100,118 per group × 9 groups) = \$901,062.

⁷⁴⁵ See *supra* note 569. Labor cost estimate includes 28 hours by an Attorney, 28 hours by a Compliance Manager, 8 hours by a Senior Systems analyst, 8 hours by an Operations Specialist, 10 hours by a Chief Compliance Officer and 5 hours by a Director of Compliance. (28 hours × \$426/hour + 28 hours × \$317/hour + 8 hours × \$291/hour + 8 hours × \$140/hour + 10 hours × \$543/hour + 5 hours × \$500/hour) = \$32,182. (\$32,182 × 9) = \$289,638.

⁷⁴⁶ See *supra* Part III.D.7. It is possible that Participants may realize economies of scale by engaging for this review at the Participant Group level. However, because the third party audit is required for each Participant regardless of Participant Group membership, the Commission preliminarily believes that it is appropriate to estimate this expense at the Participant level because efficiencies in third-party reviews is not under the Participants' direct control.

⁷⁴⁷ Labor cost estimate assumes 3 hours of Chief Compliance Officer labor, 5 hours of Compliance Manager labor, 3 hours of Compliance Attorney labor, 2 hours of Senior Systems Analyst labor, and 2 hours of Senior Programmer labor. (3 hours × \$543/hour + 5 hours × \$317/hour + 3 hours × \$374/hour + 2 hours × \$291/hour + 2 hours × \$339/hour) = \$5,596. (\$5,596 per Participant × 25 Participants) = \$139,900.

⁷⁴⁸ See *supra* note 574. (\$57,500 per Participant × 25 Participants) = \$1,437,500.

codifying this decision reduces the risk that, at a later date, one or more Participants might elect to connect with CAT in a less secure manner than with private lines, as they currently plan to connect to CAT. Furthermore, the Commission preliminarily believes that because Participants are not only reporters, but also users of CAT Data in their regulatory roles, ensuring that they connect to CAT in the most secure manner may further safeguard CAT Data by making the normal access mode for CAT Data be through private lines.⁷⁵⁶ The Commission recognizes that this restriction may also prevent the Participants from electing to connect to CAT through a more secure method developed in the future that does not rely upon private lines. The Commission preliminarily believes this concern is mitigated by the Participants' ability to amend the Plan at a later date to allow such an access method.

Second, the Commission preliminarily believes that the requirement to establish "allow listing" procedures to allow connections to CAT only to those countries where CAT reporting or regulatory use is both necessary and expected might reduce the risk of a security breach by limiting connections from other sources.

The Commission preliminarily estimates that provisions of the proposed amendments concerning secure connectivity will cause the Plan Processor to incur initial one-time labor costs of \$33,100⁷⁵⁷ and ongoing annual labor costs of \$3,100.⁷⁵⁸

The Commission preliminarily estimates that requiring the Plan Processor to develop "allow listing" capability will cause the Plan Processor to incur initial one-time implementation labor costs of \$13,700.⁷⁵⁹ Maintaining this list will cause the Plan Processor to incur \$1,200⁷⁶⁰ in ongoing annual costs. In addition, the Plan Processor is estimated to incur \$19,400⁷⁶¹ in one-time labor costs to implement procedures to allow access to CAT if the source location for a particular instance

of access request cannot be determined technologically. The Commission estimates that the Plan Processor will incur \$1,900⁷⁶² in annual ongoing costs to maintain and enforce this restriction.

The Commission recognizes that the requirement that CAT data centers be located in the United States may prevent the Plan Processor from locating CAT data centers in other areas that might reduce the costs associated with maintaining CAT data centers. This could cause future costs of CAT to be higher than they might be otherwise.⁷⁶³

10. Breach Management Policies and Procedures

The Plan includes a requirement for reporting noncompliance incidents and security breaches to the Chief Compliance Officer.⁷⁶⁴ The Plan also requires the Plan Processor to develop policies and procedures governing its responses to systems or data breaches, including a formal cyber incident response plan, and documentation of all information relevant to breaches.⁷⁶⁵ CAT LLC has stated that in the event of unauthorized access to CAT Data that it will ". . . take all reasonable steps to investigate the incident, mitigate potential harm from the unauthorized access and protect the integrity of the CAT System. CAT LLC also will report unauthorized access to law enforcement, the SEC and other authorities as required or as it deems appropriate. CAT LLC will notify other parties of unauthorized access to CAT Data where required by law and as it otherwise deems appropriate. CAT LLC will maintain insurance that is required by law."⁷⁶⁶

The proposed amendments would require the formal cyber incident response plan to incorporate corrective actions and breach notifications, modeled after similar provisions in Regulation SCI.⁷⁶⁷ Because of the lack of specificity in requirements for the cyber incident response in the Plan, it is possible that Participants might satisfy the existing provisions without providing for breach notifications to affected CAT Reporters, the Participants and the Commission, and prompt remediation of security threats. While the Commission believes it is unlikely the Participants would leave a security

threat unaddressed, it also preliminarily believes that requiring procedures to be in place to deal with an incident ahead of time facilitates a quicker response should such an incident occur because procedures can specify who is to be involved in the response and in what capacity, and where authority lies in making the response.

The proposed amendments would require the formal cyber incident response plan to include taking appropriate corrective action that includes, at a minimum, mitigating potential harm to investors and market integrity, and devoting adequate resources to remedy the systems or data breach as soon as reasonably practicable. While the Commission preliminarily believes that the Participants are likely to take corrective action in the wake of a security breach without this explicit provision in the Plan, to the extent that this provision hastens the Participants' corrective action in the wake of a cyber incident, this provision may improve the security of CAT Data by reducing potential harm to investors and market integrity that may accrue if such a response were delayed.

In addition, the proposed amendments would require the Plan Processor to provide breach notifications of systems or data breaches to CAT Reporters that it reasonably estimates may have been affected, as well as to the Participants and the Commission, promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred. In addition, the proposed amendments state that the cyber incident response plan must provide for breach notifications. The Commission preliminarily believes that breach notifications in the wake of a cyber incident may reduce harm to CAT reporters and investors whose data was exposed through a cyber incident. While the proposed amendments allow for delay in breach notification when such notification could expose environments from which CAT Data is accessed and analyzed to greater security risks, or compromise an investigation into the breach, the proposal would require the affirmative documentation of the reasons for the Plan Processor's determination to temporarily delay a breach notification, which is important to prevent the Plan Processor from improperly invoking this exception.

The proposed amendments would provide an exception to the requirement for breach notifications for systems or data breaches "that the Plan Processor reasonably estimates would have no or

⁷⁵⁶ The Commission preliminarily believes that use of the Online Targeted Query Tool through encrypted connections over public lines may still occur, but because of the 200,000 row limit to OTQT queries, it would be more difficult for a bad actor that gained access through a public line to access CAT Data if the Plan Processor is able to make other tools only available to users connecting through private lines. To the extent that the Plan Processor does not restrict access to other tools to users not connecting through public lines, this potential benefit would not be realized.

⁷⁵⁷ (\$13,700 + \$19,400) = \$33,100.

⁷⁵⁸ (\$1,200 + \$1,900) = \$3,100.

⁷⁵⁹ See *supra* note 577.

⁷⁶⁰ See *supra* note 579.

⁷⁶¹ See *supra* note 581.

⁷⁶² See *supra* note 583.

⁷⁶³ See *supra* Part II.J for policy discussion of this requirement.

⁷⁶⁴ See *supra* Part II.J.

⁷⁶⁵ See *supra* Part II.J.

⁷⁶⁶ See CAT NMS Plan website frequently asked questions, "What happens if there is unauthorized access to CAT Data?" #S.11 at <https://www.catnmsplan.com/faq>.

⁷⁶⁷ See *supra* Part II.J.

a de minimis impact on the Plan Processor's operations or on market participants." The Commission preliminarily believes that the exception to the breach notification requirement may help to focus the Plan Processor's resources on security issues with more significant impacts. Importantly, even for a breach that the Plan Processor believes to be a de minimis breach, the Plan Processor would be required to document all information relevant to such a breach. This would increase the likelihood that the Plan Processor has all the information necessary should its initial determination that a breach is de minimis prove to be incorrect, so that it could promptly provide breach notifications as required. In addition, maintaining documentation for all breaches, including de minimis breaches, would be helpful in identifying patterns among systems or data breaches. While the Commission preliminarily believes that these limitations on the breach notification requirement may slightly limit the benefits of breach notification in the wake of a breach, it preliminarily believes these modifications may reduce the potential impact of a breach in the case of the delay notification provision because it would facilitate accurate later notification if deemed necessary.

The Commission preliminarily believes that requiring breach management policies and procedures and the cyber incident response plan to incorporate new elements required by the proposed amendments would result in a one-time labor cost of \$49,800⁷⁶⁸ for the Plan Processor.⁷⁶⁹ Further, the Commission estimates that the Plan Processor will incur an ongoing labor cost of \$42,200⁷⁷⁰ to maintain, update and enforce these policies and procedures and the cyber incident response plan. The Commission believes that the Participants would incur initial labor costs of \$9,500⁷⁷¹ for review and approval of the updated cyber incident response plan by the Operating Committee.⁷⁷²

11. Firm Designated ID and Allocation Reports

Prior to approval of the CAT NMS Plan, the Commission granted

exemptive relief related to allocations of orders, which relieved the Participants from the requirement to link allocations to orders and allowed the usage of "Allocation Reports."⁷⁷³ This exemptive relief is conditioned on, among other things, the Central Repository having the ability to use information provided in Allocation Reports to link the subaccount holder to those with authority to trade on behalf of the account. However, the CAT NMS Plan as approved does not currently explicitly require Customer and Account Attributes be reported for Firm Designated IDs that are submitted in Allocation Reports, as it does for Firm Designated IDs that are submitted in connection with the original receipt or origination of an order.⁷⁷⁴

The proposed amendments would require that Customer and Account Attributes must be reported for Firm Designated IDs submitted in connection with Allocation Reports, and not just for Firm Designated IDs submitted in connection with the original receipt or origination of an order.⁷⁷⁵ The Commission preliminarily believes that these provisions of the proposed amendments are unlikely to have significant economic benefits and costs because implementation of the exemptive relief is already underway and thus its benefits and costs are included in the baseline.

B. Impact on Efficiency, Competition, and Capital Formation

The Commission preliminarily believes that the proposed amendments are likely to have effects on efficiency and competition, with minimal if any effects on capital formation. The Commission anticipates moderate mixed effects on efficiency due to negative effects on the efficiency with which Participants perform their regulatory tasks but positive effects on the efficiency by which the CAT NMS Plan is implemented by Participants by standardizing policies and procedures across Participants and improving efficiencies in how Participants perform some regulatory activities. The Commission preliminarily believes that the proposed amendments will have minor mixed effects on competition. In the case of the market for regulatory services, the Commission preliminarily believes that competition may increase

due to additional Participants seeking out RSAs if the amendments are adopted. In the case of the market to serve as Plan Processor, the Commission preliminarily believes the proposed amendments may serve to increase the switching costs Participants would face in replacing the Plan Processor, thus reducing competition in this market. The Commission preliminarily believes that the proposed amendments would not significantly affect capital formation.

1. Baseline for Efficiency, Competition and Capital Formation in the Market for Regulatory Services

There are currently nine Participant Groups.⁷⁷⁶ The 24 national securities exchanges are each Plan Participants. The exchanges are currently controlled by eight separate entities and thus comprise eight Participant Groups; four of these operate a single exchange.⁷⁷⁷ The sole national securities association, FINRA, is also a CAT NMS Plan Participant and comprises its own Participant Group.

Participants compete in the market for regulatory services. These services include conducting market surveillance, cross-market surveillance, oversight, compliance, investigation, and enforcement, as well as the registration, testing, and examination of broker-dealers. Although the Commission oversees exchange Participants' supervision of trading on their respective venues, the responsibility for direct supervision of trading on an exchange resides in the Participant that operates the exchange. Currently, Participants compete to provide regulatory services in at least two ways.

First, because Participants are responsible for regulating trading within venues they operate, their regulatory services are bundled with their operation of the venue. Consequently, for a broker-dealer, selecting a trading venue also entails the selection of a provider of regulatory services surrounding the trading activity.

Second, Participants could provide this supervision not only for their own venues, but for other Participants' venues as well through the use of RSAs

⁷⁶⁸ See *supra* note 585.

⁷⁶⁹ See *supra* Part III.D.9.

⁷⁷⁰ See *supra* note 588.

⁷⁷¹ Labor costs include one hour per Participant of Vice President of Operations labor. Hourly rate estimated by using the median annual salary from *www.payscale.com*, multiply by 5.35 to account for other compensation, benefits and overhead and adjusting for 1800 hours of labor per year. $((\$128,159 \times 5.35 / 1800 = \$381/\text{hour}) \cdot (25 \text{ hours} \times \$381/\text{hour}) = \$9,525$.

⁷⁷² *Id.*

⁷⁷³ See *supra* Part II.K.

⁷⁷⁴ See CAT NMS Plan, *supra* note 3, at Section 6.5(d)(ii)(C). However while the CAT NMS Plan does require such information for Firm Designated IDs that are submitted in Allocation Reports, it is required in a separate provision, Section 6.5(d)(iv). See *supra* Part II.K.

⁷⁷⁵ See *supra* Part II.K.

⁷⁷⁶ See *supra* note 611.

⁷⁷⁷ Cboe Global Markets, Inc. controls BYX, BZX, C2, EDGA, EDGX, and Cboe; Miami Internal Holdings, Inc. controls Miami International, MIAx Emerald, and MIAx PEARL; Nasdaq, Inc. controls BX, GEMX, ISE, MRX, PHLX, and Nasdaq; Intercontinental Exchange, Inc. controls NYSE, Arca, American, Chicago, and National. The four entities that control a single-exchange are IEX Group which controls IEX, a consortium of broker-dealers which controls BOX, Long Term Stock Exchange, Inc. which controls LTSE, and MEMX Holdings LLC, which controls MEMX LLC.

or a plan approved pursuant to Rule 17d-2 under the Exchange Act.

Consequently, Participants compete to provide regulatory services to venues they do not operate. Because providing trading supervision is characterized by high fixed costs (such as significant IT infrastructure and specialized personnel), some Participants could find that another Participant could provide some regulatory services more efficiently or at a lower cost than they would incur to provide this service in-house. Currently, nearly all the Participants that operate equity and option exchanges contract with FINRA for some or much of their trading surveillance and routine inspections of members' activity. FINRA provides nearly 100% of the cross-market surveillance for equity markets. Within options markets, through RSAs FINRA provides approximately 50% of cross-market surveillance. As a result, the market for regulatory services in the equity and options markets currently has one dominant competitor: FINRA. This may provide relatively uniform levels of surveillance across trading venues.

As discussed in the CAT NMS Plan Approval Order,⁷⁷⁸ as exchanges provide data to the Central Repository to comply with requirements of the Plan, it will become less costly from an operational standpoint for Participants to contract with other Participants to conduct both within market and cross-market surveillance of members because data will already be centralized and uniform due to Plan requirements.

2. Efficiency

The Commission preliminarily believes that the proposed amendments will have moderate and mixed effects on efficiency. The Commission preliminarily believes that improvements to CAT Data security from the proposed amendments may improve efficiency by reducing the likelihood of a CAT Data breach. To the extent that the likelihood of a data breach is reduced, the Commission preliminarily believes that taking measures that may prevent a data breach is inherently more efficient than remediating the consequences of a data breach after it has occurred. The Commission preliminarily believes that provisions of the proposed amendments that require the creation and use of SAWs and set forth requirements that will apply to such workspaces may have negative effects on the efficiency with which Participants perform their

regulatory tasks. To the extent that participants implement the current CAT NMS Plan in a manner that is efficient for them individually, provisions increasing uniformity may reduce efficiency by requiring some Participants to abandon decisions that were efficient for them in favor of a potentially less efficient mandated alternative. Finally, the Commission preliminarily believes that the relatively more standardized SAW environments may also enable efficiencies in how Participants perform regulatory activities by facilitating commercial opportunities to license tools between Participants.

The Commission preliminarily believes that improvements to CAT Data security from the proposed amendments may improve efficiency by reducing the likelihood of a CAT Data breach. Because the costs of a data breach are potentially high and would be borne primarily by investors and CAT Data reporters and because the economic impact of a significant data breach is likely to exceed the costs of measures in the proposed amendments that are designed to prevent such a data breach, the Commission preliminarily believes that to the extent that the likelihood of a data breach is reduced, taking measures that may prevent a data breach is inherently more efficient than remediating the consequences of a data breach after it occurred.

The Commission preliminarily believes that provisions of the proposed amendments that require the creation and use of SAWs and set forth requirements that will apply to such workspaces are likely to have negative effects on the efficiency with which Participants perform their regulatory tasks. The CAT NMS Plan as it currently stands does not include provisions for the manner in which Participants access and work with CAT Data beyond the security provisions discussed previously.⁷⁷⁹ Currently, Participants discharge their regulatory duties through a number of approaches, with some Participants performing those duties in their private analytic workspaces while others outsource many of their regulatory duties, particularly those requiring data that is not collected by their normal operations, to other Participants through the use of RSAs or under a plan approved pursuant to Rule 17d-2 under the Exchange Act.⁷⁸⁰ The Commission believes this diversity of approaches

represents strategic choices on the part of Participants.

Rule 613 requires that Participants update their surveillance and oversight activities to make use of CAT Data that will be made available through the Plan.⁷⁸¹ Planned approaches for incorporating CAT Data into regulatory activities that may currently be optimal for a Participant, such as performing most of its regulatory duties in-house, may become more difficult for Participants. For example, a Participant's regulatory staff may be proficient in technical infrastructure that may not be available or might be less efficient in the SAWs. Consequently, adapting to the requirements of the proposed amendments may reduce the efficiency with which a Participant can discharge its regulatory duties with staff and infrastructure already in place.

Further, working within the SAW may be less efficient than alternative environments Participants might have selected to access and analyze CAT Data. The proposed amendments impose some uniformity across SAWs and the Commission preliminarily believes that this uniformity reduces the flexibility of design options for Participants in designing their analytic environments, which may result in more costly or less efficient solutions.⁷⁸² The Commission preliminarily believes that these reductions in efficiency are partially mitigated by provisions in the proposed amendments that provide for exceptions to the SAW use requirement although it recognizes that exercising these provisions is also costly to Participants.⁷⁸³

In addition, the Commission preliminarily believes that provisions of the proposed amendments that require regulators to secure Commission approval before exercising programmatic access to the Customer Information Subsystems will impose costs⁷⁸⁴ upon regulators. These provisions are likely to delay regulators' access to such data as well, further reducing the efficiency with which regulators perform duties that rely upon programmatic access of Customer Identifying Systems.

While the Commission recognizes that provisions of the proposed amendments that reduce the options Participants have (for example, by requiring use of a SAW or an Exempted Environment)

⁷⁷⁸ See CAT NMS Plan Approval Order, *supra* note 3, at Part IV.G.1.c.

⁷⁷⁹ See *supra* Part IV.B.1.

⁷⁸⁰ See *supra* Part IV.D.1.

⁷⁸¹ See discussion of the adoption of Rule 613(a)(3)(iv), 77 FR 45788 (Aug. 1, 2012), available at: <https://www.govinfo.gov/content/pkg/FR-2012-08-01/pdf/2012-17918.pdf>.

⁷⁸² See *supra* Part IV.A.

⁷⁸³ See *supra* Part IV.D.

⁷⁸⁴ See *supra* Part IV.A.6.

are likely to impact how regulators perform their regulatory duties, the Commission preliminarily believes security improvements to CAT Data may partially mitigate these inefficiencies. The proposed amendments are intended to reduce the likelihood of a CAT Data breach. To the extent that security in environments from which Participants access and analyze CAT Data is improved, the likelihood that investors and CAT Data reporters are harmed by a data breach and the likelihood that Participants will need to address the consequences of a data breach, are likely to be reduced. While Participants are likely to see reductions in the efficiency with which they perform their regulatory duties, investors and CAT Data reporters, the parties likely to experience the greatest harm in the event of a data breach, directly benefit from improvements to security from the proposed amendments.

The Commission preliminarily believes other provisions of the proposed amendments are likely to increase efficiency. The Commission preliminarily believes that standardizing implementation of security protocols through the common detailed design specifications may be more efficient than having each Participant that implements a SAW or Excepted Environment for CAT Data because it avoids duplication of effort. This may also improve efficiency by reducing the complexity of security monitoring of environments from which CAT Data is accessed and analyzed.

The Commission preliminarily believes that the relatively more standardized SAW environments may also lead to efficiencies in how Participants perform regulatory activities. To the extent that Participants will be working in similar environments on similar regulatory tasks, tools developed to facilitate one Participant's activities in the SAW may be potentially useful to others. This may facilitate commercial opportunities to license tools between Participants, possibly improving efficiency to the extent that licensing agreements are less costly than development activities. Such tools may also be superior to those developed by a Participant in isolation because there may be opportunities over time for common tools to be updated to reflect evolving best practices.

3. Competition

The Commission preliminarily believes that the proposed amendments will have minor mixed effects on competition. In the case of the market for regulatory services, the Commission preliminarily believes that competition

may increase due to additional Participants seeking out RSAs if the amendments are adopted.

In the CAT NMS Plan Approval Order, the Commission discussed potential changes to competition in the market for regulatory services.⁷⁸⁵ The Commission preliminarily believes that the proposed amendments could further increase competition in the market of regulatory services because the proposed amendments' provisions requiring the creation and use of SAWs and limiting access to Customer Identifying Systems to SAWs may incentivize other Participants to enter such agreements as providers of regulatory services or as customers of other Participants that provide such services. Participants are likely to face additional operational challenges in performing regulatory duties using CAT Data because of the proposed amendments, particularly in the case of a Participant that elects to work in an Exempted Environment and thus cannot access Customer Identifying Systems from their primary analytic environment without also maintaining a SAW. Consequently, it is possible some Participants that otherwise would have performed some of these duties in house may instead choose to outsource. An increase in the market for these services may incentivize Participants to enter into or increase their competition within this market as providers of regulatory services.

4. Capital Formation

Because the proposed amendments concern the security of data used by regulators to reconstruct market events, monitor market behavior, and investigate misconduct, the Commission preliminarily does not anticipate that the proposed rules would encourage or discourage assets being invested in the capital markets and thus do not expect the rules will significantly affect capital formation.

C. Alternatives

1. Private Contracting for Analytic Environments

The Commission considered an alternative wherein the Participants would be required to work in analytic environments that would be provided by individual Participants, instead of SAWs provided by the Plan Processor, unless they sought exceptions so they could work in Excepted Environments. This alternative approach would differ from the baseline by requiring Participants to obtain an exception if

⁷⁸⁵ See CAT NMS Plan Approval Order, *supra* note 3, at Part V.G.1.c.

they did not choose to work within the analytic environments currently being developed by the Plan Processor.

Under the alternative approach, security monitoring of the analytic environments might be less uniform. Responsibility for the implementation of security controls and monitoring compliance of those controls would reside with the Participant that provided the analytic environment.⁷⁸⁶ This would be likely to result in the security of some implementations being greater than others, for example if security monitoring in some analytic environments occurred more frequently than in others. This could result in some implementations being less secure than they would be under the proposed approach where the Plan Processor is responsible for security monitoring in the SAWs and has more involvement in the configuration of the SAWs.⁷⁸⁷ The Commission recognizes that this variability could also lead to some analytic environments being more secure than they would be under the proposed approach.

The Commission also preliminarily believes that the alternative approach might be less efficient than the proposed approach. Under the alternative, each Participant would need to configure its analytic environment and develop security protocols within its analytic environment. Under the current proposal, some of these tasks would be performed by the Plan Processor.⁷⁸⁸ This duplication of effort across Participants may be inefficient.

The Commission preliminarily believes that the alternative approach may also be more costly to Participants. Cloud computing resources exhibit volume pricing discounts. Under the proposed approach, the Plan Processor would presumably contract for all the cloud computing resources required by the Participants collectively. This may reduce not only recurring operating costs for the SAWs, but implementation costs including costs incurred to contract with the cloud services provider. The Commission cannot determine if the Plan Processor would share any savings that result with individual Participants that contracted for SAWs through the Plan Processor, but the potential for favorable pricing exists.

⁷⁸⁶ See *supra* Part IV.B.2.

⁷⁸⁷ To the extent that a bad actor would focus an incursion attempt upon the least secure environment, reducing variability between environments may improve CAT Data security by reducing vulnerabilities within environments from where CAT Data is accessed and analyzed.

⁷⁸⁸ See *supra* Part II.C.

2. Not Allowing for Exceptions to the SAW Use Requirement

The Commission considered an alternative approach that would not provide an exception process to the requirement that Participants use SAWs when employing the UDDQ and bulk extract tools to access and analyze CAT Data. Under the alternative approach, each Participant would use a SAW provided by the Plan Processor to perform its regulatory duties with CAT Data.

The Commission preliminarily believes that under the alternative approach, there would necessarily be less variability in the security of environments from which CAT Data is accessed and analyzed. To the extent that variation results in some environments being more secure than others, the proposed approach could potentially lead to the existence of relatively weaker security controls within some environments. On the other hand, it is not necessarily true that Excepted Environments would have weaker security than SAWs because an Excepted Environment could have security controls that exceed those within SAWs. However, the Commission recognizes that under the alternative approach, variability between environments that access and analyze CAT Data is likely to be minimized because security controls for all SAWs would be configured by the Plan Processor.

The alternative approach prevents participants from seeking exceptions to the requirement that CAT data be analyzed in a SAW, which may be suboptimal for some participants because they have alternative analytic environments and in which they plan to access and analyze CAT Data. The Commission preliminarily believes that under this alternative approach, Participants may achieve or maintain the security standards required by the CAT NMS Plan less efficiently than they might under the proposed amendments because Participants have significant investments in private analytic environments and regulatory tools that could not be used in the absence of an exception process.⁷⁸⁹

3. Alternative Download Size Limits for the Online Targeted Query Tool

The Commission considered alternative download size limits for the OTQT. Under the proposed approach, downloads through the OTQT are limited to extracting no more than 200,000 records per query result.⁷⁹⁰

Under the alternative approach, downloads through the OTQT would be limited to a different number of maximum records.

The Commission preliminarily believes that increasing the proposed download size limit such that more records could be downloaded through a single OTQT query might reduce inefficiencies that may result from the 200,000 record download limit.⁷⁹¹ However, increasing this limit would also allow more CAT Data to be extracted from CAT, increasing the attack surface of CAT.

The Commission preliminarily believes that decreasing the download size limit such that fewer records could be downloaded through a single OTQT query might potentially increase inefficiencies that may result from the 200,000 download limit. However, decreasing this limit would also allow less CAT Data to be extracted through OTQT, decreasing the attack surface of CAT.

4. Allowing Access to Customer Identifying Systems From Excepted Environments

The Commission considered an alternative approach where Participants would be able to access data in Customer Identifying Systems from Excepted Environments. Under the proposed approach, access to Customer Identifying Systems is only available through SAWs.

The Commission preliminarily believes that the alternative approach might reduce inefficiencies that Participants working within Excepted Environments are likely to experience under the proposed amendments. It is possible that under the proposal, some Participants may seek exceptions to work within Excepted Environments and may have no need of a SAW outside of their need to access data within the CAIS. The proposed restriction on Customer Identifying Systems access from SAWs may reduce efficiency by forcing some Participants to maintain a minimal SAW that they do not use other than to access Customer Identifying Systems, or cause them to enter into 17d–2s or RSAs in order to satisfy those regulatory duties they cannot otherwise perform in their Excepted Environments. The Commission preliminarily believes that the alternative approach may provide less security for sensitive customer and account information contained in Customer Identifying Systems. As discussed previously, Customer and Account Attribute data is among the

most sensitive data in CAT.⁷⁹² To the extent that Excepted Environments increase the variability of security across environments that access and analyze CAT Data,⁷⁹³ restricting Customer Identifying Systems access to within SAWs provides more uniform security across environments accessing this data and thus may improve its security to the extent that one or more Excepted Environments exist that are not as secure as SAWs.

D. Request for Comment on the Economic Analysis

The Commission is sensitive to the potential economic effects, including the costs and benefits, of the proposed amendments to the CAT NMS Plan. The Commission has identified above certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

179. Please explain whether you believe the Commission's analysis of the potential effects of the proposed amendments to the CAT NMS Plan is reasonable.

180. The Commission preliminarily believes that the proposed amendments may improve the efficiency of CAT implementation by explicitly defining the scope of the information security program required by the CAT NMS Plan. Do you agree? Are there other economic effects of defining the scope of the information security program that the Commission should consider?

181. Please explain if you agree or disagree with the Commission's assessment of the benefits of the proposed amendments. Are there additional benefits that the Commission should consider?

182. Do you believe the Commission's cost estimates are reasonable? If not, please provide alternative estimates where possible. Are there additional costs that the Commission should consider?

183. Please explain whether you agree with the Commission's assessment of potential conflicts of interests involving the Security Working Group. Are there further conflicts of interest that the Commission should consider? Are there factors that the Commission has not considered that may further mitigate

⁷⁸⁹ See *supra* Part IV.A.3.c.

⁷⁹⁰ See *supra* Part II.D.

⁷⁹¹ See *supra* Part IV.A.4.

⁷⁹² See *supra* Part II.C.2.

⁷⁹³ See *supra* Part IV.C.2.

potential conflicts of interest involving the Security Working Group?

184. In its calculations of cost estimates, the Commission assumes that the hourly labor rate for the CISO is equivalent to that of a Chief Compliance Officer. Do you agree with this assumption? If not, please provide an alternative estimate if possible.

185. In its calculation of cost estimates, the Commission assumes that the hourly rate of a Chief Regulatory Officer as 125% of the rate of a Chief Compliance Officer. Do you agree with this assumption? If not, please provide an alternate estimate if possible.

186. In its calculation of cost estimates, the Commission estimates the hourly rate of an Operating Committee member using an adjusted hourly rate for a Vice President of Operations of \$381 per hour. Is this estimate reasonable? If not, please provide an alternate estimate if possible.

187. Do you agree or disagree with the Commission's assessment of the benefits of providing for exceptions for the SAW usage requirements? Are there additional benefits of the SAW exception provision that the Commission should consider?

188. The Commission preliminarily believes that each Participant Group will establish a single SAW or Excepted Environment because it preliminarily believes that each Participant Group largely centralizes its regulatory functions that would require CAT Data. Are there reasons why a single Participant Group may wish to have multiple SAWs? Are there reasons some Participant Groups may decide to maintain both a SAW and an Excepted Environment?

189. The Commission preliminarily believes that the proposed amendments' provisions related to the CISP may improve the security of CAT Data because, to the extent that security controls are implemented more uniformly than they would be under the current CAT NMS Plan, they reduce variability in security control implementation. Do you agree? Are there additional economic effects of provisions of the proposed amendments related to the CISP that the Commission should consider?

190. The Commission preliminarily believes that the requirement that the Plan Processor must evaluate and notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications before that SAW may connect to the Central Repository will further increase uniformity of security control implementations. Do you agree? Are there other economic effects of this

provision that the Commission should consider?

191. Do you agree that provisions allowing for exceptions to the SAW usage requirement may allow Participants to achieve or maintain the security standards required by the CAT NMS Plan more efficiently? Are there other economic effects of this provision that the Commission should consider?

192. The proposed amendments require that each Participant using a non-SAW environment simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment. How often would a Participant Group make changes to its Excepted Environment that would necessitate material changes to its security controls?

193. The proposed amendments require that Participants would need to implement processes in Excepted Environments to enable Plan Processor security monitoring. The Commission preliminarily believes that development costs for the processes that produce log files that support Plan Processor monitoring would require similar development activities to developing the automated monitoring processes themselves. Do you agree? Please provide alternate estimates of the costs of these development activities if possible.

194. The Commission believes that by limiting the number of records of CAT Data that can be extracted through the OTQT will increase security by limiting the data that is accessed outside of secure environments. Do you agree? Are there other economic effects of limiting the number of records that can be extracted through the OTQT that the Commission should consider?

195. The Commission preliminarily believes that limiting the number of records of CAT Data that can be extracted through the OTQT this may reduce the regulatory use of CAT Data. Do you agree with this assessment? Are there additional indirect costs to regulators from this provision that the Commission should consider?

196. The Commission preliminarily believes that requiring the Plan Processor to evaluate and validate each Participant's SAW before that SAW may connect to the Central Repository will further increase uniformity of security control implementations. Do you agree? Are there other economic effects of requiring the Plan Processor to perform this evaluation and validation that the Commission should consider?

197. The Commission preliminarily believes that standardizing implementation of security protocols through the common detailed design specifications may be more efficient than having each Participant that implements a SAW or private environment for CAT Data do so independently because it avoids duplication of effort. Do you agree? Are there other economic effects of these provisions that the Commission should consider?

198. The Commission preliminarily believes that the requirement that customer addresses be reported to CAIS with separate fields for street number and street name is likely to have a de minimis economic impact upon both Participants and CAT Reporters. Do you agree? If possible, please provide cost estimates for providing this information in separate fields.

199. Do you agree with the Commission's cost estimates for the Plan Processor to establish programmatic access to the Customer Identifying Systems? Please provide alternative estimates if possible. Are there additional direct or indirect costs to providing this programmatic access that the Commission should consider?

200. Do you agree that placing restrictions on access to Customer Identifying Systems to Regulatory Staff will reduce the risk of inappropriate use of customer and account information? Are there additional economic effects of these restrictions that the Commission should consider?

201. Do you agree with the Commission's analysis of the economic effects of provisions of the proposed amendments that prohibit any use of CAT Data that has both regulatory and commercial uses? Are there additional economic effects of these provisions that the Commission should consider?

202. The proposed amendments would require the Participants to periodically review the effectiveness of the Proposed Confidentiality Policies and take prompt action to remedy deficiencies in such policies. The Commission preliminarily estimates that this review would require approximately 20% of the labor of the initial effort to jointly draft those policies because presumably many of the policies would not need revision with each review. Do you agree? Please provide alternative cost estimates if possible.

203. The Commission preliminarily believes that providing an exception allowing non-regulatory staff to access CAT data in certain circumstances may help avoid inefficiencies where a Participant's response to a market event

is slowed due to prohibitions on staff other than Regulatory Staff having access to CAT Data. Do you agree? Are there additional economic effects of providing this exception that the Commission should consider?

204. The Commission preliminarily believes the risk that CAT data will be misused by allowing non-regulatory staff to use the data in certain circumstances is mitigated by the requirement that the Participant's Chief Regulatory Officer provide written permission for such access. Do you agree? Are there additional security risks or economic effects of these provisions that the Commission should consider?

205. The Commission preliminarily believes that the Plan Processor has transactional test data available for its staff and contractors to use for development activities. Do you agree? If not, please provide an estimate of the costs the Plan Processor would incur to create such test data.

206. The Commission believes that the ability to amend the plan in the future mitigates the concern that participants may be prevented in the future from using more secure methods to connect to CAT that have yet to be developed. Do you agree? Are there other indirect costs of these provisions that the Commission should consider?

207. The Commission preliminarily believes that the proposed amendments are likely to have moderate mixed effects on efficiency. Do you agree? Are there other effects of the proposed amendments on efficiency that the Commission should consider?

208. The Commission preliminarily believes that the proposed amendments are likely to have minor mixed effects on competition. Do you agree? Are there other effects of the proposed amendments on competition that the Commission should consider?

209. The Commission preliminarily believes that the proposed amendments' effects on capital formation likely won't be significant. Do you agree? Are there other effects of the proposed amendments on capital formation that the Commission should consider?

210. Do you believe that provisions of the proposed amendments that require the creation and use of SAWs and set forth requirements that will apply to such workspaces may have negative effects on the efficiency with which Participants perform their regulatory tasks? Are there other economic effects of these provisions that the Commission should consider?

211. The Commission preliminarily believes that the relatively more standardized SAW environments may

also enable efficiencies in how Participants perform regulatory activities by facilitating commercial opportunities to license tools between Participants. Do you agree? Are there other economic effects of these provisions that the Commission should consider?

212. The Commission preliminarily believes that provisions of the proposed amendments that require the creation and use of SAWs and set forth requirements that will apply to such workspaces are likely to have negative effects on the efficiency with which Participants perform their regulatory tasks. Do you agree? Are there other economic effects on how Participants perform their regulatory tasks that the Commission should consider?

213. The Commission preliminarily believes that the uniformity across SAWs imposed by the plan reduces the flexibility of design options for Participants potentially resulting in more costly and/or less efficient solutions. Do you agree with this assessment? In what manner could the flexibility of design options available to Participants be affected by the proposed amendments?

214. Do you agree that the potential reductions in efficiency due to the imposed uniformity across SAWs are partially mitigated by provisions in the proposed amendments that providing for exceptions to the SAW use requirement?

215. The Commission preliminarily believes that the proposed amendments could further increase competition in the market of regulatory services because the proposed amendments' provision requiring the creation and use of secure analytical workspaces may incentivize other Participants to enter such agreements as providers of regulatory services or as customers of other Participants that provide such services. Are there likely to be additional economic effects on how Participants provide and use 17d-2 and RSA agreements?

216. Do you believe that the alternative approach of private contracting for analytic environments would likely lead to some implementations to be less secure than they would be under the proposed approach? Are there additional economic effects of the alternative approach that the Commission should consider?

217. Do you agree with the Commission's analysis of the alternative approach of not allowing exceptions to the SAW use requirement? Are there additional economic effects of the

alternative approach that the Commission should consider?

218. The proposed amendments would limit downloads through the OTQT to 200,000 records. Would an alternative limit to download size have security or efficiency benefits?

219. Do you agree with the Commission's analysis of the alternative approach of allowing access to CAIS from Exempted Environments? Are there additional economic effects of the alternative approach that the Commission should consider?

V. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),⁷⁹⁴ the Commission requests comment on the potential effect of this proposal on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views, to the extent possible.

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")⁷⁹⁵ requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)⁷⁹⁶ of the Administrative Procedure Act,⁷⁹⁷ as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."⁷⁹⁸ Section 605(b) of the RFA states that this requirement shall not apply "to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁷⁹⁹

The proposed amendments to the CAT NMS Plan would only impose requirements on national securities

⁷⁹⁴ Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

⁷⁹⁵ 5 U.S.C. 601 *et seq.*

⁷⁹⁶ 5 U.S.C. 603(a).

⁷⁹⁷ 5 U.S.C. 551 *et seq.*

⁷⁹⁸ The Commission has adopted definitions for the term "small entity" for purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

⁷⁹⁹ 5 U.S.C. 605(b).

exchanges registered with the Commission under Section 6 of the Exchange Act and FINRA. With respect to the national securities exchanges, the Commission's definition of a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.⁸⁰⁰ None of the national securities exchanges registered under Section 6 of the Exchange Act that would be subject to the proposed amendments are "small entities" for purposes of the RFA. In addition, FINRA is not a "small entity."⁸⁰¹ For these reasons, the proposed rule will not apply to any "small entities." Therefore, for the purposes of the RFA, the Commission certifies that the proposed amendments would not have a significant economic impact on a substantial number of small entities.

The Commission requests comment regarding this certification. In particular, the Commission solicits comment on the following:

220. Do commenters agree with the Commission's certification that the proposed amendments would not have a significant economic impact on a substantial number of small entities? If not, please describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

VI. Statutory Authority and Text of the Proposed Amendments to the CAT NMS Plan

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 5, 6, 11A(a)(3)(B), 15, 15A, 17(a) and (b), 19 and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k-1, 78o, 78o-3, 78q(a) and (b), 78s, 78w(a), and pursuant to Rule 608(a)(2) and (b)(2),⁸⁰² the Commission proposes to amend the CAT NMS Plan in the manner set forth below.

Additions are *italicized*; deletions are [bracketed].

* * * * *

Section 1.1. Definitions

As used throughout this Agreement (including, for the avoidance of doubt, the

Exhibits, Appendices, Attachments, Recitals and Schedules identified in this Agreement):

* * * * *

"[Customer]Account [Information]Attributes" shall include, but not be limited to, [account number,] account type, customer type, date account opened, and large trader identifier (if applicable); except, however, that (a) in those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution, the Industry Member will (i) provide the Account Effective Date in lieu of the "date account opened"; (ii) provide the relationship identifier in lieu of the "account number"; and (iii) identify the "account type" as a "relationship"; (b) in those circumstances in which the relevant account was established prior to the implementation date of the CAT NMS Plan applicable to the relevant CAT Reporter (as set forth in Rule 613(a)(3)(v) and (vi)), and no "date account opened" is available for the account, the Industry Member will provide the Account Effective Date in the following circumstances: (i) Where an Industry Member changes back office providers or clearing firms and the date account opened is changed to the date the account was opened on the new back office/clearing firm system; (ii) where an Industry Member acquires another Industry Member and the date account opened is changed to the date the account was opened on the post-merger back office/clearing firm system; (iii) where there are multiple dates associated with an account in an Industry Member's system, and the parameters of each date are determined by the individual Industry Member; and (iv) where the relevant account is an Industry Member proprietary account.

* * * * *

"CAIS" refers to the Customer and Account Information System within the CAT System that collects and links Customer-ID(s) to Customer and Account Attributes and other identifiers for queries by Regulatory Staff.

"CAIS/CCID Subsystem Regulator Portal" refers to the online tool enabling Manual CAIS access and Manual CCID Subsystem access.

* * * * *

"CCID Subsystem" refers to the subsystem within the CAT System which will create the Customer-ID from a Transformed Value(s), as set forth in Section 6.1(v) and Appendix D, Section 9.1.

"CCID Transformation Logic" refers to the mathematical logic identified by the Plan Processor that accurately transforms an individual tax payer identification number(s)(ITIN(s))/social security number(s)(SSN(s))/Employer Identification Number (EIN(s)) into a Transformed Value(s) for submission into the CCID Subsystem, as set forth in Appendix D, Section 9.1.

* * * * *

"Comprehensive Information Security Program" includes the organization-wide and system-specific controls and related policies and procedures required by NIST SP 800-53 that address information security for the information and information systems that

support the operations of the Plan Processor and the CAT System, including those provided or managed by an external organization, contractor, or source, inclusive of Secure Analytical Workspaces.

* * * * *

"Customer and Account Attributes" shall mean the data elements in Account Attributes and Customer Attributes.

* * * * *

"Customer [Identifying Information] Attributes" means information of sufficient detail to identify a Customer, including, but not limited to, (a) with respect to individuals: Name, address, [date] year of birth, [individual tax payer identification number ("ITIN")/social security number ("SSN")], individual's role in the account (e.g., primary holder, joint holder, guardian, trustee, person with the power of attorney); and (b) with respect to legal entities: Name, address, Employer Identification Number ("EIN"), and [/]Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable; provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer.

* * * * *

"Customer Identifying Systems" means CAIS and the CCID Subsystem.

* * * * *

"Customer Identifying Systems Workflow" describes the requirements and process for accessing Customer Identifying Systems as set forth in Appendix D, Data Security.

* * * * *

"Manual CAIS Access" when used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to manually query CAIS, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in Section 6.5(g).

* * * * *

"Manual CCID Subsystem Access" when used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to manually query the CCID Subsystem, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in Section 6.5(g).

* * * * *

["PII"] means personally identifiable information, including a social security number or tax identifier number or similar information; Customer Identifying Information and Customer Account Information.]

* * * * *

"Programmatic CAIS Access" when used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to programmatically query, and return results that include, data from the CAIS and transactional CAT Data, in support of the regulatory purpose of an inquiry or set of inquiries, in accordance with Appendix D, Data Security, and the Participants' policies as set forth in Section 6.5(g).

⁸⁰⁰ See 17 CFR 240.0-10(e).

⁸⁰¹ See 13 CFR 121.201

⁸⁰² 17 CFR 242.608(a)(2) and (b)(2). These provisions enable the Commission to propose amendments to any effective NMS Plan by "publishing the text thereof, together with a statement of the purpose of such amendment," and providing "interested persons an opportunity to submit written comments."

“Programmatic CCID Subsystem Access” when used in connection with the Customer Identifying Systems Workflow, as defined in Appendix D, shall mean the Plan Processor functionality to programmatically query the CCID Subsystem to obtain Customer-ID(s) from Transformed Value(s), in support of the regulatory purpose of an inquiry or set of inquiries, in accordance with Appendix D, Data Security, and the Participants’ policies as set forth in Section 6.5(g).

* * * * *

“Regulatory Staff” means the Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) and staff within the Chief Regulatory Officer’s (or similarly designated head(s) of regulation’s) reporting line. In addition, Regulatory Staff must be specifically identified and approved in writing by the Chief Regulatory Officer (or similarly designated head(s) of regulation).

* * * * *

“Secure Analytical Workspace” or “SAW” means an analytic environment account that is part of the CAT System, and subject to the Comprehensive Information Security Program, where CAT Data is accessed and analyzed by Participants pursuant to Section 6.13. The Plan Processor shall provide a SAW account for each Participant that implements all common technical security controls required by the Comprehensive Information Security Program.

* * * * *

“Secure File Sharing” means a capability that allows files to be extracted and shared outside of the SAW in a manner consistent with the provisions of Section 6.13(a)(i)(D).

* * * * *

“Transformed Value” refers to the value generated by the CCID Transformation Logic, as set forth in Section 6.1(v) and Appendix D, Section 9.1.

* * * * *

Section 4.12. Subcommittees and Working Groups

* * * * *

(c) The Operating Committee shall establish and maintain a security working group composed of the Chief Information Security Officer, and the chief information security officer or deputy chief information security officer of each Participant (the “Security Working Group”). Commission observers shall be permitted to attend all meetings of the Security Working Group, and the CISO and the Operating Committee may invite other parties to attend specific meetings. The Security Working Group’s purpose shall be to advise the Chief Information Security Officer (who shall directly report to the Operating Committee in accordance with Section 6.2(b)(iii)) and the Operating Committee, including with respect to issues involving:

(i) Information technology matters that pertain to the development of the CAT System;

(ii) the development, maintenance, and application of the Comprehensive Information Security Program;

(iii) the review and application of the confidentiality policies and procedures required by Section 6.5(g);

(iv) the review and analysis of third party risk assessments conducted pursuant to Section 5.3 of Appendix D, including the review and analysis of results and corrective actions arising from such assessments; and

(v) emerging cybersecurity topics. The Chief Information Security Officer shall apprise the Security Working Group of relevant developments and provide it with all information and materials necessary to fulfill its purpose.

* * * * *

Section 6.1. Plan Processor

* * * * *

(d) The Plan Processor shall:

* * * * *

(v) provide Secure Analytical Workspaces in accordance with Section 6.13.

* * * * *

(v) The Plan Processor shall develop, with the prior approval of the Operating Committee, the functionality to implement the process for creating a Customer-ID(s), consistent with this Section and Appendix D, Section 9.1. With respect to the CCID Subsystem, the Plan Processor shall develop functionality to:

(i) Ingest Transformed Value(s) and any other required information and convert the Transformed Value(s) into an accurate and reliable Customer-ID(s);

(ii) Validate that the conversion from the Transformed Value(s) to the Customer-ID(s) is accurate; and

(iii) Transmit the Customer-ID(s), consistent with Appendix D, Section 9.1, to CAIS or a Participant’s SAW.

* * * * *

Section 6.2. Chief Compliance Officer and Chief Information Security Officer

(a) Chief Compliance Officer.

* * * * *

(v) The Chief Compliance Officer shall:

* * * * *

(H) regularly review the Comprehensive Information Security Program developed and maintained by the Plan Processor pursuant to Section 6.12 and determine the frequency of such reviews;

* * * * *

(Q) oversee the Plan Processor’s compliance with applicable laws, rules and regulations related to the CAT system, in its capacity as Plan Processor[.];

(R) in collaboration with the Chief Information Security Officer, review the Participants’ policies developed pursuant to Section 6.5(g)(i), and, if the Chief Compliance Officer, in consultation with the Chief Information Security Officer, finds that such policies are inconsistent with the requirements of the Plan, notify the Operating Committee of such deficiencies;

(S) in collaboration with the Chief Information Security Officer, determine, pursuant to Section 6.13(d), whether a Participant should be granted an exception from Section 6.13(a)(i)(B) and, if applicable, whether such exception should be continued; and

(T) as required by Section 6.6(b)(ii)(B)(3), in collaboration with the Chief Information

Security Officer, review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted.

(b) Chief Information Security Officer.

* * * * *

(v) Consistent with Appendices C and D, the Chief Information Security Officer shall be responsible for creating and enforcing appropriate policies, procedures, and control structures to monitor and address data security issues for the Plan Processor and the Central Repository including:

* * * * *

(F) [PII] Customer and Account Attributes data requirements, including the standards set forth in Appendix D, [PII Data Requirements] Customer Identifying Systems Requirements and Customer Identifying Systems Workflow;

* * * * *

(viii) In collaboration with the Chief Compliance Officer, the Chief Information Security Officer shall review the Participants’ policies developed pursuant to Section 6.5(g)(i). If the Chief Information Security Officer, in consultation with the Chief Compliance Officer, finds that such policies are inconsistent with the requirements of the Plan, they will be required to notify the Operating Committee of such deficiencies.

(ix) In collaboration with the Chief Compliance Officer, the Chief Information Security Officer shall determine, pursuant to Section 6.13(d), whether a Participant should be granted an exception from Section 6.13(a)(i)(B) and, if applicable, whether such exception should be continued.

(x) As required by Section 6.6(b)(ii)(B)(3), in collaboration with the Chief Compliance Officer, review CAT Data that has been extracted from the CAT System to assess the security risk of allowing such CAT Data to be extracted.

* * * * *

Section 6.4. Data Reporting and Recording by Industry Members

* * * * *

(d) Required Industry Member Data.

* * * * *

(ii) Subject to Section 6.4(c) and Section 6.4(d)(iii) with respect to Options Market Makers, and consistent with Appendix D, Reporting and Linkage Requirements, and the Technical Specifications, each Participant shall, through its Compliance Rule, require its Industry Members to record and report to the Central Repository the following, as applicable (“Received Industry Member Data” and collectively with the information referred to in Section 6.4(d)(i) “Industry Member Data”):

* * * * *

(C) for original receipt or origination of an order and Allocation Reports, the Firm Designated ID for the relevant Customer, and in accordance with Section 6.4(d)(iv), Customer and Account Attributes [Information and Customer Identifying Information] for the relevant Customer[.]; and

(D) for all Customers with an ITIN/SSN/EIN, the Transformed Value.

* * * * *

Section 6.5. Central Repository

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(b) Retention of Data

* * * * *

(i) Consistent with Appendix D, Data Retention Requirements, the Central Repository shall retain the information collected pursuant to paragraphs (c)(7) and (e)(7) of SEC Rule 613 in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention by the Plan Processor for a period of not less than six (6) years. Such data when available to the Participant's R[r]egulatory S[s]taff and the SEC shall be linked.

* * * * *

(f) Data Confidentiality

(i) The Plan Processor shall, without limiting the obligations imposed on Participants by this Agreement and in accordance with the framework set forth in, Appendix D, Data Security, and Functionality of the CAT System, be responsible for the security and confidentiality of all CAT Data received and reported to the Central Repository. Without limiting the foregoing, the Plan Processor shall:

* * * * *

(C) develop and maintain a C[c]omprehensive I[i]nformation S[s]ecurity P[p]rogram with a dedicated staff for the [Central Repository, consistent with Appendix D, Data Security] CAT System, that employs state of the art technology, which program will be regularly reviewed by the Chief Compliance Officer and Chief Information Security Officer;

* * * * *

(ii) [Each Participant shall adopt and enforce policies and procedures that:

(A) implement effective information barriers between such Participant's regulatory and non-regulatory staff with regard to access and use of CAT Data stored in the Central Repository;

(B) permit only persons designated by Participants to have access to the CAT Data stored in the Central Repository; and

(C) impose penalties for staff non-compliance with any of its or the Plan Processor's policies or procedures with respect to information security.

(iii) Each Participant shall as promptly as reasonably practicable, and in any event within 24 hours, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee, any instance of which such Participant becomes aware of: (A) noncompliance with the policies and procedures adopted by such Participant pursuant to Section 6.5(e)(ii); or (B) a breach of the security of the CAT.

(iv) The Plan Processor shall:

* * * * *

(B) require the establishment of secure controls for data retrieval and query reports by Participants' R[r]egulatory S[s]taff; and

* * * * *

(v) The Company shall endeavor to join the FS-ISAC and comparable bodies as the Operating Committee may determine.

(g) Participants' Confidentiality Policies and Procedures.

(i) The Participants shall establish, maintain and enforce *identical* written policies [and procedures] that apply to each Participant. Each Participant shall establish, maintain and enforce procedures and usage restriction controls in accordance with these policies. The policies must:

(A) be reasonably designed to (1) ensure the confidentiality of [the CAT Data] obtained from the Central Repository; and (2) limit the use of CAT Data to [obtained from the Central Repository] solely [for surveillance and regulatory purposes.]; [Each Participant shall periodically review the effectiveness of the policies and procedures required by this paragraph, and take prompt action to remedy deficiencies in such policies and procedures.]

(B) limit extraction of CAT Data to the minimum amount of data necessary to achieve a specific surveillance or regulatory purpose;

(C) limit access to CAT Data to persons designated by Participants, who must be (1) Regulatory Staff or (2) technology and operations staff that require access solely to facilitate access to and usage of the CAT Data by Regulatory Staff;

(D) implement effective information barriers between such Participants' Regulatory Staff and non-Regulatory Staff with regard to access and use of CAT Data;

(E) limit access to CAT Data by non-Regulatory Staff, by allowing such access only where there is a specific regulatory need for such access and requiring that a Participant's Chief Regulatory Officer (or similarly designated head(s) of regulation), or his or her designee, document his or her written approval of each instance of access by non-Regulatory Staff;

(F) require all Participant staff who are provided access to CAT Data to: (1) sign a "Safeguard of Information" affidavit as approved by the Operating Committee pursuant to Section 6.5(f)(i)(B); and (2) participate in the training program developed by the Plan Processor that addresses the security and confidentiality of information accessible in the CAT pursuant to Section 6.1(m), provided that Participant staff may be provided access to CAT Data prior to meeting these requirements in exigent circumstances;

(G) define the individual roles and regulatory activities of specific users;

(H) impose penalties for staff non-compliance with the Participant's or the Plan Processor's policies, procedures, or usage restriction controls with respect to information security, including, the policies required by Section 6.5(g)(i);

(I) be reasonably designed to implement and satisfy the Customer and Account Attributes data requirements of Section 4.1.6 of Appendix D such that Participants must be able to demonstrate that a Participant's ongoing use of Programmatic CAIS and/or CCID Subsystem access is in accordance with the Customer Identifying Systems Workflow; and

(J) document monitoring and testing protocols that will be used to assess Participant compliance with the policies.

(ii) The Participants shall periodically review the effectiveness of the policies and procedures and usage restriction controls required by Section 6.5(g)(i), including by using the monitoring and testing protocols documented within the policies pursuant to Section 6.5(g)(i)(J), and take prompt action to remedy deficiencies in such policies, procedures and usage restriction controls.

(iii) Each Participant shall as promptly as reasonably practicable, and in any event within 24 hours of becoming aware, report to the Chief Compliance Officer, in accordance with the guidance provided by the Operating Committee: (A) any instance of noncompliance with the policies, procedures, and usage restriction controls adopted by such Participant pursuant to Section 6.5(g)(i); or (B) a breach of the security of the CAT.

(iv) The Participants shall make the policies required by Section 6.5(g)(i) publicly available on each of the Participant websites, or collectively on the CAT NMS Plan website, redacted of sensitive proprietary information.

(v) On an annual basis, each Participant shall engage an independent accountant to perform an examination of compliance with the policies required by Section 6.5(g)(i) in accordance with attestation standards of the AICPA (referred to as U.S. Generally Accepted Auditing Standards or GAAS) or the PCAOB, and with Commission independence standards based on SEC Rule 2-01 of Regulation S-X. The independent accountant's examination report shall be submitted to the Commission upon completion, in a text-searchable format (e.g. a text-searchable PDF). The examination report provided for in this paragraph shall be considered submitted with the Commission when electronically received by an email address provided by Commission staff.

(vi) The policies required by Section 6.5(g)(i) are subject to review and approval by the Operating Committee, after such policies are reviewed by the Chief Compliance Officer and Chief Information Security Officer pursuant to Sections 6.2(a)(v)(R) and 6.2(b)(viii).

* * * * *

Section 6.6 [Regular] Written Assessments, Audits and Reports.

* * * * *

(b) Regular Written Assessment of the Plan Processor's Performance.

* * * * *

(ii) Contents of Written Assessment. The annual written assessment required by this Section 6.6 shall include:

* * * * *

(B) a detailed plan, based on the evaluation conducted pursuant to Section 6.6(b)(i), for any potential improvements to the performance of the CAT with respect to the items specified in SEC Rule 613(b)(6)(ii), as well as:

* * * * *

(3) an evaluation of the Comprehensive I[i]nformation S[s]ecurity P[p]rogram to ensure that the program is consistent with the highest industry standards for the protection of data[.], as part of which, the CCO, in collaboration with the CISO, shall review the quantity and type of CAT Data

extracted from the CAT System to assess the security risk of permitting such CAT Data to be extracted and identify any appropriate corrective measures;

* * * * *

Section 6.10 Surveillance

* * * * *

(c) Use of CAT Data by Regulators.

* * * * *

(ii) Extraction of CAT Data shall be consistent with all permission rights granted by the Plan Processor. All CAT Data returned shall be encrypted, and [PII] Customer and Account Attributes data shall be [masked]unavailable unless users have permission to view the CAT Data that has been requested.

* * * * *

Section 6.12. Comprehensive Information Security Program

The Plan Processor shall develop and maintain the C[omprehensive I[n]formation S[ecurity] P[rogram] [for the Central Repository], to be approved and reviewed at least annually by the Operating Committee, and which contains at a minimum the specific requirements detailed in Appendix D, Data Security and Section 6.13.

* * * * *

Section 6.13. Secure Analytical Environments

(a) SAW Environments. The Comprehensive Information Security Program shall apply to every Participant's SAW and must, at a minimum:

(i) Establish data access and extraction policies and procedures that include the following requirements:

(A) Participants shall use SAWs as the only means of accessing and analyzing Customer and Account Attributes.

(B) Participants shall use SAWs when accessing and analyzing CAT Data through the user-defined direct query and bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2, unless receiving an exception as set forth in Section 6.13(d).

(C) Participants shall only extract from SAWs the minimum amount of CAT Data necessary to achieve a specific surveillance or regulatory purpose.

(D) Secure file sharing capability provided by the Plan Processor shall be the only mechanism for extracting CAT Data from SAWs.

(ii) Establish security controls, policies, and procedures for SAWs that require all NIST SP 800-53 security controls and associated policies and procedures required by the Comprehensive Information Security Program to apply to the SAWs, provided that:

(A) For the following NIST SP 800-53 control families, at a minimum, security controls, policies, and procedures, shall be applied by the Plan Processor and shall be common to both the SAWs and the Central Repository in accordance with Section 2.4 of NIST SP 800-53, unless technologically or organizationally not possible: audit and accountability, security assessment and

authorization, configuration management, incident response, system and communications protection, and system and information integrity; and

(B) SAW-specific security controls, policies, and procedures shall be implemented to cover any remaining NIST SP 800-53 security controls for which common security controls, policies, and procedures are not possible.

(b) Detailed Design Specifications.

(i) The Plan Processor shall develop, maintain, and make available to the Participants detailed design specifications for the technical implementation of the access, monitoring, and other controls required for SAWs by the Comprehensive Information Security Program controls.

(ii) The Plan Processor shall notify the Operating Committee that each Participant's SAW has achieved compliance with the detailed design specifications before that SAW may connect to the Central Repository.

(c) SAW Operations.

(i) In accordance with the detailed design specifications developed pursuant to Section 6.13(b)(i), the Plan Processor shall monitor each Participant's SAW, for compliance with the Comprehensive Information Security Program and the detailed design specifications developed pursuant to Section 6.13(b)(i) only, and notify the Participant of any identified non-compliance with the Comprehensive Information Security Program or with the detailed design specifications developed pursuant to Section 6.13(b)(i).

(ii) Participants shall comply with the Comprehensive Information Security Program, comply with the detailed design specifications developed pursuant to Section 6.13(b)(i), and promptly remediate any identified non-compliance.

(iii) Each Participant may provide and use its choice of software, hardware configurations, and additional data within its SAW, so long as such activities comply with the Comprehensive Information Security Program.

(d) Non-SAW Environments.

(i) A Participant may seek an exception from the requirements of Section 6.13(a)(i)(B). If such exception is granted, the Participant may employ the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 in a non-SAW environment.

(A) To seek an exception from Section 6.13(a)(i)(B), the requesting Participant shall provide the Chief Information Security Officer, the Chief Compliance Officer, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group with:

(1) A security assessment of the non-SAW environment, conducted within the last twelve (12) months by a named, independent third party security assessor, that: (a) demonstrates the extent to which the non-SAW environment complies with the NIST SP 800-53 security controls and associated policies and procedures required by the Comprehensive Information Security Program pursuant to Section 6.13(a)(ii), (b) explains whether and how the Participant's security and privacy controls mitigate the risks associated with extracting CAT Data to

the non-SAW environment through user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2, and (c) includes a Plan of Action and Milestones document detailing the status and schedule of any corrective actions recommended by the assessment; and

(2) Detailed design specifications for the non-SAW environment demonstrating: (a) the extent to which the non-SAW environment's design specifications adhere to the design specifications developed by the Plan Processor for SAWs pursuant to Section 6.13(b)(i), and (b) that the design specifications will enable the operational requirements set forth for non-SAW environments in Section 6.13(d)(iii).

(B) Within 60 days of receipt of the materials described in Section 6.13(d)(i)(A), the Chief Information Security Officer and the Chief Compliance Officer must simultaneously notify the Operating Committee and the requesting Participant of their determination.

(1) The Chief Information Security Officer and the Chief Compliance Officer may jointly grant an exception if they determine, in accordance with policies and procedures developed by the Plan Processor, that the residual risks identified in the security assessment or detailed design specifications provided pursuant to Section 6.13(d)(i)(A) do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800-53. If an exception is granted, the Chief Information Security Officer and the Chief Compliance Officer shall provide the requesting Participant with a detailed written explanation setting forth the reasons for that determination.

(2) If the Chief Information Security Officer and the Chief Compliance Officer decide not to grant an exception to the requesting Participant, they must provide the Participant with a detailed written explanation setting forth the reasons for that determination and specifically identifying the deficiencies that must be remedied before an exception could be granted.

(C) If a request for an exception from Section 6.13(a)(i)(B) is denied, the requesting Participant may attempt to re-apply, after remedying the deficiencies identified by the Chief Information Security Officer and the Chief Compliance Officer, by submitting a new security assessment that complies with the requirements of Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified in Section 6.13(d)(i)(A)(2).

(ii) Continuance of any exception granted pursuant to Section 6.13(d)(i) is dependent upon an annual review process.

(A) To continue an exception, the requesting Participant shall provide a new security assessment that complies with the requirements of Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials required by Section 6.13(d)(i)(A)(2) to the Chief Information Security Officer, the Chief Compliance Officer, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group at least once a year, as measured from the date that the initial

application materials were submitted. If these materials are not provided by the specified date, the Chief Information Security Officer and the Chief Compliance Officer must revoke the exception in accordance with remediation timelines developed by the Plan Processor.

(B) Within 60 days of receipt of the updated application materials, the Chief Information Security Officer and the Chief Compliance Officer must simultaneously notify the Operating Committee and the requesting Participant of their determination.

(1) The Chief Information Security Officer and the Chief Compliance Officer may jointly continue an exception if they determine, in accordance with policies and procedures developed by the Plan Processor, that the residual risks identified in the security assessment or detailed design specifications provided pursuant to Section 6.13(d)(ii)(A) do not exceed the risk tolerance levels set forth in the risk management strategy developed by the Plan Processor for the CAT System pursuant to NIST SP 800–53. If the exception is continued, the Chief Information Security Officer and the Chief Compliance Officer shall provide the requesting Participant with a detailed written explanation setting forth the reasons for that determination.

(2) If the Chief Information Security Officer and the Chief Compliance Officer decide not to continue an exception, they must provide the requesting Participant with a detailed written explanation setting forth the reasons for that determination and specifically identifying the deficiencies that must be remedied before an exception could be granted anew.

(C) If a request for a renewed exception from Section 6.13(a)(i)(B) is denied, or if an exception is revoked pursuant to Section 6.13(d)(ii)(A), the CISO and the CCO must require the requesting Participant to cease employing the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 in its non-SAW environment in accordance with the remediation timeframes developed by the Plan Processor. The requesting Participant may attempt to re-apply for an exception, after remedying the deficiencies identified by the Chief Information Security Officer and the Chief Compliance Officer, by submitting a new security assessment that complies with the requirements of Section 6.13(d)(i)(A)(1) and up-to-date versions of the materials specified in Section 6.13(d)(i)(A)(2).

(iii) Non-SAW Operations. During the term of any exception granted by the Chief Information Security Officer and the Chief Compliance Officer:

(A) The Participant shall not employ the non-SAW environment to access CAT Data through the user-defined direct query or bulk extract tools described in Section 6.10(c)(i)(B) and Appendix D, Section 8.2 until the Plan Processor notifies the Operating Committee that the non-SAW environment has achieved compliance with the detailed design specifications provided by the Participant pursuant to Section 6.13(d)(i) or (ii).

(B) The Plan Processor shall monitor the non-SAW environment in accordance with the detailed design specifications provided

by the Participant pursuant to Section 6.13(d)(i) or (ii), for compliance with those detailed design specifications only, and shall notify the Participant of any identified non-compliance with these detailed design specifications. The Participant shall comply with such detailed design specifications and promptly remediate any identified non-compliance.

(C) The Participant shall simultaneously notify the Plan Processor, the members of the Security Working Group (and their designees), and Commission observers of the Security Working Group of any material changes to its security controls for the non-SAW environment.

(D) The Participant may provide and use its choice of software, hardware, and additional data within the non-SAW environment, so long as such activities comply with the detailed design specifications provided by the Participant pursuant to Section 6.13(d)(i) or (ii).

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Appendix C

Appendix C was filed with the CAT NMS Plan that was published for comment on May 17, 2016.⁸⁰³ As required by Rule 613, Appendix C includes discussion of various considerations related to how the Participants propose to implement the requirements of the CAT NMS Plan, cost estimates for the proposed solution, and the costs and benefits of alternate solutions considered but not proposed. Because these discussions were intended to ensure that the Commission and the Participants had sufficiently detailed information to carefully consider all aspects of the national market system plan that would ultimately be submitted by the Participants, these discussions have not been updated to reflect the subsequent amendments to the CAT NMS Plan and Appendix D.

Discussion of Considerations

SEC Rule 613(a)(1) Considerations

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Appendix D

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4.1 Overview

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The Plan Processor must provide to the Operating Committee a C[omprehensive S[ecurity P[lan] that covers all components of the CAT System, including physical assets and personnel, and the training of all persons who have access to the Central Repository consistent with Article VI, Section 6.1(m). The Comprehensive Information S[ecurity P[lan] must be updated annually. The Comprehensive Information S[ecurity P[lan] must include an overview of the Plan Processor's network security controls, processes and procedures pertaining to the CAT Systems. Details of the Comprehensive Information S[ecurity P[lan] must document how the Plan Processor will protect, monitor and patch the

environment; assess it for vulnerabilities as part of a managed process, as well as the process for response to security incidents and reporting of such incidents. The Comprehensive Information S[ecurity P[lan] must address physical security controls for corporate, data center, and leased facilities where Central Repository data is transmitted or stored. The Plan Processor must have documented "hardening baselines" for systems that will store, process, or transmit CAT Data or [PII] Customer and Account Attributes data.

4.1.1 Connectivity and Data Transfer

[The CAT System(s) must have encrypted internet connectivity. CAT Reporters] Industry members must connect to the CAT infrastructure using secure methods such as private lines for machine-to-machine interfaces or [(for smaller broker-dealers)] encrypted Virtual Private Network connections over public lines for manual web-based submissions. Participants must connect to the CAT infrastructure using private lines. For all connections to CAT infrastructure, the Plan Processor must implement capabilities to allow access (i.e., "allow list") only to those countries where CAT reporting or regulatory use is both necessary and expected. Where possible, more granular "allow listing" should be implemented (e.g., by IP address). The Plan Processor must establish policies and procedures to allow access if the location cannot be determined technologically.

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4.1.2 Data Encryption

All CAT Data must be encrypted at rest and in flight using industry standard best practices (e.g., SSL/TLS) including archival data storage methods such as tape backup. Symmetric key encryption must use a minimum key size of 128 bits or greater (e.g., AES–128), larger keys are preferable. Asymmetric key encryption (e.g., PGP) for exchanging data between Data Submitters and the Central Repository is desirable.

Storage of unencrypted [PII] Customer and Account Attributes data is not permissible. [PII] Customer and Account Attributes encryption methodology must include a secure documented key management strategy such as the use of HSM(s). The Plan Processor must describe how [PII] Customer and Account Attributes encryption is performed and the key management strategy (e.g., AES–256, 3DES).

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4.1.3 Data Storage and Environment

Data centers housing CAT Systems (whether public or private) must, at a minimum, be AICPA SOC 2 certified by a qualified third-party auditor that is not an affiliate of any of the Participants or the CAT Processor, and be physically located in the United States. The frequency of the audit must be at least once per year.

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4.1.4 Data Access

The Plan Processor must provide an overview of how access to [PII] Customer and Account Attributes and other CAT Data by

⁸⁰³ See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613.

Plan Processor employees and administrators is restricted. This overview must include items such as, but not limited to, how the Plan Processor will manage access to the systems, internal segmentation, multi-factor authentication, separation of duties, entitlement management, background checks, etc.

The Plan Processor must develop and maintain policies and procedures reasonably designed to prevent, detect, and mitigate the impact of unauthorized access or usage of data in the Central Repository. Such policies and procedures must be approved by the Operating Committee, and should include, at a minimum:

- Information barriers governing access to and usage of data in the Central Repository;
- Monitoring processes to detect unauthorized access to or usage of data in the Central Repository; and
- Escalation procedures in the event that unauthorized access to or usage of data is detected.

A Role Based Access Control (“RBAC”) model must be used to permission users with access to different areas of the CAT System. The CAT System must support [an arbitrary number of] as many roles as required by Participants and the Commission to permit [with] access to different types of CAT Data, down to the attribute level. The administration and management of roles must be documented. Periodic reports detailing the current list of authorized users and the date of their most recent access must be provided to Participants, the SEC and the Operating Committee. The reports provided to [of] the Participants and the SEC will include only their respective list of users. The Participants must provide a response to the report confirming that the list of users is accurate. The required frequency of this report will be defined by the Operating Committee. The Plan Processor must log every instance of access to Central Repository data by users.

Following “least privileged” practices, separation of duties, and the RBAC model for permissioning users with access to the CAT System, all Plan Processor employees and contractors that develop and test Customer Identifying Systems shall only develop and test with non-production data and shall not be entitled to access production data (i.e., Industry Member Data, Participant Data, and CAT Data) in CAIS or the CCID Subsystem. All Plan Processor employees and contractors that develop and test CAT Systems containing transactional CAT Data shall use non-production data for development and testing purposes; if it is not possible to use non-production data, such Plan Processor employees and contractors shall use the oldest available production data that will support the desired development and testing, subject to the approval of the Chief Information Security Officer.

Passwords stored in the CAT System must be stored according to industry best practices. Reasonable password complexity rules should be documented and enforced, such as, but not limited to, mandatory periodic password changes and prohibitions on the reuse of the recently used passwords.

Password recovery mechanisms must provide a secure channel for password reset,

such as emailing a one-time, time-limited login token to a pre-determined email address associated with that user. Password recovery mechanisms that allow in-place changes or email the actual forgotten password are not permitted.

Any login to the system that is able to access [PII] Customer and Account Attributes data must follow [non-PII password] rules that do not allow personally identifiable information to be used as part of a password and must be further secured via multi-factor authentication (“MFA”). The implementation of MFA must be documented by the Plan Processor. MFA authentication capability for all logins is required to be implemented by the Plan Processor.

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4.1.5 Breach Management

The Plan Processor must develop written policies and procedures governing its responses to systems or data breaches. Such policies and procedures will include a formal cyber incident response plan (which must include taking appropriate corrective action that includes, at a minimum, mitigating potential harm to investors and market integrity, and devoting adequate resources to remedy the systems or data breach as soon as reasonably practicable), and documentation of all information relevant to breaches. The Plan Processor must provide breach notifications of systems or data breaches to CAT Reporters that it reasonably estimates may have been affected, as well as to the Participants and the Commission, promptly after any responsible Plan Processor personnel have a reasonable basis to conclude that a systems or data breach has occurred. Such breach notifications, which must include a summary description of the systems or data breach, including a description of the corrective action taken and when the systems or data breach has been or is expected to be resolved: (a) may be delayed if the Plan Processor determines that dissemination of such information would likely compromise the security of the CAT System or an investigation of the systems or data breach, and documents the reasons for such determination; and (b) do not apply to systems or data breaches that the Plan Processor reasonably estimates would have no or a de minimis impact on the Plan Processor’s operations or on market participants.

The cyber incident response plan will provide guidance and direction during security incidents and must provide for breach notifications. The plan will be subject to approval by the Operating Committee. The plan may include items such as:

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4.1.6 [PII Data Requirements] Customer Identifying Systems Requirements and Customer Identifying Systems Workflow

Customer and Account Attributes data must be stored separately from other CAT Data within the CAIS. It cannot be stored with the transactional CAT Data in the Central Repository, and it must not be accessible from public internet connectivity.

[PII data] Customer and Account Attributes must not be included in the result set(s) from

online or direct query tools, reports or bulk data extraction tools used to query transactional CAT Data. Instead, query results of transactional CAT Data will display [existing non-PII] unique identifiers (e.g., Customer-ID or Firm Designated ID). The [PII] Customer and Account Attributes corresponding to these identifiers can be gathered [using the PII] by accessing CAIS in accordance with the Customer Identifying Systems [w] Workflow described below [in Appendix D, Data Security, PII Data Requirements]. By default, users entitled to query CAT Data are not authorized to access [for PII] Customer Identifying Systems access. The process by which someone becomes entitled [for PII] to Customer Identifying Systems [access], and how [they] an authorized person then [go about accessing PII data] can access Customer Identifying Systems, must be documented by the Plan Processor. The chief regulatory officer (or similarly designated head(s) of regulation), or his or her designee, [or other such designated officer or employee] at each Participant must, at least annually, review and certify that people with [PII] Customer Identifying Systems access have the appropriate level of access for their role, in accordance with the Customer Identifying Systems Workflow, as described below.

[Using the RBAC model described above, access to PII data shall be configured at the PII attribute level, following the “least privileged” practice of limiting access as much as possible.

PII data must be stored separately from other CAT Data. It cannot be stored with the transactional CAT Data, and it must not be accessible from public internet connectivity. A full audit trail of PII access (who accessed what data, and when) must be maintained. The Chief Compliance Officer and the Chief Information Security Officer shall have access to daily PII reports that list all users who are entitled for PII access, as well as the audit trail of all PII access that has occurred for the day being reported on.]

A full audit trail of access to Customer Identifying Systems by each Participant and the Commission (who accessed what data and when) must be maintained by the Plan Processor, and the Plan Processor must provide to each Participant and the Commission the audit trail for their respective users on a monthly basis. The Chief Compliance Officer and the Chief Information Security Officer shall have access to daily reports that list all users who are entitled to Customer Identifying Systems access, such reports to be provided to the Operating Committee on a monthly basis.

Customer Identifying Systems Workflow Access to Customer Identifying Systems

Access to Customer Identifying Systems are subject to the following restrictions:

- Only Regulatory Staff may access Customer Identifying Systems and such access must follow the “least privileged” practice of limiting access to Customer Identifying Systems as much as possible.
- Using the RBAC model described above, access to Customer and Account Attributes shall be configured at the Customer and Account Attributes level.

- All queries of Customer Identifying Systems must be based on a “need to know” data in the Customer Identifying Systems, and queries must be designed such that query results contain only the Customer and Account Attributes that Regulatory Staff reasonably believes will achieve the regulatory purpose of the inquiry or set of inquiries, consistent with Article VI, Section 6.5(g) of the CAT NMS Plan.

- Customer Information Systems must be accessed through a Participant’s SAW.

- Access to Customer Identifying Systems will be limited to two types of access: manual access (which shall include Manual CAIS Access and Manual CCID Subsystem Access) and programmatic access (which shall include Programmatic CAIS Access and Programmatic CCID Subsystem Access).

- Authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access must be requested and approved by the Commission, pursuant to the provisions below.

- Manual CAIS Access

If Regulatory Staff have identified a Customer(s) of regulatory interest through regulatory efforts and now require additional information from CAT regarding such Customer(s), Manual CAIS Access will be used. Additional information about Customer(s) may be accessed through Manual CAIS Access by (1) using identifiers available in the transaction database (e.g., Customer-ID(s) or industry member Firm Designated ID(s)) to identify Customer and Account Attributes associated with the Customer-ID(s) or industry member Firm Designated ID(s), as applicable; or (2) using Customer Attributes in CAIS to identify a Customer-ID(s) or industry member Firm Designated ID(s), as applicable, associated with the Customer Attributes, in order to search the transaction database. Open-ended searching of parameters not specific to a Customer(s) is not permitted.

Manual CAIS Access will provide Regulatory Staff with the ability to retrieve data in CAIS via the CAIS/CCID Subsystem Regulator Portal with query parameters based on data elements including Customer and Account Attributes and other identifiers available in the transaction database (e.g., Customer-ID(s) or Firm Designated ID(s)).

Performance Requirements for Manual CAIS Access shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, Online Targeted Query Tool Performance Requirements.

- Manual CCID Subsystem Access

Manual CCID Subsystem Access will be used when Regulatory Staff have the ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of regulatory interest obtained through regulatory efforts outside of CAT and now require additional information from CAT regarding such Customer(s). Manual CCID Subsystem Access must allow Regulatory staff to convert ITIN(s)/SSN(s)/EIN(s) into Customer-ID(s) using the CCID Subsystem. Manual CCID Subsystem Access will be limited to 50 ITIN(s)/SSN(s)/EIN(s) per query.

Manual CCID Subsystem Access must provide Regulatory Staff with the ability to retrieve data from the CCID Subsystem via the CAIS/CCID Subsystem Regulator Portal

based on ITIN(s)/SSN(s)/EIN(s) where the CCID Transformation Logic is embedded in the client-side code of the CAIS/CCID Subsystem Regulator Portal.

Performance Requirements for the conversion of ITIN(s)/SSN(s)/EIN(s) to Customer-ID(s) shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, Online Targeted Query Tool Performance Requirements.

Programmatic Access—Authorization for Programmatic CAIS Access and Programmatic CCID Subsystem

A Participant must submit an application, approved by the Participant’s Chief Regulatory Officer (or similarly designated head(s) of regulation) to the Commission for authorization to use Programmatic CAIS Access or Programmatic CCID Subsystem Access if a Participant requires programmatic access. The application must explain:

- Which programmatic access is being requested: Programmatic CAIS Access and/or Programmatic CCID Subsystem Access;
- Why Programmatic CAIS Access or Programmatic CCID Subsystem is required, and why Manual CAIS Access or Manual CCID Subsystem Access cannot achieve the regulatory purpose of an inquiry or set of inquiries;
- The Participant’s rules that require Programmatic Access for surveillance and regulatory purposes;
- The regulatory purpose of the inquiry or set of inquiries requiring programmatic access;
- A detailed description of the functionality of the Participant’s system(s) that will use data from CAIS or the CCID Subsystem;
- A system diagram and description indicating architecture and access controls to the Participant’s system that will use data from CAIS or the CCID Subsystem; and
- The expected number of users of the Participant’s system that will use data from CAIS or the CCID Subsystem.

SEC staff shall review the application and may request supplemental information to complete the review prior to Commission action.

The Commission shall approve Programmatic CAIS Access or Programmatic CCID Subsystem Access if it finds that such access is generally consistent with one or more of the following standards: that such access 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 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.

The Commission shall issue an order approving or disapproving a Participant’s application for Programmatic CAIS Access or Programmatic CCID Subsystem Access within 45 days, which can be extended for an additional 45 days if the Commission determines that such longer period of time is

appropriate and provides the Participant with the reasons for such determination.

- Programmatic CAIS Access

The Plan Processor will provide Programmatic CAIS Access by developing and supporting an API that allows Regulatory Staff to use analytical tools and ODBC/JDBC drivers to access the data in CAIS.

Programmatic CAIS Access may be used when the regulatory purpose of the inquiry or set of inquiries by Regulatory Staff requires the use of Customer and Account Attributes and other identifiers (e.g., Customer-ID(s) or Firm Designated ID(s)) to query the Customer and Account Attributes and transactional CAT Data.

Performance Requirements for Programmatic CAIS Access shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, User-Defined Direct Query Performance Requirements.

- Programmatic CCID Subsystem Access

The Plan Processor will provide Programmatic CCID Subsystem Access by developing and supporting the CCID Transformation Logic and an API to facilitate the submission of Transformed Values to the CCID Subsystem for the generation of Customer-ID(s).

Programmatic CCID Subsystem Access allows Regulatory Staff to submit multiple ITIN(s)/SSN(s)/EIN(s) of a Customer(s) of regulatory interest identified through regulatory efforts outside of CAT to obtain Customer-ID(s) in order to query CAT Data regarding such Customer(s).

Performance Requirements for the conversion of ITIN(s)/SSN(s)/EIN(s) to Customer-ID(s) shall be consistent with the criteria set out in Appendix D, Functionality of the CAT System, User-Defined Direct Query Performance Requirements.

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6.1 Data Processing

CAT order events must be processed within established timeframes to ensure data can be made available to Participants’ R[egulatory S]taff and the SEC in a timely manner. The processing timelines start on the day the order event is received by the Central Repository for processing. Most events must be reported to the CAT by 8:00 a.m. Eastern Time the Trading Day after the order event occurred (referred to as transaction date). The processing timeframes below are presented in this context. All events submitted after T+1 (either reported late or submitted later because not all of the information was available) must be processed within these timeframes based on the date they were received.

The Participants require the following timeframes (Figure A) for the identification, communication and correction of errors from the time an order event is received by the processor:

- Noon Eastern Time T+1 (transaction date + one day)—Initial data validation, lifecycle linkages and communication of errors to CAT Reporters;
- 8:00 a.m. Eastern Time T+3 (transaction date + three days)—Resubmission of corrected data; and
- 8:00 a.m. Eastern Time T+5 (transaction date

+ five days)—Corrected data available to Participants' R[r]egulatory S[s]taff and the SEC.

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6.2 Data Availability Requirements

Prior to 12:00 p.m. Eastern Time on T+1, raw unprocessed data that has been ingested by the Plan Processor must be available to Participants' R[r]egulatory S[s]taff and the SEC.

Between 12:00 p.m. Eastern Time on T+1 and T+5, access to all iterations of processed data must be available to Participants' R[r]egulatory S[s]taff and the SEC.

The Plan Processor must provide reports and notifications to Participants' R[r]egulatory S[s]taff and the SEC regularly during the five-day process, indicating the completeness of the data and errors. Notice of major errors or missing data must be reported as early in the process as possible. If any data remains un-linked after T+5, it must be available and included with all linked data with an indication that the data was not linked.

If corrections are received after T+5, Participants' R[r]egulatory S[s]taff and the SEC must be notified and informed as to how re-processing will be completed. The Operating Committee will be involved with decisions on how to re-process the data; however, this does not relieve the Plan Processor of notifying the Participants' R[r]egulatory S[s]taff and the SEC.

Figure B: Customer and Account Attributes [Information (Including PII)]

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CAT [PII] *Customer and Account Attributes* data must be processed within established timeframes to ensure data can be made available to Participants' R[r]egulatory S[s]taff and the SEC in a timely manner. Industry Members submitting [new or modified] *Transformed Values and Customer and Account Attributes* [information] must provide [it] *them* to the *CCID Subsystem and Central Repository respectively* no later than 8:00 a.m. Eastern Time on T+1. The *CCID Subsystem and Central Repository* must validate the data and generate error reports no later than 5:00 p.m. Eastern Time on T+1. The *CCID Subsystem and Central Repository* must process the resubmitted data no later than 5:00 p.m. Eastern Time on T+4. Corrected data must be resubmitted no later than 5:00 p.m. Eastern Time on T+3. The *Central Repository* must process the resubmitted data no later than 5:00 p.m. Eastern Time on T+4. Corrected data must be available to regulators no later than 8:00 a.m. Eastern Time on T+5.

Customer information that includes [PII data] *Customer and Account Attributes and Customer-ID(s)* must be available to regulators immediately upon receipt of initial data and corrected data, pursuant to security policies for retrieving [PII] *Customer and Account Attributes and Customer-IDs*.

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8.1 Regulator Access

The Plan Processor must provide Participants' [r]Regulatory [s]Staff and the SEC with access to [all] CAT Data *based on*

a roles-based access control model that follows "least privileged" practices and only for surveillance and regulatory purposes[only] consistent with Participants Confidentiality Policies and Procedure as set forth in Article VI, Section 6.5(g). Participants' [r]Regulatory [s]Staff and the SEC [will access CAT Data to] must be performing regulatory functions when using CAT Data, including for economic analyses, market structure analyses, market surveillance, investigations, and examinations, and may not use CAT Data in such cases where use of CAT Data may serve both a surveillance or regulatory purpose, and a commercial purpose. In any case where use of CAT Data may serve both a surveillance or regulatory purpose, and a commercial purpose (e.g., economic analyses or market structure analyses in support of rule filings submitted to the Commission pursuant to Section 19(b) of the Exchange Act), use of CAT Data is not permitted.

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8.1.1 Online Targeted Query Tool

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The tool must provide a record count of the result set, the date and time the query request is submitted, and the date and time the result set is provided to the users. In addition, the tool must indicate in the search results whether the retrieved data was linked or unlinked (e.g., using a flag). In addition, the online targeted query tool must not display any [PII] *Customer and Account Attributes* data. Instead, it will display existing [non-PII] unique identifiers (e.g., Customer-ID or Firm Designated ID). The [PII] *Customer and Account Attributes* corresponding to these identifiers can be gathered using the [PII] *Customer Identifying Systems [w]Workflow* described in Appendix D, Data Security, [PII] *Customer and Account Attributes* Data Requirements. The Plan Processor must define the maximum number of records that can be viewed in the online tool as well as the maximum number of records that can be downloaded (*which may not exceed 200,000 records per query request*). Users must have the ability to download the results to .csv, .txt, and other formats, as applicable. These files will also need to be available in a compressed format (e.g., .zip, .gz). Result sets that exceed the maximum viewable or download limits must return to users a message informing them of the size of the result set and the option to choose to have the result set returned via an alternate method.

The Plan Processor must define a maximum number of records that the online targeted query tool is able to process. The minimum number of records that the online targeted query tool is able to process is 5,000 (if viewed within the online query tool) or 10,000 (if viewed via a downloadable file). *The maximum number of records that can be viewed via downloadable file is 200,000.*

Once query results are available for download, users are to be given the total file size of the result set and an option to download the results in a single or multiple file(s), *if the download does not exceed 200,000 records*. Users that select the multiple file option will be required to define

the maximum file size of the downloadable files *subject to the download restriction of 200,000 records per query result*. The application will then provide users with the ability to download the files. This functionality is provided to address limitations of end-user network environment that may occur when downloading large files.

The tool must log submitted queries and parameters used in the query, the user ID of the submitter, the date and time of the submission, as well as the delivery of results (*the number of records in the result(s) and the time it took for the query to be performed*). *The tool must log the same information for data accessed and extracted, when applicable.* The Plan Processor will use this logged information to provide monthly reports to each Participant and the SEC of its respective metrics on query performance and data usage of the online query tool. The Operating Committee must receive all monthly reports in order to review items, including user usage and system processing performance.

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8.1.3 Online Targeted Query Tool Access and Administration

Access to CAT Data is limited to authorized regulatory users from the Participants and the SEC. Authorized regulators from the Participants and the SEC may access all CAT Data, with the exception of [PII] *Customer and Account Attributes* data. A subset of the authorized regulators from the Participants and the SEC will have permission to access and view [PII] *Customer and Account Attributes* data. The Plan Processor must work with the Participants and SEC to implement an administrative and authorization process to provide regulator access. The Plan Processor must have procedures and a process in place to verify the list of active users on a regular basis.

A two-factor authentication is required for access to CAT Data. [PII] *Customer and Account Attributes* data must not be available via the online targeted query tool or the user-defined direct query interface.

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8.2 User-Defined Direct Queries and Bulk Extraction of Data

The Central Repository must provide for direct queries, bulk extraction, and download of data for all regulatory users. Both the user-defined direct queries and bulk extracts will be used by regulators to deliver large sets of data that can then be used in internal surveillance or market analysis applications. The data extracts must use common industry formats.

Direct queries must not return or display [PII] *Customer and Account Attributes* data. Instead, they will return existing [non-PII] unique identifiers (e.g., Customer-ID or Firm Designated ID). The [PII] *Customer and Account Attributes* corresponding to these identifiers can be gathered using the [PII] *Customer Identifying Systems [w]Workflow* described in Appendix D, Data Security, [PII] *Customer and Account Attributes* Data Requirements.

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8.2.1 User-Defined Direct Query Performance Requirements

The user-defined direct query tool is a controlled component of the production environment made available to allow the Participants' R[egulatory] S[taff] and the SEC to conduct queries. The user-defined direct query tool must:

Provide industry standard programmatic interface(s) that allows Participants' R[egulatory] S[taff] and the SEC with the ability to create, save, and run a query;

* * * * *

8.2.2 Bulk Extract Performance Requirements

* * * * *

Extraction of data must be consistently in line with all permissioning rights granted by the Plan Processor. Data returned must be encrypted, password protected, and sent via secure methods of transmission. In addition, [PII] Customer and Account Attributes data will be unavailable [must be masked] unless users have permission to view the data that has been requested.

* * * * *

The user-defined direct query and bulk extraction tool must log submitted queries and parameters used in the query, the user ID of the submitter, the date and time of the submission, and the date and time of the delivery of results. The Plan Processor will use this logged information to provide monthly reports to the Operating Committee, Participants and the SEC of their respective usage of the [online query tool] user-defined direct query and bulk extraction tool.

* * * * *

8.3 Identifying Latency and Communicating Latency Warnings to CAT Reporters

The Plan Processor will measure and monitor Latency within the CAT network. Thresholds for acceptable levels of Latency will be identified and presented to the Operating Committee for approval. The Plan Processor will also define policies and procedures for handling and the communication of data feed delays to CAT Reporters, the SEC, and Participants' R[egulatory] S[taff] that occur in the CAT. Any delays will be posted for public consumption, so that CAT Reporters may choose to adjust the submission of their data appropriately, and the Plan Processor will provide approximate timelines for when system processing will be restored to normal operations.

* * * * *

9. [CAT Customer and Customer Account Information] CAIS, the CCID Subsystem and the Process for Creating Customer-IDs

9.1 The CCID Subsystem

The Plan Processor will generate a Customer-ID using a two-phase transformation process that does not require ITIN(s)/SSN(s)/EIN(s) to be reported to the CAT. In the first phase, Industry Members or Regulatory Staff will transform the ITIN(s)/SSN(s)/EIN(s) of a Customer using the CCID Transformation Logic, as further outlined below, into a Transformed Value which will

be submitted to the CCID Subsystem with any other information and additional elements required by the Plan Processor to establish a linkage between the Customer-ID and Customer and Account Attributes. The CCID Subsystem will perform a second transformation to create the globally unique Customer-ID for each Customer. From the CCID Subsystem, the Customer-ID will be sent to CAIS separately from any other CAT Data (e.g., Customer and Account Attributes) required by the Plan Processor to identify a Customer. The Customer-ID will be linked to the associated Customer and Account Attributes and made available to Regulatory Staff for queries in accordance with Appendix D, 4.1.6 (Customer Identifying Systems Workflow) and Appendix D, Section 6 (Data Availability). The Customer-ID may not be shared with the Industry Member.

The CCID Transformation Logic will be provided to Industry Members and Participants (pursuant to the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow), as described below.

Industry Members: The CCID Transformation Logic will be embedded in the CAT Reporter Portal or used by Industry Member in machine-to-machine processing.

Regulatory Staff: Regulatory Staff may receive ITIN(s)/SSN(s)/EIN(s) of Customers from outside sources (e.g., via regulatory data, a tip, complaint, or referral) and require the conversion of ITIN(s)/SSN(s)/EIN(s) to Customer-ID(s). Consistent with the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow), for conversion of fifty or fewer ITIN(s)/SSN(s)/EIN(s), the Plan Processor will embed the CCID Transformation Logic in the client-side code of the CAIS/CCID Subsystem Regulator Portal. For Programmatic CCID Access, Participants and the SEC will use the CCID Transformation Logic pursuant to the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow).

The CCID Subsystem must be implemented using network segmentation principles to ensure traffic can be controlled between the CCID Subsystem and other components of the CAT System, with strong separation of duties between the CCID Subsystem and all other components of the CAT System. The design of the CCID Subsystem will maximize automation of all operations of the CCID Subsystem to prevent, if possible, or otherwise minimize human intervention with the CCID Subsystem and any data in the CCID Subsystem.

The Participants must ensure the timeliness, accuracy, completeness, and integrity of a Transformed Value(s), and must ensure the accuracy and overall performance of the CCID Subsystem to support the creation of a Customer-ID that uniquely identifies each Customer. The Participants also must assess the overall performance and design of the CCID Subsystem and the process for creating Customer-ID(s) as part of each annual Regular Written Assessment of the Plan Processor, as required by Article VI, Section 6.6(b)(i)(A). Because the CCID Subsystem is part of the CAT System, all provisions of the CAT NMS Plan that apply to the CAT System apply to the CCID Subsystem.

9.1[2 Customer and [Customer] Account Attributes in CAIS and Transformed Values [Information Storage]

The CAT must [capture] collect and store Customer and [Customer Account Information] Account Attributes in a secure database physically separated from the transactional database. The Plan Processor will maintain information of sufficient detail to uniquely and consistently identify each Customer across all CAT Reporters, and associated accounts from each CAT Reporter. The following attributes, at a minimum, must be captured:

- [Social security number (SSN) or Individual Taxpayer Identification Number (ITIN);

- Date of birth;
- Current n)Name (including first, middle and last name);

- [Current a)Address (including street number, street name, street suffix and/or abbreviation (e.g., road, lane, court, etc.), city, state, zip code, and country;

- [Previous name] Year of Birth; and

- [Previous address] Role in the Account.

For legal entities, the CAT must [capture] collect the following attributes:

- [Legal Entity Identifier (LEI) (if available);

- Tax identifier;

- [Full legal name; and]

- Address[.] (including street number, street name, street suffix and/or abbreviation (e.g., road, lane, court, etc.), city, state, zip code, and country;

- Employer Identification Number (EIN); and

- Legal Entity Identifier (LEI), or other comparable common entity identifier (if available), provided that if an Industry Member has an LEI for a Customer, the Industry Member must submit the Customer's LEI.

For the account of a Customer, the Plan Processor must collect, at a minimum, the following data:

- Account Owner Name

- Account Owner Mailing Address

- Account type;

- Customer type;

- Date Account Opened, or Account Effective Date, as applicable;

- Large Trader Identifier (if applicable);

- Prime Broker ID;

- Bank Depository ID; and

- Clearing Broker.

The Plan Processor must maintain valid Customer and [Customer] Account Attributes [Information] for each trading day and provide a method for Participants' [r]egulatory [s]taff and [the] SEC staff to easily obtain historical changes to [that information (e.g., name changes, address changes, etc.)] Customer-IDs, Firm Designated IDs, and all other Customer and Account Attributes.

[The Plan Processor will design and implement a robust data validation process for submitted Firm Designated ID, Customer Account Information and Customer Identifying Information, and must continue to process orders while investigating Customer information mismatches. Validations should:

- Confirm the number of digits on a SSN,

- Confirm date of birth, and
- Accommodate the situation where a single SSN is used by more than one individual.]

The Plan Processor will use the [Customer information submitted by all broker-dealer CAT Reporters] *Transformed Value* to assign a unique Customer-ID for each Customer. The Customer-ID must be consistent across all [broker-dealers] *Industry Members* that have an account associated with that Customer. This unique [CAT-]Customer-ID will not be returned to [CAT Reporters and will only be used internally by the CAT] *Industry Members*.

[Broker-Dealers] *Industry Members* will initially submit full [account] lists of *Customer and Account Attributes, Firm Designated IDs, and Transformed Values* for all [a]Active [a]Accounts to the Plan Processor and subsequently submit updates and changes on a daily basis. In addition, the Plan Processor must have a process to periodically receive [full account lists] updates, including a full refresh of all *Customer and Account Attributes, Firm Designated IDs, and Transformed Values* to ensure the completeness and accuracy of the [account database] *data in CAIS*. The Central Repository must support account structures that have multiple account owners and associated *Customer and Account Attributes* [information] [joint accounts, managed accounts, etc.], and must be able to link accounts that move from one [CAT Reporter] *Industry Member* to another (e.g., due to mergers and acquisitions, divestitures, etc.).

[9.2 Required Data Attributes for Customer Information Data Submitted by Industry Members

At a minimum, the following Customer information data attributes must be accepted by the Central Repository:

- Account Owner Name;
- Account Owner Mailing Address;
- Account Tax Identifier (SSN, TIN, ITIN);
- Market Identifiers (Larger Trader ID, LEI);
- Type of Account;
- Firm Identifier Number;
 - The number that the CAT Reporter will supply on all orders generated for the Account;
- Prime Broker ID;
- Bank Depository ID; and
- Clearing Broker.]

9.3. Customer-ID Tracking

The Plan Processor will assign a [CAT-]Customer-ID for each unique Customer. The Plan Processor will [determine] *create* a unique Customer-ID using [information such as SSN and DOB] *the Transformed Value* for natural persons *Customers* or an EIN for legal entity [identifiers for]-*Customers* [that are not natural persons] and will resolve *discrepancies in Transformed Values*. Once a [CAT-]Customer-ID is assigned, it will be added to each linked (or unlinked) order record for that Customer.

Participants and the SEC must be able to use the unique [CAT-]Customer-ID to track orders from, *and allocations to*, any Customer or group of Customers *over time*, regardless of what brokerage account was used to enter the order.

9.4 Error Resolution for [Customer Data] the CCID Subsystem and CAIS

The CCID Subsystem and CAIS shall support error resolution functionality which includes the following components: *validation of submitted data, notification of errors in submitted data, resubmission of corrected data, validation of corrected data, and an audit trail of actions taken to support error resolution.*

Consistent with Section 7.2, the Plan Processor will design and implement a robust data validation process for all ingested values and functionality including, at a minimum:

- The ingestion of Transformed Values and the creation of Customer-IDs through the CCID Subsystem;
- The transmission of Customer-IDs from the CCID Subsystem to CAIS or a Participant's SAW; and
- The transmission and linking of all Customer and Account Attributes and any other identifiers (e.g., Industry Member Firm Designated ID) required by the Plan Processor to be reported to CAIS.

For example, the validation process should at a minimum identify and resolve errors with an Industry Member's submission of *Transformed Values, Customer and Account Attributes, and Firm Designated IDs* including where there are identical Customer-IDs associated with significantly different names, and identical Customer-IDs associated with different years of birth, or other differences in Customer and Account Attributes for identical Customer-IDs.

These validations must result in notifications to the Industry Member to allow for corrections, resubmission of corrected data and revalidation of corrected data. As a result of this error resolution process there will be accurate reporting within a single Industry Member as it relates to the submission of *Transformed Values and the linking of associated Customer and Account Attributes reported.*

The Plan Processor must design and implement procedures and mechanisms to handle both minor and material inconsistencies in Customer information. The Central Repository needs to be able to accommodate minor data discrepancies such as variations in road name abbreviations in searches. Material inconsistencies such as two different people with the same [SSN] *Customer-ID* must be communicated to the submitting [CAT Reporters] *Industry Members* and resolved within the established error correction timeframe as detailed in Appendix D, Section [8]6.2.

The Central Repository must have an audit trail showing the resolution of all errors including material inconsistencies, occurring in the CCID Subsystem and CAIS. The audit trail must, at a minimum, include the:

- [CAT Reporter] *Industry Members and Participants* (pursuant to the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow) submitting the [data] *Transformed Value* or Customer and Account Attributes and other identifiers, as applicable;
- Initial submission date and time;
- Data in question or the ID of the record in question;

- Reason identified as the source of the [issue]error, such as:
 - *Transformed Value outside the expected range of values;*
 - duplicate [SSN]Customer-ID, significantly different Name;
 - duplicate [SSN]Customer-ID, different [DOB]year of birth;
 - discrepancies in LTID; or
 - others as determined by the Plan Processor;
- Date and time *notification of the [issue] error* was transmitted to the [CAT Reporter]Industry Member or Participant (pursuant to the provisions of Appendix D, Section 4.1.6 (Customer Identifying Systems Workflow), include[ed]ing each time the issue was re-transmitted, if more than once;
- Corrected submission date and time, including each corrected submission if more than one, or the record ID(s) of the corrected data or a flag indicating that the issue was resolved and corrected data was not required; and
- Corrected data, the record ID, or a link to the corrected data.

10. User Support

10.1 CAT Reporter Support

The Plan Processor will provide technical, operational and business support to CAT Reporters for all aspects of reporting including, but not limited to, issues related to the CCID Transformation Logic and reporting required by the CCID Subsystem. Such support will include, at a minimum:

- Self-help through a web portal;
- Direct support through email and phone;
- Support contact information available through the internet; and
- Direct interface with Industry Members and Data Submitters via industry events and calls, industry group meetings and informational and training sessions.

The Plan Processor must develop tools to allow each CAT Reporter to:

- Monitor its submissions;
- View submitted transactions in a non-bulk format (i.e., non-downloadable) to facilitate error corrections;
- Identify and correct errors;
- Manage Customer and [Customer]Account Attributes[Information];
- Monitor its compliance with CAT reporting requirements;[and]
- Monitor system status[.]; and
- Monitor the use of the CCID Transformation Logic including the submission of *Transformed Values to the CCID Subsystem.*

* * * * *

10.2 CAT User Support

The Plan Processor will develop a program to provide technical, operational and business support to CAT users, including Participants' R[egulatory S]taff and the SEC. The CAT help desk will provide technical expertise to assist regulators with questions and/or functionality about the content and structure of the CAT query capability.

The Plan Processor will develop tools, including an interface, to allow users to monitor the status of their queries and/or

reports. Such website will show all in-progress queries/reports, as well as the current status and estimated completion time of each query/report.

The Plan Processor will develop communication protocols to notify regulators of CAT System status, outages and other issues that would affect Participants' R[r]egulatory S[s]taff and the SEC's ability to access, extract, and use CAT Data. At a minimum, Participants' R[r]egulatory S[s]taff and the SEC must each have access to a secure website where they can monitor CAT System status, receive and track system notifications, and submit and monitor data requests.

The Plan Processor will develop and maintain documentation and other materials as necessary to train regulators in the use of the Central Repository, including documentation on how to build and run reporting queries.

10.3 CAT Help Desk

The Plan Processor will implement and maintain a help desk to support broker-dealers, third party CAT Reporters, and Participant CAT Reporters (the "CAT Help Desk"). The CAT Help Desk will address business questions and issues, as well as technical and operational questions and issues. The CAT Help Desk will also assist

Participants' regulatory staff and the SEC with questions and issues regarding obtaining and using CAT Data for regulatory purposes.

The CAT Help Desk must go live within a mutually agreed upon reasonable timeframe after the Plan Processor is selected, and must be available on a 24x7 basis, support both email and phone communication, and be staffed to handle at minimum 2,500 calls per month. Additionally, the CAT Help Desk must be prepared to support an increased call volume at least for the first few years. The Plan Processor must create and maintain a robust electronic tracking system for the CAT Help Desk that must include call logs, incident tracking, issue resolution escalation.

CAT Help Desk support functions must include:

- Setting up new CAT Reporters, including the assignment of CAT-Reporter-IDs and support prior to submitting data to CAT;
- Managing CAT Reporter authentication and entitlements;
- Managing CAT Reporter and third party Data Submitters testing and certification;
- Managing Participants and SEC authentication and entitlements;
- Supporting CAT Reporters with data submissions and data corrections, including submission of Customer and [Customer] Account *Attributes* [Information];

- Coordinating and supporting system testing for CAT Reporters;
- Responding to questions from CAT Reporters about all aspects of CAT reporting, including reporting requirements, technical data transmission questions, potential changes to SEC Rule 613 that may affect the CAT, software/hardware updates and upgrades, entitlements, reporting relationships, and questions about the secure and public websites;
- Responding to questions from Participants' regulatory staff and the SEC about obtaining and using CAT Data for regulatory purposes, including the building and running of queries; [and]
- Responding to administrative issues from CAT Reporters, such as billing; *and*
- *Responding to questions from and providing support to CAT Reporters regarding all aspects of the CCID Transformation Logic and CCID Subsystem.*

By the Commission.

Dated: August 21, 2020.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2020-18801 Filed 10-15-20; 8:45 am]

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Part V

Securities and Exchange Commission

17 CFR Parts 210, 229, and 249

Update of Statistical Disclosures for Bank and Savings and Loan Registrants; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, and 249

[Release No. 33–10835; 34–89835; File No. S7–02–17]

RIN 3235–AL79

Update of Statistical Disclosures for Bank and Savings and Loan Registrants

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting rules to update our statistical disclosure requirements for banking registrants. These registrants currently provide many disclosures in response to the items set forth in Industry Guide 3 (“Guide 3”), *Statistical Disclosure by Bank Holding Companies*, which are not Commission rules. The amendments update and expand the disclosures that registrants are required to provide, codify certain Guide 3 disclosure items and eliminate other Guide 3 disclosure items that overlap with Commission rules, U.S. Generally Accepted Accounting Principles (“U.S. GAAP”), or International Financial Reporting Standards (“IFRS”). In addition, we are relocating the codified disclosure requirements to a new subpart of Regulation S–K and rescinding Guide 3.

DATES:

Effective date: These final rules are effective November 16, 2020, except for the amendments to 17 CFR 229.801(c) and 229.802(c), which are effective on January 1, 2023.

Compliance date: See Section V for further information on transitioning to the final rules.

FOR FURTHER INFORMATION CONTACT:

Stephanie Sullivan, Associate Chief Accountant, Division of Corporation Finance, at (202) 551–3400, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

The Commission is amending 17 CFR 229.404 (“Item 404 of Regulation S–K”) under the Securities Act of 1933 (“Securities Act”)¹ and the Securities Exchange Act of 1934 (“Exchange Act”);² 17 CFR 210.9–01 (“Rule 9–01 of Regulation S–X”) and 17 CFR 210.9–03 (“Rule 9–03 of Regulation S–X”) under the Securities Act and the Exchange Act; and 17 CFR 249.220f (“Form 20–F”) under the Exchange Act. In

addition, the Commission is adding a new subpart, 17 CFR 229.1400 (“Item 1400 of Regulation S–K”), which will include 17 CFR 229.1401 through 17 CFR 229.1406, and rescinding 17 CFR 229.801(c) and 229.802(c) under the Securities Act and Exchange Act.

Table of Contents

- I. Introduction
- II. New Subpart 1400 of Regulation S–K
 - A. Codification
 - B. Location of Codification Requirements and XBRL
 - C. Scope
 - D. Applicability to Domestic Registrants and Foreign Registrants
 - E. Reporting Periods
 - F. Distribution of Assets, Liabilities and Stockholders’ Equity; Interest Rate and Interest Differential (Average Balance, Interest and Yield/Rate Analysis and Rate/Volume Analysis)
 - G. Investment Portfolio
 - H. Loan Portfolio
 - I. Allowance for Credit Losses
 - J. Deposits
- III. Certain Existing Guide 3 Disclosures That Would Not Be Codified in Proposed Subpart 1400 of Regulation S–K
 - A. Return on Equity and Assets
 - B. Short-Term Borrowings
- IV. Changes to Article 9 of Regulation S–X
- V. Compliance Date
- VI. Other Matters
- VII. Economic Analysis
 - A. Introduction
 - B. Baseline
 - C. Economic Effects
 - D. Effects on Efficiency, Competition, and Capital Formation
- VIII. Paperwork Reduction Act
 - A. Summary of the Collections of Information
 - B. Burden and Cost Estimates Related to the Proposed Rules
- IX. Regulatory Flexibility Act Certification
- X. Statutory Authority
- Text of the Amendments

I. Introduction

On September 17, 2019, we proposed rules³ to update the disclosure of information that banks, bank holding companies (“BHCs”), savings and loan associations, and savings and loan holding companies (together, “bank and savings and loan registrants”) provide in response to the items set forth in Guide 3.⁴ By its terms, Guide 3 applies to

³ *Update of Statistical Disclosures for Bank and Savings and Loan Registrants*, Release No. 33–10688 (Sept. 17, 2019) [84 FR 52936 (Oct. 3, 2019)] (“Proposing Release”).

⁴ *Guides for Statistical Disclosure by Bank Holding Companies*, Release No. 33–5735 (Aug. 31, 1976) [41 FR 39007 (Sept. 14, 1976)] (“Guide 3 Release”). When it published the Guide 3 Release, the Commission stated that “[t]he Guides are not Commission rules nor do they bear the Commission’s official approval; they represent policies and practices followed by the Commission’s Division of Corporation Finance in administering the disclosure requirements of the

BHCs. However, the disclosures called for by Guide 3 are also provided by other registrants with material lending and deposit activities, including savings and loan holding companies.⁵ Guide 3 calls for disclosure in seven areas: (1) Distribution of assets, liabilities and stockholders’ equity; interest rates and interest differential, (2) investment portfolios, (3) loan portfolios, (4) summary of loan loss experience, (5) deposits, (6) return on equity and assets, and (7) short-term borrowings. We proposed to include within the rules’ scope the registrants that under existing practice provide the disclosures called for by Guide 3: Banks, savings and loan associations, and savings and loan holding companies. We also proposed to update the disclosures that bank and savings and loan registrants must provide to investors, including the elimination of disclosure items that overlap with Commission rules, U.S. GAAP, or IFRS.⁶ Finally, we proposed to codify the updated disclosure requirements in a new Subpart 1400 of Regulation S–K and to rescind Guide 3.

We received a number of comment letters in response to the Proposing Release.⁷ Many of the commenters generally supported the Commission’s efforts to revise existing Guide 3

federal securities laws.” Guide 3 was originally published as Securities Act Guide 61 and Exchange Act Guide 3. In 1982, Securities Act Guide 61 and Exchange Act Guide 3 were redesignated as Securities Act Industry Guide 3 and Exchange Act Industry Guide 3. *See Rescission of Guides and Redesignation of Industry Guides*, Release No. 33–6384 (Mar. 3, 1982) [47 FR 11476 (Mar. 16, 1982)].

⁵ Many registrants refer to Staff Accounting Bulletin Topic 11:K—Application of Article 9 and Guide 3 (“SAB 11:K”), which states that “[t]he SEC staff believes [Guide 3 information] would be material to a description of business of [non-BHC] registrants with material lending and deposit activities . . .” The Industry Guides and SAB 11:K are not rules, regulations or statements of the Commission. In light of the adoption of these amendments, the staff intends to rescind SAB 11:K.

⁶ References to IFRS throughout are to IFRS as issued by the International Accounting Standards Board (“IASB”).

⁷ *See, e.g.*, letters from Aimee Heilig (Nov. 9, 2019) (“A. Heilig”); American Bankers Association (Dec. 23, 2019) (“ABA”); Bank of America Corporation (Dec. 2, 2019) (“BAC”); Bank Policy Institute and Securities Industry and Financial Markets Association (Dec. 2, 2019) (“BPI/SIFMA”); Center for Audit Quality (Nov. 25, 2019) (“CAQ”); CFA Institute (Jan. 9, 2020) (“CFA”); Crowe LLP (Nov. 25, 2019) (“Crowe”); Deloitte & Touche LLP (Nov. 25, 2019) (“Deloitte”); Ernst & Young LLP (Nov. 27, 2019) (“EY”); KPMG LLP (Dec. 2, 2019) (“KPMG”); Maria Deering (Nov. 10, 2019) (“M. Deering”); PricewaterhouseCoopers LLP (Nov. 21, 2019) (“PwC”); Qing Burke, Assistant Professor of Accounting, et al., Miami University (Oct. 3, 2019) (“Prof. Burke”); XBRL US, Inc. (Dec. 2, 2019) (“XBRL”). The comments on the Proposing Release are available at: <https://www.sec.gov/comments/s7/-02/-17/s70217.htm>.

¹ 15 U.S.C. 77a *et seq.*

² 15 U.S.C. 78a *et seq.*

disclosure items.⁸ Several of the commenters who supported the proposed rules also suggested certain revisions to the proposed disclosure requirements.⁹ We have reviewed and considered all of the comments that we received on the proposed rules. After taking into consideration the public comments, we are adopting rules substantially as proposed.

II. New Subpart 1400 of Regulation S-K

A. Codification

We proposed to update and codify certain Guide 3 disclosure items in a new Subpart 1400 of Regulation S-K, consistent with the approach the Commission has taken when it modernized other Industry Guides. A number of commenters agreed with this proposal,¹⁰ and no commenters opposed codification. Accordingly, the final rules codify the updated disclosure requirements in a new Subpart 1400 of Regulation S-K.

B. Location of Disclosure Requirements and XBRL

Consistent with existing Guide 3, we did not propose to require the disclosures required by new Subpart 1400 of Regulation S-K to be presented in the notes to the financial statements. Therefore, if disclosures are provided outside the financial statements, the disclosures would not be required to be audited, nor would they be subject to the Commission's requirement to file financial statements in a machine-readable format using XBRL. The Proposing Release requested comment as to whether we should require the proposed disclosures to be included in the notes to the financial statements, as well as whether we should require the proposed disclosures to be provided in a structured format.¹¹

A number of commenters observed that the existing Guide 3 disclosures are typically included within Management's Discussion & Analysis ("MD&A"), the Business section, or the notes to the

financial statements.¹² Several of these commenters agreed that the proposed disclosure items should not be required to be presented in the notes to the financial statements, thus retaining the existing flexibility for registrants to determine where the disclosures are provided.¹³ One commenter stated that allowing registrants to decide where best to present each disclosure will result in "superior disclosures," with related disclosures being grouped together.¹⁴ A few commenters encouraged the Commission to consider input from investors and others as to whether the disclosures should be included in the audited financial statements before mandating such an approach.¹⁵ Several commenters observed that if we were to require the disclosures in the notes to the financial statements, the note disclosures would be subject to audit procedures, and registrants would need to file them in an XBRL format.¹⁶ Two of these commenters specifically noted that mandating footnote disclosure of specified data would likely increase audit costs.¹⁷ However, these commenters also noted that footnote disclosures are subject to XBRL tagging and are more likely to be uniform in their content and location compared to information outside the financial statements, which would reduce search costs for users.

Several commenters stated that the proposed disclosures should not be subject to the Commission's requirements to file financial statements in a machine-readable format using XBRL.¹⁸ Two of these commenters noted that requiring a structured format could be difficult for registrants or confusing for investors because registrants may provide the disclosures in MD&A, which would result in some MD&A disclosures being provided in an XBRL format while other MD&A disclosures would not be.¹⁹ For example, one of these commenters stated that the cost of selectively providing these disclosures in XBRL format in MD&A could be significant to registrants.²⁰

A few commenters supported the use of a machine-readable format for the disclosure items that would be codified

in Subpart 1400 of Regulation S-K.²¹ These commenters recommended requiring registrants to tag all Subpart 1400 data in XBRL, regardless of location, to ensure that a machine-readable format of these disclosures is consistently available across all registrants providing them. Furthermore, these commenters recommended that Inline XBRL be used for Subpart 1400 data because it is already supported in the marketplace for other required disclosures, specifically the financial statements and data on the cover page of certain filings.²² These commenters stated that data provided in a machine-readable format improves the productivity of the data collection process, which reduces the cost of analysis and encourages more robust and in-depth analysis. These commenters also stated that the costs for XBRL preparation have declined and that they do not believe that the additional tags required for Subpart 1400 data would pose a significant burden.²³

The final rules do not require bank and savings and loan registrants to include Item 1400 of Regulation S-K disclosures in a specified location. We agree with commenters that retaining flexibility as to where to provide the disclosures is important and will allow registrants to use their judgment to determine where the disclosures can best be included to maximize the readability and usefulness of the disclosure. We are cognizant of the additional costs that would be incurred if the disclosures were required to be included in the notes to the financial statements, and we believe investors are accustomed to locating this information in different locations within SEC filings given the current flexibility as to where to include the disclosures.

As discussed above, we received mixed comments regarding the benefits, costs and practical challenges of requiring the proposed disclosures in a machine readable format. Therefore, like the proposed rules, the final rules do not require a registrant to present new Subpart 1400 of Regulation S-K in a machine-readable format unless the registrant elects to include the disclosures within the financial statements.

⁸ See, e.g., letters from A. Heilig; ABA; BAC; BPI/SIFMA; CAQ; Crowe; Deloitte; EY; KPMG; and PwC.

⁹ See, e.g., letters from ABA; BAC; BPI/SIFMA; CAQ; Crowe; Deloitte; EY; KPMG; and PwC.

¹⁰ (One hour \times 0.75) \times \$400 = \$300.

¹¹ Registrants subject to the financial disclosure requirements of Regulation S-K are either currently required or will be required to file their financial statements and filing cover page disclosures in the Inline XBRL format. See [17 CFR 229.601(b)(101)]; [17 CFR 229.601(b)(104)]. See also Inline XBRL Filing of Tagged Data, Securities Act Release No. 10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018), at 40851] ("Inline XBRL Adopting Release").

¹² See e.g., letters from BAC; BPI/SIFMA; CAQ; Crowe; and EY.

¹³ See letters from ABA; BAC; BPI/SIFMA; and EY.

¹⁴ See letter from BPI/SIFMA.

¹⁵ See letters from CAQ; EY; and PwC.

¹⁶ See letters from CAQ; Deloitte; and EY.

¹⁷ See letters from CAQ and EY.

¹⁸ See letters from ABA; BAC; and BPI/SIFMA.

¹⁹ See letters from BAC and BPI/SIFMA.

²⁰ See letter from BPI/SIFMA.

²¹ See letters from CFA and XBRL.

²² See letters from CFA and XBRL.

²³ See *id.* (citing the pricing study for small reporting companies conducted by the AICPA and XBRL, available at: <https://www.aicpa.org/InterestAreas/FRC/AccountingFinancialReporting/XBRL/DownloadableDocuments/XBRL%20Costs%20for%20Small%20Companies.pdf>).

C. Scope

i. Proposal

We proposed that Subpart 1400 of Regulation S–K would apply to bank and savings and loan registrants. In the Proposing Release, we expressed the view that identifying and codifying the types of registrants within the scope of the proposed rules would clarify the existing practice of providing Guide 3 disclosures when registrants have material lending and deposit-taking activities.²⁴ We also indicated that the proposed scope would capture the majority of registrants that predominantly engage in the activities covered by existing Guide 3 and for which these activities are material.²⁵

ii. Comments on Proposal

One commenter stated that the scope of the proposed rules would largely capture the majority of registrants who currently provide the disclosures called for by Guide 3.²⁶ Another commenter recommended expanding the scope of the proposed rules to cover any institution that performs the services under the scope of the proposed rules, even if it is not their primary role or sole function, provided it does not place undue burden on the institution.²⁷ One commenter encouraged the Commission to consider input from investors and others regarding the scope of registrant applicability.²⁸

iii. Final Rules

After considering the comments, we are adopting rules related to the scope as proposed. Subpart 1400 of Regulation S–K applies to bank and savings and loan registrants. We received limited feedback suggesting that the scope should be expanded to include other registrants in the financial services industry, and we did not receive any feedback from investors or others explaining how the proposed disclosures would be valuable for assessing registrants outside of the proposed scope. We continue to believe there is not a large population of non-bank and savings and loan registrants

that are providing Guide 3 disclosures today that will be outside the scope of Subpart 1400 of Regulation S–K. This is because those registrants likely engage in only one or a few of the activities addressed by Guide 3 (e.g., lending and deposit-taking). We also continue to believe that registrants should be able to ascertain easily whether they are a bank or savings and loan registrant for purposes of these rules, reducing any potential confusion regarding the applicability of the disclosure requirements to non-bank and savings and loan registrants.

D. Applicability to Domestic Registrants and Foreign Registrants

i. Proposal

Consistent with existing Guide 3, we proposed that the rules would apply to both domestic registrants, including Regulation A issuers, and foreign registrants, notwithstanding the differences between U.S. GAAP and IFRS in some of the items called for by Guide 3, such as the measurement of credit losses and disclosures of financial instruments, among other areas.²⁹ The proposed rules would explicitly exempt foreign private issuers applying IFRS (“IFRS registrants”) from certain of the disclosure requirements that are not applicable under IFRS in order to address certain challenges foreign private issuers may face in providing the proposed disclosures.³⁰

We also proposed not to codify the undue burden or expense accommodation for foreign registrants in Guide 3’s General Instruction 6, which states that the disclosure items also apply to foreign registrants to the extent the information is available or can be compiled without unwarranted or undue burden and expense. In doing so, we noted that all registrants, not just foreign registrants, can avail themselves of relief from providing information that is “unknown and not reasonably available to the registrant” under 17 CFR 230.409 (“Securities Act Rule 409”) and 17 CFR 240.12b–21 (“Exchange Act Rule 12b–21”).³¹

²⁹ See note 56 in the Proposing Release.

³⁰ Foreign private issuers are a subset of foreign registrants, and include any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents and any of the following: A majority of its officers or directors are citizens or residents of the United States; more than 50% of its assets are located in the United States; or its business is principally administered in the United States. See Rule 405 of Regulation C [17 CFR 230.405] and Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)].

³¹ Securities Act Rule 409 and Exchange Act Rule 12b-21 state that information required need be given only insofar as it is known or reasonably

ii. Comments on Proposal

One commenter stated that the proposed rules should apply to both domestic and foreign registrants, but asked the Commission to consider carve-outs and add other exceptions that align with the registrant’s applicable accounting standards in their domicile countries.³² This commenter did not provide any examples of exceptions in accounting standards that were not addressed in the proposed rules.

Another commenter stated that the proposed rules would modify certain of the requirements for foreign registrants filing Form 20–F using IFRS and supported those changes.³³ However, this commenter also noted that many foreign registrants currently report Guide 3 information on a modified basis as a result of prior consultations with Commission staff and asked the Commission to confirm in the adopting release that the proposed amendments are not intended to change existing interpretations of hardship or prior staff guidance to foreign registrants with respect to the disclosure requirements. This commenter also stated the Commission should codify the undue burden or expense accommodation in General Instruction 6.³⁴ Other commenters noted that they had seen limited use of the accommodation in Rules 409 and 12b–21 and therefore surmised that it may be rare for a registrant to be able to demonstrate that the required information is not reasonably available or that obtaining it may require unreasonable effort or expense.³⁵ These commenters asked the Commission to provide guidance on factors the registrant should consider when evaluating whether the requested information is unknown or that obtaining it would require unreasonable effort or expense. Several commenters stated it is unclear whether registrants

available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof would involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted. The rule provides two additional conditions. The first is that the registrant must give such information on the subject that it possesses or can acquire without unreasonable effort or expense, together with the sources of that information. The second is that the registrant must include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

³² See letter from BAC.

³³ See letter from BPI/SIFMA.

³⁴ See *id.*

³⁵ See, e.g., letters from CAQ; Crowe; Deloitte; and KPMG.

²⁴ See supra note 5.

²⁵ See note 44 of the Proposing Release observing that there were only four registrants with loans and bank deposits on their balance sheets that would not have been within the scope of the proposed rules. However, as discussed in note 169, we estimate that the final rules will capture all of the registrants that we have identified in Section VII.B.ii as currently being covered by existing Guide 3. See *infra* note 169 for a description of methodology used to determine this set of registrants.

²⁶ See letter from BAC.

²⁷ See letter from M. Deering.

²⁸ See letter from PwC.

would be required to discuss an accommodation or alternative presentation with the staff if they relied on the guidance in Rules 409 and 12b-21 and suggested clarifying any expectations.³⁶ One commenter recommended using language based on Item 3.A.1 of Form 20-F,³⁷ which they stated provides a similar hardship accommodation for foreign private issuers.³⁸

iii. Final Rules

After considering the comments, we are adopting the rules as proposed. The rules apply to domestic registrants, including Regulation A issuers,³⁹ and to foreign registrants.⁴⁰ In considering whether to codify the undue burden or expense accommodation for foreign registrants in General Instruction 6, we note that no commenters provided examples of disclosures that would involve an undue hardship to provide. We also note that the staff has not received any requests for accommodation during the past ten years and that prior accommodation requests tended to request relief with respect to reporting periods or categories or classes of financial instruments that were different from those called for by Guide 3. We believe the final rules address these matters by linking the disclosure requirements to categories or classes of financial instruments disclosed in the registrant's U.S. GAAP or IFRS financial statements, aligning the reporting period requirements with those required to be presented in the financial statements,

and explicitly exempting IFRS registrants from certain of the disclosure requirements. We also acknowledge commenter feedback that requested that we consider carve-outs and add other exceptions that align with the foreign registrants' applicable accounting standards in their domicile countries. However, a foreign registrant that presents financial statements prepared in accordance with its home-country accounting standards is required to reconcile the financial statements to U.S. GAAP and to provide all other information required by U.S. GAAP and Regulation S-X, unless the requirements specifically do not apply to the foreign registrant.⁴¹ Therefore, the information required to be disclosed under Item 1400 of Regulation S-K would always be in accordance with U.S. GAAP or IFRS, which eliminates the need for an exception for the accounting standards in the registrant's domicile country for the purpose of these disclosures. For the reasons discussed above, we do not believe codifying the accommodation in General Instruction 6 is necessary.

Securities Act Rule 409 and Exchange Act Rule 12b-21, however, remain applicable to all registrants, including foreign registrants. Although several commenters requested guidance related to the application of Securities Act Rule 409 and Exchange Act Rule 12b-21 by foreign registrants, we do not believe it is necessary to do so because registrants have applied these rules for many years in a variety of other contexts without the need for additional guidance. Additionally, we believe the application of Rule 409 or Rule 12b-21 is dependent on the registrant's specific facts and circumstances. To the extent that a registrant believes Rule 409 or Rule 12b-21 applies to its facts and circumstances for any of the disclosures required by Item 1400 of Regulation S-K, there is no requirement to discuss such application or analysis in advance with the staff.

E. Reporting Periods

i. Proposal

We proposed defining the term "reported period" for purposes of Subpart 1400 of Regulation S-K to mean each annual period for which Commission rules require a registrant to provide financial statements. Commission rules generally require two years of balance sheets and three years of income statements,⁴² except that smaller reporting companies ("SRCs")⁴³

may present only two years of income statements,⁴⁴ and emerging growth companies ("EGCs")⁴⁵ may present only two years of financial statements in initial public offerings of common equity securities.⁴⁶ Lastly, Commission rules for Regulation A issuers generally require two years of annual financial statements for Tier 1 and Tier 2 offerings.⁴⁷

We also proposed requiring interim period disclosures if there is a material change in the information or the trend evidenced thereby. Lastly, we proposed to require new bank and savings and loan registrants to disclose certain credit ratios for each of their last five fiscal years in initial registration statements and Regulation A offering statements.⁴⁸ Consistent with Securities Act Rule 409 and Exchange Act Rule 12b-21, the information would be required only insofar as it is known or reasonably available to the registrant.

ii. Comments on Proposal

One commenter agreed with each of the proposed changes to reporting periods.⁴⁹ A number of commenters agreed with the proposal to reduce the number of reporting periods and align them with the annual periods for which

owned subsidiary of a parent that is not an SRC) that had a public float of less than \$250 million as of the last business day of its most recently completed second fiscal quarter; or had annual revenues of less than \$100 million during its most recently completed fiscal year, and no public float or a public float of less than \$700 million as of the last business day of its most recently completed second fiscal quarter. See Rule 405 of Regulation C, Rule 12b-2 of the Exchange Act [17 CFR 240.12b-2], and Item 10(f) of Regulation S-K [17 CFR 229.10(f)].

⁴⁴ 17 CFR 210.8 ("Article 8 of Regulation S-X").

⁴⁵ An EGC is an issuer with less than \$1.07 billion in total annual gross revenues during its most recently completed fiscal year. If an issuer qualifies as an EGC as of the first day of its most recently completed fiscal year it maintains that status until the earliest of: (1) The last day of the fiscal year of the issuer during which it has total annual gross revenues of \$1.07 billion or more; (2) the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities pursuant to an effective registration statement; (3) the date on which the issuer has, during the previous 3-year period, issued more than \$1 billion in non-convertible debt; or (4) the date on which the issuer is deemed to be a "large accelerated filer" (as defined in Exchange Act Rule 12b-2). See Rule 405 of Regulation C under the Securities Act and Rule 12b-2 of the Exchange Act.

⁴⁶ Securities Act § 7(a)(2)(A), 15 U.S.C. 77g(a)(2)(A).

⁴⁷ Part F/S(b) of Form 1-A requires two years of annual financial statements for Tier 1 offerings, which need not be on an audited basis, and Part F/S(c)(ii) of Form 1-A requires two years of audited annual financial statements for Tier 2 offerings. Issuers in Tier 2 offerings are required to file an annual report on Form 1-K containing two years of audited financial statements.

⁴⁸ See discussion of credit ratios disclosure in Section II.I.v of the Proposing Release.

⁴⁹ See letter from M. Deering.

³⁶ See letters from CAQ; Crowe; and Deloitte.

³⁷ Item 3.A.1 of Form 20-F states, in part, that selected financial data for either or both of the earliest two years of the five-year period may be omitted if the company represents that such information cannot be provided, or cannot be provided on a restated basis, without unreasonable effort or expense. The Commission recently proposed to delete this Item and the related instructions. See Management's Discussion & Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10750 (Jan. 30, 2020) (the "2020 MD&A Proposing Release").

³⁸ See letter from CAQ.

³⁹ Item 7(c) of Form 1-A [17 CFR 239.90] states that the disclosure guidelines in all Securities Act Industry Guides must be followed, and to the extent that the industry guides are codified into Regulation S-K, the Regulation S-K industry disclosure items must be followed. Therefore, issuers in Tier 1 and Tier 2 offerings are required to comply with the final rules in Regulation A offering statements. Additionally, issuers in Tier 2 offerings are required to file annual reports on Form 1-K [17 CFR 239.91]. Item 1 of Form 1-K requires the information required by Item 7 of Form 1-A to be included in annual reports.

⁴⁰ We have added an Instruction to Item 4 of Form 20-F to state that if a registrant is a bank, BHC, savings and loan association, or savings and loan holding company, it must provide the information specified in Subpart 1400 of Regulation S-K.

⁴¹ See Item 18 of Form 20-F.

⁴² 17 CFR 210.3 ("Article 3 of Regulation S-X").

⁴³ An SRC is an issuer (other than an investment company, an asset-backed issuer, or a majority-

Commission rules require financial statements to be presented.⁵⁰ One of these commenters supported the proposal to modify the current interim period instruction to clarify that the threshold to include an additional interim period is based on whether there is a material change in the information or the trend evidenced thereby, stating that this is consistent with other Commission guidance and FASB guidance.⁵¹ However, another commenter stated that the Commission should align the threshold for interim reporting to the threshold in Rule 10–01(a)(5) of Regulation S–X,⁵² which only requires disclosure of information to the extent sufficient to keep the interim disclosures from being misleading.⁵³

A few commenters were supportive of the proposed credit ratio disclosures for each of the last five fiscal years in initial registration statements and initial Regulation A offering statements.⁵⁴ One of these commenters cited the lack of publicly available prior period information for these reporting periods as reason for its support.⁵⁵ Another commenter stated it was supportive only if the information is known or reasonably available to the registrant.⁵⁶ This commenter indicated that the use of Rules 409 and 12b–21 is very limited, and observed that registrants generally have omitted information that could not be produced without unreasonable effort or expense only when the exception is codified in the specific disclosure requirement (e.g., Item 3 of Form 20–F⁵⁷ as it relates to Selected Financial Data for the earliest two years).

Several other commenters encouraged the Commission to consider requiring the credit ratio disclosure for only the number of years presented in the financial statements in the initial registration statement.⁵⁸ One of these commenters questioned whether the five-year requirement was consistent with disclosure effectiveness and investor protection.⁵⁹ All of these commenters requested that the Commission, at a minimum, align the reporting periods to the financial statement periods for EGCs in order for the requirement to be consistent with

the underlying principles and objectives of the Jumpstart Our Business Startups Act⁶⁰ (“JOBS Act”).⁶¹ Two of these commenters also recommended that the Commission consider this revised approach for Regulation A issuers that would otherwise qualify as EGCs.⁶²

iii. Final Rules

After considering the comments, we are adopting the rules as proposed for the annual and interim reporting period definitions. We continue to believe it is appropriate to align the required reporting periods with the relevant annual periods for which Commission rules require a registrant to provide financial statements because the Subpart 1400 of Regulation S–K disclosures are integrally related to the financial statements. There have been changes in technology since Guide 3 was originally issued, particularly the availability of past financial statements and other disclosure made in filings on the Commission’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”). As such, the historical information provided pursuant to Guide 3 that is not required by Subpart 1400 of Regulation S–K will generally be accessible through the registrant’s prior filings on EDGAR. Furthermore, the elimination of repetitive disclosures, reduction in costs and burdens to registrants, and availability of technology reflected in the final rules is in line with the 2015 Fixing America’s Surface Transportation Act (“FAST Act”) mandate⁶³ and the related Commission rulemaking.⁶⁴ Finally, we do not believe it is necessary to align the threshold for interim reporting with the threshold in Rule 10–01(a)(5) of Regulation S–X. Investors and bank and savings and loan registrants are familiar with the interim period threshold we are codifying, and we believe that threshold strikes the appropriate balance for when additional information would be material to an investment decision.

After considering commenter feedback, we are not adopting the proposed rules that would have required certain credit ratio disclosures for each of the registrant’s last five fiscal years in initial registration statements and in initial Regulation A offering statements of bank and savings and loan

registrants. Instead, the final rules limit the required credit ratio disclosures to the periods for which financial statements are required, consistent with the requirements for periodic reports and other registration statements. As commenters indicated, the JOBS Act provided scaled disclosure requirements for EGCs, including reducing the maximum number of years for which financial statements are required from three to two. As raised by a commenter, the proposed five-year requirement is inconsistent with the staff practice to accept only two years of summary financial data⁶⁵ in an EGC’s initial registration statement instead of the five years required in non-EGCs’ registration statements.⁶⁶ We agree that EGCs and Regulation A issuers should be able to align the credit ratio reporting periods with the periods for which they provide financial statements, similar to other financial reporting requirements. Additionally, after consideration of commenter feedback and additional staff analysis as to the frequency of initial registration statements filed by EGCs and Regulation A bank and savings and loan registrants relative to all initial registration statements filed by bank and savings and loan registrants, we do not believe it is necessary to require a different reporting requirement for the limited non-EGC bank and savings and loan registrants filing initial registration statements. There was only one initial registration statement in the last two years that was filed by a non-EGC bank and savings and loan registrant.⁶⁷ Therefore, all registrants and Regulation A issuers will be required to provide the ratios for the same periods for which they provide financial statements. After further consideration and analysis, we believe this approach is appropriate because it is unclear how useful the limited credit ratio information would be without the additional context of other financial statement information for those additional periods. Additionally, we note that our existing rules already

⁵⁰ See letters from ABA; BAC; BPI/SIFMA; and EY.

⁵¹ See letter from BPI/SIFMA.

⁵² See 17 CFR 210.10–01(a)(5).

⁵³ See letter from BAC.

⁵⁴ See letters from BAC and EY.

⁵⁵ See letter from BAC.

⁵⁶ See letter from EY.

⁵⁷ See *supra* note 37.

⁵⁸ See letters from CAQ; Crowe; and Deloitte.

⁵⁹ See letter from Crowe.

⁶⁰ Public Law 112–106, Sec. 102, 126 Stat. 309 (2012).

⁶¹ See letters from CAQ; Crowe; and Deloitte.

⁶² See letters from CAQ and Crowe.

⁶³ Public Law 114–94, Sec. 72003, 129 Stat. 1312 (2015).

⁶⁴ *FAST Act Modernization and Simplification of Regulation S–K*. Release No. 33–10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 2, 2019)].

⁶⁵ Item 301 of Regulation S–K [17 CFR 229.301]. The Commission recently proposed to eliminate Item 301 of Regulation S–K. See 2020 MD&A Proposing Release at *supra* note 37.

⁶⁶ See the JOBS Act Frequently Asked Questions document issued by the Division of Corporation Finance addressing generally applicable questions on Title 1 of the JOBS Act available at: <https://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-1-general.htm>.

⁶⁷ Based on staff analysis, the total number of bank and savings and loan registrants’ initial registration statements that went effective from May 1, 2018 to May 1, 2020 was 32. Based on XBRL data, 31 were EGCs. No bank and savings and loan registrants’ offering statements were qualified during this period.

require a discussion of known trends,⁶⁸ and the Commission has issued guidance emphasizing the requirement to provide trend disclosure in MD&A.⁶⁹ Therefore to the extent that additional historical information is necessary to discuss those trends, such as information outside the financial statement periods included in the filing, registrants will continue to be required to provide that information.

F. Distribution of Assets, Liabilities and Stockholders' Equity; Interest Rate and Interest Differential (Average Balance, Interest and Yield/Rate Analysis and Rate/Volume Analysis)

i. Proposal

We proposed to codify in proposed Item 1402 of Regulation S–K all of the average balance sheet, interest and yield/rate analysis, and rate/volume analysis disclosure items currently in Item I of Guide 3. We also proposed to further disaggregate the categories of interest-earning assets and interest-bearing liabilities required to be disclosed. Specifically, we proposed to require registrants to separate (1) federal funds sold⁷⁰ from securities purchased with agreements to resell and (2) federal funds purchased from securities sold under agreements to repurchase⁷¹ and

to disaggregate commercial paper.⁷² Finally, we proposed to codify the instructions related to foreign activities contained in General Instruction 7⁷³ and Instruction 5 of Item I⁷⁴ of Guide 3.

ii. Comments on Proposal

One commenter supported the proposal to codify the average balance and rate section of Guide 3, stating that the disclosures are unique to Guide 3 and that users of its financial statements find the information useful.⁷⁵ In contrast, another commenter stated that the additional disaggregation that would be required by the proposal appears to remove any element of professional judgment based on quantitative or qualitative materiality assessments, and therefore may result in disaggregation that will be of little value to users.⁷⁶ A different commenter stated that the required disaggregation is more granular than current practice and financial statement requirements.⁷⁷ This commenter noted that, for example, federal funds sold and securities purchased with agreements to resell are typically aggregated on a single line item on the balance sheet. This commenter also stated that separating these items and requiring them to be disclosed on an average balance basis may not be relevant or may be confusing to investors. Several commenters recommended either retaining Guide 3's existing language of "should include," or revising the language in proposed Item 1402 to state "must include, if material" when referring to the

disaggregation requirement, in order to give registrants the flexibility to present this information in a way that they believe is most relevant to users.⁷⁸

iii. Final Rules

After considering the comments, we are adopting the rules substantially as proposed. Item 1402 of Regulation S–K codifies all of the average balance sheet, interest and yield/rate analysis and rate/volume analysis disclosure items currently in Item I of Guide 3, along with General Instruction 7 and Instruction 5 of Item 1 of Guide 3. We also are adopting the requirement to disaggregate the categories of interest-earning assets and interest-bearing liabilities required to be disclosed, as proposed.

In a change from the proposal, as suggested by commenters, Item 1402(a) of Regulation S–K states that the categories enumerated in Item 1402(a) "must be included, if material," rather than the proposed language, which stated that disclosure "must include, at a minimum." While we continue to believe this disclosure can elicit useful information about the drivers of the changes in net interest earnings across registrants in a simple and comparable format, we acknowledge commenters' concerns about requiring disaggregated information when it is not material to investors. We believe the adopted approach strikes an appropriate balance between providing sufficient information to help investors understand material changes in interest income and interest expense from period to period, and permitting the omission of immaterial information that could make it more difficult to understand the material drivers of business results. Furthermore, we believe that in practice registrants have applied a materiality qualifier in providing the existing disclosures called for by Guide 3, and therefore we believe that this change aligns the language in the final rules with how registrants apply the existing descriptions of "major categories of interest-earning assets and interest-bearing liabilities." In addition, while we acknowledge one commenter's statement that federal funds sold and securities purchased with agreements to resell are typically aggregated in a single line item on the balance sheet, the type of collateral could vary under the two categories, which could drive differences in weighted average interest rates and related changes in the rate/volume analysis. As a result, we continue to believe it is appropriate to list these two

⁶⁸ Item 303 of Regulation S–K [17 CFR 229.303] requires a registrant to discuss its financial condition, changes in financial condition, and results of operations. Instruction 3 to paragraph 303(a) states that the discussion shall focus on the material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. The instruction further states that this would include descriptions and amounts of matters that: (A) Would have an impact on future operations and have not had an impact in the past, and (B) have had an impact on reported operations and are not expected to have an impact on future operations.

Similarly, for foreign private issuers, Item 5.D. of Form 20–F requires a foreign private issuer to discuss, for at least the current financial year, any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the company's net sales or revenues income from continuing operations, profitability, liquidity, or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.

⁶⁹ See, e.g., Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Release No. 33–6835 (May 18, 1989) [54 FR 22427 (May 24, 1989)] and Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operation, Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056 (Dec. 29, 2003)] (the "2003 MD&A Interpretive Release").

⁷⁰ Federal funds sold are reserves of a banking institution that are lent to other institutions overnight.

⁷¹ ASC 860–10 defines a repurchase agreement as an arrangement under which a transferor (repo

party) transfers a security to a transferee (repo counterparty or reverse party) in exchange for cash and concurrently agrees to reacquire the security at a future date for an amount equal to the cash exchanged plus a stipulated interest factor.

⁷² Commercial paper consists of short-term promissory notes issued primarily by corporations. Maturities of commercial paper range up to 270 days but average about 30 days.

⁷³ General Instruction 7 of Guide 3 clarifies that foreign data need not be presented if the registrant is not required to make separate disclosures concerning its foreign activities pursuant to the test set forth in Rule 9–05 of Regulation S–X [17 CFR 210.9–05]. Rule 9–05 requires disclosure when foreign activities, which include loans and other revenue producing assets, exceed 10% of (1) assets, (2) revenue, (3) income (loss) before income tax expense, or (4) net income (loss).

⁷⁴ Instruction 5 to Item I of Guide 3 states that if disclosure regarding foreign activities is required pursuant to General Instruction 7 of Guide 3, the information required by paragraphs A, B and C of Item I should be further segregated between domestic and foreign activities for each significant category of assets and liabilities disclosed pursuant to Item I.A, as well as disclosure of the percentage of total assets and total liabilities attributable to foreign activities.

⁷⁵ See letter from BAC.

⁷⁶ See letter from BPI/SIFMA.

⁷⁷ See letter from ABA.

⁷⁸ See letters from ABA and BPI/SIFMA.

categories separately but note that the final rules only require disaggregation if material.

G. Investment Portfolio

i. Proposal

We proposed to codify in Item 1403 of Regulation S–K the requirement to disclose weighted average yield for each range of maturities by category of debt securities and proposed to use the categories required by U.S. GAAP⁷⁹ or IFRS,⁸⁰ rather than those categories currently called for by Item II.B of Guide 3. In the Proposing Release, we stated our belief that the proposed weighted average yield disclosure would provide investors with information to evaluate more effectively the performance of the portfolio and that revising the categories of debt securities to conform to the categories presented in accordance with U.S. GAAP or IFRS would enhance the consistency and usefulness of the registrant's investment portfolio disclosures.⁸¹ As proposed, this disclosure requirement would apply only to debt securities that are not carried at fair value through earnings. Due to the substantial overlap with U.S. GAAP and IFRS disclosure requirements, we proposed not to codify in Item 1403 the following disclosure items in Item II of Guide 3: (a) Book value information; (b) the maturity analysis of book value information; and (c) the disclosures related to investments exceeding 10% of stockholders' equity.

⁷⁹ ASC 320–10 addresses the accounting and reporting for debt securities. ASC 320–10–50–1B states that major security types should be based on the nature and risks of the security and that an entity should consider all of the following when considering whether disclosure for a particular security type is necessary: (a) Shared activity or business sector, (b) vintage, (c) geographic concentration, (d) credit quality, and (e) economic characteristics. Financial institutions, including banks, savings and loan associations, savings banks, credit unions, finance companies and insurance entities are required to include the nine securities categories listed in ASC 942–320–50–2, although additional types may also be necessary: (a) Equity securities, segregated by either (1) industry type or (2) registrant size, or (3) investment objective; (b) debt securities issued by U.S. Treasury and other U.S. government corporations and agencies; (c) debt securities issued by states of the United States and political subdivisions of the states; (d) debt securities issued by foreign governments; (e) corporate debt securities; (f) residential mortgage-backed securities; (g) commercial mortgage-backed securities; (h) collateralized debt obligations; and (i) other debt obligations.

⁸⁰ IFRS 7 addresses disclosures for financial instruments. IFRS 7.6 requires disclosures by classes of financial instruments, which are defined as “. . . classes that are appropriate to the nature of the information disclosed and that take into account the characteristics of those financial instruments.”

⁸¹ See Section II.F.iii of the Proposing Release.

ii. Comments on Proposal

One commenter supported the proposal to eliminate the investment portfolio disclosure items that overlap with U.S. GAAP.⁸² This commenter also supported moving away from the bright-line thresholds in Guide 3.⁸³ Furthermore, this commenter also supported the proposal to require disclosure of weighted average yields of each category of debt securities not carried at fair value through earnings by specified range of maturities because it would provide decision-useful information to investors. While not commenting specifically on the investment portfolio disclosure requirements, many commenters generally supported the elimination of disclosure items that overlap with those in Commission rules, U.S. GAAP, or IFRS.⁸⁴

iii. Final Rules

After considering the comments, we are adopting Item 1403 of Regulation S–K as proposed. Item 1403 of Regulation S–K codifies the requirement to disclose weighted average yield for each range of maturities by category of debt securities required to be disclosed in the registrant's U.S. GAAP or IFRS financial statements. As proposed, the final rules only apply to debt securities that are not carried at fair value through earnings. The final rules do not codify the following disclosure items in Item II of Guide 3: (a) Book value information; (b) the maturity analysis of book value information; and (c) the disclosures related to investments exceeding 10% of stockholders' equity, because these items substantially overlap with U.S. GAAP and IFRS disclosure requirements.

H. Loan Portfolio

i. Proposal

We proposed to codify in Item 1404 of Regulation S–K the requirement to disclose the maturity by loan category and the total amount of loans due after one year that have (a) predetermined interest rates and (b) floating or adjustable interest rates disclosure currently called for by Item III.B, by the loan categories disclosed in the

⁸² See letter from BAC.

⁸³ For example, the disclosures related to investments exceeding 10% of stockholders' equity. See further discussion in Section II.F of the Proposing Release.

⁸⁴ See, e.g., letters from ABA; BPI/SIFMA; CAQ; Crowe; Deloitte; EY; KPMG; M. Deering; and PwC.

registrant's U.S. GAAP⁸⁵ or IFRS⁸⁶ financial statements. Currently Item III.B of Guide 3 provides for the exclusion of certain loan categories (real estate-mortgage, installment loans to individuals and lease financing) from these disclosures and the aggregation of other loan categories (foreign loans to governments and official institutions, banks and other financial institutions, commercial and industrial and other loans). The proposed rules would not provide for any exclusion of loan categories, or permit the aggregation of loan categories for purposes of this disclosure. Additionally, we proposed to codify the existing Guide 3 instruction stating that the determination of maturities should be based on contractual terms. We proposed to clarify the “rollover policy” for these disclosures by stating that, to the extent non-contractual rollovers or extensions are included for purposes of measuring the allowance for credit losses under U.S. GAAP or IFRS, such non-contractual rollovers or extensions should be included for purposes of the maturities classification and the policy should be briefly disclosed.

We proposed not to codify the following Guide 3 disclosure items because they call for disclosures that are reasonably similar to disclosures already required by Commission rules, U.S. GAAP, or IFRS:⁸⁷

- The loan category disclosures called for by Item III.A of Guide 3;
- The loan portfolio risk elements disclosure called for by Item III.C, which among other disclosures, included disclosure of loan concentrations exceeding 10% of loans that are not otherwise disclosed in the loan category disclosure in Item III.A and disclosure of cross border outstandings to borrowers in each foreign country where such outstandings exceed 1% of total assets; and
- The other interest bearing assets disclosure called for by Item III.D.⁸⁸

ii. Comments on Proposal

One commenter supported aligning the requirements with the loan categories under existing U.S. GAAP and IFRS requirements but asked the Commission to allow registrants to

⁸⁵ ASC 310–10–45–2 and ASC 310–10–50–3 require that major categories of loans or trade receivables be presented separately either in the balance sheet or in the notes to the financial statements.

⁸⁶ See *supra* note 80.

⁸⁷ See Section II.G of the Proposing Release.

⁸⁸ We also proposed to delete the loan presentation disclosure required under 17 CFR 210.9–03(7)(a)–(c) (“Rule 9–03(7)(a)–(c) of Regulation S–X”). See Section IV below.

exclude any loan categories from the maturity and sensitivity to interest rate changes disclosure that are not material to the registrant.⁸⁹ This commenter stated that, similar to disclosure requirements for U.S. GAAP, registrants should have the ability to aggregate certain loan categories for purposes of the disclosure on the basis of relevance, materiality, and other considerations. This commenter also supported moving away from the bright-line thresholds in Guide 3 and instead relying on existing U.S. GAAP and IFRS requirements that call for the disclosure of significant concentrations of credit risk. Finally, this commenter stated that the use of the “significant” threshold in U.S. GAAP and IFRS would not result in the loss of material information.

Another commenter recommended the Commission continue to allow registrants to exclude or aggregate certain loan categories if they determine an alternative presentation is more appropriate.⁹⁰ This commenter stated that mirroring the loan categories and classes presented in the financial statements, without the flexibility to exclude certain loan categories, would not result in more meaningful disclosures. For example, this commenter stated it is likely that large portfolios of consumer loans, such as credit cards, would be classified in the “within 1 year” category, whereas residential real estate loans would generally be in the “over 10 year” category.

iii. Final Rules

After considering the comments, we are adopting final rules substantially as proposed. Consistent with the proposal, Item 1404(a) of Regulation S–K codifies the requirement to disclose the maturity by loan category disclosure currently called for by Item III.B of Guide 3, with the loan categories based on the categories required by U.S. GAAP⁹¹ or IFRS⁹² in the financial statements, but in response to comments received, the final rules also require additional maturity categories to provide investors with sufficient information on the potential interest rate risk associated with the loans in the portfolio. The final rules also codify the existing Guide 3 instruction stating the determination of maturities should be based on contractual terms, and also codifies the language, as proposed, regarding the “rollover policy” for these disclosures.

Item 1404(b) of Regulation S–K codifies the disclosure items in Item III.B of Guide 3 regarding the total amount of loans due after one year that have (a) predetermined interest rates or (b) floating or adjustable interest rates, and specifies that this disclosure should also be disaggregated by the loan categories disclosed in the registrant’s U.S. GAAP or IFRS financial statements.

While we acknowledge commenter feedback suggesting that the final rules should allow registrants to exclude certain loan categories from the Item 1404 of Regulation S–K disclosure, we do not believe any exceptions are necessary as the disclosure is driven by the loan categories required by U.S. GAAP or IFRS. U.S. GAAP⁹³ considers materiality, so such immaterial loan categories generally would not be presented in the financial statements, and therefore would not be required by these disclosure requirements. The staff has observed that registrants typically aggregate immaterial loan categories into an “other” loan category, or will combine these immaterial loan categories with the most comparable material loan category. We would not expect this “other” loan category to be disaggregated further for purposes of this disclosure. Rather, this “other” loan category would be disclosed as a single additional category, consistent with the presentation in the U.S. GAAP or IFRS financial statements. We continue to believe conforming the loan categories required in this disclosure to those required by U.S. GAAP or IFRS promotes consistency of loan portfolio disclosures throughout a registrant’s filing, and elicits trend information about interest income and potential interest rate risk.

In response to commenter feedback about large portfolios being concentrated in a single maturity category, the final rules require additional maturity categories. Specifically, we have separated the proposed “after five years” maturity category into two categories: (1) After five years through 15 years, and (2) after 15 years. We believe these additional maturity categories will elicit more decision-relevant information for investors by capturing the maturity periods of commonly offered residential mortgage loan products, such as 15-year and 30-year residential mortgages. For example, we expect that under the final rules, residential mortgage loans would no longer be classified in a single maturity category, as noted by a commenter, thus providing investors additional information about the risk

profile of those loans. Furthermore, for as long as the loans remain outstanding, the loans would move through the maturity categories until they are paid off or sold, such that over time, even 30-year residential mortgage loans would migrate into different maturity categories.

Consistent with the proposal, the final rules do not codify the loan category disclosure items in Item III.A of Guide 3, the loan portfolio risk element disclosure items in Item III.C, or the other interest bearing asset disclosure items in Item III.D. The rules codify the Guide 3 loan disclosure items that we believe elicit information material to an investment decision and do not overlap with other existing disclosure requirements or principles. The final rules will thereby elicit disclosure that assists investors in evaluating the registrant’s loan portfolio while also limiting the burdens on registrants to prepare such disclosures as registrants should be able to derive this information from their existing books and records.

I. Allowance for Credit Losses

i. Proposal

We proposed to require in Item 1405 of Regulation S–K the disclosure of the ratio of net charge-offs during the period to average loans outstanding based on the loan categories required to be disclosed in the registrant’s U.S. GAAP or IFRS financial statements, instead of on a consolidated basis as called for by Guide 3. We also proposed to require registrants to provide the tabular allocation of the allowance disclosure called for by Item IV.B of Guide 3, except that the allocation would be based on the loan categories presented in the U.S. GAAP financial statements, instead of the loan categories specified in Item IV.B of Guide 3, which we believe is not a substantive change from existing practice given the existing instruction⁹⁴ in Item IV of Guide 3 which permits other loan categories to be used if considered a more appropriate presentation.⁹⁵ We did not propose to codify the rollforward of the allowance for loan loss disclosures called for by Item IV.A of Guide 3, given the overlap of this requirement with U.S. GAAP and IFRS.

The proposed rules did not require any incremental disclosures related to

⁸⁹ See letter from BAC.

⁹⁰ See letter from BPI/SIFMA.

⁹¹ See *supra* note 85.

⁹² See *supra* note 80.

⁹³ See *supra* note 85.

⁹⁴ See Instruction 3 to Item IV of Guide 3.
⁹⁵ As explained in the Proposing Release, we did not propose to apply this requirement to IFRS registrants because IFRS 7.35H already requires this information at a similar level of disaggregation in the financial statements. See Section II.H.iii of the Proposing Release.

the New Credit Loss Standard or IFRS 9 because, as explained in the Proposing Release, we first wanted to assess the disclosures provided under the new U.S. GAAP and IFRS standards and evaluate whether additional information is necessary.⁹⁶ However, the Proposing Release contained a number of requests for comments seeking feedback on the types of disclosures that may be material upon the adoption of the New Credit Loss Standard.

ii. Comments on Proposal

Several commenters supported eliminating the allowance for credit losses disclosure items, such as the five-year analysis of loan loss experience called for by Item IV.A of Guide 3, that are duplicative of U.S. GAAP or IFRS.⁹⁷ One commenter was supportive of the proposed allocation of the allowance for credit losses disclosure requirement.⁹⁸ Another commenter stated that the tabular allocation of the allowance for credit losses would not be burdensome to prepare and that it provides a convenient location for such information to be obtained by investors.⁹⁹ However, this commenter and another commenter indicated that the disclosures should be at the same level as the allowance disclosures under U.S. GAAP, which is at the portfolio segment level, and that further

disaggregation is not warranted.¹⁰⁰ One of these commenters stated that there will be significant operational difficulties in allocating the allowance in ways that would not conform to U.S. GAAP reporting.¹⁰¹ The other commenter recommended retaining the instruction to Item III.A of Guide 3, which provides latitude to registrants to use loan categories outside of those identified in Guide 3 “if considered a more appropriate presentation.”¹⁰²

One commenter asserted that the proposed requirement to disclose disaggregated net charge-offs to average loans ratios by loan category may not provide meaningful information to the extent the disaggregated ratios are not significant drivers of business results.¹⁰³ Another commenter stated that the charge-off ratios will have little, if any, relation to credit loss provisions or the allowance for credit losses upon the adoption of the New Credit Loss Standard, especially for loans with longer terms, such as many consumer loan products, and therefore appears not to support the requirement to provide this ratio.¹⁰⁴ This commenter further stated that charge-off ratios on these product lines might confuse investors and others who are trying to assess credit performance, as allowances will be recorded at origination or commitment and can significantly change based on economic forecasts. One commenter stated that the charge-off ratios should not be more disaggregated than at the portfolio segment level, which is the level U.S. GAAP requires for allowance disclosures.¹⁰⁵ Several commenters stated there may be operational challenges or systems limitations associated with calculating the ratio of net charge-offs to average loans on a disaggregated basis versus on a consolidated basis as provided today.¹⁰⁶ These commenters highlighted the estimated increase in burden hours as well as professional costs related to these disclosure requirements from the Paperwork Reduction Act analysis in the Proposing Release and recommended the Commission consider feedback from investors and others to determine whether the benefits justify these costs.¹⁰⁷

In response to request for comments on disclosure requirements related to the New Credit Loss Standard or IFRS 9, no commenters indicated that we should require disclosures incremental to the New Credit Loss Standard or IFRS 9 at this time. A few commenters stated that it was premature to determine which incremental disclosures may be useful to investors given that the standard-setting processes for the New Credit Loss Standard and IFRS 9 were only recently completed and have resulted in major changes to previous accounting standards.¹⁰⁸ These commenters recommended that the Commission provide registrants the opportunity to determine the most appropriate way to communicate to their investors about the new standard, including how best to explain period-to-period changes in expected credit losses, consideration of loan mix and volume, credit performance related to expectations, changes in key inputs and assumptions, or other factors over the next few years before proposing any additional disclosure requirements.

One of these commenters cautioned that, while the inputs and assumptions made to the New Credit Loss Standard models will be critical to credit loss estimates and thus will be important to investment decisions, and disclosure of such inputs initially appears helpful to investors, the complexity of credit loss modeling (for example, non-linear relationships of changes in certain economic conditions to loss given default) will likely frustrate many investors who wish to use inputs in their own modeling.¹⁰⁹ This commenter stated that any future required disclosure related to the New Credit Loss Standard methodology should not be required in a formulaic manner or template. This commenter also noted that due to the broad range of credit loss modeling methods that will be performed by banks, it expects there to be a wide diversity in how qualitative adjustments are defined and applied in the credit loss modeling, not only between registrants, but also between periods within a registrant.

iii. Final Rules

After considering the comments, we are adopting the rules as proposed. Item 1405(c) of Regulation S-K codifies the requirement to provide a tabular allocation of the allowance disclosures based on the loan categories presented in the U.S. GAAP financial statements

from the Aggregated Portions of the Proposed Rules in Section VII of the Proposing Release.

¹⁰⁸ See letters from ABA and KPMG.

¹⁰⁹ See letter from ABA.

⁹⁶ See Section II.H of the Proposing Release. Accounting Standards Update (“ASU”) 2016–13—*Financial Instruments—Credit Losses (Topic 326)* (“New Credit Loss Standard”) replaces the current U.S. GAAP incurred loss methodology with a methodology that reflects expected credit losses over the entire contractual terms of the financial instruments. Absent an election to suspend adoption under Section 4014 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), as discussed further below, the New Credit Loss Standard became effective for public business entities that meet the definition of an SEC filer for their fiscal years beginning after December 15, 2019, including interim periods within those fiscal years. Public Law 116–136, 134 Stat. 281 (Mar. 27, 2020). However, SEC filers that are eligible to be SRCs, as defined by the SEC, and entities that are not SEC filers, are provided a delayed effective date of three years. Thus, SRCs, certain EGCs, and non-SEC filers are able to elect to defer adopting the New Credit Loss Standard until their fiscal year beginning after December 15, 2022.

The CARES Act provides an insured depository institution, a bank holding company, or any affiliate thereof with the option to temporarily suspend application of the New Credit Loss Standard until the earlier of the date on which the national emergency concerning COVID–19 terminates or December 31, 2020.

IFRS 9—*Financial Instruments* was effective January 1, 2018 for calendar year companies and requires a 12-month expected credit loss measurement unless there has been a significant increase in credit risk, in which case it is a lifetime expected credit loss measurement.

⁹⁷ See letters from ABA and BAC.

⁹⁸ See letter from A. Heilig.

⁹⁹ See letter from ABA.

¹⁰⁰ See letters from ABA and BPI/SIFMA.

¹⁰¹ See letter from ABA.

¹⁰² See letter from BPI/SIFMA.

¹⁰³ See letter from BPI/SIFMA.

¹⁰⁴ See letter from ABA.

¹⁰⁵ See letter from ABA.

¹⁰⁶ See letters from CAQ (stating that the ratio would not be computable from disclosures in the financial statements) and Crowe.

¹⁰⁷ See Table 12: *Estimated Change in Internal Burden Hours and Costs for Outside Professionals*

for registrants applying or reconciling to U.S. GAAP. Item 1405(c) of Regulation S-K does not apply to IFRS registrants because IFRS already requires this information at a similar level of disaggregation in the financial statements.¹¹⁰ While one commenter recommended retaining the instruction to Item III.A of Guide 3, which provides latitude to registrants to use loan categories outside of those identified in Guide 3, we do not believe this is necessary as we have tied the loan categories for this disclosure to the loan categories presented in the U.S. GAAP financial statements. We continue to believe the tabular allocation required by this Item will provide for easier analysis by investors when reviewing these disclosures. The final rules also codify the requirement to disclose disaggregated net charge-off ratios. We continue to believe that, in many circumstances, disclosure of disaggregated net charge-off ratios may provide material information to investors in terms of transparency and comparability. For example, the staff has observed that credit cards and other unsecured loans often have higher net charge-off ratios relative to secured loans, such as residential mortgage loans or commercial loans. Therefore, to the extent a bank and savings and loan registrant has a material loan category with higher net charge-offs relative to other loan categories in its loan portfolio, a single disclosure of the consolidated net charge-off ratio may not reveal trends present in the loan portfolio because the portfolio performance can be skewed by a specific loan category or by the number and type of loan products. Furthermore, disaggregated net charge-off ratio disclosures can facilitate comparison of loan performance by specific loan category among banks of varying sizes and operations.

While one commenter noted that the meaningfulness of the disaggregation of the net charge-off ratio may be contingent on whether the ratios are significant drivers of business results, and another stated that the charge-off ratio will have little, if any, relation to the provisions or the allowance for credit losses upon the adoption of the New Credit Loss Standard, we believe disaggregated net charge-off ratios generally are key performance measures for bank and savings and loan registrants. This is evident from the disclosure that bank and savings and loan registrants provide in SEC filings, including earnings releases, which often includes information about charge-offs

by loan category, and in some cases, the net charge-off ratio at the loan category level. The staff has observed that some bank and savings and loan registrants have continued to provide this information in their quarterly reports after their recent adoption of the New Credit Loss Standard. Additionally, the staff has observed that some bank and savings and loan registrants have disclosed expectations of future charge-off amounts as part of their disclosure of projections or earnings guidance for the forecasted period upon their adoption of the New Credit Loss Standard. We also note that the Federal Deposit Insurance Corporation ("FDIC") publishes a quarterly banking profile ("FDIC Quarterly") that provides a comprehensive summary of the financial results for all FDIC-insured institutions.¹¹¹ Both prior to, and after, the adoption of the New Credit Loss Standard, the FDIC Quarterly reports, among other things, the net charge-off amounts and the net charge-off ratio on an industry-wide basis, including the charge-off ratio at the loan category level. We therefore continue to believe this information may be material for investors to understand a registrant's financial results. Furthermore, we did not receive any comments from registrants indicating that the disaggregated net charge-off ratios would be costly or burdensome to provide. We acknowledge that adoption of the New Credit Loss Standard affects the relationship between the net charge-off ratio to the provision for loan losses and the allowance for credit losses, but we continue to believe this information is used by investors, as evidenced by the fact that the information is still disclosed by a number of registrants. Additionally, despite the change in the allowance for credit loss methodology upon the adoption of the New Credit Loss Standard, we note that both components of the disaggregated net charge-off ratios (net charge-offs during the period and average loans outstanding during the period), and therefore the ratio itself, are generally not materially affected by the New Credit Loss Standard. The New Credit Loss Standard did not directly change the applicable U.S. GAAP guidance for charge-offs and total loans. Therefore, we believe that changes in these ratios over time, including prior to and after adoption of the New Credit Loss Standard, may provide material trend

information to investors about how the portfolio is performing.

Consistent with the proposal, and the suggestions of several commenters, the final rules do not codify the disclosure items in Item IV of Guide 3 that overlap with U.S. GAAP and IFRS and do not require any disclosures related to the New Credit Loss Standard or IFRS 9.

iv. Proposal—New Credit Ratios Disclosure

Guide 3 currently calls for the disclosure of one credit ratio, net charge-offs during the period to average loans outstanding, as outlined in Item IV.A of Guide 3. As discussed in Section II.I.i above, we proposed to codify the requirement to disclose this ratio by the loan categories disclosed in the U.S. GAAP or IFRS financial statements. In addition, we also proposed to require in Item 1405(a) of Regulation S-K disclosure of the following new credit ratios on a consolidated basis, along with each of the components used in their calculation: (1) Allowance for Credit Losses¹¹² to Total Loans; (2) Nonaccrual Loans to Total Loans; and (3) Allowance for Credit Losses¹¹³ to Nonaccrual Loans. The proposed rules would also require a discussion of the factors that drove material changes in the ratios, or related components, during the periods presented. As discussed in Section II.E.iii above, the credit ratios would be required for each annual period for which Commission rules require financial statements, and any additional interim period if there was a material change in the information or the trends evidenced thereby. The proposed rules would not require disclosure of the ratio of nonaccrual loans to total loans or the allowance for credit losses to nonaccrual loans for IFRS registrants, as

¹¹² Allowance for Credit Losses refers to the allowance for loan losses recorded on the registrant's loan portfolio calculated in accordance with U.S. GAAP or IFRS. To the extent that net investments in leases by a lessor are included in the total loans denominator, the allowance for credit losses also includes the related allowance for credit losses for the net investment in leases. The allowance for credit losses excludes any allowance for credit losses recorded related to the securities portfolio or unfunded commitments, which are not considered as part of the total loan portfolio in the denominator of this ratio.

¹¹³ To the extent that net investments in leases by a lessor are included in the nonaccrual loans denominator, the allowance for credit losses also includes the related allowance for credit losses for the net investment in leases. The allowance for credit losses excludes any allowance for credit losses recorded related to the securities portfolio or unfunded commitments, which are not considered within nonaccrual loans in the denominator of this ratio.

¹¹¹ Federal Deposit Insurance Corporation, *Quarterly Banking Profile* (Second Quarter 2020), available at <https://www.fdic.gov/bank/analytical/quarterly/2020-vol14-3/fdic-v14n3-2q2020.pdf>.

¹¹⁰ IFRS 7.35H.

there is no concept of nonaccrual loans in IFRS.

v. Comments on Proposal

We received limited feedback on our proposal to require credit ratios disclosure. The primary feedback we received was that these credit ratios may no longer be as relevant to investors upon the adoption of the New Credit Loss Standard.¹¹⁴

One commenter stated that each of the ratios, excluding the net charge-off to average loans ratio, is readily calculable from U.S. GAAP disclosures already provided in the financial statements and encouraged the Commission to consider feedback from users to determine whether separate disclosure of the amounts is necessary.¹¹⁵ Another commenter stated that many analysts and investors already calculate and monitor these ratios and that disclosing them would not be substantially burdensome to banks.¹¹⁶ However, this commenter recommended not codifying the requirement to disclose the ratios due to the potential changes resulting from the adoption of the New Credit Loss Standard.¹¹⁷ This commenter noted that under the incurred loss accounting methodology, increases in nonaccrual loans will typically coincide with higher allowance levels and higher credit loss provisions, but this relationship is significantly diminished under the New Credit Loss Standard as credit performance should effectively be anticipated at origination.¹¹⁸ This commenter further cautioned that, due to the significant changes in the measurement basis of the allowance for credit losses from the New Credit Loss Standard, the ratio disclosures may be confusing to analysts, not only in comparing the ratios based on the incurred loss methodology prior to the adoption of the New Credit Loss Standard, but also in comparing registrants that are adopting the New Credit Loss Standard in 2020 to those that will adopt in 2023.¹¹⁹

One commenter noted the proposed credit ratios are not required by U.S. GAAP and IFRS.¹²⁰ This commenter recommended that we not require disclosures beyond those required by

U.S. GAAP or IFRS until such time as it is clear that incremental disclosures are necessary given that the standard-setting processes for the New Credit Loss Standard and IFRS 9 were only recently completed by the FASB and IASB and have resulted in major changes to the previous accounting standards.

A few commenters stated the Commission should not require a discussion of the factors that drove material changes in credit ratios.¹²¹ One of these commenters said the proposed disclosure requirement overlaps with Item 303(a) of Regulation S-K's requirement to provide such other information that the registrant believes is necessary to an understanding of its financial condition, changes in financial condition, and results of operations.¹²² Another commenter cited the complexity of what can drive the New Credit Loss Standard estimate.¹²³ For example, this commenter observed that nonaccrual loans and charge-offs result from credit deterioration events, which are not necessarily direct drivers of the New Credit Loss Standard allowance estimate, and therefore would not necessarily drive changes in ratios to the extent they have been accurately forecast. As a result, according to this commenter, a discussion of these metrics may be confusing to analysts or investors. Finally, although the proposed rules would not have required disclosure of the ratio of nonaccrual loans to total loans or the allowance for credit losses to nonaccrual loans for IFRS registrants as there is no concept of nonaccrual loans in IFRS, this commenter asked the Commission to explore how "Stage 3"¹²⁴ assets under IFRS 9 may be considered comparable to nonaccrual loans within U.S. GAAP.

vi. Final Rules

Having considered the comments, we are adopting the rules as proposed. We continue to believe that investors evaluate these ratios when making investment decisions and that disclosure of the components used in the calculation of the ratios, along with the proposed narrative disclosure of the factors driving material changes in the ratio or related components, would further aid investors' understanding of the reasons for the material changes in ratios. The staff has observed that these

credit ratios are already commonly disclosed by most bank and savings and loan registrants with material lending portfolios, and the staff has observed that many bank and savings and loan registrants have continued to provide these credit ratios in their earnings releases and periodic reports after the adoption of the New Credit Loss Standard. Therefore, we believe these registrants may continue to find that this information may be material for an investor's understanding of their financial results.¹²⁵

We also note that the FDIC Quarterly,¹²⁶ both prior to and after the adoption of the New Credit Loss Standard, continues to collect and report industry-wide data on the components, or similar components, of these ratios, and the related ratios or similar ratios. For example, the FDIC Quarterly reports industry-wide data on the allowance for credit losses and total loans, and the related allowance for credit losses to total loans outstanding ratio. Additionally, the FDIC Quarterly reports noncurrent loans and leases,¹²⁷ the noncurrent loans to total loans ratio, and the ratio of the allowance for credit losses to noncurrent loans and leases, which is similar to, but not the same as, the two nonaccrual¹²⁸ ratios (nonaccrual loans to total loans outstanding at each period end and allowance for credit losses to nonaccrual loans at each period end) that we are codifying in Item 1405 of Regulation S-K. Furthermore, while we acknowledge commenter feedback that the ratios are affected by the adoption of the New Credit Loss Standard, the staff has observed that registrants that continue to disclose them have provided disclosure to explain the impact of the change in the accounting for credit losses on the ratios from period to period. Additionally, despite the change in the allowance for credit loss methodology upon the adoption of the New Credit Loss Standard, we note that both components of the nonaccrual loans to total loans ratio (nonaccrual loans and total loans outstanding at

¹²⁵ See *supra* note 96. As illustrated by Table 2 in Section VII, around 44% of bank and savings and loan registrants are either SRCs or EGCs and are not required to adopt the New Credit Loss Standard until fiscal years beginning after December 15, 2022. Therefore, over the next few years, there will continue to be a significant population of bank and savings and loan registrants that apply the incurred loss approach and not the New Credit Loss Standard.

¹²⁶ See *supra* note 111.

¹²⁷ The FDIC Quarterly defines noncurrent loans as loans that are past due 90 days or more or that are in nonaccrual status.

¹²⁸ Nonaccrual loans represent loans that are in nonaccrual status. See ASC 326–20–50–16.

¹¹⁴ See letter from ABA.

¹¹⁵ See letter from CAQ.

¹¹⁶ See letter from ABA.

¹¹⁷ The New Credit Loss Standard replaces the current incurred loss methodology with a methodology that reflects expected credit losses over the entire contractual term of the financial instruments. See ASC Topic 326.

¹¹⁸ This comment relates only to the allowance for credit losses to nonaccrual loans and not the other three credit ratios proposed.

¹¹⁹ See *supra* note 96.

¹²⁰ See letter from KPMG.

¹²¹ See e.g., letters from ABA and BPI/SIFMA.

¹²² See letter from BPI/SIFMA.

¹²³ See letter from ABA.

¹²⁴ The term "Stage 3 assets" is not formally defined in IFRS 9 but has become part of the common description of the IFRS 9 methodology. In this context, Stage 3 assets are considered to be non-performing or credit-impaired loans.

period end), and therefore the ratio itself, are generally not materially affected by the New Credit Loss Standard. The New Credit Loss Standard did not directly change the applicable U.S. GAAP guidance for nonaccrual loans or total loans outstanding. Therefore, we believe that changes in this ratio over time, including prior to and after adoption of the New Credit Loss Standard, can provide material trend information to investors about how the portfolio is performing.

We recognize that, under the incurred loss approach, changes in the allowance for credit losses are based on changes in losses incurred to date, whereas under the New Credit Loss Standard, changes in the allowance for credit losses are based on changes in estimates of expected credit losses over the life of the loan portfolio. As such, the allowance for credit losses to total loans ratio and allowance for credit losses to nonaccrual loans ratio convey different information to investors under the two approaches. We believe that, despite this important difference in the information contained in these ratios under alternative credit loss approaches, the disclosure of these two ratios along with the discussion of the factors that led to material changes in these ratios or their components could be material to investors, regardless of the approach used (incurred loss approach or New Credit Loss Standard). This is because investors are familiar with these ratios and are accustomed to analyzing them, and while the drivers of the changes in the ratios are affected by the New Credit Loss Standard, we believe the ratios continue to convey information that is relevant to evaluating a registrant's credit risk and lending policy decisions. For example, the ratio of nonaccrual loans to total loans conveys information about the registrant's lending decisions and how their portfolio has performed since origination. Similarly, the allowance for credit losses to total loans provides information about the level of credit losses estimated relative to the loan portfolio, with a higher ratio reflecting a higher estimate of credit losses in the portfolio. Over time, investors can evaluate changes in trends in these ratios, which may give material quantitative information about how changes in the registrant's underwriting policies or servicing decisions can affect the credit quality of their portfolio, or how the loan portfolio is affected by macroeconomic and other factors. Furthermore, having this information disclosed on a ratio basis allows for comparability of credit trends across

bank and savings and loan registrants of all sizes. For example, the ratios take into account the size of the loan portfolio, and thus a small community bank's ratio could be compared against a large bank's ratio, in addition to peers of a similar size. This could allow investors to assess credit trends more broadly. While we acknowledge commenter feedback that with the adoption of the New Credit Loss Standard, credit deterioration events, including those that result in nonaccrual loans and charge-offs, may not necessarily directly drive changes in the ratios, another commenter stated that analysts and investors calculate and monitor these ratios.¹²⁹ The final rules ensure these ratios are calculated on a consistent and comparable basis among all bank and savings and loan registrants. The benefit to investors of having these consistent and comparable ratio disclosures along with their components and discussion of the material changes to the ratios already disclosed in the filing, without investors having to perform their own calculations and analysis, justifies the limited burden on a registrant to disclose this information.

We acknowledge commenter feedback that the ratio disclosures may be confusing to analysts, not only in comparing a registrant's prior ratios based on the incurred loss methodology to the ratios after the adoption of the New Credit Loss Standard, but also in comparing registrants that are adopting the New Credit Loss Standard in 2020 to those that will adopt in 2023. However, it is common for any new accounting standard to have different adoption dates based on the size or type of entity, so this is not unique to the New Credit Loss Standard, and we believe investors and analysts are accustomed to making adjustments to their analysis as a result. Furthermore, since the final rules require registrants to disclose material changes in the credit ratios, we believe investors should have the information available to understand the factors driving the changes in the ratios, which may include how they are affected upon the adoption of the New Credit Loss Standard, or material changes in the credit quality of the loan portfolio.

We also acknowledge that a few commenters stated that we should not require a discussion of the factors that drove material changes in the credit ratios. However, we continue to believe that this narrative disclosure is necessary for an investor's understanding of the material changes

in the ratios and credit quality of the loan portfolio, and we believe management has the information readily available to them to discuss the drivers of the material changes in the ratios because the individual components are already required by U.S. GAAP and IFRS. We believe this information could be provided within MD&A if management believes it is the most appropriate place to discuss the information. To the extent that there were no material changes in the credit ratios or the related components, there would be no requirement to provide this narrative discussion.

We also note that U.S. GAAP, both before and after the adoption of the New Credit Loss Standard, requires disclosure of many of the components of these ratios, such as nonaccrual loans, and the rollforward of the allowance for credit losses by portfolio segment, which includes separate line items showing charge-offs against the allowance and recoveries of amounts previously charged off (that together can be used to calculate net charge-offs, which is the numerator to the disaggregated net charge-off ratio). We believe this indicates that these components, and potentially the related ratios, continue to have relevance upon the adoption of the New Credit Loss Standard.¹³⁰ As noted by a commenter, we believe this will limit the burden a registrant will have in providing these disclosures.¹³¹

J. Deposits

i. Proposal

We proposed to codify in Item 1406 of Regulation S-K the majority of the deposit disclosure items in Item V of Guide 3, with some revisions. Specifically, we proposed to replace the "amount of outstanding domestic time certificates of deposit and other time deposits equal to or in excess of \$100,000" by maturity disclosure called for by Item V.D with a requirement to disclose the "amount of time deposits in uninsured accounts" by maturity. We proposed to require separate presentation of: (1) U.S. time deposits in amounts in excess of the FDIC insurance limit, and (2) time deposits that are

¹³⁰ ASC 310-10-50-7 (and ASC 326-20-50-16 upon the adoption of the New Credit Loss Standard) requires disclosure of nonaccrual loans by class of financing receivable. ASC 310-10-50-11B (and ASC 326-20-50-13 upon the adoption of the New Credit Loss Standard) requires disclosure of a rollforward of the allowance for credit losses, by portfolio segment, showing the beginning and ending balance, the current period provision, writeoffs charged against the allowance, and recoveries of amounts previously charged off.

¹³¹ See letter from ABA.

¹²⁹ See letter from ABA.

otherwise uninsured (including, for example, U.S. time deposits in uninsured accounts, non-U.S. time deposits in uninsured accounts, or non-U.S. time deposits in excess of any country-specified insurance fund), by time remaining until maturity of: (A) Three months or less; (B) over three through six months; (C) over six through 12 months; and (D) over 12 months. The proposed rules did not have a defined dollar threshold for the disclosure, which we indicated would make the rules easier to apply when there is a change in the FDIC insurance limit.¹³²

Additionally, we proposed that bank and savings and loan registrants quantify the amount of uninsured deposits as of the end of each reported period. The proposed rules defined uninsured deposits for bank and savings and loan registrants that are U.S. federally insured deposit institutions as individual deposits in U.S. offices of amounts exceeding the FDIC insurance limit and investment products such as mutual funds, annuities, or life insurance policies. The proposed rules would require foreign bank and savings and loan registrants to disclose how they define uninsured deposits for purposes of this disclosure given that the definition varies from jurisdiction to jurisdiction.

ii. Comments on Proposal

One commenter stated that the proposed deposit disclosures would provide transparency with respect to a registrant's source of funding and liquidity risk profile.¹³³ Another commenter was supportive of the proposed disclosures related to bank deposits, including the amounts that are uninsured.¹³⁴

One commenter stated the Commission should emphasize that the rules would change existing practice regarding the disclosure of uninsured deposits as existing Guide 3 disclosures do not call for the separate disclosure of the uninsured portion of time deposits or any other deposits.¹³⁵ Several commenters highlighted that there may be potential complexity and costs or operational challenges involved in calculating a precise amount for uninsured deposits.¹³⁶ Most of these commenters attributed these challenges to complex deposit insurance rules¹³⁷

that apply across accounts.¹³⁸ A few of these commenters also noted that depository institutions report estimated uninsured amounts in their call reports.¹³⁹

Several commenters mentioned the FDIC's new rule, *Recordkeeping for Timely Deposit Insurance Determination (FDIC Part 370 Rule)*,¹⁴⁰ which became effective on April 1, 2020, and is limited to insured depository institutions with greater than two million deposit accounts.¹⁴¹ This rule requires such institutions to configure information systems to accurately calculate insured and uninsured deposits. One of these commenters encouraged the Commission to consider further outreach to the FDIC and registrants about the potential difficulty and cost of preparing the proposed disclosure and whether the disclosure objective could be achieved in another way.¹⁴² This commenter also asked the Commission to consider whether certain information provided in investor and analyst presentations with respect to registrant's sources of deposits might achieve the same objective as the proposed rule.

One commenter suggested that given the complexities and the FDIC's new standard of accuracy in reporting that will differ between the largest and other depository institutions, the Commission should consider aligning its proposed disclosures with other regulatory requirements and standards, or otherwise simplify the proposed disclosure requirements.¹⁴³ Another commenter stated that providing total uninsured deposits would not address the purpose of the proposed disclosure to allow users of the financial statements to assess a firm's potential liquidity risk, because disclosing only total uninsured deposits provides an incomplete picture of a firm's liquidity risk and, on its own, could result in an investor making an uninformed judgment.¹⁴⁴ This commenter further stated that the disclosure of uninsured deposits would present significant challenges and costs for registrants, and the lack of comparability among different deposit schemes may prove

misleading to investors and therefore should not be adopted.

Several commenters stated that, if adopted, the Commission should clarify the definition of uninsured deposits.¹⁴⁵ For example:

- A few commenters sought clarity on whether the amount to be disclosed would be the portion of the individual deposit account balance that is greater than the FDIC limit, or the total deposit account balance.¹⁴⁶

- One commenter sought clarification on whether the amount of uninsured deposits should be measured for each individual account or should include all accounts or persons to whom the insurance limits apply.¹⁴⁷

- Another commenter noted that certain states such as Massachusetts have their own deposit insurance funds and recommended that deposits covered by these and other similar regimes be considered insured for purposes of the proposed disclosure.¹⁴⁸

- A few commenters stated that the final rule should explain how the term "uninsured deposits" would be applied to investment products such as mutual funds, annuities, or life insurance policies.¹⁴⁹

One commenter commended the Commission for proposing to remove the \$100,000 threshold for uninsured deposits and replace it with a more principles-based requirement and to provide foreign registrants with the flexibility to disclose the definition of uninsured deposits appropriate for their country of domicile.¹⁵⁰ However, this commenter stated that U.S. GAAP disclosure requirements largely address the proposed disclosure of outstanding time deposits in uninsured accounts by maturity and recommended not adopting this disclosure requirement.¹⁵¹

iii. Final Rules

After considering the comments, we are adopting the rules substantially as proposed. Item 1406 of Regulation S-K codifies the majority of the disclosure items in Item V of Guide 3, with some revisions.

¹⁴⁵ See e.g., letters from ABA; BPI/SIFMA; CAQ; and EY.

¹⁴⁶ See letters from ABA; BPI/SIFMA; CAQ and EY.

¹⁴⁷ See letter from EY.

¹⁴⁸ See letter from BPI/SIFMA.

¹⁴⁹ See letters from ABA and BPI/SIFMA.

¹⁵⁰ See letter from BAC.

¹⁵¹ See letter from BAC (stating that ASC-942-405-50-1 requires disclosure of the aggregate amount of time deposit accounts (including certificates of deposits) in denominations that meet or exceed the FDIC insurance limit and ASC 470-10-50-1 requires disclosure of time deposits having a remaining term of more than one year and the aggregate amount of maturities for each of the five years following the balance sheet date).

¹³⁸ See letters from ABA; BPI/SIFMA; CAQ; Crowe; and PwC.

¹³⁹ See letters from CAQ; Crowe; and PwC.

¹⁴⁰ 12 CFR part 370. See also Federal Deposit Insurance Corporation, *12 CFR part 370 Recordkeeping for Timely Deposit Insurance Determination* (July 17, 2020), available at <https://www.fdic.gov/regulations/resources/recordkeeping/>.

¹⁴¹ See e.g., letters from ABA; BPI/SIFMA; and PwC.

¹⁴² See letter from Crowe.

¹⁴³ See letter from PwC.

¹⁴⁴ See letter from BPI/SIFMA.

¹³² See Section II.I.iii of the Proposing Release.

¹³³ See letter from BAC.

¹³⁴ See letter from A. Heilig.

¹³⁵ See letter from CAQ.

¹³⁶ See e.g., letters from ABA; BPI/SIFMA; CAQ; Crowe; EY; and PwC.

¹³⁷ 12 CFR 1821(a).

The final rules define uninsured deposits for bank and savings and loan registrants that are U.S. federally insured depository institutions as the portion of deposit accounts in U.S. offices that exceed the FDIC insurance limit or similar state deposit insurance regimes and amounts in any other uninsured investment or deposit accounts that are classified as deposits and not subject to any federal or state deposit insurance regimes. This definition varies slightly from the proposal based on commenter feedback. Specifically, we have clarified that the amount to be disclosed for uninsured deposits is based on the portion of the account balance greater than the FDIC insurance limit and that registrants may consider other similar state deposit insurance regimes in evaluating whether a deposit is insured. We also eliminated the reference to “individual” deposits in the revised definition to address commenter feedback seeking clarity on whether uninsured deposits are measured based on each individual account, or include all accounts or persons to whom the insurance limits apply. Consistent with the proposal, the final rules require foreign bank and savings and loan registrants to disclose the definition of uninsured deposits appropriate for their country of domicile. However, in response to commenter concerns about how the proposed disclosure requirements would interact with overlapping regulatory regimes, the final rules specify that all registrants should determine the amount of uninsured deposits for purposes of Item 1406 based on the same methodologies and assumptions used for regulatory reporting requirements, to the extent applicable. This clarification better aligns the final rules with U.S. bank regulatory reporting requirements and provides some additional parameters for foreign registrants that may operate in several different jurisdictions and therefore may be subject to different insurance regimes. We believe this change should reduce the cost of providing this disclosure and reduce some of the comparability concerns for registrants operating in different jurisdictions. Unlike the proposed rules, however, the final rules do not expressly reference other investment products such as mutual funds, annuities or life insurance policies or otherwise address whether such products would be considered uninsured deposits as some commenters requested. We believe bank and savings and loan registrants already evaluate whether any particular product is

subject to an FDIC insurance regime, or similar state deposit insurance regimes, and therefore additional guidance is unnecessary.

In another change from the proposal, and consistent with commenter feedback, we have revised the final rules to permit a registrant to disclose uninsured deposits at the reported date based on an estimate of uninsured deposits if it is not reasonably practicable to provide a precise measure of uninsured deposits. To avail itself of this accommodation, a registrant must disclose that the amounts are based on estimated amounts of uninsured deposits, and the estimates must be based on the same methodologies and assumptions used for the bank or savings and loan registrant’s regulatory reporting requirements, such as the FDIC rules. We believe this change will reduce complexity and better align the requirements with U.S. bank regulatory reporting requirements, which should reduce the cost of providing this disclosure.

Consistent with the proposal, the rules require disclosure of (1) U.S. time deposits in excess of the FDIC insurance limit, and (2) time deposits that are otherwise uninsured by time remaining until maturity of: (A) Three months or less; (B) over three through six months; (C) over six through 12 months; and (D) over 12 months. While U.S. GAAP¹⁵² requires disclosure of time deposits that meet or exceed the insured limit, it does not require this information to be disaggregated into the same maturity categories. Furthermore, U.S. GAAP does not require disclosure of time deposits that are otherwise uninsured by time remaining until maturity. IFRS does not specifically require any of the deposit disclosures in Item 1406 of Regulation S–K.¹⁵³ While we acknowledge commenter feedback that U.S. GAAP disclosure requirements are similar to the uninsured deposit disclosures, we continue to believe the disaggregated maturity categories provide material information about deposits that are more prone to withdrawals if a registrant experiences financial difficulty, which may help investors better evaluate potential risks to the registrant’s short-term liquidity position. While we acknowledge commenters’ concerns that disclosing only total uninsured deposits may present an incomplete picture of a firm’s liquidity risk, we believe the disclosure of uninsured deposits, along with the other deposit disclosures required by the final rules, as well as the liquidity

disclosures required within MD&A, would significantly mitigate these concerns.

Overall, in light of the revisions and clarifications we have made, we believe the final rules provide transparency regarding a material source of funding for bank and savings loan registrants, while balancing any operational costs and burdens a registrant may incur in providing this disclosure.¹⁵⁴

III. Certain Existing Guide 3 Disclosures That Would Not Be Codified in Subpart 1400 of Regulation S–K

A. Return on Equity and Assets

Item VI of Guide 3 calls for disclosure of four specific ratios for each reported period, including return on assets, return on equity, a dividend payout ratio, and an equity to assets ratio. We proposed not to codify the requirement to disclose these ratios in Subpart 1400 of Regulation S–K because these ratios are not unique to bank and savings and loan registrants, and the Commission’s guidance on MD&A already requires registrants to identify and discuss key performance measures when they are used to manage the business and would be material to investors.¹⁵⁵ Furthermore, the Commission recently issued additional guidance on the disclosure of key performance indicators and metrics in MD&A that highlights the requirement to provide disclosure that a registrant believes is necessary to an understanding of its financial condition, changes in financial condition, and results of operations.¹⁵⁶ We did not receive any commenter feedback on this aspect of the proposal. For the reasons noted in the Proposing Release, and in light of this recent guidance, we are adopting the rules as proposed and are not codifying the requirement to disclose any of the ratios currently called for by Item VI of Guide 3.

B. Short-Term Borrowings

We proposed not to codify the short-term borrowing disclosure items in Item VII of Guide 3 in their current form. Instead, we proposed to codify as part of proposed Item 1402 of Regulation S–K the average balance and related average rate paid for each major category of interest-bearing liability disclosures currently called for by Item I.B.1 and I.B.3 of Guide 3, and to further require disaggregation of the major

¹⁵⁴ See Section VII.C.i below.

¹⁵⁵ See Section III.A of the Proposing Release.

¹⁵⁶ See Commission Guidance on Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33–10751 (Jan. 30, 2020) (the “2020 MD&A Interpretive Release”).

¹⁵² ASC 942–405–50–1(a).

¹⁵³ See Section II.I of the Proposing Release.

categories of interest-bearing liabilities to include those referenced in Item VII of Guide 3 and Article 9¹⁵⁷ of Regulation S–X. We did not propose to codify any of the other existing disclosure items in Item VII because we believed these are substantially covered by existing Commission rules¹⁵⁸ and the financial statement requirements.¹⁵⁹ We did not receive any commenter feedback on this aspect of the proposal, and are adopting the rules as proposed for the reasons noted in the Proposing Release.

IV. Changes to Article 9 of Regulation S–X

Rule 9–01 of Regulation S–X states that Article 9 is applicable to the consolidated financial statements filed for BHCs and to any financial statements of banks that are included in filings with the Commission, although other registrants with material lending and deposit activities also apply the rules in Article 9 of Regulation S–X.¹⁶⁰ In light of our proposal to codify the scope of Subpart 1400 of Regulation S–K to include savings and loan associations and savings and loan holding companies, we proposed to amend Rule 9–01 of Regulation S–X to include these registrants within the scope of Article 9 of Regulation S–X as well. However, we also noted that, if registrants other than bank and savings and loan registrants believe the Article 9 presentation would be material to an understanding of their business, the proposed rules would not preclude that presentation for those registrants. Additionally, we proposed deleting Rule 9–03(7)(a)–(c) of Regulation S–X due to overlapping requirements with both U.S. GAAP¹⁶¹ and IFRS.¹⁶² We did

not receive any commenter feedback on this aspect of the proposal, and are adopting the amendments as proposed for the reasons noted in the Proposing Release.

V. Compliance Date

After considering feedback from commenters,¹⁶³ registrants will be required to apply the final rules for the first fiscal year ending on or after December 15, 2021 (the “mandatory compliance date”). Registrants filing initial registration statements are not required to apply the final rules until an initial registration statement is first filed containing financial statements for a period on or after the mandatory compliance date. Until the mandatory compliance date, bank and savings and loan registrants should continue to refer to Guide 3 for assistance in meeting their disclosure obligations.

Voluntary early compliance with the final rules is permitted¹⁶⁴ in advance of the registrant’s mandatory compliance date, provided that the final rules are applied in their entirety from the date of early compliance.

VI. 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 provisions or application.

Pursuant to the Congressional Review Act,¹⁶⁵ the Office of Information and Regulatory Affairs has designated these rules as not a “major rule,” as defined by 5 U.S.C. 804(2).

VII. Economic Analysis

A. Introduction

The Commission is adopting rules to rescind Guide 3 and to update and codify into a new Subpart 1400 of Regulation S–K certain Guide 3 disclosure items that do not overlap with existing disclosure requirements in Commission rules, U.S. GAAP, or IFRS,

while adding to that Subpart certain credit ratio disclosure requirements. New Subpart 1400 applies to bank and savings and loan registrants. The final rules are expected to streamline bank and savings and loan registrants’ compliance efforts and may enhance comparability across issuers, to the benefit of both registrants and investors.

We are mindful of the costs imposed by, and the benefits obtained from, our rules. In this section, we analyze potential economic effects stemming from the final rules and alternatives considered by the Commission, including those posed by commenters.¹⁶⁶ We analyze these effects against a baseline that consists of the current regulatory framework and current market practices.

Where possible, we have attempted to quantify the expected economic effects of the final rules. In many cases, however, we are unable to quantify these economic effects. Some of the primary economic effects, such as the effect on investors’ search costs, are inherently difficult to quantify. In many instances, we lack the information or data necessary to provide reasonable estimates for the economic effects of the final rules. Furthermore, we did not receive any information from commenters that would allow us to further quantify the economic effects. Where we cannot quantify the relevant economic effects, we discuss them in qualitative terms. In addition, the broader economic effects of the final rules, such as those related to efficiency, competition, and capital formation, are difficult to quantify with any degree of certainty because the final rules simultaneously codify certain disclosure requirements, add new credit ratio disclosure requirements, and rescind disclosure items that overlap with Commission rules, U.S. GAAP, or IFRS. Therefore, it is difficult to quantitatively attribute the overall effects on efficiency, competition, and capital formation to specific aspects of the final rules.

¹⁵⁷ 17 CFR 210.9–01 through 9–07. Article 9 sets forth the form and content of the consolidated financial statements filed for bank holding companies and for any financial statements of banks that are included in filings with the Commission.

¹⁵⁸ In the Proposing Release, the Commission referred to the *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management’s Discussion and Analysis*, Release No. 33–9144 (Sept. 17, 2010) [75 FR 59893 (Sept. 28, 2010)], as support for the idea that Item 303 of Regulation S–K elicits disclosure of any trends or uncertainties that may arise related to the maximum month-end amounts of short-term borrowings called for by Item VII.2. See Section III.B.i of the Proposing Release.

¹⁵⁹ See Section II.F.i discussing the proposed codification of the requirement to disclose the average amount outstanding during the period and the interest paid on such amount, and the average rate paid, for each major category of interest-bearing liability. Article 9 of Regulation S–X requires disclosure of the period-end amount outstanding by the short-term borrowing categories.

¹⁶⁰ See *supra* note 5.

¹⁶¹ See *supra* note 85.

¹⁶² See *supra* note 80.

¹⁶³ See letters from BPI/SIFMA and KPMG. BPI/SIFMA recommended that the Commission not require the rules to be effective until at least the December 31, 2021 Form 10–K to allow registrants sufficient time to source and test the information and ensure the information produced is accurate and reliable. KPMG encouraged the Commission to provide detailed transition guidance that includes consideration of the timing of the rule’s effective date and approaching relevant filing deadlines.

¹⁶⁴ To the extent that registrants have questions about application of the rules in connection with early compliance, they should reach out to Commission staff for additional transition guidance.

¹⁶⁵ 5 U.S.C. 801 *et seq.*

¹⁶⁶ Securities Act Section 2(a) and Exchange Act Section 3(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, Exchange Act Section 23(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 that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

B. Baseline

Our baseline consists of the disclosures currently called for by Guide 3, as well as those provided under current market practices.

i. Regulation

In general, Guide 3 calls for disclosures related to interest-earning assets and interest-bearing liabilities of both domestic and foreign BHC registrants and registrants that have material lending and deposit-taking activities.¹⁶⁷ Since the last substantive revision of Guide 3 in 1986, certain U.S. GAAP and IFRS disclosure requirements have changed for registrants engaged in the activities

addressed in Guide 3, resulting in some overlap between the Guide 3 disclosure items and other disclosure requirements, which may impose compliance costs on registrants without providing additional material information to investors.

Guide 3 calls for five years of loan portfolio and loan loss experience data and three years of all other data. This timeframe goes beyond the financial statement periods specified in Commission rules,¹⁶⁸ which generally require two years of balance sheets and three years of income statements for registrants other than EGCs and SRCs. Guide 3 provides that registrants with less than \$200 million of assets or less than \$10 million of net worth may

present only two years of information. In contrast, the scaled disclosure regimes in Commission rules for SRCs and EGCs are based on other thresholds, such as public float, total annual revenues, or a combination of both. As such, some SRCs and EGCs may not qualify for scaled disclosure under Guide 3.

ii. Affected Registrants

We define the scope of Guide 3 as the population of registrants that currently may be providing Guide 3 disclosures. Table 1 below shows the estimated number of registrants within the Guide 3 scope,¹⁶⁹ along with their cumulative assets by type and domestic/foreign status.¹⁷⁰

TABLE 1—REGISTRANTS WITHIN THE GUIDE 3 SCOPE ¹

Type	Domestic		Foreign		Total	
	Number	Assets, ² \$bln	Number	Assets, \$bln	Number	Assets, \$bln
BHCs ³	391	18,251	26	23,246	417	41,497
Financial services registrants with lending and deposit-taking activities: ⁴	60	1,737	16	3,104	76	4,840
SLHCs ⁵	49	637	0	0	49	637
Banks	11	1,099	16	3,104	27	4,203
Total	451	19,988	42	26,350	493	46,337

¹ The estimates are based on the data as of May 1, 2020. We define active registrants as those that have filed an annual, periodic, or current report or registration statement with the Commission during the period beginning May 1, 2019 and ending May 1, 2020.

In the Proposing Release, we identified 487 registrants within the Guide 3 scope. Upon further review of filings, we identified four registrants included in Table 1 of the Proposing Release that were either inactive or no longer met the definition of a BHC or a bank; and 17 registrants that were inadvertently excluded from the scope of registrants providing Guide 3 disclosures. Therefore, we are updating the scope estimate for May 1, 2019 reported in the Proposing Release from 487 to 500.

Our estimate of the scope as of May 1, 2020 excludes 30 BHC, SLHC, and bank registrants that became inactive during the period between May 1, 2019 and May 1, 2020 (based on the definition of active registrants for the period ending May 1, 2020) and includes 23 new financial service registrants that became active during the period between May 1, 2019 and May 1, 2020. As a result, the estimated number of registrants within the Guide 3 scope decreased from 500 to 493 during the period between May 1, 2019 and May 1, 2020.

² The estimates for total assets of registrants are based on these registrants' most recent Form 10-K or Form 20-F filed as of May 1, 2020. The analysis is based on data from XBRL filings and staff review of filings for financial services registrants that did not submit XBRL filings. For foreign registrants that report total assets in local currency, we used exchange rates as of December 31, 2019 to convert their reported value to U.S. dollars.

¹⁶⁷ See *supra* Section I for a description of Guide 3 disclosure categories. See also instructions to Item 4 of Form 20-F, which indicate that the information specified in any industry guide that applies to the registrant should be furnished. In addition, the staff has observed that, although not required, Form 40-F filers that are banking institutions typically provide the disclosures called for by Guide 3.

¹⁶⁸ See Articles 3 and 8 of Regulation S-X.

¹⁶⁹ To estimate the scope, we first identify registrants that meet the definition of a BHC in Rule 1-02(e) of Regulation S-X or that are BHCs under the Bank Holding Company Act. To estimate the number of BHC registrants, staff reviewed Commission filings by registrants in the following Standard Industrial Classification ("SIC") codes to determine if the registrant met the definition of a BHC under Rule 1-02(e) of Regulation S-X: 6021, 6022, 6029, 6035, and 6036. For purposes of this economic analysis, we only considered BHCs that are within the following SIC codes: 6021, 6022, 6029, 6035, 6036, 6099, 6111, 6141, 6153, 6159, 6162, 6163, 6172, 6199, 6200, 6211, 6221, 6282, 6311, 6321, 6324, 6331, 6351, 6361, 6399, 6411, 6500, 6510, 6519, 6798, and 7389. We note that registrants with SIC codes other than these may be BHCs. As such, the population of BHCs may be underestimated.

We also identify certain other financial services registrants that have both lending and deposit-taking activities but are not BHCs, as these registrants may be providing Guide 3 disclosures as a result of their activities. For purposes of this economic analysis, we assume that a registrant is a financial services registrant if its type of business is identified by one of the following SIC codes: 6021, 6022, 6029, 6035, 6036, 6099, 6111, 6141, 6153, 6159, 6162, 6163, 6172, 6199, 6200, 6211, 6221, 6282, 6311, 6321, 6324, 6331, 6351, 6361, 6399, 6411, 6500, 6510, 6519, 6798, and 7389. We note that registrants with SIC codes other than these may be providing financial services and some registrants with the specified above SIC codes may not be providing financial services. As such, the population of financial services registrants may be under- or overestimated.

For the purposes of this analysis, we define the subset of financial services registrants that have both lending and deposit-taking activities as those financial services registrants that have any amounts of loans and deposits reported in Commission filings. We note that amounts of loans and deposits may not be material for some registrants in the subset. Therefore, the number of registrants that currently may be providing Guide 3 disclosures due to their activities may be overestimated.

This analysis is based on data from XBRL filings and staff review of filings for financial services registrants that did not submit XBRL filings. To identify financial services registrants that have both lending and deposit-taking activities, we used XBRL tags commonly used for loans and deposits. Staff reviewed the financial statements of identified registrants to determine whether the tags were related to the type of activities described in Guide 3 and excluded those with unrelated activities. We note that some registrants may use non-standard or custom XBRL tags to identify their lending or deposit-taking activities. As such, the number of financial services registrants with lending and deposit-taking activities may be underestimated.

We also note that registrants with SIC codes other than those specified above may have lending and deposit-taking activities. For example, based on data from XBRL filings, staff identified 22 registrants that report both holdings of loans and deposit-taking activities and that may provide some Guide 3 disclosures.

¹⁷⁰ For purposes of this economic analysis, we define domestic registrants as those that file Forms 10-K and foreign registrants as those that file Forms 20-F.

³Data on holding companies subject to the Bank Holding Company Act was obtained from Reporting Form FR Y-9C for holding companies as of Q4 2019.

⁴In Table 1 of the Proposing Release, we identified four registrants in the “other” category. We defined other registrants as those that did not meet the definition of a bank, savings and loan holding company (“SLHC”), or savings and loan association (“SLA”). Upon further staff review, we reclassified these four registrants as BHCs because they met the definition of a BHC under Rule 1-02(e) of Regulation S-X, as of May 1, 2020.

⁵We identified only SLHCs and did not identify any SLAs within the population of financial services registrants with lending and deposit-taking activities.

We estimate that, among registrants identified as being within the scope of Guide 3, approximately 84.6% are BHCs that in aggregate hold approximately 89.6% of total Guide 3 registrants’ total assets. We also estimate that, among the registrants within the scope of Guide 3, 91.4% are domestic registrants that in

aggregate hold 43.1% of total Guide 3 registrants’ total assets. Although the number of foreign registrants is much smaller than the number of domestic registrants, foreign registrants in aggregate hold approximately 56.9% of total assets, as shown by the total assets in Table 1.

Table 2 below shows the estimated number of registrants within the scope of Guide 3 that qualify for scaled Guide 3 disclosures, as well as the number of registrants that qualify for SRC and/or EGC status.

TABLE 2—SCALED DISCLOSURE THRESHOLDS FOR REGISTRANTS WITHIN THE GUIDE 3 SCOPE ¹

Scaled disclosure threshold	Qualifying registrants	
	Number	Total assets \$bln
Guide 3 scaled threshold registrants	7	7
SRC registrants	204	257
EGC registrants	73	143

¹To estimate the number of registrants that meet the Guide 3 scaled disclosure threshold, the staff analyzed the most recent Form 10-K or Form 20-F filed as of May 1, 2020. The analysis was based on data from XBRL filings and staff review of filings for those registrants that did not submit their filings in XBRL format. The estimates for the number of affected registrants that are SRCs are based on information from their most recent annual filing, as of May 1, 2020. The estimates for the number of affected registrants that are EGCs are based on their most recent periodic filings, as of May 1, 2020.

Among the 493 registrants within the Guide 3 scope, 44% are either SRCs or EGCs.¹⁷¹ However, only 1% of registrants within the Guide 3 scope qualify for scaled disclosure in Guide 3. We also estimate that among the seven registrants that qualify for scaled Guide 3 disclosure, six are either an SRC, an EGC, or both.

C. Economic Effects

The economic effects of the final rules primarily stem from changes to the substance and reporting periods of the Guide 3 disclosure items, including, among other things, the addition of certain new credit ratio disclosure requirements. As a result, the affected bank and savings and loan registrants would experience changes in their compliance costs. In particular, affected registrants would experience a decrease in compliance costs stemming from a removal of overlapping disclosure items and reduced reporting periods. However, this reduction may be fully or partially offset by an increase in costs stemming from the proposed new credit ratio disclosure requirements and more disaggregated disclosure requirements. As discussed in Section VIII.B.v below, we estimate that the final rules will on aggregate increase paperwork and

reporting burdens for the affected registrants.¹⁷² As a result, these costs may flow through to customers in the form of higher costs for financial services, and to shareholders in the form of lower earnings. On the other hand, the final rules are expected to decrease investors’ search costs and reduce information asymmetries between investors and affected registrants, which may lead to increased allocative efficiency and lower cost of capital. Below, we first discuss the economic effects of changes to the substance and reporting periods of the disclosure requirements, followed by a discussion of economic effects related the scope and applicability of the disclosure requirements and the location and format of the required disclosures.

i. Codified Disclosures

The final rules codify in a new Subpart 1400 of Regulation S-K Guide 3 disclosure items that do not significantly overlap with disclosure requirements in other Commission rules, U.S. GAAP, and IFRS.

a. Costs and Benefits

Codifying Guide 3 disclosure items that do not significantly overlap with disclosure requirements in Commission

rules, U.S. GAAP, and IFRS provides a single source of disclosure requirements about the specified financial activities, which will facilitate compliance and may make it easier for registrants to understand their disclosure obligations. Codifying disclosure requirements in Regulation S-K may cause affected registrants to expend additional resources to produce the disclosures, as the status of the disclosure items would be elevated from staff guidance to a rule, which could result in additional costs. However, this effect may be fully or partially offset, due to the elimination of uncertainty around the existing disclosure structure for BHCs and registrants with material lending and deposit-taking activities under Guide 3, as well as any uncertainty on the part of registrants as to whether specific disclosures are required, given the staff guidance status of Guide 3.

The final rules modify some of the disclosure requirements that are being codified to better align them with other existing reporting practices. Specifically, the final rules align the investment categories in Item II.B and loan categories in Items III.B, IV.A, and IV.B of Guide 3 with the respective debt securities and loan categories required to be disclosed in the registrant’s U.S. GAAP or IFRS financial statements. One commenter generally supported aligning the loan categories to the existing U.S.

¹⁷¹ We note that 54 affected registrants are both SRCs and EGCs.

¹⁷² See *infra* Section VIII for a discussion of our estimates—for PRA purposes—of the burdens and costs associated with the final rules.

GAAP and IFRS requirements.¹⁷³ We believe that revising loan and debt securities categories to conform to financial statement categories will promote comparability and consistency of disclosures within a registrant's filing and reduce the preparation burdens and other related costs imposed on affected registrants. However, we recognize that, to the extent that Guide 3 loan and investment categories provide information incremental to financial statement categories, and bank and savings and loan registrants currently provide these disclosures based on the Guide 3 categories, investors may lose this information.

In the Proposing Release, we proposed to codify Guide 3 maturity categories for loan disclosures without a change: Due in one year or less, due in one to five years, and due after five years. However, two commenters indicated that some loan categories may be predominantly classified into a single maturity bucket due to their nature, and, therefore, requiring disaggregation by maturity for such loan categories would not provide more meaningful information to investors.¹⁷⁴ Another commenter submitted a study concluding that disaggregated information may be value-relevant to investors because such information may have predictive and confirmatory value.¹⁷⁵ In response to commenters' feedback, the final rules further disaggregate the categories of interest-earning assets and interest-bearing liabilities in Item I disclosures and further disaggregate the "after 5 year" maturity category for loan disclosures in Item III into "5 years through 15 years" and "after 15 years." We expect that, under the final rules, some loan categories, such as real estate loans, will no longer be classified within a single "after five years" maturity bucket. Therefore, the final rules should provide more decision-relevant information to investors by better accommodating maturity periods on commonly offered loan products. We recognize that additional disaggregation may increase compliance costs for the affected registrants, which could be passed onto customers and investors. However, this increase in compliance costs may be offset by a potential reduction in cost of capital that could arise as a result of increased transparency and decreased

information asymmetries between investors and affected registrants. To the extent that investors view loans with maturities of 5 to 15 years and loans with maturities of 15 years or longer differently in terms of their risk profile, investors may be able to make more efficient portfolio allocation decisions.

The final rules do not exclude certain loan categories from the sensitivities of loans to changes in interest rates disclosure requirement.¹⁷⁶ One commenter noted that the maturity and sensitivities to changes in interest rates disclosures should allow for exclusion of loan categories that are not material to the registrant.¹⁷⁷ Another commenter stated that mirroring loan categories and classes presented in the financial statements without the flexibility to exclude certain loan categories from the maturity disclosure would not result in more meaningful disclosures.¹⁷⁸ However, as discussed in section II.H.iii above, we believe that immaterial loan categories generally would not be presented in the financial statements.¹⁷⁹ Therefore, we expect the maturity disclosures for each reported loan category to be relevant to investors. Specifically, the maturity table may help investors and other users of Commission filings to better understand the liquidity profile of registrants' assets, and the interest rate disclosures may help them understand the interest rate risk associated with specific loan categories. As a result, investors' search costs, as well as information asymmetries between investors and affected registrants may decrease. In addition, while we agree with commenters that some loan categories historically have been predominantly classified into a single maturity bucket, we do not expect this always to be the case. For example, in an environment with decreasing interest rates, it can be beneficial for individuals and businesses to refinance their loans. In this case, the maturity of such loans may be extended, provided that borrowers refinanced loans with the same original maturity across institutions. As a result, multiple loans within a specific loan category

presented by a registrant may have similar maturities. However, we do not expect the same effect to be present in an environment with rising interest rates.

We proposed to require separate presentation of federal funds sold and securities purchased with agreements to resell. One commenter indicated that the required disaggregation of federal funds sold and securities purchased with agreements to resell may not be relevant for certain institutions and may be confusing to investors.¹⁸⁰ Another commenter stated that the additional disaggregation in Item I appears to remove any element of professional judgment based on quantitative or qualitative materiality assessments, and therefore may result in disaggregation that will be of little value to users.¹⁸¹ While we continue to believe that more disaggregated categories of assets and liabilities may provide investors with insight into the drivers of changes in the affected registrants' net interest earnings, we recognize that only material categories would be relevant to investors. The final rules clarify that only major categories that are material must be disaggregated in the disclosure. We do not expect this clarification to substantially reduce the amount of information about interest-earning assets and interest-bearing liabilities available to investors, relative to the baseline. At the same time, this clarification should help registrants avoid the burden associated with providing such information when it is not material.

The final rules also modify the categories of deposits in Item V of Guide 3 and require separate presentation of uninsured deposits. The final rules link the definition of uninsured deposits to federal or state deposit insurance regimes for U.S. registrants and provides foreign registrants the flexibility to use and disclose a definition of uninsured deposits appropriate for their country of domicile. Additionally, the final rules permit a registrant to disclose an estimate of uninsured deposits based on the same methodologies and assumptions used for the registrant's regulatory reporting requirements if it is not practicable to provide a precise measure of uninsured deposits at the reported period. Two commenters supported replacing the \$100,000 bright-line threshold in Guide 3 with a threshold that aligns with federal or state deposit insurance limits.¹⁸² We

¹⁷⁶ Currently, Guide 3 excludes the following domestic loan categories from the maturity by loan category disclosure: Real estate mortgage loans, installment loans to individuals, and lease financing.

¹⁷⁷ See letter from BAC.

¹⁷⁸ See letter from BPI/SIFMA.

¹⁷⁹ Because U.S. GAAP considers materiality, we believe that immaterial loan categories would not be presented as a response to the adopted disclosure requirements. Under the current baseline, Part III.A of Guide 3 calls for disclosure for each specified loan category, regardless of materiality.

¹⁸⁰ See letter from ABA.

¹⁸¹ See letter from BPI/SIFMA.

¹⁸² See letters from BAC and A. Heilig.

¹⁷³ See letter from BAC.

¹⁷⁴ See letters from BAC and BPI/SIFMA.

¹⁷⁵ See letter from Prof. Burke (citing Qing L. Burke, Terry D. Warfield, & Matthew M. Wieland, *Value Relevance of Disaggregated Information: An Examination of the Volume and Rate Analysis of Bank Net Interest Income*, Acct. Horizons (forthcoming, 2020)).

believe that by avoiding specific reference to existing dollar limits, the final rules better accommodate future changes in the deposit insurance regimes that are applicable to registrants, as it would allow registrants to avoid calculating two different amounts for uninsured deposits if the FDIC limit changes. This aspect of the final rules will also provide investors with more clarity as to which deposits should be classified as insured and which should not, potentially reducing the associated compliance burden and providing greater transparency for investors with respect to the affected registrants' sources of funding and risks related to these particular types of funding.

The final rules require disclosure of uninsured deposits. One commenter suggested that due to the lack of comparability among different deposit schemes, the disclosure of uninsured deposits may be misleading to investors and, therefore, should not be required.¹⁸³ However, other commenters indicated that disclosure of uninsured deposits would provide transparency with respect to a registrant's sources of funding and liquidity risk profile.¹⁸⁴ While recognizing that comparability of uninsured deposits among affected registrants may be limited due to different insurance regimes and differences in methodologies used to calculate amounts of uninsured deposits, we believe that the final rules provide transparency with respect to affected registrants' sources of funding and risks related to these particular types of funding. As a result, requiring disclosure of uninsured deposits may reduce information asymmetries between investors and registrants and may increase allocative efficiency.

The final rules also require disclosure of net charge-offs on a disaggregated basis, as proposed. Two commenters stated that there may be operational challenges or systems limitations associated with calculating the ratio of net charge-offs to average loans on a disaggregated basis.¹⁸⁵ We recognize that, to the extent that some bank and savings and loan registrants currently may not be compiling data that is sufficiently granular to compute these ratios on such a basis, providing the disaggregated information would increase costs for these registrants. Another commenter indicated that this disclosure might not provide meaningful information to investors to

the extent the disaggregated ratios are not significant drivers of business results.¹⁸⁶ However, we believe that more disaggregated data for the net charge-off ratio may provide material information, as it could help investors better understand drivers of the changes in a bank and savings and loan registrant's charge-offs and the related provision for loan losses. This may result in decreased information asymmetries between registrants and investors and increased allocative efficiency.

b. Alternatives

As an alternative, we could have defined uninsured deposits of FDIC-insured registrants based solely on whether the amount of deposits exceeds the FDIC insurance limit, as proposed. This alternative definition would count deposits that are insured by states or other similar deposit insurance regimes as uninsured deposits, as also pointed out by a commenter,¹⁸⁷ despite similar risk profile between FDIC-insured deposits and deposits insured by states or other similar deposit insurance regimes. In addition, this alternative would include state or other regulator-insured deposits within the definition of uninsured deposits for FDIC-insured registrants while excluding deposits insured by similar deposit regimes for foreign registrants, which could make uninsured deposits of domestic and foreign registrants less comparable relative to the final rules. Therefore, we have revised the final definition of uninsured deposits to exclude deposits covered by state deposit insurance regimes.

As another alternative, we could have defined uninsured deposits to expressly include investment products such as mutual funds, annuities, or life insurance policies, as proposed. This alternative would have helped to ensure that such products are considered by registrants when disclosing their uninsured deposits. In response to the proposal, two commenters called for the final rules to explain how the term "uninsured deposits" would be applied to investment products such as mutual funds, annuities, or life insurance policies.¹⁸⁸ To avoid regulatory complexity, the final rules do not specify what products are considered uninsured deposits; rather, they allow the affected registrants to apply the methodology used for regulatory bank reporting to make such determinations. Relative to the proposal, this aspect of

the final rules may increase comparability in the disclosure of uninsured deposits among registrants that share similar regulatory reporting requirements (as they would apply the same methodology used for regulatory reporting purposes) while decreasing the operational complexity associated with providing such disclosures.

Finally, we could have required all affected registrants to disclose precise amounts of uninsured deposits, as proposed. Under this alternative, comparability among registrants would increase relative to the final rules. However, several commenters urged the Commission to consider operational complexities and costs of calculating the precise amounts of uninsured deposits rather than providing an estimate, which is more consistent with industry practices.¹⁸⁹ We recognize that, in some instances, due to complex deposit insurance rules that apply across accounts, it may be operationally challenging and costly for registrants to report precise amounts of uninsured deposits. Therefore, the final rules allow disclosure of an estimate of uninsured deposits if it is not practicable to provide a precise measure. To mitigate potential loss of comparability due to disclosure of estimated rather than the precise amount of uninsured deposits, the final rules require that the methodologies and assumptions used for the estimate be the same as those used for the registrant's regulatory reporting.

ii. New Credit Ratios

The final rules require disclosure of three additional credit ratios for bank and savings and loan registrants, along with each of the components used in the ratios' calculation and a discussion of the factors that led to material changes in the ratios or related components.¹⁹⁰ In the Proposing Release, we indicated that the additional compliance burden for the proposed credit ratio disclosure requirements would not be significant for existing bank and savings and loan registrants, as the components of each proposed ratio are already required disclosures in bank and savings and loan registrants' financial statements. One commenter agreed with this assessment.¹⁹¹

For similar reasons, we also stated in the Proposing Release that the benefit to investors of requiring these additional

¹⁸³ See letter from BPI/SIFMA.

¹⁸⁴ See letters from BAC and A. Heilig.

¹⁸⁵ See letters from CAQ and Crowe.

¹⁸⁶ See letter from BPI/SIFMA.

¹⁸⁷ See *id.*

¹⁸⁸ See letters from ABA and BPI/SIFMA.

¹⁸⁹ See *e.g.*, letters from ABA; BPI/SIFMA; CAQ; Crowe; and PWC.

¹⁹⁰ The final rules also include an instruction stating that affected IFRS registrants do not have to provide either of the nonaccrual ratios as there is no concept of nonaccrual in IFRS.

¹⁹¹ See letter from ABA.

credit ratios may be modest. One commenter agreed that the ratios are easily calculable from the information already required in the financial statements, and on that basis, questioned whether the separate disclosure of the ratios is necessary.¹⁹² We note that, although the ratios can be calculated from the financial statements under the final rules, disclosure of these ratios will be accompanied by a discussion of the factors that led to material changes in the ratios or their components. This discussion may be material information to investors and can potentially reduce information asymmetries between registrants and investors, resulting in more efficient investment decisions and potentially lowering cost of capital for the affected registrants. While we recognize that the ratios themselves can be calculated from the financial statements, we believe that the required discussion of changes to ratios or their components would be more complete and likely more informative with disclosure of the ratios themselves.

Two commenters indicated that, under the New Credit Loss Standard,¹⁹³ some of the new ratios may not be as relevant to investors.¹⁹⁴ We recognize that, under the current approach, changes in the allowance for credit losses are based on changes in losses incurred to date, whereas under the New Credit Loss Standard, changes in the allowance for credit losses are based on changes in estimates of expected losses over the life of the loan portfolio. As such, the allowance for credit losses to total loans ratio and allowance for credit losses to nonaccrual loans ratio convey different information to investors under the two approaches. We believe that, despite this important difference in the information contained in these ratios under alternative credit loss approaches, the disclosure of these two ratios along with the discussion of the factors that led to material changes in these ratios or their components could be material to investors, regardless of the approach used (New Credit Loss Standard or incurred loss approach). To the extent that the ratios are material to investors, the final rules may result in increased information efficiency, allowing investors to better allocate their investment portfolios and potentially reducing cost of capital for the affected registrants.

Commenters also stated that because the timeline for the implementation of the New Credit Loss Standard differs

among the types of affected registrants (e.g., a regional bank that is not an SRC versus a community bank that is an SRC), it may be difficult or confusing to compare these credit ratios across all bank and savings and loan registrants. We recognize that comparability of ratios across registrants may be reduced until all affected registrants adopt the New Credit Loss Standard. However, we believe that the discussion of the factors that led to material changes in the ratios or their components may mitigate this concern, as investors will be able to understand how the ratios and their components differ across registrants. In addition, as discussed in Section II.I above, we believe that the majority of affected registrants will adopt New Credit Loss Standard by the mandatory compliance date of the final rules.

iii. Not Codified Disclosures and Instructions

The final rules do not codify the following Guide 3 disclosure items and instructions that overlap with Commission rules, U.S. GAAP, or IFRS:

- Short-term borrowing disclosures called for by Item VII.1 and 2;
- Book value information, the maturity analysis of book value information, and the disclosures related to investments exceeding 10% of stockholders' equity called for by Item II;
- Loan category disclosure, the loan portfolio risk elements disclosure, and the other interest-bearing assets disclosure called for by Item III;
- The analysis of loss experience disclosure called for by Item IV.A;
- The breakdown of the allowance disclosures called for by Item IV.B for IFRS registrants; and
- General Instruction 6 to Guide 3.

The final rules also do not codify the disclosure items in Item VI of Guide 3 related to return on assets, return on equity, dividend payout, and equity to assets ratios. Because we are rescinding Guide 3, we do not anticipate affected registrants would provide any Guide 3 disclosures not required by new subpart 1400, unless required by other Commission rules, U.S. GAAP, or IFRS. However, registrants may voluntarily continue to provide these disclosures.

a. Costs and Benefits

To the extent that the disclosure items not codified are reasonably similar to disclosure requirements in Commission rules, U.S. GAAP, or IFRS, not including these disclosure requirements in Regulation S-K should facilitate bank and savings and loan registrants' compliance efforts by reducing the need to replicate disclosures or reconcile

overlapping disclosure requirements, and decrease the reporting burdens for the registrants that currently may be following Guide 3. This is consistent with feedback received from some commenters, who stated that the removal of overlapping disclosure requirements will streamline compliance efforts and decrease registrants' reporting burdens.¹⁹⁵

Investors should not be adversely affected by the decision not to codify the aforementioned disclosure items, given that the overlapping disclosure requirements in Commission rules, U.S. GAAP, or IFRS elicit reasonably similar information. Moreover, some commenters pointed out that duplication of information and/or presentation of information that is almost, but not quite, the same, can prove confusing to investors.¹⁹⁶ To the extent that this effect is present, the more streamlined presentation of information may reduce search costs for investors and decrease information asymmetries between registrants and investors. On the other hand, to the extent that the Guide 3 disclosure items elicit incremental information to investors, not codifying these disclosure items could marginally increase information asymmetries and investor search costs.

The final rules do not codify the ratios in Item VI of Guide 3. Because these ratios are not specific to the activities of bank and savings and loan registrants, we believe that in most cases the Item VI ratios do not provide additional information about the risks that are particular to the affected registrants. In addition, to the extent the Item VI ratios may be relevant to some affected registrants, codification of these ratios could be viewed as duplicative because Commission guidance on Item 303 of Regulation S-K states that companies should identify and discuss key performance indicators when they are used to manage the business and would be material to investors.¹⁹⁷ Moreover, users of financial disclosures can calculate the ratios based on information already disclosed in Commission filings. Therefore, eliminating the disclosure of these ratios should not result in the loss of material information.

The final rules also do not codify the undue burden or expense accommodation for foreign registrants in General Instruction 6 of Guide 3. One

¹⁹⁵ See, e.g., letter from BAC.

¹⁹⁶ See, e.g., letter from BPI/SIFMA.

¹⁹⁷ See Proposing Release at note 264 (citing the 2003 MD&A Interpretive Release, *supra* note 69). See also the 2020 MD&A Interpretive Release, *supra* note 156.

¹⁹² See letter from CAQ.

¹⁹³ See *supra* note 96.

¹⁹⁴ See letters from ABA and KPMG.

commenter indicated that this accommodation should be codified,¹⁹⁸ and several commenters¹⁹⁹ noted that they had seen limited use of the accommodation in Rules 409 and 12b–21 and therefore surmised that it may be rare for a registrant to be able to demonstrate that the required information is not reasonably available or that obtaining it may require unreasonable effort or expense.²⁰⁰ However, these commenters did not provide any specific examples of when reliance on the accommodation in General Instruction 6 of Guide 3 would be necessary, notwithstanding the flexibility in disclosure provided to IFRS registrants under the final rules and the ability of all registrants to rely on Securities Act Rule 409 and Exchange Act Rule 12b–21. To the extent that some registrants currently rely on the undue burden accommodation in General Instruction 6 and would be unable to rely on Securities Act Rule 409 or Exchange Act Rule 12b–21, these registrants may experience an increase in compliance costs. However, the final rules' linkage of categories of debt securities and loans with those required by U.S. GAAP and IFRS should reduce the need for foreign registrants to seek regulatory accommodations with respect to the final disclosure requirements. In addition, as noted in Section II.D above, the staff has not received any requests from foreign registrants seeking relief under General Instruction 6 during the past 10 years. Thus, we do not expect any such increase in compliance costs to be substantial.

iv. Reporting Periods

The final rules align the reporting periods for the required disclosures with the periods required by Commission rules for financial statements, rather than the longer periods called for by Guide 3.

a. Costs and Benefits

Consistent with commenters' feedback,²⁰¹ we believe that alignment of reporting periods with the periods required by Commission rules for

financial statements will reduce compliance costs for registrants currently following Guide 3 and will make it easier for both investors and bank and savings and loan registrants to determine which periods should be disclosed and why they are disclosed. We believe that the cost reduction associated with this alignment will be more pronounced for affected registrants that are EGCs or SRCs. As indicated in Table 2 above, only seven registrants within the Guide 3 scope qualify for scaled disclosure under Guide 3. However, we estimate that 223 registrants within the Guide 3 scope are either EGCs, SRCs, or both; and among these, only six qualify for the scaled disclosure under Guide 3. In contrast, under Commission rules, all EGCs and SRCs qualify for scaled disclosure. As such, the final rules will provide the same relief to these registrants as they have under other Commission rules, reducing their compliance costs.

Because prior period information for existing registrants is publicly available on EDGAR, scaling the number of reporting periods required to be presented in a particular filing should not have a significant adverse impact on investors of existing registrants. We acknowledge, however, that, to the extent that investors of new bank and savings and loan registrants rely on Guide 3 information that covers a longer period of time than the required reporting periods under the final rules, information asymmetries between investors and new bank and savings registrants may increase.

b. Alternatives

As an alternative, we considered codifying the current Guide 3 reporting periods. Under this alternative, all bank and savings and loan registrants with total assets over \$200 million or net worth over \$10 million, including SRCs and EGCs, would provide the loan and allowance for credit losses disclosures for five years and the rest of the disclosures for three years. As such, the data would be required for a longer period of time than Commission rules require for financial statements. On the one hand, additional historical periods may benefit investors in new bank and savings and loan registrants, as historical information is not publicly available for these registrants.²⁰² On the

other hand, under this alternative, the majority of SRCs and EGCs would not realize the benefits of scaled disclosure, which would impose higher compliance costs for these registrants. On balance, we believe benefits of scaled disclosure justify the reduction in historical information.

v. Scope

a. Costs and Benefits

The final rules will apply to bank and savings and loan registrants. One commenter agreed that the final rules' scope captures the majority of registrants who currently provide Guide 3 disclosures.²⁰³ We agree with the commenter and expect that this approach will not subject any additional registrants to requirements to disclose information currently called for by Guide 3 and will not exclude any registrants that are within the Guide 3 scope from the final rules' disclosure requirements, as our analysis indicates that the population identified above in Table 1 includes all bank and savings and loan registrants within the financial services industry. At the same time, the final rules' scope will provide more certainty to registrants with lending and deposit-taking activities because they no longer will need to assess the applicability of Guide 3 based on the materiality of their activities and, instead, will be explicitly required to provide disclosure based on whether they are a bank and savings and loan registrant.

b. Alternatives

As an alternative to the final scope, we considered a scope that would not be limited to bank and savings and loan registrants, but instead would encompass all financial services registrants that conduct the activities addressed in the final rules. Such an approach was supported by one commenter.²⁰⁴ Tables 3 below shows the estimated number of financial services registrants²⁰⁵ that conduct activities addressed in the final rules and Table 4 lists these financial services registrants by their type of business. Both tables display the applicability of the final rules to these registrants.

¹⁹⁸ See letter from BPI/SIFMA.

¹⁹⁹ See letters from CAQ; Crowe; Deloitte; and KPMG.

²⁰⁰ See *supra* note 31.

²⁰¹ See, e.g., letters from ABA; BAC; BPI/SIFMA; and EY.

²⁰² See letters from BAC and EY.

²⁰³ See letter from BAC.

²⁰⁴ See letter from M. Deering.

²⁰⁵ See *supra* note 169.

TABLE 3—ACTIVITIES OF FINANCIAL SERVICES REGISTRANTS

Financial services registrants	Holding debt securities ¹		Holding loans		Deposit-taking	
	Number	Assets, \$bln	Number	Assets, \$bln	Number	Assets, \$bln
Within final rules' scope	493	46,337	493	46,337	493	46,337
Not within final rules' scope	527	19,759	296	16,979	0	0
Total	1,020	66,096	789	63,316	493	46,337

¹ For purposes of this economic analysis, we define financial services registrants holding debt securities as those that have any investment securities reported in their financial statements. The analysis was based on data from XBRL filings and staff review of filings for financial services registrants that did not submit XBRL filings. To the extent that the estimate includes financial services registrants that hold equity and not debt securities or that hold debt securities that are not material, the number of financial services registrants with holdings of debt securities may be overestimated. To the extent that some financial services registrants may use non-standard or custom XBRL tags to identify their investment activities or that there are financial services registrants outside of the SIC codes specified in note 169, *supra*, the number of financial services registrants with holdings of debt securities may be underestimated. To estimate the number of registrants holding debt securities, the staff analyzed the most recent Form 10-K or Form 20-F filed as of May 1, 2020 for financial services registrants.

TABLE 4—FINANCIAL SERVICES REGISTRANTS BY TYPE ¹

Type of financial services	Within final rules' scope		Not within final rules' scope		Total	
	Number	Assets, \$bln	Number	Assets, \$bln	Number	Assets, \$bln
Banking and saving ²	461	40,995	2	0	463	40,995
Credit and finance	20	1,706	62	6,552	82	8,258
Brokers, dealers, and exchanges	7	3,436	93	832	100	4,268
Investment advice	1	152	43	263	44	415
Insurance	1	12	142	10,460	143	10,471
Real estate	0	0	213	1,658	213	1,658
Other financial services	3	37	65	510	68	547
Total	493	46,337	620	20,274	1,113	66,612

¹ We used SIC codes 6021, 6022, 6029, 6035, and 6036 to identify banks and saving institutions; SIC codes 6111, 6141, 6153, 6159, 6162, 6172, and 6199 to identify credit and finance services registrants; SIC codes 6163, 6200, 6211, and 6221 to identify brokers, dealers, and exchanges; SIC code 6282 to identify investment advisers; SIC codes 6311, 6321, 6324, 6331, 6351, 6361, 6399, and 6411 to identify insurance services companies; SIC codes 6500, 6510, 6519, and 6798 to identify real estate registrants; and SIC codes 6099 and 7389 to identify registrants that provide other financial services.

² We note that there are 30 registrants outside of the SIC codes 6021, 6022, 6029, 6035, and 6036 (and thus not included in the 463 banking and savings registrants) that are either identified as BHCs under the BHC Act or Rule 1-02(e) of Regulation S-X, or identified as SLHCs.

We estimate that, out of 1,113 financial services registrants that report at least one of the activities addressed in the final rules in their filings, 620 registrants that in aggregate hold 30.4% of financial services registrants' assets are not within the scope of the final rules. Under the alternative approach discussed above, these 620 financial services registrants would be subject to the final rules and would experience an increase in compliance costs as a result of new disclosure obligations. Among these 620 registrants, 203 report holdings of debt securities and loans, 93 report holdings of loans only, and 324 report holdings of debt securities only. We also estimate that all of 493 financial services registrants that report deposit-taking activities will be within the final rules' scope; however, out of 1,020 financial services registrants that hold debt securities, 527 registrants that in aggregate hold approximately 29.9% of assets among financial services registrants with debt securities would not be within the final rules' scope; out of 789 financial services registrants that hold loans, 296 registrants that in aggregate hold approximately 26.8% of

assets among financial services registrants with holdings of loans would not be within the final rules' scope. Under the alternative approach discussed above, the disclosure of these activities would be required for the financial services registrants that do not fall under the definition of a banking and savings registrant.

To the extent that certain types of registrants outside the final rules' scope conduct activities similar to bank and savings and loan registrants, this alternative approach could lead to more consistent and comparable disclosure among registrants that provide similar financial services and help investors better compare registrants that conduct similar activities, which in turn could increase allocative efficiency. In addition, to the extent registrants that conduct one of the activities addressed by the final rules are not within the final rules' scope, and to the extent that these registrants currently have a competitive advantage over registrants providing Guide 3 disclosures due to lower costs, the alternative may decrease this disparity. However, given that many of the 620 registrants that do not fall

within the final rules' scope may not currently provide the disclosures we are codifying, the increased costs due to this alternative approach may be significant. However, we note that even for a registrant that will not be subject to disclosure requirements under the final rules, other Commission disclosure requirements, such as MD&A, or investor demand may elicit certain disclosure about financial activities of these registrants to the extent they are material.

vi. Applicability of Disclosure

a. Costs and Benefits

Guide 3 calls for disclosure related to lending, deposit-taking, and investment activities, regardless of materiality of these activities; and specifies a few bright-line thresholds for disclosure of specific items related to these activities. The final rules codify the 10% bright-line disclosure threshold for deposit categories disclosure, clarify that disaggregation of Item I disclosures is

required only for material items,²⁰⁶ and do not specify disclosure thresholds, similar to Guide 3, for any of the other disclosure requirements that are being codified. As such, we believe that this aspect of the final rules will not result in meaningful economic effects for registrants and investors as compared to the baseline.

b. Alternatives

As an alternative, we considered requiring disclosures based on the materiality of the relevant financial activities to the registrant's business or financial statements. While a materiality-based approach may result in a more tailored compliance regime and elicit disclosure that is more relevant to a registrant's operations, such an approach could increase uncertainty about whether bank and savings and loan registrants need to provide disclosures, as these registrants would have to make a judgment about which of their activities are material. This alternative approach may also lead to a decreased comparability between registrants that conduct activities specified in the final rules. In addition, if certain investors have a different perception than registrants about what activities are material, these investors may have less information on which to base their investment decisions.

As another alternative, we considered using a bright-line threshold for all proposed disclosure requirements. Such an approach may be easier to apply as it would not require judgment and would reduce bank and savings and loan registrants' uncertainty about whether they need to provide disclosures. However, a bright-line threshold may be under- or over-inclusive, especially for bank and savings and loan registrants with a level of activities just below or over the specified threshold. As a result, disclosures by registrants that fall just below the threshold would be less comparable to those of registrants above the threshold, despite conducting similar activities. In addition, under this alternative, some bank and savings and loan registrants may be incentivized to actively manage their activity to the level just below the threshold such that they would not have to provide the disclosures for specified activities, even

though those activities could be material to their business. In this instance, the bright-line approach would be under-inclusive.

vii. Location of Disclosures

a. Costs and Benefits

Investors and other users of Commission filings may process information located in different places within a registrant's filing differently. The final rules provide bank and savings and loan registrants with flexibility to determine where in the filing to present the required information, just as they do under the current Guide 3 instructions.²⁰⁷ As such, we expect that this aspect of the final rules will not result in meaningful economic effects for registrants and investors as compared to the baseline.

b. Alternatives

As an alternative, we could have required disclosures to be placed in the footnotes to the financial statements. Several commenters noted that under this alternative approach, the footnote disclosures would be subjected to audit procedures, and registrants would need to file the disclosures in an XBRL format.²⁰⁸ One of these commenters stated that requiring the disclosures to be included in the footnotes would likely increase audit costs.²⁰⁹ As such, we expect that affected registrants' compliance costs would be higher under this alternative, relative to the final rules.

In the Proposing Release, we noted that requiring the disclosure to be located in the footnotes to financial statements could increase reliability of disclosures and decrease search costs for users of financial statements and information asymmetries between investors and bank and savings and loan registrants. One commenter, however, indicated that allowing registrants to decide where best to present the disclosure will result in a superior presentation, with related disclosures

being grouped together.²¹⁰ We agree that prescribing a specific location for the disclosures could diminish bank and savings and loan registrants' ability to present the information in the context in which it is most relevant and understandable for investors reading the report. In addition, this alternative would increase compliance costs for those bank and savings and loan registrants that currently provide the aforementioned disclosures within the MD&A section.

viii. Format of Disclosures

In the Proposing Release, we requested comment on whether the disclosures addressed in the final rules should be provided in a structured machine-readable format. A few commenters supported the use of the structured machine-readable Inline XBRL format for disclosures addressed in the final rules, regardless of their location.²¹¹ According to these commenters, this requirement would ensure consistency of data across all affected registrants.²¹² In addition, these commenters stated that data provided in a structured format encourages more robust and in-depth analysis due to reduced costs of analysis.²¹³

On the other hand, two commenters stated that the cost to registrants of providing the information in XBRL format could be significant.²¹⁴ One commenter indicated that such an approach would be confusing for users of financial statements and would reduce comparability among registrants.²¹⁵ In addition, some commenters indicated that it may be difficult for registrants that provide disclosures addressed in the final rules within their MD&A section to selectively provide such disclosures in a structured data format while providing other MD&A disclosures in a non-structured data format.²¹⁶

While we recognize that having the data provided in a structured machine-readable format could increase financial statement comparability and enable investors and other users of Commission filings to access and use disclosures more easily, thus reducing information asymmetries between investors and affected registrants, we also recognize

²⁰⁶ The existing language in Item I of Guide 3 indicates that registrants "should" rather than "must" include specific disaggregated categories. We believe that clarifying the final rules to add a materiality qualifier should bring the required disclosures more in line with existing disclosure practices under Guide 3. See *supra* Section VII.C.i.a for a discussion of economic effects related to disaggregation of Item I.

²⁰⁷ Based on the staff's review of financial services registrants' annual reports that contain Guide 3 disclosures, there currently is diversity in location of the disclosures, with some registrants providing the disclosures in the Business section and others providing it in MD&A. Several commenters also noted that the disclosures currently called for by Guide 3 are typically included in the Business section or in MD&A. See letters from CAQ; Crowe; and EY. Two other commenters noted that many preparers include existing Guide 3 disclosures in MD&A in conjunction with other required MD&A disclosures, while others include the information within their financial statements. See letters from BAC and BPI/SIFMA.

²⁰⁸ See e.g., letters from CAQ; Deloitte; and EY.

²⁰⁹ See letter from EY.

²¹⁰ See letter from BPI/SIFMA. Several other commenters supported retaining the existing flexibility to determine where the disclosures are provided. See letters from ABA; BAC; BPI/SIFMA; and EY.

²¹¹ See letters from CFA and XBRL.

²¹² *Id.* See also letter from EY.

²¹³ See letters from CFA and XBRL.

²¹⁴ See letters from ABA and BPI/SIFMA.

²¹⁵ See letter from BAC.

²¹⁶ See letters from BPI/SIFMA and BAC.

the challenges of providing data in structured format.²¹⁷

Specifically, requiring final rules' disclosures to be submitted in a structured machine-readable format regardless of their location may impose additional compliance costs on those affected registrants that currently provide the disclosures within their MD&A section in a non-structured format. Even though the costs of providing disclosures in XBRL format may have declined in the recent years,²¹⁸ requiring registrants that provide the final rules' disclosures within their MD&A section to provide these disclosures in a structured data format may initially increase their compliance costs, relative to unaffected registrants, for which MD&A disclosures are not required to be in a structured data format. Ultimately, for the reasons discussed in Section II.B above, we decided not to adopt this alternative.

D. Effects on Efficiency, Competition, and Capital Formation

Consistent with commenters' feedback, we believe that the codification of certain Guide 3 disclosure items may promote comparability among filings, increase the quality and availability of information about bank and savings and loan registrants' activities, and help avoid uncertainty about when the disclosures are required. As a result, the final rules may reduce information asymmetries, allowing investors to achieve better allocative efficiency which, in turn, may increase the demand for securities offerings, reduce costs of capital, and enhance capital formation.

The outcome of not codifying the disclosure requirements that overlap with Commission rules, U.S. GAAP, and IFRS on informational efficiency depends on the balance of two effects. On the one hand, the clarity of information presented in Commission

filings may increase, which would reduce search costs for investors who do not use computerized search tools for locating data and lead to more efficient information processing. Given that some investors may have limited attention and limited information processing capabilities²¹⁹ and may invest more in firms with more concise disclosures,²²⁰ we believe that eliminating overlapping or duplicative information should facilitate more efficient investment decision-making, enhancing the informational and allocative efficiency of the market and facilitating capital formation. On the other hand, not codifying certain Guide 3 disclosure items could lead to increased information asymmetries between investors and bank and savings and loan registrants to the extent that some of the Guide 3 disclosure items that overlap with, but are not entirely duplicative of, U.S. GAAP or IFRS disclosures would no longer be called for by an industry guide. This impact may be heightened for smaller registrants and first time entrants, as these types of registrants may exhibit more information asymmetries due to less historical information being available for investors. We did not receive any comments that quantify the size of either of these two effects. As such, we acknowledge that both effects may be present.

The final rules also may have several effects on competition.²²¹ First, to the extent that compliance costs increase for bank and savings and loan registrants under the final rules, private banking companies may gain additional competitive advantage from not incurring such increased costs. Second, to the extent that certain costs related to required disclosures are fixed, these burdens may have a larger impact on smaller bank and savings and loan registrants, potentially reducing their ability to offer banking products and terms that would enable them to better compete with their larger peers. Third, the cost savings from not codifying all of the Guide 3 disclosure items may be larger for IFRS bank and savings and loan registrants, as they often face particular challenges in presenting the Guide 3 disclosures that presume a U.S.

GAAP presentation; however, we do not anticipate this effect to be substantial.²²² Although we requested comment on the extent of the aforementioned effects on competition, we did not receive any feedback from commenters. As such, we acknowledge that all three effects may be present.

VIII. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules that would be affected by the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").²²³ The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted the proposed rules to the Office of Management and Budget ("OMB") for review in accordance with the PRA.²²⁴ While some commenters provided comments on the possible costs of the proposed rules,²²⁵ no commenters specifically addressed our PRA analysis. Where appropriate, we have revised our burden estimates after considering other relevant comments as well as differences between the proposed and final rules.

The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

- Regulation S–K (OMB Control No. 3235–007);²²⁶
- Form S–1²²⁷ (OMB Control No. 3235–0065);

²²² See *id.*

²²³ 44 U.S.C. 3501 *et seq.*

²²⁴ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

²²⁵ See, e.g., letters from ABA; BPI/SIFMA; CAQ; Crowe; EY; and PWC.

²²⁶ The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in that regulation and is reflected in the analysis of those forms. To avoid a PRA inventory reflecting duplicative burdens and for administrative convenience, we do not assign paperwork burdens to Regulation S–K.

²²⁷ 17 CFR 239.11.

²¹⁷ See Section VI.C.vii of the Proposing Release for a discussion of academic research on the benefits and costs of XBRL.

²¹⁸ Two commenters referenced a study that estimates that XBRL preparation costs for small companies declined by 45% from 2014 to 2017, and that the average cost of a full-year of fully outsourced XBRL preparation for such companies in 2017 was less than \$5,500. See letters from CFA and XBRL. See also Press Release, AICPA, XBRL Costs for Small Companies Have Declined 45%, According to AICPA Study (Aug. 18, 2018), available at <https://www.aicpa.org/press/pressreleases/2018/xbrl-costs-have-declined-according-to-aicpa-study>.

As a baseline matter, all affected registrants currently are subject to Inline XBRL tagging requirements for the financial statements and cover pages in their periodic reports and for the financial statements in certain registration statements.

²¹⁹ See, e.g., David Hirshleifer & Siew Hong Teoh, *Limited Attention, Information Disclosure, and Financial Reporting*, 36 J. Acct. & Econ. 337 (2003).

²²⁰ See, e.g., Alastair Lawrence, *Individual Investors and Financial Disclosure*, 56 J. Acct. & Econ. 130 (2013); Michael S. Drake, Jeffrey Hales, & Lynn Rees, *Disclosure Overload? A Professional User Perspective on the Usefulness of General Purpose Financial Statements*, 36 Contemp. Acct. Res. 1935 (2019).

²²¹ See Section VI.D of the Proposing Release for a more detailed discussion.

- Form S-3²²⁸ (OMB Control No. 3235-0073);²²⁹
- Form S-4²³⁰ (OMB Control No. 3235-0324);
- Form F-1²³¹ (OMB Control No. 3235-0258);
- Form F-3²³² (OMB Control No. 3235-0256);
- Form F-4²³³ (OMB Control No. 3235-0325);
- Form 10²³⁴ (OMB Control No. 3235-0064);
- Form 10-K²³⁵ (OMB Control No. 3235-0064);
- Form 10-Q²³⁶ (OMB Control No. 3235-0070);
- Form 20-F (OMB Control No. 3235-0063); and
- Regulation A (Form 1-A)²³⁷ (OMB Control No. 3235-0286).

The regulations and forms listed above were adopted under the Securities Act or the Exchange Act. The regulations and forms set forth the disclosure requirements for registration statements, offering statements, and periodic reports filed by registrants and issuers to help investors make informed investment decisions. A description of the final rules, including the need for the information and its use, as well as a description of the likely respondents, can be found in Sections II through V above, and a discussion of the economic effects of the proposed rules can be found in Section VII above.

B. Burden and Cost Estimates Related to the Proposed Rules

i. Affected Registrants and Forms

We estimate that, currently, approximately 493 bank and savings and loan registrants provide the disclosures set forth in Guide 3. These registrants have to provide the disclosures required by the final rules in Securities Act registration statements filed on Forms S-1, S-3, S-4, F-1, F-3, and F-4, Exchange Act registration statements on Forms 10 and 20-F, Exchange Act annual reports on Forms 10-K and 20-F, Exchange Act quarterly reports on Form 10-Q, and Regulation A offering statements on Form 1-A. We refer to these registrants in this PRA analysis as “affected registrants.”

The final rules codify certain disclosure items in Guide 3 and eliminate other Guide 3 disclosure items that overlap with Commission rules, U.S. GAAP, or IFRS. Although the disclosure items in Guide 3 are not Commission rules, under existing practice, affected registrants currently provide many of these disclosures in response to Guide 3. Therefore, the burdens associated with these disclosure requirements are already included in the current burden hours and costs for the affected forms. As such, for PRA purposes, we are only revising the burdens and costs of the affected forms to reflect changes to the existing Guide 3 disclosure items in the final rules.

For example, as discussed in greater detail below,²³⁸ the final rules do not codify in Item 1403 the disclosure items in Item II of Guide 3 that substantially overlap with U.S. GAAP and IFRS disclosure requirements, and those disclosure requirements that the final rules do codify in Item 1403 are consistent with the current disclosure items in Item II. Therefore, we estimate that there would be no change to the burdens and costs of affected registrants as a result of Item 1403 because the Item would include disclosure items that are already included in Guide 3. In contrast, as discussed below,²³⁹ Item 1404, in addition to codifying the loan disclosure items in Item III of Guide 3 that do not overlap with Commission rules, U.S. GAAP, or IFRS, requires certain interest rate disclosures that are not currently called for by Guide 3. Therefore, we estimate that Item 1404 would increase the burden and costs to affected registrants.

Additionally, for PRA purposes, we have allocated the burden and costs estimates related to the final rules to annual reports on Forms 10-K and 20-F. We have not adjusted the burdens and costs of a registrant filing its quarterly reports on Form 10-Q, as the registrant would be required to collect and disclose almost the same information related to the final rules cumulatively in its annual report as in each of its prior quarterly reports. Therefore, including the burden and cost estimates in both annual and quarterly reports would result in a PRA inventory reflecting duplicative burdens.

Further, as with quarterly reports on Form 10-Q, a registrant would be required to collect and disclose almost the same information related to the final rules in a registration or offering

statement as it would in an annual report. However, we recognize that there could be some additional burdens and costs associated with a registration or offering statement that may not apply to an annual report. Therefore, we assign a small incremental increase in burdens and costs to all affected registration and offering statements, including Forms 20-F, S-1, S-4, F-1, F-4, 10, and 1-A.

ii. Standard Estimated Burden Allocation for Specified Forms

For purposes of the PRA, total burden is to be allocated between internal burden hours and outside professional costs. A registrant's internal burden is estimated in internal burden hours and its outside professional costs are estimated at \$400 per hour.²⁴⁰ Table 5 below sets forth the percentage estimates we typically use for the burden allocation for each form.

TABLE 5—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED FORMS

Form type	Internal (percent)	Outside professionals (percent)
Form 10-K	75	25
Form 20-F	25	75
Form S-1	25	75
Form S-4	25	75
Form F-1	25	75
Form F-4	25	75
Form 10	25	75
Form 1-A	75	25

iii. Burden Change for Specific Portions of the Final Rules

a. Disclosure Related to Distribution of Assets, Liabilities, and Stockholders' Equity; and Interest Rate and Interest Differential (Item I of Guide 3/Item 1402)

The final rules in Item 1402 require additional disaggregation to include the categories under Item VII of Guide 3 and certain other categories in Article 9 of Regulation S-X. We are adopting the rules substantially as proposed. In a change from the proposed rules, the final rules clarify that the categories enumerated in the final rules “must be included, if material,” rather than the disclosure “must include, at a minimum.” We do not believe this change affects our burdens and costs

²²⁸ 17 CFR 239.13.

²²⁹ The paperwork burdens for Form S-3 and Form F-3 that would result from the final rules are imposed through the forms from which they are incorporated by reference and reflected in the analysis of those forms.

²³⁰ 17 CFR 239.25.

²³¹ 17 CFR 239.31.

²³² 17 CFR 239.33.

²³³ 17 CFR 239.34.

²³⁴ 17 CFR 249.210.

²³⁵ 17 CFR 249.310.

²³⁶ 17 CFR 249.308a.

²³⁷ 17 CFR 239.90.

²³⁸ See Section VIII.B.iii.b below.

²³⁹ See Section VIII.B.iii.c below.

²⁴⁰ 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 will be an average of \$400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

estimate from the Proposing Release as in many cases we believe the additional disaggregation will provide material information. Therefore, we estimate that the burdens and costs of an affected annual report will increase by two hours

per year and the burdens and costs of an affected registration or offering statement will increase by one hour per year. Table 6 below shows the resulting estimated change in an affected registrant's internal burden hours and

costs for outside professionals due to the disclosure related to the distribution of assets, liabilities, and stockholders' equity and interest rate and interest differential.

TABLE 6—ESTIMATED INCREASE IN INTERNAL BURDEN HOURS AND COSTS FOR PROFESSIONALS FROM THE DISCLOSURE RELATED TO DISTRIBUTION OF ASSETS, LIABILITIES, AND STOCKHOLDERS' EQUITY; AND INTEREST RATE AND INTEREST DIFFERENTIAL

[Item I of Guide 3/Item 1402]

Form (A)	Number of affected filings (B)	Increase in internal burden hours per registrant (C)	Total increase in internal burden hours (D) [(B) * (C)]	Increase in outside professional cost per registrant (E)	Total increase in outside professional cost (F) [(B) * (E)]
Annual Reports = +2 hours					
Form 10-K	450	¹ 1.5	675	² \$200	\$90,000
Form 20-F	43	³ 0.5	21.5	⁴ 600	25,800
Registration and Offering Statements = +1 hour					
Form 20-F	1	⁵ 0.25	0.25	⁶ 300	300
Form S-1	15	⁷ 0.25	3.75	⁸ 300	4,500
Form S-4	87	⁹ 0.25	21.75	¹⁰ 300	26,100
Form F-1	1	¹¹ 0.25	0.25	¹² 300	300
Form F-4	2	¹³ 0.25	0.5	¹⁴ 300	600
Form 10	2	¹⁵ 0.25	0.5	¹⁶ 300	600
Form 1-A	1	¹⁷ 0.75	0.75	¹⁸ 100	75

¹ Two hours × 0.75 = 1.5 hours.

² (Two hours × 0.25) × \$400 = \$200.

³ Two hours × 0.25 = 0.5 hours.

⁴ (Two hours × 0.75) × \$400 = \$600.

⁵ One hour × 0.25 = 0.25 hours.

⁶ (One hour × 0.75) × \$400 = \$300.

⁷ One hour × 0.25 = 0.25 hours.

⁸ (One hour × 0.75) × \$400 = \$300.

⁹ One hour × 0.25 = 0.25 hours.

¹⁰ (One hour × 0.75) × \$400 = \$300.

¹¹ One hour × 0.25 = 0.25 hours.

¹² (One hour × 0.75) × \$400 = \$300.

¹³ One hour × 0.25 = 0.25 hours.

¹⁴ (One hour × 0.75) × \$400 = \$300.

¹⁵ One hour × 0.25 = 0.25 hours.

¹⁶ (One hour × 0.75) × \$400 = \$300.

¹⁷ One hour × 0.75 = 0.75 hours.

¹⁸ (One hour × 0.25) × \$400 = \$100.

b. Disclosure Related to Investment Portfolios (Item II of Guide 3/Item 1403)

We are adopting final rules as proposed. The disclosure items in Item II of Guide 3 that the final rules do not codify in Item 1403 substantially overlap with U.S. GAAP and IFRS disclosure requirements, and those that the final rules codify in Item 1403 are consistent with the current disclosure items in Item II of Guide 3. Therefore, we estimate that there will be no change to the burdens and costs of an affected annual report or registration or offering statement as a result of this aspect of the final rules.

c. Disclosure Related to Loan Portfolios (Item III of Guide 3/Item 1404)

In Item 1404, the final rules codify the loan disclosure items in Item III of Guide 3 that do not overlap with Commission rules, U.S. GAAP, or IFRS. We are adopting final rules substantially as proposed. In a change from the proposed rules, the final rules separate the "after five years" maturity category into two separate categories. We do not believe this change affects our burdens and costs estimate from the Proposing Release because the change requires only a slightly different calculation. The final rules in Item 1404

require additional disclosure regarding interest rates for all loan categories, so we estimate that the burdens and costs of an affected annual report will increase by three hours per year and the burdens and costs of an affected registration or offering statement will increase by one hour per year. Table 7 below shows the resulting estimated change in an affected registrant's internal burden hours and costs for outside professionals due to the final disclosure requirements related to loan portfolios.

TABLE 7—ESTIMATED CHANGE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE DISCLOSURE RELATED TO LOAN PORTFOLIOS
[Item III of Guide 3/Item 1404]

Form (A)	Number of affected filings (B)	Increase in internal burden hours per registrant (C)	Total increase in internal burden hours (D) [(B) * (C)]	Increase in outside professional cost per registrant (E)	Total increase in outside professional cost (F) [(B) * (E)]
Annual Reports = +3 hours					
Form 10-K	450	¹ ✖	1,012.5	² \$300	\$135,000
Form 20-F	43	³ 0.75	32.25	⁴ 900	38,700
Registration and Offering Statements = +1					
Form 20-F	1	⁵ 0.25	0.25	⁶ 300	300
Form S-1	15	⁷ 0.25	3.75	⁸ 300	4,500
Form S-4	87	⁹ 0.25	21.75	¹⁰ 300	26,100
Form F-1	1	¹¹ 0.25	0.25	¹² 300	300
Form F-4	2	¹³ 0.25	0.5	¹⁴ 300	600
Form 10	2	¹⁵ 0.25	0.5	¹⁶ 300	600
Form 1-A	1	¹⁷ 0.75	0.75	¹⁸ 100	75

¹ Three hours × 0.75 = 2.25 hours.

² (Three hours × 0.25) × \$400 = \$300.

³ Three hours × 0.25 = 0.75 hours.

⁴ (Three hours × 0.75) × \$400 = \$900.

⁵ One hour × 0.25 = 0.25 hours.

⁶ (One hour × 0.75) × \$400 = \$300.

⁷ One hour × 0.25 = 0.25 hours.

⁸ (One hour × 0.75) × \$400 = \$300.

⁹ One hour × 0.25 = 0.25 hours.

¹⁰ (One hour × 0.75) × \$400 = \$300.

¹¹ One hour × 0.25 = 0.25 hours.

¹² (One hour × 0.75) × \$400 = \$300.

¹³ One hour × 0.25 = 0.25 hours.

¹⁴ (One hour × 0.75) × \$400 = \$300.

¹⁵ One hour × 0.25 = 0.25 hours.

¹⁶ (One hour × 0.75) × \$400 = \$300.

¹⁷ One hour × 0.75 = 0.75 hours.

¹⁸ (One hour × 0.25) × \$400 = \$100.

d. Disclosure Related to Allowance for Credit Losses (Item IV of Guide 3/Item 1405(c))

We are adopting final rules as proposed. The disclosure items in Item IV of Guide 3 that the final rules do not codify in proposed Item 1405(c) substantially overlap with U.S. GAAP and IFRS disclosure requirements, and those disclosure items that the final rules do codify in Item 1405(c) are consistent with the current disclosure items in Item IV of Guide 3. Therefore, we estimate that there will be no change to the burdens and costs of an affected annual report or registration or offering statement as a result of this aspect of the final rules.

e. Disclosure Related to Deposits (Item V of Guide 3/Item 1406)

The final rules in Item 1406 codify the majority of the disclosure items in Item V of Guide 3, with some revisions. We are adopting final rules substantially as proposed. In a change from the proposed rules, the final rules state that uninsured deposits may be based on estimated amounts of uninsured deposits as of the reporting period end, to the extent it is not practicable to provide a precise measure of uninsured deposits. The final rules also differ from the proposed rules by requiring that such estimates of uninsured deposits be based on the same methodologies and assumptions used for the applicable

bank or savings and loan registrant's regulatory reporting requirements. We do not believe these changes affect our burdens and costs estimate from the Proposing Release as they represent modest accommodations that do not fundamentally alter the registrant's disclosure obligations. We estimate that burdens and costs of an affected annual report will increase by three burden hours per year and the burdens and costs of an affected registration or offering statement will increase by one hour per year. Table 8 below shows the resulting estimated change in an affected registrant's internal burden hours and costs for outside professionals due to the final disclosure related to deposits.

TABLE 8—ESTIMATED CHANGE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE DISCLOSURE RELATED TO DEPOSITS
[Item V of Guide 3/Item 1406]

Form (A)	Number of affected filings (B)	Increase in internal burden hours per registrant (C)	Total increase in internal burden hours (D) [(B) * (C)]	Increase in outside professional cost per registrant (E)	Total increase in outside professional cost (F) [(B) * (E)]
Annual Reports = +3 hours					
Form 10-K	450	¹ 2.25	1,012.5	² \$300	\$135,000
Form 20-F	43	³ 0.75	32.25	⁴ 900	38,700
Registration and Offering Statements = +1					
Form 20-F	1	⁵ 0.25	0.25	⁶ 300	300
Form S-1	15	⁷ 0.25	3.75	⁸ 300	4,500
Form S-4	87	⁹ 0.25	21.75	¹⁰ 300	26,100
Form F-1	1	¹¹ 0.25	0.25	¹² 300	300
Form F-4	2	¹³ 0.25	0.5	¹⁴ 300	600
Form 10	2	¹⁵ 0.25	0.5	¹⁶ 300	600
Form 1-A	1	¹⁷ 0.75	0.75	¹⁸	75

¹ Three hours × 0.75 = 2.25 hours.

² (Three hours × 0.25) × \$400 = \$300.

³ Three hours × 0.25 = 0.75 hours.

⁴ (Three hours × 0.75) × \$400 = \$900.

⁵ One hour × 0.25 = 0.25 hours.

⁶ (One hour × 0.75) × \$400 = \$300.

⁷ One hour × 0.25 = 0.25 hours.

⁸ (One hour × 0.75) × \$400 = \$300.

⁹ One hour × 0.25 = 0.25 hours.

¹⁰ (One hour × 0.75) × \$400 = \$300.

¹¹ One hour × 0.25 = 0.25 hours.

¹² (One hour × 0.75) × \$400 = \$300.

¹³ One hour × 0.25 = 0.25 hours.

¹⁴ (One hour × 0.75) × \$400 = \$300.

¹⁵ One hour × 0.25 = 0.25 hours.

¹⁶ (One hour × 0.75) × \$400 = \$300.

¹⁷ One hour × 0.75 = 0.75 hours.

¹⁸ (One hour × 0.25) × \$400 = \$100.

f. Disclosure Related to Return on Equity and Assets (Item VI of Guide 3)

As proposed, the final rules do not codify the disclosure items in Item VI of Guide 3. Therefore, we estimate that the

burdens and costs of an affected annual report will decrease by two burden hours per year and the burdens and costs of an affected registration or offering statement will decrease by one hour per year. Table 9 below shows the

resulting estimated change in an affected registrant's internal burden hours and costs for outside professionals due to this aspect of the final rules.

TABLE 9—ESTIMATED DECREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE DISCLOSURE RELATED TO RETURN ON EQUITY AND ASSETS
[Item VI of Guide 3]

Form (A)	Number of affected filings (B)	Decrease in internal burden hours per registrant (C)	Total decrease in internal burden hours (D) [(B) * (C)]	Decrease in outside professional cost per registrant (E)	Total decrease in outside professional cost (F) [(B) * (E)]
Annual Reports = -2 hours					
Form 10-K	450	¹ (1.5)	(675)	² (\$200)	(\$90,000)
Form 20-F	43	³ (0.5)	(21.5)	⁴ (600)	(25,800)
Registration and Offering Statements = -1 hour					
Form 20-F	1	⁵ (0.25)	(0.25)	⁶ (300)	(300)
Form S-1	15	⁷ (0.25)	(3.75)	⁸ (300)	(4,500)
Form S-4	87	⁹ (0.25)	(21.75)	¹⁰ (300)	(26,100)
Form F-1	1	¹¹ (0.25)	(0.25)	¹² (300)	(300)
Form F-4	2	¹³ (0.25)	(0.5)	¹⁴ (300)	(600)

TABLE 9—ESTIMATED DECREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE DISCLOSURE RELATED TO RETURN ON EQUITY AND ASSETS—Continued
[Item VI of Guide 3]

Form (A)	Number of affected filings (B)	Decrease in internal burden hours per registrant (C)	Total decrease in internal burden hours (D) [(B) * (C)]	Decrease in outside professional cost per registrant (E)	Total decrease in outside professional cost (F) [(B) * (E)]
Form 10	2	¹⁵ (0.25)	(0.5)	¹⁶ (300)	(600)
Form 1-A	1	¹⁷ (0.75)	(0.75)	¹⁸ (100)	(75)

¹ Two hours × 0.75 = 1.5 hours.

² (Two hours × 0.25) × \$400 = \$200.

³ Two hours × 0.25 = 0.5 hours.

⁴ (Two hours × 0.75) × \$400 = \$600.

⁵ One hour × 0.25 = 0.25 hours.

⁶ (One hour × 0.75) × \$400 = \$300.

⁷ One hour × 0.25 = 0.25 hours.

⁸ (One hour × 0.75) × \$400 = \$300.

⁹ One hour × 0.25 = 0.25 hours.

¹⁰ (One hour × 0.75) × \$400 = \$300.

¹¹ One hour × 0.25 = 0.25 hours.

¹² (One hour × 0.75) × \$400 = \$300.

¹³ One hour × 0.25 = 0.25 hours.

¹⁴ (One hour × 0.75) × \$400 = \$300.

¹⁵ One hour × 0.25 = 0.25 hours.

¹⁶ (One hour × 0.75) × \$400 = \$300.

¹⁷ One hour × 0.75 = 0.75 hours.

¹⁸ (One hour × 0.25) × \$400 = \$100.

g. Disclosure Related to Short-Term Borrowings (Item VII of Guide 3/Item 1402)

We are adopting final rules as proposed. The final rules codify the average amount outstanding and interest paid disclosure items in Item VII of

Guide 3 as part of Rule 1402, but do not codify the remaining disclosure items in Item VII. Therefore, we estimate that the burdens and costs of an affected annual report will decrease by four burden hours per year and the burdens and costs of an affected registration or

offering statement will decrease by one hour per year. Table 10 below shows the resulting estimated change in an affected registrant's internal burden hours and costs for outside professionals due to the disclosure related to short-term borrowings.

TABLE 10—ESTIMATED DECREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE FINAL RULES RELATED TO SHORT-TERM BORROWINGS
[Item VII of Guide 3/Item 1402]

Form (A)	Number of affected filings (B)	Decrease in internal burden hours per registrant (C)	Total decrease in internal burden hours (D) [(B) * (C)]	Decrease in outside professional cost per registrant (E)	Total decrease in outside professional cost (F) [(B) * (E)]
Annual Reports = – 4 hours					
Form 10-K	450	¹ (3)	(1,350)	² (\$400)	(\$180,000)
Form 20-F	43	³ (1)	(43)	⁴ (1,200)	(51,600)
Registration and Offering Statements = – 1					
Form 20-F	1	⁵ (0.25)	(0.25)	⁶ (300)	(300)
Form S-1	15	⁷ (0.25)	(3.75)	⁸ (300)	(4,500)
Form S-4	87	⁹ (0.25)	(21.75)	¹⁰ (300)	(26,100)
Form F-1	1	¹¹ (0.25)	(0.25)	¹² (300)	(300)
Form F-4	2	¹³ (0.25)	(0.5)	¹⁴ (300)	(600)
Form 10	2	¹⁵ (0.25)	(0.5)	¹⁶ (300)	(600)
Form 1-A	1	¹⁷ (0.75)	(0.75)	¹⁸ (100)	(75)

¹ Four hours × 0.75 = 3 hours.

² (Four hours × 0.25) × \$400 = \$400.

³ Four hours × 0.25 = 1 hours.

⁴ (Four hours × 0.75) × \$400 = \$1,200.

⁵ One hour × 0.25 = 0.25 hours.

⁶ (One hour × 0.75) × \$400 = \$300.

⁷ One hour × 0.25 = 0.25 hours.

⁸ (One hour × 0.75) × \$400 = \$300.

⁹ One hour \times 0.25 = 0.25 hours.

¹⁰ (One hour \times 0.75) \times \$400 = \$300.

¹¹ One hour \times 0.25 = 0.25 hours.

¹² (One hour \times 0.75) \times \$400 = \$300.

¹³ One hour \times 0.25 = 0.25 hours.

¹⁴ (One hour \times 0.75) \times \$400 = \$300.

¹⁵ One hour \times 0.25 = 0.25 hours.

¹⁶ (One hour \times 0.75) \times \$400 = \$300.

¹⁷ One hour \times 0.75 = 0.75 hours.

¹⁸ (One hour \times 0.25) \times \$400 = \$100.

h. Disclosure Related to Credit Ratios (Items 1405(a) and (b))

Under the final rules, credit ratios and related disclosures are required for the same periods for which our rules require financial statements for those filings. We proposed this same period requirement for all filings other than initial registration and offering statements, such that the proposed credit ratios and related disclosures for annual reports and registration or offering statements that are not initial registration or offering statements would be required for the same periods for which our rules require financial statements for those filings, which would be less than five years. Additionally, we proposed a period requirement of five years for initial registration and offering statements,

such that an affected registrant filing its initial registration or offering statement would be required to provide its credit ratios and related disclosures for each of the last five years. The final rules eliminate this bifurcation and require credit ratios and related disclosures for the same periods for which our rules require financial statements for those filings.

In the Proposing Release, we estimated that the burdens and costs of an annual report would increase by six burden hours per year and the burdens and costs of a registration or offering statement that is not an initial registration or offering statement would increase by one hour per year. Additionally, we estimated that providing the additional years of credit ratios and related disclosures that go beyond what would be required in an

annual report or a registration or offering statement that is not an initial registration or offering statement would increase the burdens and costs for an initial registration or offering statement by six burden hours per year. Because the final rules do not include a five-year period requirement for credit ratio disclosures in initial registration statements, we estimate that the burdens and costs of an annual report will increase by six burden hours per year and the burdens and costs of a registration or offering statement, initial or otherwise, will increase by one hour per year.

Table 11 below shows the resulting estimated change in an affected registrant's internal burden hours and costs for outside professionals due to the disclosure related to credit ratios.

TABLE 11—ESTIMATED INCREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONALS FROM THE DISCLOSURE RELATED TO CREDIT RATIOS (ITEMS 1405(A) AND (B))

Form (A)	Number of affected filings (B)	Increase in internal burden hours per registrant (C)	Total increase in internal burden hours (D) [(B) * (C)]	Increase in outside professional cost per registrant (E)	Total increase in outside professional cost (F) [(B) * (E)]
Annual Reports = +6 hours					
Form 10-K	450	¹ 4.5	2,025	² \$600	\$270,000
Form 20-F	43	³ 1.5	64.5	⁴ 1,800	77,400
Registration and Offering Statements = +1 hours					
Form 20-F	1	⁵ 0.25	0.25	⁶ 300	300
Form S-1	15	⁷ 0.25	3.75	⁸ 300	4,500
Form S-4	87	⁹ 0.25	21.75	¹⁰ 300	26,100
Form F-1	1	¹¹ 0.25	0.25	¹² 300	300
Form F-4	2	¹³ 0.25	0.5	¹⁴ 300	600
Form 10	2	¹⁵ 0.25	0.5	¹⁶ 300	600
Form 1-A	1	¹⁷ 0.75	0.75	¹⁸ 100	75

¹ Six hours \times 0.75 = 4.5 hours.

² (Six hours \times 0.25) \times \$400 = \$600.

³ Six hours \times 0.25 = 1.5 hours.

⁴ (Six hours \times 0.75) \times \$400 = \$1,800.

⁵ One hour \times 0.25 = 0.25 hours.

⁶ (One hour \times 0.75) \times \$400 = \$300.

⁷ One hour \times 0.25 = 0.25 hours.

⁸ (One hour \times 0.75) \times \$400 = \$300.

⁹ One hour \times 0.25 = 0.25 hours.

¹⁰ (One hour \times 0.75) \times \$400 = \$300.

¹¹ One hour \times 0.25 = 0.25 hours.

¹² (One hour \times 0.75) \times \$400 = \$300.

¹³ One hour \times 0.25 = 0.25 hours.

¹⁴ (One hour \times 0.75) \times \$400 = \$300.

¹⁵ One hour \times 0.25 = 0.25 hours.

¹⁶ (One hour \times 0.75) \times \$400 = \$300.

¹⁷ One hour \times 0.75 = 0.75 hours.

¹⁸ (One hour \times 0.25) \times \$400 = \$100.

iv. Total Change in Burden Per Form as a Result of the Final Rules

Table 12 below shows the resulting estimated change in an affected

registrant's internal burden hours and costs for outside professionals per form as a result of the final rules.

TABLE 12—ESTIMATED TOTAL INCREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONAL AS A RESULT OF THE FINAL RULES

Form	Total number of affected forms	Burden hour change per form	Total change in internal burden hours	Outside professional costs change per form	Total change in outside professional cost
<i>Form 10-K</i>			2,700		\$360,000
Subsection a (Item 1402 of S-K)	450	1.5	675	\$200	\$90,000
Subsection b (Item 1403 of S-K)	0	0	0	\$0	0
Subsection c (Item 1404 of S-K)	450	2.25	1,012.5	\$300	\$135,000
Subsection d (Item 1405(c) of S-K)	0	0	0	\$0	0
Subsection e (Item 1406 of S-K)	450	2.25	1,012.5	\$300	\$135,000
Subsection f (Item VI of Guide 3)	450	(1.5)	(675)	(\$200)	(\$90,000)
Subsection g (Item 1402 of S-K)	450	(3)	(1,350)	(\$400)	(\$180,000)
Subsection h (Items 1405(a) and (b) of S-K)	450	4.5	2,025	\$600	270,000
<i>Form 20-F</i>			86.5		\$103,800
<i>Form 20-F (Annual Report)</i>		2	86	\$2,400	\$103,200
Subsection a (Item 1402 of S-K)	43	0.5	21.5	\$600	\$25,800
Subsection b (Item 1403 of S-K)	0	0	0	\$0	0
Subsection c (Item 1404 of S-K)	43	0.75	32.25	\$900	\$38,700
Subsection d (Item 1405(c) of S-K)	0	0	0	\$0	0
Subsection e (Item 1406 of S-K)	43	0.75	32.25	\$900	\$38,700
Subsection f (Item VI of Guide 3)	43	(0.5)	(21.5)	(\$600)	(\$25,800)
Subsection g (Item 1402 of S-K)	43	(1)	(43)	(\$1,200)	(\$51,600)
Subsection h (Items 1405(a) and (b) of S-K)	43	1.5	64.5	\$1,800	\$77,400
<i>Form 20-F (Registration Statement)</i>		0.5	0.5	\$600	\$600
Subsection a (Item 1402 of S-K)	1	0.25	0.25	\$300	\$300
Subsection b (Item 1403 of S-K)	0	0	0	\$0	\$0
Subsection c (Item 1404 of S-K)	1	0.25	0.25	\$300	\$300
Subsection d (Item 1405(c) of S-K)	0	0	0	\$0	\$0
Subsection e (Item 1406 of S-K)	1	0.25	0.25	\$300	\$300
Subsection f (Item VI of Guide 3)	1	(0.25)	(0.25)	(\$300)	(\$300)
Subsection g (Item 1402 of S-K)	1	(0.25)	(0.25)	(\$300)	(\$300)
Subsection h (Items 1405(a) and (b) of S-K)	1	0.25	0.25	\$300	\$300
<i>Form S-1</i>			7.5		\$9,000
Subsection a (Item 1402 of S-K)	15	0.25	3.75	\$300	\$4,500
Subsection b (Item 1403 of S-K)	0	0	0	0	0
Subsection c (Item 1404 of S-K)	15	0.25	3.75	\$300	\$4,500
Subsection d (Item 1405(c) of S-K)	0	0	0	0	0
Subsection e (Item 1406 of S-K)	15	0.25	3.75	\$300	\$4,500
Subsection f (Item VI of Guide 3)	15	(0.25)	(3.75)	(\$300)	(\$4,500)
Subsection g (Item 1402 of S-K)	15	(0.25)	(3.75)	(\$300)	(\$4,500)
Subsection h (Items 1405(a) and (b) of S-K)	15	0.25	3.75	\$300	\$4,500
<i>Form S-4</i>			43.5		\$52,200
Subsection a (Item 1402 of S-K)	87	0.25	21.75	\$300	\$26,100
Subsection b (Item 1403 of S-K)	0	0	0	0	0
Subsection c (Item 1404 of S-K)	87	0.25	21.75	\$300	\$26,100
Subsection d (Item 1405(c) of S-K)	0	0	0	0	0
Subsection e (Item 1406 of S-K)	87	0.25	21.75	\$300	\$26,100
Subsection f (Item VI of Guide 3)	87	(0.25)	(21.75)	(\$300)	(\$26,100)
Subsection g (Item 1402 of S-K)	87	(0.25)	(21.75)	(\$300)	(\$26,100)
Subsection h (Items 1405(a) and (b) of S-K)	87	0.25	21.75	\$300	\$26,100
<i>Form F-1</i>			0.5		\$600
Subsection a (Item 1402 of S-K)	1	0.25	0.25	\$300	\$300
Subsection b (Item 1403 of S-K)	0	0	0	0	\$0
Subsection c (Item 1404 of S-K)	1	0.25	0.25	\$300	\$300
Subsection d (Item 1405(c) of S-K)	0	0	0	0	\$0

TABLE 12—ESTIMATED TOTAL INCREASE IN INTERNAL BURDEN HOURS AND COSTS FOR OUTSIDE PROFESSIONAL AS A RESULT OF THE FINAL RULES—Continued

Form	Total number of affected forms	Burden hour change per form	Total change in internal burden hours	Outside professional costs change per form	Total change in outside professional cost
Subsection e (Item 1406 of S-K)	1	0.25	0.25	\$300	\$300
Subsection f (Item VI of Guide 3)	1	(0.25)	(0.25)	(\$300)	(\$300)
Subsection g (Item 1402 of S-K)	1	(0.25)	(0.25)	(\$300)	(\$300)
Subsection h (Items 1405(a) and (b) of S-K)	1	0.25	0.25	\$300	\$300
<i>Form F-4</i> .....	.....	.....	1.0	.....	\$1,200
Subsection a (Item 1402 of S-K)	2	0.25	0.5	\$300	\$600
Subsection b (Item 1403 of S-K)	0	0	0	0	\$0
Subsection c (Item 1404 of S-K)	2	0.25	0.5	\$300	\$600
Subsection d (Item 1405(c) of S-K)	0	0	0	0	\$0
Subsection e (Item 1406 of S-K)	2	0.25	0.5	\$300	\$600
Subsection f (Item VI of Guide 3)	2	(0.25)	(0.5)	(\$300)	(\$600)
Subsection g (Item 1402 of S-K)	2	(0.25)	(0.5)	(\$300)	(\$600)
Subsection h (Items 1405(a) and (b) of S-K)	2	0.25	0.5	\$300	\$600
<i>Form 10</i> .....	.....	.....	1.0	.....	\$1,200
Subsection a (Item 1402 of S-K)	2	0.25	0.5	\$300	\$600
Subsection b (Item 1403 of S-K)	0	0	0	0	\$0
Subsection c (Item 1404 of S-K)	2	0.25	0.5	\$300	\$600
Subsection d (Item 1405(c) of S-K)	0	0	0	0	\$0
Subsection e (Item 1406 of S-K)	2	0.25	0.5	\$300	\$600
Subsection f (Item VI of Guide 3)	2	(0.25)	(0.5)	(\$300)	(\$600)
Subsection g (Item 1402 of S-K)	2	(0.25)	(0.5)	(\$300)	(\$600)
Subsection h (Items 1405(a) and (b) of S-K)	2	0.25	0.5	\$300	\$600
<i>Form 1-A</i> .....	.....	.....	1.5	.....	\$1,200
Subsection a (Item 1402 of S-K)	1	0.75	0.75	\$600	\$600
Subsection b (Item 1403 of S-K)	0	0	0	\$0	\$0
Subsection c (Item 1404 of S-K)	1	0.75	0.75	\$600	\$600
Subsection d (Item 1405(c) of S-K)	0	0	0	\$0	\$0
Subsection e (Item 1406 of S-K)	1	0.75	0.75	\$600	\$600
Subsection f (Item VI of Guide 3)	1	(0.75)	(0.75)	(\$600)	(\$600)
Subsection g (Item 1402 of S-K)	1	(0.75)	(0.75)	(\$600)	(\$600)
Subsection h (Items 1405(a) and (b) of S-K)	1	0.75	0.75	\$600	\$600
<i>Total</i> .....	.....	.....	2,842	.....	\$529,200

v. Total Paperwork Burden Under the Final Rules costs for outside professional under the final rules.²⁴¹

Table 13 below shows the total estimated internal burden hours and

TABLE 13—TOTAL PAPERWORK BURDEN UNDER THE FINAL RULES

	Current annual responses	Current burden hours	Current cost burden	Change in internal registrant burden hours	Change in outside professional costs	Burden hours for affected responses	Costs for affected responses
	(A)	(B)	(C)	(D)	(E)	(F) [(B) + (D)]	(G) [(C) + (E)]
10-K	8,137	14,198,780	\$1,895,224,719	2,700	\$360,000	14,201,480	\$1,895,584,719
20-F	725	479,304	576,875,025	87	103,800	479,391	576,978,825
S-1	901	147,208	180,319,975	8	9,000	147,216	180,328,975
S-4	551	562,465	677,378,579	44	52,200	562,509	677,430,779
F-1	63	26,692	32,275,375	1	600	26,693	32,275,975
F-4	39	14,049	17,073,825	1	1,200	14,050	17,075,025
10	216	11,855	14,091,488	1	1,200	11,856	14,092,688
1-A	179	98,396	13,111,912	2	1,200	98,398	13,113,112

²⁴¹ Figures in the table have been rounded to the nearest whole number.

IX. Regulatory Flexibility Act Certification

The Commission certified, under section 605(b) of the Regulatory Flexibility Act (“RFA”), that, when adopted, the proposed amendments to the rules would not have a significant economic impact on a substantial number of small entities. This certification, including our basis for the certification, was set forth in Section IX of the Proposing Release. The Commission solicited comments regarding this certification and received no comments. We continue to believe this certification is appropriate. As noted in the Proposing Release, the Commission identified only one issuer that potentially would be subject to the proposed amendments and that may be considered a small entity. In addition, the proposed rules would have resulted in only modest effects on registrants’ compliance burdens, for example, by adding between six additional burden hours for annual reports and one additional burden hour for registration statements (initial or otherwise). We also do not believe the proposed rules would otherwise have a significant economic effect on any small entities.

We are adopting the final rules as proposed with one substantive change relating to the proposed new credit ratio disclosure requirements. We do not believe that this change, which as discussed above will further limit the registrant’s compliance burdens, alters the basis upon which the certification in the Proposing Release was made. Accordingly, we certify that the final rules will not have a significant economic impact on a substantial number of small entities.

X. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 3(b), 7, 10, 19(a), and 28 of the Securities Act and Sections 3(b), 12, 13, 15(d), 23(a), and 36(a) of the Exchange Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

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

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

- 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012), unless otherwise noted.

- 2. Revise § 210.9-01 to read as follows:

§ 210.9-01 Application of §§ 210.9-01 to 210.9-07

The consolidated financial statements filed for bank holding companies, savings and loan holding companies, and the financial statements of banks and savings and loan associations, must apply the guidance in this article in filings with the Commission.

- 3. Amend § 210.9-03 by:
- a. Removing and reserving paragraphs 7(a) through (c); and
- b. revising paragraph 7(e)(2).

The revisions to read as follows:

§ 210.9-03 Balance sheets.

* * * * *

7. * * *

(e) * * *

(2) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to (e)(1)(i) above relates to loans that are disclosed as past due, nonaccrual or troubled debt restructurings in the consolidated financial statements, so state and disclose the aggregate amounts of such loans along with such other information necessary to an understanding of the effects of the transactions on the financial statements.

* * * * *

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

- 3. 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, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78 mm, 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).

- 4. Amend § 229.404 by revising Instruction 4.c under “Instructions to Item 404(a)” to read as follows:

§ 229.404 (Item 404) Transactions with Related Persons, Promoters and Certain Control Persons

* * * * *

Instructions to Item 404(a)

* * * * *

4. * * *

c. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T (12 CFR part 220) and the loans are not disclosed as past due, nonaccrual or troubled debt restructurings in the consolidated financial statements, disclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:

- i. Were made in the ordinary course of business;
- ii. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and
- iii. Did not involve more than the normal risk of collectibility or present other unfavorable features.

* * * * *

§ 229.801 [Amended]

- 5. Amend § 229.801 by removing and reserving paragraph (c).

§ 229.802 [Amended]

- 6. Amend § 229.802 by removing and reserving paragraph (c).
- 7. Add subpart 229.1400, consisting of §§ 229.1400 through 229.406, to read as follows:

Subpart 229.1400—Disclosure by Bank and Savings and Loan Registrants

Sec.

- 229.1401 (Item 1401) General instructions.
 229.1402 (Item 1402) Distribution of assets, liabilities and stockholders' equity; interest rates and interest differential.
 229.1403 (Item 1403) Investments in debt securities.
 229.1404 (Item 1404) Loan portfolio.
 229.1405 (Item 1405) Allowance for Credit Losses.
 229.1406 (Item 1406) Deposits.

§ 229.1401 (Item 1401) General instructions.

(a) A bank, bank holding company, savings and loan association, or savings and loan holding company ("bank and savings and loan registrants") must provide the disclosure required by this subpart.

(b) When the term "reported period" is used in this subpart, it refers to each of the periods described below:

(1) Each annual period required by 17 CFR part 210 ("Regulation S-X") or 17 CFR 239.90 ("Form 1-A"); and—

(2) Any additional interim period subsequent to the most recent fiscal year end if a material change in the information or the trend evidenced thereby has occurred.

(c) In this subpart, registrants are required to use daily averages unless otherwise indicated. Registrants may use weekly or month-end averages where the collection of data on a daily average basis would involve unwarranted or undue burden or expense; provided that such averages are representative of the registrant's operations. Registrants must disclose the basis used for presenting averages.

(d) In various provisions throughout this subpart, registrants are required to disclose information relating to certain foreign financial activities. For purposes of this subpart, a registrant only is required to present this information if the registrant meets the threshold to make separate disclosures concerning its foreign activities in its consolidated financial statements pursuant to the test set forth in § 210.9-05 of Regulation S-X.

§ 229.1402 (Item 1402) Distribution of assets, liabilities and stockholders' equity; interest rates and interest differential.

(a) For each reported period, present average balance sheets containing the information specified below. The format of the average balance sheets may be condensed from consolidated financial statements, provided that the condensed average balance sheets indicate the significant categories of assets and liabilities, including all major categories of interest-earning assets and interest-bearing liabilities. Major categories of interest-earning assets must include, if material, loans, taxable investment

securities, non-taxable investment securities, interest bearing deposits in other banks, federal funds sold, securities purchased with agreements to resell, and other short-term investments. Major categories of interest-bearing liabilities must include, if material, savings deposits, other time deposits, federal funds purchased, securities sold under agreements to repurchase, commercial paper, other short-term debt, and long-term debt.

(b) For each reported period, present an analysis of net interest earnings as follows:

(1) For each major category of interest-earning asset and each major category of interest-bearing liability, the average amount outstanding during the period and the interest earned or paid on such amount.

(2) The average yield for each major category of interest-earning asset.

(3) The average rate paid for each major category of interest-bearing liability.

(4) The average yield on all interest-earning assets and the average rate paid on all interest-bearing liabilities.

(5) The net yield on interest-earning assets (net interest earnings divided by total interest-earning assets, with net interest earnings equaling the difference between total interest earned and total interest paid).

(6) The registrant may, at its option, present its analysis in connection with the average balance sheet required by paragraph (a) of this section.

(c) For the interest rates and interest differential analysis,

(1) Present for each comparative reporting period

(i) The dollar amount of change in interest income, and

(ii) The dollar amount of change in interest expense.

(2) For each major category of interest-earning asset and interest-bearing liability, segregate the changes presented pursuant to paragraph (c)(1) of this section into amounts attributable to:

(i) Changes in volume (change in volume times old rate),

(ii) Changes in rates (change in rate times old volume), and

(iii) Changes in rates and volume (change in rate times change in volume).

(3) The rates and volume variances presented pursuant to paragraph (c)(2) must be allocated on a consistent basis between rates and volume variances, and the basis of allocation disclosed in a note to the table.

Instructions to Item 1402:

1. If material, disclose how non-accruing loans have been treated for purposes of the analyses required by paragraph (b).

2. In the calculation of the changes in the interest income and interest expense required by paragraph (c), exclude any out-of-period items and adjustments and disclose the types and amounts of items excluded in a note to the table.

3. If material loan fees are included in the interest income computation, disclose the amount of such fees.

4. If tax-exempt income is calculated on a tax equivalent basis, describe the extent of recognition of exemption from Federal, state, and local taxation and the combined marginal or incremental rate used in a brief note to the table.

5. If disclosure regarding foreign activities is required pursuant to Item 1401(d) of this subpart, the information required by paragraphs (a), (b) and (c) of this section must be further segregated between domestic and foreign activities for each significant category of assets and liabilities disclosed pursuant to paragraph (a). In addition, for each reported period, present separately, on the basis of averages, the percentage of total assets and total liabilities attributable to foreign activities.

§ 229.1403 (Item 1403) Investments in debt securities.

(a) As of the end of the latest reported period, state the weighted average yield of each category of debt securities not carried at fair value through earnings for which disclosure is required in the financial statements and is due:

- (1) In one year or less,
- (2) After one year through five years,
- (3) After five years through ten years, and
- (4) After ten years.

(b) Disclose how the weighted average yield has been calculated. Additionally, state whether yields on tax-exempt obligations have been computed on a tax-equivalent basis (see Instruction 4 to Item 1402 of this subpart). Discuss any major changes in the tax-exempt portfolio.

§ 229.1404 (Item 1404) Loan portfolio.

(a) As of the end of the latest reported period, present separately the amount of loans in each category for which disclosure is required in the financial statements that are due:

- (1) In one year or less,
- (2) After one year through five years,
- (3) After five years through 15 years, and
- (4) After 15 years.

(b) For each loan category for which disclosure is provided in response to paragraph (a), present separately the total amount of loans in such loan category that are due after one year that

(1) Have predetermined interest rates and

(2) Have floating or adjustable interest rates.

Instructions to Item 1404:

1. Report scheduled repayments in the maturity category in which the payment is due.

2. Report demand loans, loans having no stated schedule of repayments and no stated maturity, and overdrafts as due in one year or less.

3. Determinations of maturities shall be based upon contractual terms. However, to the extent that non-contractual rollovers or extensions are included for purposes of measuring the allowance for credit losses under U.S.

GAAP or IFRS, include such non-contractual rollovers or extensions for purposes of the maturities classification and briefly discuss this methodology.

§ 229.1405 (Item 1405) Allowance for Credit Losses.

(a) For each reported period, disclose the following credit ratios, along with each component of the ratio's calculation:

(1) Allowance for credit losses to total loans outstanding at each period end.

(2) Nonaccrual loans to total loans outstanding at each period end.

(3) Allowance for credit losses to nonaccrual loans at each period end.

(4) Net charge-offs during the period to average loans outstanding during the period. Provide this ratio for each loan category for which disclosure is required in the financial statements.

(b) Provide a discussion of the factors that drove material changes in the ratios in (a) above, or the related components, during the periods presented.

(c) At the end of each reported period, provide a breakdown of the allowance for credit losses by each loan category for which disclosure is required by U.S. GAAP in the following format:

ALLOCATION OF THE ALLOWANCE FOR CREDIT LOSSES

Balance at End of Period Applicable to:	Reported period	
	Amount	Percent of loans in each category to total loans
Each loan category required by U.S. GAAP	\$X	X%
		100%

Instructions to Item 1405:

1. A foreign private issuer that prepares its financial statements in accordance with IFRS as issued by the IASB does not need to provide disclosure responsive to Items 1405(a)(2), (a)(3) and Item 1405(c).

2. Net charge-offs must be based on current period net charge-offs for each loan category.

§ 229.1406 (Item 1406) Deposits.

(a) For each reported period, present separately the average amount of and the average rate paid on each of the following deposit categories that are in excess of 10 percent of average total deposits:

(1) Noninterest bearing demand deposits.

(2) Interest-bearing demand deposits.

(3) Savings deposits.

(4) Time deposits.

(5) Other.

(b) If the registrant believes other categories more appropriately describe the nature of the deposits, those categories may be used.

(c) If material, separately present domestic deposits and foreign deposits for all amounts reported under (a) above. Foreign deposits as used here means deposits from depositors who are not in the registrant's country of domicile.

(d) If material, the registrant must disclose separately the aggregate amount of deposits by foreign depositors in domestic offices. Registrants are not

required to identify the nationality of the depositors.

(e) As of the end of each reported period, present separately the amount of uninsured deposits. For registrants that are U.S. federally insured depository institutions, uninsured deposits are the portion of deposit accounts in U.S. offices that exceed the Federal Deposit Insurance Corporation insurance limit or similar state deposit insurance regime, and amounts in any other uninsured investment or deposit accounts that are classified as deposits and not subject to any federal or state deposit insurance regime. Foreign banking or savings and loan registrants must disclose the definition of uninsured deposits appropriate for their country of domicile. All registrants should consider the methodologies and assumptions used for regulatory reporting of uninsured deposits, to the extent applicable, for disclosure of uninsured deposits. To the extent it is not reasonably practicable to provide a precise measure of uninsured deposits at the reported period, the registrant must disclose that the amounts are based on estimated amounts of uninsured deposits as of the reported period. Such estimates must be based on the same methodologies and assumptions used for the applicable bank or savings and loan registrant's regulatory reporting requirements.

(f) As of the end of the latest reported period, state the amount outstanding of:

(1) The portion of U.S. time deposits, by account, that are in excess of the Federal Deposit Insurance Corporation insurance limit or similar state deposit insurance regime; and

(2) Time deposits that are otherwise uninsured (including for example, U.S. time deposits in uninsured accounts, non-U.S. time deposits in uninsured accounts, or non-U.S. time deposits in excess of any country-specific insurance fund limit), by time remaining until maturity of:

(i) 3 months or less;

(ii) Over 3 through 6 months;

(iii) Over 6 through 12 months; and

(iv) Over 12 months.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 9. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b) Public Law 111–203, 124 Stat. 1904; Sec. 102(a)(3), Public Law 112–106, 126 Stat. 309 (2012); Sec. 107, Public Law 112–106, 126 Stat. 313 (2012), and Sec. 72001, Public Law 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

■ 10. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Adding Instruction 4 to Item 4; and

■ b. revising Instruction 2 to Item 7.B.

The addition and revisions to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
WASHINGTON, DC 20549

FORM 20-F

* * * * *

PART I

* * * * *

Instructions to Item 4: * * *

4. If you are bank, bank holding company, savings and loan association or savings and loan holding company, provide the information specified in

Subpart 1400 of Regulation S-K (§ 229.1400 *et seq.* of this chapter).

* * * * *

Instructions to Item 7.B: * * *

2. In response to Item 7.B.2, if the lender is a bank, savings and loan association, or broker dealer extending credit under Federal Reserve Regulation T, and the loans are not disclosed as past due, nonaccrual or troubled debt restructurings in the consolidated financial statements, your response may consist of a statement, if true, that the loans in question (A) were made in the ordinary course of business, (B) were

made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (C) did not involve more than the normal risk of collectability or present other unfavorable features.

* * * * *

By the Commission.

Dated: September 11, 2020.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2020-20655 Filed 10-15-20; 8:45 am]

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Part VI

Small Business Administration

13 CFR Parts 121, 124, 125, et al.

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments; Final Rule

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 124, 125, 126, 127, and 134**

RIN 3245-AG94

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to President Trump's government-wide regulatory reform initiative, the U.S. Small Business Administration (SBA) initiated a review of its regulations to determine which might be revised or eliminated. As a result, this rule merges the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award, revises several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarifies other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, in response to public comment, the rule requires a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required.

DATES: This rule is effective on November 16, 2020, except for § 127.504 which is effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205-7625; mark.hagedorn@sba.gov.

SUPPLEMENTARY INFORMATION:**I. Background Information**

On January 30, 2017, President Trump issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs", which is designed to reduce unnecessary and burdensome regulations and to control costs associated with regulations. In response to the President's directive to simplify regulations, SBA initiated a review of its regulations to determine which might be

revised or eliminated. Based on this analysis, SBA identified provisions in many areas of its regulations that can be simplified or eliminated.

On November 8, 2019, SBA published in the **Federal Register** a comprehensive proposal to merge the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA; eliminate the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture to SBA for review and approval prior to contract award; revise several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants; and clarify other related regulatory provisions to eliminate confusion among small businesses and procuring activities. 84 FR 60846. Some of the proposed changes involved technical issues. Others were more substantive and resulted from SBA's experience in implementing the current regulations. The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289.

As part of the rulemaking process, SBA also held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. See 84 FR 66647. These consultations were in addition to those held by SBA before issuing the proposed rule in Anchorage, AK (see 83 FR 17626), Albuquerque, NM (see 83 FR 24684), and Oklahoma City, OK (see 83 FR 24684). SBA considers tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allowed for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of

tribally-owned and Alaska Native Corporation (ANC) owned firms participating in the 8(a) BD Program. Additionally, SBA held a Listening Session in Honolulu, HI to obtain comments and input from key 8(a) BD program stakeholders in the Hawaiian small business community, including 8(a) applicants and Participants owned by Native Hawaiian Organizations (NHOs).

During the proposed rule's 91-day comment period, SBA received 189 timely comments, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address misinterpretations of the rules. For the most part, the comments supported the substantive changes proposed by SBA.

This rule merges the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program. The rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award in every instance. Additionally, the rule makes several other changes to the 8(a) BD Program to eliminate or reduce unnecessary or excessive burdens on 8(a) Participants.

The rule combines the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program in order to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. SBA originally established a mentor-protégé program for 8(a) Participants a little more than 20 years ago. 63 FR 35726, 35764 (June 30, 1998). The purpose of that program was to encourage approved mentors to provide various forms of business assistance to eligible 8(a) Participants to aid in their development. On September 27, 2010, the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240 was enacted. The Jobs Act was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. The Jobs Act was drafted by Congress in recognition of the fact that mentor-protégé programs serve an important business development function for small businesses and therefore included language authorizing SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB)

Program, each of which was modeled on SBA's existing mentor-protégé program available to 8(a) Participants. *See* section 1347(b)(3) of the Jobs Act. Thereafter, on January 2, 2013, the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112–239 was enacted. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provided that a small business mentor-protégé program must be identical to the 8(a) BD Mentor-Protégé Program, except that SBA could modify each program to the extent necessary, given the types of small business concerns to be included as protégés.

Subsequently, SBA published a Final Rule in the **Federal Register** combining the authorities contained in the Jobs Act and the NDAA 2013 to create a mentor-protégé program for all small businesses. 81 FR 48558 (July 25, 2016).

The mentor-protégé program available to firms participating in the 8(a) BD Program has been used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD Mentor-Protégé relationship has been to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the All Small Mentor-Protégé Program is designed to require approved mentors to aid protégé firms so that they may enhance their capabilities, meet their business goals, and improve their ability to compete for contracts. The purposes of the two programs are identical. In addition, the benefits available under both programs are identical. Small businesses and 8(a) Program Participants receive valuable business development assistance and any joint venture formed between a protégé firm and its SBA-approved mentor receives an exclusion from affiliation, such that the joint venture will qualify as a small business provided the protégé individually qualifies as small under the size standard corresponding to the NAICS code assigned to the procurement. A protégé firm may enter a joint venture with its SBA-approved mentor and be eligible for any contract opportunity for which the protégé qualifies. If a protégé

firm is an 8(a) Program Participant, a joint venture between the protégé and its mentor could seek any 8(a) contract, regardless of whether the mentor-protégé agreement was approved through the 8(a) BD Mentor-Protégé Program or the All Small Mentor-Protégé Program. Moreover, a firm could be certified as an 8(a) Participant after its mentor-protégé relationship has been approved by SBA through the All Small Mentor-Protégé Program and be eligible for 8(a) contracts as a joint venture with its mentor once certified.

Because the benefits and purposes of the two programs are identical, SBA believes that having two separate mentor-protégé programs is unnecessary and causes needless confusion in the small business community. As such, this rule eliminates a separate 8(a) BD Mentor-Protégé Program and continues to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program. Specifically, the rule revises § 124.520 to merely recognize that an 8(a) Participant, as any other small business, may participate in SBA's Small Business Mentor-Protégé Program. In merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program, the rule also makes conforming amendments to SBA's size regulations (13 CFR part 121), the joint venture provisions (13 CFR 125.8), and the All Small Mentor-Protégé Program regulations (13 CFR 125.9).

A mentor-protégé relationship approved by SBA through the 8(a) BD Mentor-Protégé Program will continue to operate as an SBA-approved mentor-protégé relationship under the All Small Mentor-Protégé Program. It will continue to have the same remaining time in the All Small Mentor-Protégé Program as it would have had under the 8(a) BD Mentor-Protégé Program if that Program continued. Any mentor-protégé relationship approved under the 8(a) BD Mentor-Protégé Program will count as one of the two lifetime mentor-protégé relationships that a small business may have under the All Small Mentor-Protégé Program.

As stated previously, SBA has also taken this action partly in response to the President's directive that each agency review its regulations. Therefore, this rule also revises regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA's intent in certain regulations. Specifically, this rule makes additional changes to the size and socioeconomic status recertification requirements for

orders issued against multiple award contracts (MACs). A detailed discussion of these changes is contained below in the Section-by-Section Analysis.

II. Section-by-Section Analysis

Section 121.103(b)(6)

The rule amends the references to SBA's mentor-protégé programs in this provision, specifying that a protégé firm cannot be considered affiliated with its mentor based solely on assistance received by the protégé under the mentor-protégé agreement. The rule eliminates the cross-reference to the regulation regarding the 8(a) BD Mentor-Protégé Program (13 CFR 124.520), leaving only the reference to the regulation regarding the All Small Business Mentor-Protégé Program.

Section 121.103(f)(2)(i)

Under § 121.103(f)(2), SBA may presume an identity of interest (and thus affiliate one concern with another) based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. The proposed rule provided that this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser. Commenters supported this change, appreciating that SBA seemed to be making economic dependence more about the issue of control, where they thought it should be. SBA adopts this language as final.

Section 121.103(g)

The rule amends the newly organized concern rule contained in § 121.103(g) by clarifying that affiliation may be found where both former and “current” officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees. The rule merely adds the word “current” to the regulatory text to ensure that affiliation may arise where the key individuals are still associated with the first company. SBA believes that such a finding of affiliation has always been authorized,

but merely seeks to clarify its intent to make sure there is no confusion. Several commenters were concerned that the rule was not clear with respect to entity-owned firms, specifically that the newly organized concern rule should not apply to tribes, ANCs and NHOs. SBA believes that entities and entity-owned firms are already excepted from affiliation under the newly organized concern rule by § 121.103(b)(2). A few commenters recommended that SBA put in clarifying language to ensure that the rule cannot be read to contradict § 124.109(c)(4)(iii), which permits a manager of a tribally-owned concern to manage no more than two Program Participants at the same time. The final rule adds such clarifying language.

Section 121.103(h)

The proposed rule sought to amend the introductory text to § 121.103(h) to revise the requirements for joint ventures. SBA believes that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. To capture SBA's intent on limited scope and duration, SBA's current regulations provide that a joint venture is something that can be formed for no more than three contracts over a two-year period. The proposed rule sought to eliminate the three-contract limit for a joint venture, but continue to prescribe that a joint venture cannot exceed two years from the date of its first award. In addition, the proposed rule clarified SBA's current intent that a novation to the joint venture would start the two-year period if that were the first award received by the joint venture.

Commenters generally supported the proposal to eliminate the three-contract limit, saying that the change will eliminate significant and unnecessary confusion. Commenters also believed that requiring partners to form a second or third joint venture after they received three contract awards created an undue administrative burden on joint ventures, and they viewed this change as an elimination of an unnecessary burden. Several commenters recommended further amending the rule to extend the amount of time that a joint venture could seek contracts to some point greater than two years. These commenters recommended two approaches, either allowing all joint ventures to seek contracts for a period greater than two years or allowing only

joint ventures between a protégé and its mentor to seek contracts beyond two years. In the mentor-protégé context, commenters reasoned that a joint venture between a protégé and its mentor should be either three years (the length of the initial mentor-protégé agreement) or six years (the total allowable length of time for a mentor-protégé relationship to exist). It is SBA's view that the requirements for all joint ventures should be consistent, and that they should not be different with respect to joint ventures between protégé firms and their mentors. One of the purposes of this final rule is to remove inconsistencies and confusion in the regulations. SBA believes that having differing requirements for different types of joint ventures would add to, not reduce, the complexity and confusion in the regulations. Regarding extending the amount of time a joint venture could operate and seek additional contracts generally, SBA opposes such an extension. As SBA noted in the supplementary information to the proposed rule, SBA believes that a joint venture should not be an on-going entity, but, rather, something formed for a limited purpose with a limited duration. SBA believes that allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture. If the parties intend to jointly seek work beyond two years from the date of the first award, the regulations allow them to form a new joint venture. That new entity would then be able to seek additional contracts over two years from the date of its first award. Although requiring the formation of several joint venture entities, SBA believes that is the correct approach. To do otherwise would be to ignore what a joint venture is intended to do.

In addition, one commenter sought further clarification regarding novations. The rule makes clear that where a joint venture submits an offer prior to the two-year period from the date of its first award, the joint venture can be awarded a contract emanating from that offer where award occurs after the two-year period expires. The commenter recommended that SBA add clarifying language that would similarly allow a novation to occur after the two-year period if the joint venture submits a novation package for contracting officer approval within the two-year period. SBA agrees, and has added clarifying language to one of the examples accompanying the regulatory text.

In the proposed rule, SBA also asked for comments regarding the exception to

affiliation for joint ventures composed of multiple small businesses in which firms enter and leave the joint venture based on their size status. In this scenario, in an effort to retain small business status, joint venture partners expel firms that have exceeded the size standard and then possibly add firms that qualify under the size standard. This may be problematic where the joint venture is awarded a Federal Supply Schedule (FSS) contract or any other MAC vehicle. A joint venture that is awarded a MAC could receive many orders beyond the two-year limitation for joint venture awards (since the contract was awarded within that two-year period), and could remain small for any order requiring recertification simply by exchanging one joint venture partner for another (*i.e.*, a new small business for one that has grown to be other than small). SBA never intended for the composition of joint ventures to be fluid. The joint venture generally should have the same partners throughout its lifetime, unless one of the partners is acquired. SBA considers a joint venture composed of different partners to be a different joint venture than the original one. To reflect this understanding, the proposed rule asked for comments as to whether SBA should specify that the size of a joint venture outside of the mentor-protégé program will be determined based on the current size status and affiliations of all past and present joint venture partners, even if a partner has left the joint venture. SBA received several comments responding to this provision on both sides of the issue. Several commenters believed that SBA should not consider the individual size of partners who have left the joint venture in determining whether the joint venture itself continues to qualify as small. These commenters thought that permitting substitution of joint venture partners allows small businesses to remain competitive for orders under large, complex MACs. Other commenters acknowledged that SBA has accurately recognized a problem that gives a competitive advantage to joint ventures over individual small businesses. They agreed that SBA likely did not contemplate a continuous turnover of joint venture partners when it changed its affiliation rules to allow a joint venture to qualify as small provided that each of its partners individually qualified as small (instead of aggregating the receipts or employees of all joint venture partners as was previously the case). SBA notes that this really is an issue only with respect to MACs. For a single award contract, size is

determined at one point in time—the date on which an offeror submits its initial offer including price. Where an offeror is a joint venture, it qualifies as small provided each of the partners to the joint venture individually qualifies as small on the date of the offer. The size of the joint venture awardee does not change if an individual member of the joint venture grows to be other than small during the performance of the contract. As detailed elsewhere in this rule, for a MAC that is not set-aside for small business, however, size may be determined as of the date a MAC holder submits its offer for a specific order that is set-aside for small business. In such a case, if a partner to the joint venture has grown to be other than small, the joint venture would not be eligible as a small business for the order. One commenter recommended that once a multi-small business joint venture wins its first MAC, its size going forward (for future contracts or any recertification required under the awarded MAC) should be determined based on the size of the joint venture's present members and any former members that were members as of the date the joint venture received its first MAC. This would allow a joint venture to remove members for legitimate reasons before the first award of the first MAC, but not allow the joint venture to change members after such an award just to be able to recertify as small for an order under the MAC. SBA thoroughly considered all the comments in response to this issue. After further considering the issue, SBA does not believe that reaching back to consider the size of previous partners (who are no longer connected to the joint venture) would be workable. A concern that is no longer connected to the joint venture has no incentive to cooperate and provide information relating to its size, even if it still qualified individually as small. Thus, SBA is not making any changes to the regulatory text to address this issue in this final rule.

The rule also proposed to add clarifying language to the introductory text of § 121.103(h) to recognize that, although a joint venture cannot be populated with individuals intended to perform contracts awarded to the joint venture, the joint venture can directly employ administrative personnel and such personnel may specifically include Facility Security Officers. SBA received overwhelming support of this change and adopts it as final in this rule.

The proposed rule also sought comments on the broader issue of facility clearances with respect to joint ventures. SBA understands that some

procuring agencies will not award a contract requiring a facility security clearance to a joint venture if the joint venture itself does not have such clearance, even if both partners to the joint venture individually have such clearance. SBA does not believe that such a restriction is appropriate. Under SBA's regulations, a joint venture *cannot* hire individuals to perform on a contract awarded to the joint venture (the joint venture cannot be "populated"). Rather, work must be done individually by the partners to the joint venture so that SBA can track who does what and ensure that some benefit flows back to the small business lead partner to the joint venture. SBA proposed allowing a joint venture to be awarded a contract where either the joint venture itself or the lead small business partner to the joint venture has the required facility security clearance. In such a case, a joint venture lacking its own separate facility security clearance could still be awarded a contract requiring such a clearance provided the lead small business partner to the joint venture had the required facility security clearance and committed to keep at its cleared facility all records relating to the contract awarded to the joint venture. Additionally, if it is established that the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, then the non-lead partner to the joint venture (which may include a large business mentor) could possess such clearance. The majority of commenters supported this proposal, agreeing that it does not make sense to require the joint venture to have the necessary facility security clearance where the joint venture entity itself is not performing the contract. These commenters believed that as long as the joint venture partner(s) performing the necessary security work had the required facility security clearance, the Government would be adequately protected.

This rule also removes current § 121.103(h)(3)(iii), which provides that a joint venture between a protégé firm and its mentor that was approved through the 8(a) BD Mentor-Protégé Program is considered small provided the protégé qualifies as individually small. Because this rule eliminates the 8(a) BD Mentor-Protégé Program as a separate program, this provision is no longer needed.

The proposed rule also clarified how to account for joint venture receipts and employees during the process of determining size for a joint venture partner. The joint venture partner must

include its percentage share of joint venture receipts and employees in its own receipts or employees. The proposed rule provided that the appropriate percentage share is the same percentage figure as the percentage figure corresponding to the joint venture partner's share of work performed by the joint venture. Commenters generally agreed with the proposed treatment of receipts. Several commenters sought further clarification regarding subcontractors, specifically asking how to treat revenues generated through subcontracts from the individual partners. One commenter recommended that the joint venture partner responsible for a specific subcontract should take on that revenue as its share of the contract's total revenues. As with all contracts, SBA does not exclude revenues generated by subcontractors from the revenues deemed to be received by the prime contractor. Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by other subcontractors. The joint venture must perform a certain percentage of the work between the partners to the joint venture (generally 50 percent, but 15 percent for general construction). SBA does not believe that it matters which partner to the joint venture the subcontract flows through. Of the 50 percent of the total contract that the joint venture partners must perform, SBA will look at how much is performed by each partner. That is the percentage of total revenues that will be attributed to each partner. This rule makes clear that revenues will be attributed to the joint venture in the same percentage as that of the work performed by each partner.

A few commenters thought that that same approach should not be applied to the apportionment of employees. They noted that some or all of the joint venture's employees may also be employed concurrently by a joint venture partner. Without taking that into account, the proposed methodology would effectively double count employees who were also employed by one of the joint venture partners. In response, SBA has amended this paragraph to provide that for employees, the appropriate way to apportion individuals employed by the joint venture is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

Section 121.402

The proposed rule amended how NAICS codes are applied to task orders to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed. Consistent with the final rule for FAR Case 2014–002, 85 FR 11746 (Feb. 27, 2020), a contracting officer must assign a single NAICS code for each order issued against a MAC, and that NAICS code must be a NAICS code that is included in the underlying MAC and represents the principal purpose of the order. SBA believes that the NAICS code assigned to a task order must reflect the principal purpose of that order. Currently, based on the business rules of the Federal Procurement Data System (FPDS) and the FAR, all contracts including MACs are restricted to only being assigned a single NAICS code, and if a MAC is assigned a service NAICS code, then that service NAICS code flows down to each individual order under that MAC. SBA does not believe it is appropriate for a task order that is nearly entirely for supplies to have a service NAICS code. In such a case, a firm being awarded such an order would not have to comply with the nonmanufacturer rule. In particular, set-aside orders should be assigned a manufacturing/supply NAICS code, so that the nonmanufacturer rule will apply to the order if it is awarded to a nonmanufacturer. Additionally, the current method for NAICS code assignment can also be problematic where a MAC is assigned a NAICS code for supplies but a particular order under that MAC is almost entirely for services. In such a case, firms that qualified as small for the larger employee-based size standard associated with a manufacturing/supply NAICS code may not qualify as small businesses under a smaller receipts-based services size standard. As such, because the order is assigned the manufacturing/supply NAICS code associated with the MAC, firms that should not qualify as small for a particular procurement that is predominantly for services may do so. SBA recognizes that § 121.402(c) already provides for a solution that will ensure that NAICS codes assigned to task and delivery orders accurately reflect the work being done under the orders. Specifically, the requirement for certain MACs to be assigned more than one NAICS code (e.g., service NAICS code and supply NAICS code) will allow for orders against those MACs to reflect both a NAICS code assigned to the MAC and also a NAICS code that accurately

reflects work under the order. The requirement to assign certain MACs more than one NAICS code has already been implemented in the FAR at 48 CFR 19.102(b)(2)(ii) but it will not go into effect until October 1, 2022. The future effective date is when FPDS is expected to implement the requirement and it allows all the Federal agencies to budget and plan for internal system updates across their multiple contracting systems to accommodate the requirement. Thus, this rule makes only minor revisions to the existing regulations to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed.

Commenters supported SBA's intent. They noted that allowing contracting officers to assign a NAICS code to an order that differs from the NAICS code(s) already contained in the MAC could unfairly disadvantage contractors who did not compete for the MAC because they did not know orders would be placed under NAICS codes not in the MAC's solicitation. A commenter noted, however, that the proposed rule added a new § 121.402(c)(2)(ii) when it appears that a revision to § 121.402(c)(2)(i) might be more appropriate. SBA agrees and has revised § 121.402(c)(2)(i) in this final rule to clarify that orders must reflect a NAICS code assigned to the underlying MAC.

In addition, the rule makes a minor change to § 121.402(e) by removing the passive voice in the regulatory text. The rule also clarifies that in connection with a size determination or size appeal, SBA may supply an appropriate NAICS code designation, and accompanying size standard, where the NAICS code identified in the solicitation is prohibited, such as for set-aside procurements where a retail or wholesale NAICS code is identified.

Sections 121.404(a)(1), 124.503(i), 125.18(d), and 127.504(c)

Size Status

SBA has been criticized for allowing agencies to receive credit towards their small business goals for awards made to firms that no longer qualify as small. SBA believes that much of this criticism is misplaced. Where a small business concern is awarded a small business set-aside contract with a duration of not more than five years and grows to be other than small during the performance of the contract, some have criticized the exercise of an option as an award to an other than small business. SBA

disagrees with such a characterization. Small business set-aside contracts are restricted only to firms that qualify as small as of the date of a firm's offer for the contract. A firm's status as a small business is relevant to its qualifying for the award of the contract. If a concern qualifies as small for a contract with a duration of not more than five years, it is considered a small business throughout the life of that contract. Even for MACs that are set-aside for small business, once a concern is awarded a contract as a small business it is eligible to receive orders under that contract and perform as a small business. In such a case, size was relevant to the initial award of the contract. Any competitor small business concern could protest the size status of an apparent successful offeror for a small business set-aside contract (whether single award or multiple award), and render a concern ineligible for award where SBA finds that the concern does not qualify as small under the size standard corresponding to the NAICS code assigned to the contract. Furthermore, firms awarded long-term small business set-aside contracts must recertify their size status at five years and every option thereafter. Firms are eligible to receive orders under that contract and perform as a small business so long as they continue to recertify as small at the required times (e.g., at five years and every option thereafter). Not allowing a concern that legitimately qualified at award and/or recertified later as small to receive orders and continue performance as a small business during the base and option periods, even if it has naturally grown to be other than small, would discourage firms from wanting to do business with the Government, would be disruptive to the procurement process, and would disincentivize contracting officers from using small business set-asides.

SBA believes, however, that there is a legitimate concern where a concern self-certifies as small for an unrestricted MAC and at some point later in time when the concern no longer qualifies as small the contracting officer seeks to award an order as a small business set-aside and the firm uses its self-certification as a small business for the underlying unrestricted MAC. A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted MAC contract. As such, competitors are very unlikely to protest the size of a concern that self-certifies as small for an unrestricted MAC. In SBA's view, where a contracting officer sets aside an order for small business under

an unrestricted MAC, the order is the first time size status is important. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. To allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.

In considering the issue, SBA looked at the data for orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018. In total, 8,666 orders were awarded as small business set-asides under unrestricted MACs in FY 2018. Of those set-aside orders, 10 percent are estimated to have been awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order award. Further, it is estimated that 7.0 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (510 out of 7,266 orders). That amounted to 12.6 percent of the dollars set-aside for small business under the FSS (\$129.6 million to firms that were no longer small in SAM out of a total of \$1.0723 billion in small business set-aside orders). Whereas, it is estimated that 49.4 percent of small business set-aside orders under government-wide acquisition contracts (GWACs) were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (261 out of 528 orders). That amounted to 67 percent of the dollars set-aside for small business under GWACs (\$119.6 million to firms that were no longer small in SAM out of a total of \$178.6 million in small business set-aside orders). SBA then considered the number and dollar value of new orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018 using the size standard "exceptions" that apply in some of SBA's size standards (e.g., the IT Value-Added Reseller exception to NAICS 541519). Taking into account all current size standards exceptions, which allow a firm to qualify under an alternative size standard for certain types of contracts, it is estimated that 6.4 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM at the time of the order (468 out of 7,266 orders). That amounted to 11.3 percent of the dollars set-aside for small business under the FSS (\$120.7 million

to firms that were no longer small in SAM out of a total of \$1.0723 billion in small business set-aside orders). Considering exceptions for set-aside orders under GWACs, it is estimated that 11.6 percent were awarded to firms that were no longer small in SAM at the time of the order (61 out of 528 orders). That amounted to 39.5 percent of the dollars set-aside for small business under GWACs (\$70.5 million to firms that were no longer small in SAM out of a total of \$178.6 million in small business set-aside orders). It is not possible to tell from FPDS whether the "exception" size standard applied to the contract or whether the agency applied the general size standard for the identified NAICS code. Thus, all that can be said with certainty is that for small business set-aside orders under the FSS, between 11.3 percent and 12.1 percent of the order dollars set-aside for small business were awarded to firms that were no longer small in SAM. This amounted to somewhere between \$120.7 million and \$129.6 that were awarded to firms that were no longer small in SAM. For GWACs, the percentage of orders and order dollars being awarded to firms that no longer qualify as small is significantly greater. Between 39.5 percent and 67.0 percent of the order dollars set-aside for small business under GWACs were awarded to firms that were no longer small in SAM. This amounted to somewhere between \$70.5 million and \$119.6 million that were awarded to firms that were no longer small in SAM.

Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, except for orders or Blanket Purchase Agreements issued under any FSS contract, if an order under an unrestricted MAC is set-aside exclusively for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order.

SBA received a significant number of comments on this issue. Many commenters supported the proposed language as a needed approach to ensure that firms that are not small do not receive orders set-aside for small businesses and procuring agencies do not inappropriately take credit for awards to small business when the

awardees are not in fact small. Many of these commenters believed that it was not fair to them as small businesses to have to compete for small business set-aside orders under unrestricted MACs with concerns that did not currently qualify as small and may not have done so for several years. Other commenters opposed the proposal for various reasons. Some believed that the regulations should be intended to foster and promote growth in small businesses and that the recertification requirement could stifle that growth. Others believed that the proposal undermines the general rule that a concern maintains its small business status for the life of a contract. SBA does not believe that a rule that requires a concern to actually be what it claims to be (i.e., a small business) in any way stifles growth. Of course, SBA supports the growth of small businesses generally. SBA encourages concerns to grow naturally and permits concerns that have been awarded small business set-aside contracts to continue to perform those contracts as small businesses throughout the life of those contracts (i.e., for the base and up to four additional option years). This rule merely responds to perceptions that SBA has permitted small business awards to concerns that do not qualify as small. As noted above, it is intended to apply only to unrestricted procurements where size and status were not relevant to the award of the underlying MAC. SBA also disagrees that this provision is inconsistent with the general rule that once a concern qualifies as small for a contract it can maintain its status as a small business throughout the life of that contract. SBA does not believe that a representation of size or status that does not affect the concern's eligibility to be awarded a contract should have the same significance as one that does.

Several commenters agreed with SBA's intent but believed that the rule needed to more accurately take into account today's complex acquisition environment. These commenters noted that many MACs now seek to make awards to certain types of business concerns (i.e., small, 8(a), HUBZone, WOSB, SDVO) in various reserves or "pools," and that concerns may be excluded from a particular pool if they do not qualify as eligible for the pool. These commenters recommended that a concern being awarded a MAC for a particular pool should be able to carry the size and/or status of that pool to each order made to the pool. SBA agrees. As noted above, SBA proposed recertification in connection with orders

set-aside for small business under an unrestricted MAC because that is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size and/or status. However, where a MAC solicitation seeks to make awards to reserves or pools of specific types of small business concerns, the concerns represent that they are small or qualify for the status designated by the pool and having that status or not determines whether the firm does or does not qualify for the award of a MAC contract for the pool. In such a case, SBA believes that size and status should flow from the underlying MAC to individual orders issued under that MAC, and the firm can continue to rely on its representations for the MAC itself unless a contracting officer requests recertification of size and/or status with respect to a specific order. SBA makes that revision in this final rule.

Many commenters also believed that there was no legitimate programmatic reason for excluding the FSS program from this recertification requirement. The commenters, however, miss that the FSS program operates under a separate statutory authority and that set-asides are discretionary, not mandatory under this authority. SBA and GSA worked closely together to stand up and create this discretionary authority and it has been very successful. This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111–240) and implemented in FAR 8.405–5 in November 2011. As a result, benefits to small businesses have been significant. The small business share of GSA Schedule sales rose from 30% in fiscal year 2010 (the last full fiscal year before the authority was implemented) to 39% in fiscal year 2019. That equates to an additional \$1 billion going to small businesses in fiscal year 2019. Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification requirement to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

For a MAC that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, SDVO small business, HUBZone small business, or WOSB), the rule generally sets size status as of the date of the offer for the

underlying MAC itself. A concern that is small at the time of its offer for the MAC will be considered small for each order issued against the contract, unless a contracting officer requests a size recertification in connection with a specific order. As is currently the case, a contracting officer has the discretion to request recertification of size status on MAC orders. If that occurs, size status would be determined at the time of the order. That would not be a change from the current regulations.

Socioeconomic Status

Where the required status for an order differs from that of the underlying contract (*e.g.*, the MAC is a small business set-aside award, and the procuring agency seeks to restrict competition on the order to only certified HUBZone small business concerns), SBA believes that a firm must qualify for the socioeconomic status of a set-aside order at the time it submits an offer for that order. Although size may flow down from the underlying contract, status in this case cannot. Similar to where a procuring agency seeks to compete an order on an unrestricted procurement as a small business set-aside and SBA would require offerors to qualify as small with respect to that order, (except for orders under FSS contracts), SBA believes that where the socioeconomic status is first required at the order level, an offeror seeking that order must qualify for the socioeconomic status of the set-aside order when it submits its offer for the order.

Under current policy and regulations, where a contracting officer seeks to restrict competition of an order under an unrestricted MAC to eligible 8(a) Participants only, the contracting officer must offer the order to SBA to be awarded through the 8(a) program, and SBA must accept the order for the 8(a) program. In determining whether a concern is eligible for such an 8(a) order, SBA would apply the provisions of the Small Business Act and its current regulations which require a firm to be an eligible Program Participant as of the date set forth in the solicitation for the initial receipt of offers for the order.

This final rule makes these changes in § 121.404(a)(1) for size, § 124.503(i) for 8(a) BD eligibility, § 125.18(d) for SDVO eligibility, and § 127.504(c) for WOSB eligibility.

Several commenters voiced concern with allowing the set-aside of orders to a smaller group of firms than all holders of a MAC. They noted that bid and proposal preparation costs can be significant and a concern that qualified

for the underlying MAC as a small business or some other specified type of small business could be harmed if every order was further restricted to a subset of small business. For example, where a MAC is set-aside for small business and every order issued under that MAC is set-aside for 8(a) small business concerns, SDVO small business concerns, HUBZone small business concerns and WOSBs, those firms that qualified only as small business concerns would be adversely affected. In effect, they would be excluded from competing for every order. SBA agrees that is a problem. That is not what SBA intended when it authorized orders issued under small business set-aside contracts to be further set-aside for a specific type of small business. SBA believes that an agency should not be able to set-aside all of the orders issued under a small business set-aside MAC for a further limited specific type of small business. As such, this final rule provides that where a MAC is set-aside for small business, the procuring agency can set-aside orders issued under the MAC to a more limited type of small business. Contracting officers are encouraged to review the award dollars under the MAC and to aim to make available for award at least 50 percent of the award dollars under the MAC to all contract holders of the underlying MAC.

In addition, a few commenters asked for further clarification as to whether orders issued under a MAC set-aside for 8(a) Participants, HUBZone small business concerns, SDVO small business concerns or WOSBs/EDWOSBs could be further set aside for a more limited type of small business. These commenters specifically did not believe that allowing the further set-aside of orders issued under a multiple award set-aside contract should be permitted in the 8(a) context. The commenters noted that the 8(a) program is a business development program of limited duration (*i.e.*, nine years), and felt that it would be detrimental to the business development of 8(a) Participants generally if an agency could issue an order set-aside exclusively for 8(a) HUBZone small business concerns, 8(a) SDVO small business concerns, or 8(a) WOSBs. The current regulatory text of § 125.2(e)(6)(i) provides that a “contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business,” for small and subcategories of small businesses. SBA intended to allow a contracting officer to issue orders for subcategories of small businesses only under small

business set-aside contracts. This rule clarifies that intent.

Section 121.404

In addition to the revision to § 121.404(a)(1) identified above, the rule makes several other changes or clarifications to § 121.404. In order to make this section easier to use and understand, the rule adds headings to each subsection, which identify the subject matter of the subsection.

The proposed rule amended § 121.404(b), which requires a firm applying to SBA's programs to qualify as a small business for its primary industry classification as of the date of its application. The proposed rule eliminated references to SBA's small disadvantaged business (SDB) program as obsolete, and added a reference to the WOSB program. SBA received no comments on these edits and adopts them as final in this rule.

The proposed rule also amended § 121.404(d) to clarify that size status for purposes of compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. Currently, only compliance with the nonmanufacturer rule is specifically addressed in this paragraph, but SBA's policy has been to apply the same rule to determine size with respect to the ostensible subcontractor rule and joint venture agreement requirements. This would not be a change in policy, but rather a clarification of existing policy. Several commenters misconstrued this to be a change in policy or believed that this would be a departure from the snapshot in time rule for determining size as of the date a concern submits its initial offer including price. As noted, SBA has intended this to be the current policy and is merely clarifying it in the regulatory text. In addition, SBA does not view this as a departure from the snapshot in time rule. The receipts/employees are determined at one specific point in time—the date on which a concern submits its initial offer including price. SBA believes that compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements can justifiably change during the negotiation process. If an offer changes during negotiations in a way that would make a large business mentor joint venture partner be in control of performance, for example, SBA does not believe that the joint venture should be able to point back to its initial offer in which the small

business protégé partner to the joint venture appeared to be in control.

The proposed rule also added a clarifying sentence to § 121.404(e) that would recognize that prime contractors may rely on the self-certifications of their subcontractors provided they do not have a reason to doubt any specific self-certification. SBA believes that this has always been the case, but has added this clarifying sentence, nevertheless, at the request of many prime contractors. SBA received positive comments on this change and adopts it as final in this rule.

The proposed rule made several revisions to the size recertification provisions in § 121.404(g). First, the recertification rule pertaining to a joint venture that had previously received a contract as a small business was not clear. If a partner to the joint venture has been acquired, is acquiring or has merged with another business entity, the joint venture must recertify its size status. In order to remain small, however, it was not clear whether only the partner which has been acquired, is acquiring or has merged with another business entity needed to recertify its size status or whether all partners to the joint venture had to do so. The proposed rule clarified that only the partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity must recertify its size status in order for the joint venture to recertify its size. Commenters generally supported this revision. One commenter believed that a joint venture should be required to recertify its size only where the managing venture, or the small business concern upon which the joint venture's eligibility for the contract was based, is acquired by, is acquiring, or has merged with another business entity. SBA disagrees. SBA seeks to make the size rules pertaining to joint ventures similar to those for individual small businesses. Where an individual small business awardee grows to be other than small, its performance on a small business contract continues to count as an award to small business. Similarly, where a joint venture partner grows to be other than small naturally, that should not affect the size of the joint venture. However, under SBA's size rules, in order for a joint venture to be eligible as small, each partner to the joint venture must individually qualify as small. Size is not determined solely by looking at the size of the managing venture. Just as an individual small business awardee must recertify its size if it is acquired by, is acquiring, or has merged with another business entity, so too should the partner to a joint venture that is acquired by, is acquiring, or has merged with another business entity. As

such, SBA adopts the proposed language as final in this rule.

Additionally, the proposed rule clarified that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under the proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award. SBA received comments on both sides of this issue. Some commenters supported the proposed provision as a way to ensure that procuring agencies do not make awards to firms who are other than small. They thought that such awards could be viewed as frustrating the purpose of small business set-asides. Other commenters opposed the proposed change. A few of these commenters believed that a firm should remain small if it was small at the time it submitted its proposal. SBA wants to make it clear that is the general rule. Size is generally determined only at the date of offer. If a concern grows to be other than small between the date of offer and the date of award (*e.g.*, another fiscal year ended and the revenues for that just completed fiscal year render the concern other than small), it remains small for the award and performance of that contract. The proposed rule dealt only with the situation where a concern merged with or was acquired by another concern after offer but before award. As stated in the supplementary information to the proposed rule, SBA believes that situation is different than natural growth. Several other commenters opposing the proposed rule believed such a policy could adversely affect small businesses due to the often lengthy contract award process. Contract award can often occur 18 months or more after the closing date for the receipt of offers. A concern could submit an offer and have no plans to merge or sell its business at that time. If a lengthy amount of time passes, these commenters argued that the concern should not be put in the position of declining to make a legitimate business decision concerning the possible merger or sale of the concern simply because the concern is hopeful of receiving the award of a contract as a small business. Several commenters recommended an intermediate position where recertification must occur if the merger or acquisition occurs within a certain amount of time from either the concern's offer or the date for the receipt

of offers set forth in the solicitation. This would allow SBA to prohibit awards to concerns that may appear to have simply delayed an action that was contemplated prior to submitting their offers, but at the same time not prohibit legitimate business decisions that could materialize months after submitting an offer. Commenters recommended requiring recertification when merger or acquisition occurs within 30 days, 90 days and 6 months of the date of an offer. SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer, but agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted. In response, the final rule continues to provide that if a merger, sale or acquisition occurs after offer but prior to award the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer, the concern will be ineligible for the award of the contract. If it occurs after 180 days, award can be made, but it will not count as an award to small business.

The proposed rule also clarified that recertification is not required when the ownership of a concern that is at least 51 percent owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. When the small business continues to be owned to the same extent by the tribe, ANC or CDC, SBA does not believe that the real ownership of the concern has changed, and, therefore, that recertification is not needed. Commenters overwhelmingly supported this change, and SBA adopts it as final in this rule. The rule makes this same change to § 121.603 for 8(a) contracts as well.

Finally, the proposed rule sought to amend § 121.404(g)(3) to specifically permit a contracting officer to request size recertification as he or she deems appropriate at any point in a long-term contract. SBA believes that this authority exists within the current regulatory language but is merely articulating it more clearly in this rule. Several commenters opposed this provision, believing that it would undermine the general rule that a concern's size status should be determined as of the date of its initial offer. They believe that establishing size at one point in time provides predictability and consistency to the procurement process. SBA agrees that size for a single award contract that does

not exceed five years should not be reexamined during the life of a contract. SBA believes, however, that the current regulations allow a contracting officer to seek recertifications with respect to MACs. Pursuant to § 121.404(g), "if a business concern is small at the time of offer for a Multiple Award Contract . . . , then it will be considered small for each order issued against the contract with the same NAICS code and size standard, *unless* a contracting officer requests a new size certification in connection with a specific order." (Emphasis added). The regulations at § 121.404(g)(3) also provide that for a MAC with a duration of more than five years, a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Under this provision, a business concern is not required to recertify its size status until prior to the end of the fifth year of that contract. However, SBA also interprets § 121.404(g)(3) as not prohibiting a contracting officer from requesting size recertification prior to the 120-day point in the fifth year of the long-term contract. As noted above, the general language of § 121.404(g) allows a contracting officer to request size recertification with respect to each order. SBA believes that the regulations permit a contracting officer the discretion to request size recertification at the contract level prior to the end of the fifth year if explicitly requested for the contract at issue and if requested of all contract holders. In this respect, the authority to request size recertification at the contract level prior to the fifth year is an extension of the authority to request recertification for subsequent orders. As such, this final rule clarifies that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point only for a long-term MAC.

Section 121.406

The rule merely corrects a typographical error by replacing the word "provided" with the word "provide."

Section 121.702

The proposed rule clarified the size requirements applicable to joint ventures in the Small Business Innovation Research (SBIR) program. Although the current regulation authorizes joint ventures in the SBIR program and recognizes the exclusion from affiliation afforded to joint ventures between a protégé firm and its

SBA-approved mentor, it does not specifically apply SBA's general size requirements for joint ventures to the SBIR program. The proposed rule merely sought to apply the general size rule for joint ventures to the SBIR program. In other words, a joint venture for an SBIR award would be considered a small business provided each partner to the joint venture, including its affiliates, meets the applicable size standard. In the case of the SBIR program, this means that each partner does not have more than 500 employees. Comments favored this proposal and SBA adopts it as final in this rule.

Section 121.1001

SBA proposed to amend § 121.1001 to provide authority to SBA's Associate General Counsel for Procurement Law to independently initiate or file a size protest, where appropriate. Commenters supported this provision, and SBA adopts it as final in this rule. In response to a comment, the final rule also revises § 121.1001(b) to reflect which entities can request a formal size determination. Specifically, a commenter pointed out that although § 121.1001(b) gave applicants for and participants in the HUBZone and 8(a) BD programs the right to request formal size determinations in connection with applications and continued eligibility for those programs, it did not provide that same authority to WOSBs/EDWOSBs and SDVO small business concerns in connection with the WOSB and SDVO programs. The final rule harmonizes the procedures for SBA's various programs as part of the Agency's ongoing effort to promote regulatory consistency.

Sections 121.1004, 125.28, 126.801, and 127.603

This rule adds clarifying language to § 121.1004, § 125.28, § 126.801, and § 127.603 regarding size and/or socioeconomic status protests in connection with orders issued against a MAC. Currently, the provisions authorize a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. This rule specifically authorizes a size protest relating to an order issued against a MAC where the order is set-aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract. The rule also specifically authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.

Section 121.1103

An explanation of the change is provided with the explanation for § 134.318.

Section 124.3

In response to concerns raised to SBA by several Program Participants, the proposed rule added a definition of what a follow-on requirement or contract is. Whether a procurement requirement may be considered a follow-on procurement is important in several contexts related to the 8(a) BD program. First, SBA's regulations provide that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. 13 CFR 124.504(d)(1). SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) BD program. However, an adverse impact analysis is not required for follow-on or renewal 8(a) acquisitions or for new requirements. 13 CFR 124.504(c). Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, NHO, or CDC. 13 CFR 124.109(c)(3)(ii), 124.110(e) and 124.111(d).

In order to properly assess what each of these regulations requires, the proposed rule defined the term "follow-on requirement or contract". The definition identified certain factors that must be considered in determining whether a particular procurement is a follow-on requirement or contract: (1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent; and (3) whether the end user of the requirement has changed. These considerations should be a guide, and not necessarily dispositive of whether a requirement qualifies as "new." Applying the 25 percent rule contained in this definition rigidly could permit procuring agencies and entity-owned firms to circumvent the intent of release, sister company restriction, and adverse impact rules.

For example, a procuring agency may argue that two procurement requirements that were previously awarded as individual 8(a) contracts can be removed from the 8(a) program

without requesting release from SBA because the value of the combined requirement would be at least 25 percent more than the value of either of the two previously awarded individual 8(a) contracts, and thus would be considered a new requirement. Such an application of the new requirement definition would permit an agency to remove two requirements from the 8(a) BD program without requesting and receiving SBA's permission for release from the program. We believe that would be inappropriate and that a procuring agency in this scenario must seek SBA's approval to release the two procurements previously awarded through the 8(a) BD program. Likewise, if an entity-owned 8(a) Participant previously performed two sole source 8(a) contracts and a procuring agency sought to offer a sole source requirement to the 8(a) BD program on behalf of another Participant owned by the same entity (tribe, ANC, NHO, or CDC) that, in effect, was a consolidation of the two previously awarded 8(a) procurements, we believe it would be inappropriate for SBA to accept the offer on behalf of the sister company. Similarly, if a small business concern previously performed two requirements outside the 8(a) program and a procuring agency wanted to combine those two requirements into a larger requirement to be offered to the 8(a) program, SBA should perform an adverse impact analysis with respect to that small business even though the combined requirement had a value that was greater than 25 percent of either of the previously awarded contracts.

SBA received a significant number of comments regarding what a follow-on requirement is and how SBA's rules regarding what a follow-on contract is should be applied to the three situations identified above. Many commenters believed that the proposed language was positive because it will help alleviate confusion in determining whether a requirement should be considered a follow-on or not. In terms of taking requirements or parts of requirements that were previously performed through the 8(a) program out of the program, commenters overwhelmingly supported SBA's involvement in the release process. Commenters were concerned that agencies have increased the value of procurement requirements marginally by 25 percent merely to call the procurements new and remove them from the 8(a) program without going through the release process. These commenters were particularly concerned where the primary and vital requirements of a procurement remained virtually identical and an

agency merely intended to add ancillary work in order to freely remove the procurement from the 8(a) BD program. A few commenters also recommended that SBA provide clear guidance when the contract term of the previously awarded 8(a) contract is different than that of a successor contracting action. Specifically, these commenters believed that an agency should not be able to compare a contract with an overall \$2.5 million value (consisting of a one year base period and four one-year options each with a \$500,000 value) with a successor contract with an overall value of \$1.5 million (consisting of a one year base period and two one-year options each with a \$500,000 value) and claim it to be new. In such a case, the yearly requirement is identical and commenters believed the requirement should not be removed without going through the release process. SBA agrees. The final rule clarifies that equivalent periods of performance relative to the incumbent or previously-competed 8(a) requirement should be compared.

Many commenters agreed that the 25 percent rule should not be applied rigidly, as that may open the door for the potential for (more) contracts to be taken out of the 8(a) BD program. Commenters also believed that SBA should be more involved in the process, noting that firms currently performing 8(a) contracts often do not discover a procuring agency's intent to reprocure that work outside the 8(a) BD program by combining it with other work and calling it a new requirement until very late in the procurement process. Once a solicitation is issued that combines work previously performed through an 8(a) contract with other work, it is difficult to reverse even where SBA believes that the release process should have been followed. Several commenters recommended adding language that would require a procuring agency to obtain SBA concurrence that a procurement containing work previously performed through an 8(a) contract does not represent a follow-on requirement before issuing a solicitation for the procurement. Although SBA does not believe that concurrence should be required, SBA does agree that a procuring activity should notify SBA if work previously performed through the 8(a) program will be performed through a different means. A contracting officer will make the determination as to whether a requirement is new, but SBA should be given the opportunity to look at the procuring activity's strategy and supply input where appropriate. SBA has added such language to § 124.504(d) in this final rule.

Several commenters supported the proposed definition of a follow-on procurement for release purposes where they agreed that a procuring agency should not be able to remove two requirements from the 8(a) program merely by combining them and calling the consolidated requirement new because it exceeds the 25 percent increase in magnitude. These commenters, however, recommended that the 25 percent change in magnitude be a “bright-line rule” with respect to whether a requirement should be considered a follow-on requirement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, Native Hawaiian Organization (NHO), or CDC. SBA understands the desire to have clear, objective rules. However, as noted previously, SBA opposes a bright-line 25 percent change in magnitude rule in connection with release. In addition, because SBA does not believe that it is good policy to have one definition of what a follow-on requirement is for one purpose and have a different definition for another purpose, SBA opposes having a bright-line 25 percent change in magnitude rule in determining whether to allow a sister company to perform a particular sole source 8(a) contract and then provide discretion only in the context of whether certain work can be removed from the 8(a) program. SBA continues to believe that the language as proposed that allows discretion when appropriate is the proper alternative. In the context of determining whether to allow a sister company to perform a particular sole source 8(a) contract, SBA agrees that a 25 percent change in magnitude should be sufficient for SBA to approve a sole source contract to a sister company. It would be the rare instance where that is not the case.

Section 124.105

The proposed rule amended § 124.105(g) to provide more clarity regarding situations in which an applicant has an immediate family member that has used his or her disadvantaged status to qualify another current or former Participant. The purpose of the immediate family member restriction is to ensure that one individual does not unduly benefit from the 8(a) BD program by participating in the program beyond nine years, albeit through a second firm. This most often happens when a second family member in the same or similar line of business seeks 8(a) BD certification. However, it is not necessarily the type of business which is a problem, but, rather, the

involvement in the applicant firm of the family member that previously participated in the program. The current regulatory language requires an applicant firm to demonstrate that “no connection exists” between the applicant and the other current or former Participant. SBA believes that requiring no connections is a bit extreme. If two brothers own two totally separate businesses, one as a general construction contractor and one as a specialty trade construction contractor, in normal circumstances it would be completely reasonable for the brother of the general construction firm to hire his brother’s specialty trade construction firm to perform work on contracts that the general construction firm was doing. Unfortunately, if either firm was a current or former Participant, SBA’s rules prevented SBA from certifying the second firm for participation in the program, even if the general construction firm would pay the specialty trade firm the exact same rate that it would have to pay to any other specialty trade construction firm. SBA does not believe that makes sense. An individual should not be required to avoid all contact with the business of an immediate family member. He or she should merely have to demonstrate that the two businesses are truly separate and distinct entities.

To this end, SBA proposed that an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the concerns have a contractual relationship that was not conducted at arm’s length. In the first instance, if one of the two family members (or business entities owned by the family member) owned *any* portion of the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. Similarly, if one of the two family members had any role as a director, officer or key employee in the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. In the second instance, the second in time family member could not qualify his or her business for the 8(a) BD program if it received or gave work to the business owned by the other family member at other than fair market

value. With these changes, SBA believes that the rule more accurately captures SBA’s intent not to permit one individual from unduly benefitting from the program, while at the same time permitting normal business relations between two firms. Commenters generally supported this change. A few commenters supported the provision but believed that an additional basis for disallowing a new immediate family member applicant into the 8(a) BD program should be where the applicant shared common facilities with a current or former Participant owned and controlled by an immediate family member. SBA agrees that an applicant owned by an immediate family member of a current or former Participant should not be permitted to share facilities with that current or former Participant. This rule adds that situation as a basis for declining an applicant. Several commenters sought further clarification as to whether a presumption against immediate family members in the same or similar line of business would continue from the previous regulations into this revised provision, and whether some sort of waiver will be needed to allow an immediate family member applicant to be certified into the 8(a) BD program. In particular, a few commenters were concerned that if an immediate family member attempted to certify an applicant concern in the same primary NAICS as the current or former Participant and the individual applying for certification has no management or technical experience in that NAICS code, that the owner/manager of the current or former Participant would play a significant role in the applicant concern even though a formal role was not identified. As noted above, SBA believes that the rules pertaining to immediate family members seeking to participate in the 8(a) BD program have been too harsh. The rule seeks to allow an applicant owned and controlled by an immediate family member of current or former Participant into the program, even in the same or similar line of business, provided certain conditions do not exist. SBA agrees with the comments that an individual seeking to certify an applicant concern in a primary NAICS code that is the same primary NAICS code of a current or former Participant operated by an immediate family member must have management or technical experience in that primary NAICS code. SBA agrees that without such a requirement, there is a risk that the owner/manager of the current or former Participant would have some role in the management or control of the applicant concern. This

rule adds a requirement that an individual applying in the same primary NAICS code as an immediate family member must have management or technical experience in that primary NAICS code, which would include experience acquired from working for an immediate family member's current or former Participant. Aside from that refinement, there is no presumption against such an applicant. The applicant must, however, demonstrate that there is no common ownership, control or shared facilities with the current or former Participant, and that any contractual relations between the two companies are arm's length transactions. One commenter questioned whether the revised requirement in proposed § 124.105(g)(2) that SBA would annually assess whether the two firms continue to "operate independently" of one another after being admitted to the program was inconsistent with the language in § 124.105(g)(1) that allows fair market contractual relations between the two firms. That language was not meant to imply that those arm's length transactions cannot occur once the second firm is admitted to the program. As part of an annual review, SBA will determine that ownership, management, and facilities continue to be separate and that any contractual relations are at fair market value. SBA would not initiate termination proceedings merely because the two firms entered into fair market value contracts after the second firm is admitted to the program. One commenter recommended that SBA should place a limit on the amount of contractual, arm's length transactions that have occurred between the firms (either dollar value or percentage of revenue). SBA disagrees. SBA does not believe a firm should be penalized for having an immediate family member participate in the 8(a) BD program. It does not make sense that a business concern owned by one family member cannot hire the business concern owned by another family member as a subcontractor at the same rate that it could hire any other business concern. Business relationships are often built upon trust. If a subcontractor has done a good job at a fair price, it is likely that the prime contractor will hire that firm again when the need arises to do that kind of work. Based upon the comments received in response to proposed § 121.103(f) (which loosened the presumption of economic dependence where one concern derived at least 70 percent of its revenues from one other business concern), most commenters believed there should not be a hard

restriction on the amount of work one business concern should be able to do with another. SBA believes the same should apply in the immediate family member context as long as a clear line of fracture exists between the two business concerns. As such, SBA does not adopt this recommendation in this final rule.

The proposed rule also amended the 8(a) BD change of ownership requirements in § 124.105(i). First, the proposed rule lessened the burden on 8(a) Participants seeking minor changes in ownership by providing that prior SBA approval is not needed where a previous owner held less than a 20 percent interest in the concern both before and after the transaction. This is a change from the previous requirement which allows a Participant to change its ownership without SBA's prior approval where the previous owner held less than a 10 percent interest. This change from 10 percent to 20 percent permits Participants to make minor changes in ownership more frequently without requiring them to wait for SBA approval.

In addition, the proposed rule eliminated the requirement that all changes of ownership affecting the disadvantaged individual or entity must receive SBA prior approval before they can occur. Specifically, proposed revisions to § 124.105(i)(2) provided that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of the Participant will increase the percentage of his or her (its) ownership interest. SBA believes that prior approval is not needed in such a case because if SBA determined that an individual or entity owned and controlled a Participant before a change in ownership and the change in ownership only increases the ownership interest of that individual or entity, there could be no question as to whether the Participant continues to meet the program's ownership and control requirements. This change will decrease the amount of times and the time spent by Participant firms seeking SBA approval of a change in ownership. SBA received unanimous support on these provisions and adopts them as final in this rule.

Section 124.109

In order to eliminate confusion, this rule clarifies several provisions relating to tribally-owned (and ANC-owned) 8(a) applicants and Participants. First, SBA amends § 124.109(a)(7) and § 124.109(c)(3)(iv) to clarify that a Participant owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe

merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. SBA believes that a tribe or ANC should be able to replace one wholly-owned intermediary company with another without going through the change of ownership process and obtaining prior SBA approval. In each of these cases, SBA believes that the underlying ownership of the Participant is not changing substantively and that requiring a Participant to request approval from SBA is unnecessary. The recommendation and approval process for a change of ownership can take several months, so this change will relieve Participants owned by tribes and ANCs from this unnecessary burden and allow them to proactively conduct normal business operations without interruption.

Second, the rule amends § 124.109(c)(3)(ii) to clarify the rules pertaining to a tribe/ANC owning more than one Participant in the 8(a) BD program. The rule adds two subparagraphs and an example to § 124.109(c)(3)(ii) for ease of use and understanding. In addition, SBA clarifies that if the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe could immediately submit an application to qualify another of its firms for participation in the 8(a) BD program under the primary NAICS code that was previously held by the Participant whose primary NAICS code was changed. A change in a primary NAICS code under § 124.112(e) should occur only where SBA has determined that the greatest portion of a Participant's revenues for the past three years are in a NAICS code other than the one identified as its primary NAICS code. In such a case, SBA has determined that in effect the second NAICS code really has been the Participant's primary NAICS code for the past three years. Commenters supported these provisions, and SBA adopts them as final.

The rule also clarifies SBA current policy that because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants. This flows directly from the statutory provision which allows an individual to manage two tribally-owned firms. Commenters supported this change, noting that if statutory and regulatory requirements explicitly allow an individual to manage two 8(a) firms,

then it would be illogical to impose the full-time work requirement on such a manager. This rule adopts the proposed language as final.

Finally, the proposed rule clarified the 8(a) BD program admission requirements governing how a tribally-owned applicant may demonstrate that it possesses the necessary potential for success. SBA's regulations previously permitted the tribe to make a firm written commitment to support the operations of the applicant concern to demonstrate a tribally-owned firm's potential for success. Due to the increased trend of tribes establishing tribally-owned economic development corporations to oversee tribally owned businesses, SBA recognizes that in some circumstances it may be adequate to accept a letter of support from the tribally-owned economic development company rather than the tribal leadership. The proposed rule permitted a tribally-owned applicant to satisfy the potential for success requirements by submitting a letter of support from the tribe itself, a tribally-owned economic development corporation or another relevant tribally-owned holding company. In order for a letter of support from the tribally-owned holding company to be sufficient, there must be sufficient evidence that the tribally-owned holding company has the financial resources to support the applicant and that the tribally-owned company is controlled by the tribe. Commenters supported this change. They noted that an economic development corporation or tribally-owned holding company is authorized to act on behalf of the tribe and is essentially an economic arm of the tribe, and that oftentimes due to the size of the tribe it can be difficult and take significant amounts of time and resources to obtain a commitment letter from the tribe itself. SBA adopts this provision as final in this rule.

Section 124.110

The proposed rule would make some of the same changes to § 124.110 for applicants and Participants owned and controlled by NHOs as it would to § 124.109 for tribally-owned applicants and Participants. Specifically, the proposed rule would subdivide § 124.110(e) for ease of use and understanding and would clarify that if the primary NAICS code of an NHO-owned Participant is changed pursuant to § 124.112(e), the NHO could submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary

NAICS code of the Participant whose primary NAICS code was changed.

Section 124.111

The proposed rule made the same change for CDCs and CDC-owned firms as for tribes and ANC's mentioned above. It clarified that a Participant owned by a CDC need not request a change of ownership from SBA where the CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant. It also subdivided the current subparagraph (d) into three smaller paragraphs for ease of use and understanding, and clarified that if the primary NAICS code of a CDC-owned Participant is changed pursuant to § 124.112(e), the CDC could submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed. SBA did not receive any comments in response to these changes. As such, SBA adopts them as final in this rule.

Section 124.112

SBA proposed to amend § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) Participants. The proposed rule permitted an 8(a) Participant that is owned at least 51 percent by a tribe, ANC, NHO or CDC to make a distribution to a non-disadvantaged individual that exceeds the applicable excessive withdrawal limitation dollar amount if it is made as part of a pro rata distribution to all shareholders. Commenters supported this change as a needed clarification to allow an entity-owned firm to increase its distribution to the tribe, ANC, NHO or CDC, and thus enable it to provide additional resources to the tribal or disadvantaged community. A few commenters were concerned with having dollar numbers in the examples set forth in the regulatory text. They were concerned that \$1 million would become the default unless done in pro rata share. SBA believes these commenters misunderstood the intent of this provision. The example in the regulation provides that where a tribally-owned Participant pays \$1,000,000 to a non-disadvantaged manager that was not part of a pro rata distribution to all shareholders, SBA would consider that to be an excessive withdrawal. SBA continues to believe that a \$1 million payout to a non-disadvantaged individual in that context

is excessive. If a tribe, ANC, NHO, or CDC owns 100 percent of an 8(a) Participant and wants to give back to the native or underserved community, nothing in this regulation would prohibit it from doing so. That Participant could give a distribution of \$1 million or more back to the tribe, ANC, NHO, or CDC in order to ensure that the native or underserved community receives substantial benefits. The clarification regarding pro rata distributions was intended to allow greater distributions to tribal communities, not to restrict such distributions. The final rule adopts that provision.

In 2016, SBA amended § 124.112(e) to implement procedures to allow SBA to change the primary NAICS code of a Participant where SBA determined that the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. 81 FR 48558, 48581 (July 25, 2016). The procedures require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. The proposed rule authorized an appeal process, whereby a Participant whose primary NAICS code was changed by its servicing district office could seek further review of that determination at a different level. Commenters supported this provision and SBA adopts it as final in this rule.

Section 124.201

The proposed rule did not amend § 124.201. However, SBA sought comments as to whether SBA should add a provision that would require a small business concern that seeks to apply for participation in the 8(a) BD program to first take an SBA-sponsored preparatory course regarding the requirements and expectations of the 8(a) BD program. Commenters were split on this proposal. Some felt it would be helpful to those firms who did not have a clear understanding of the expectations of participating in the 8(a) BD program. Others thought it would merely delay their participation in the program needlessly. Some commenters were concerned that there might be time commitments and travel expenses if a live course were required and recommended having the option to provide such training via a web-based platform. Commenters also noted that for entity-owned applicants, this requirement should not apply beyond the entity's first company to enter the 8(a) BD program. After reviewing the

comments, SBA believes that such a preparatory course should be an option, but not a requirement. As such, SBA does not believe that the regulatory text needs to be revised in this final rule.

Section 124.203

Section 124.203 requires applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. In 2016, SBA removed the requirement that an applicant must submit a signed Internal Revenue Service (IRS) Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. 81 FR 48558, 48569 (July 25, 2016). At that time, SBA agreed with a commenter to the proposed rule that questioned the need for every applicant to submit IRS Form 4506T. In eliminating that requirement for every applicant, SBA reasoned that it always has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. SBA proposed to amend § 124.203 to add back the requirement that every applicant to the 8(a) BD program submit IRS Form 4506T (or when available, IRS Form 4506C) because not having the Form readily available when needed has unduly delayed the application process for those affected applicants. In addition, SBA believed that requiring Form 4506T in every case would serve as a deterrent to firms that may think it is not necessary to fully disclose all necessary financial information.

However, during the comment period SBA determined that neither Form is a viable option for independent personal income verification purposes at this time. On July 1, 2019, the IRS removed the third-party mailing option from the Form 4506T after it was determined that this delivery method presents a risk to sensitive taxpayer information. As a result, the IRS will no longer send tax return transcripts directly to SBA; rather, transcripts must be mailed to the taxpayer's address of record. Because SBA may not receive tax return transcripts directly from the IRS under Form 4506T, the Agency no longer believes it is an effective tool for independent income verification. In addition, current IRS guidance indicates

that Form 4506C is available only to industry lenders participating in the Income Verification Express Service program.

SBA nevertheless continues to recognize the importance of obtaining authorization to receive taxpayer information at the time of application. It is SBA's understanding that the IRS is currently developing a successor form or program through which SBA and other Federal agencies may directly receive a taxpayer's tax return information for income verification purposes. As such, the final rule provides that each individual claiming disadvantaged status must authorize SBA to request and receive tax return information directly from the IRS if such authorization is required. Although SBA does not anticipate using this authorization often to verify an applicant's information, SBA believes that this additional requirement imposes a minimal burden on 8(a) BD program applicants. Additionally, SBA believes that this required authorization will help to maintain the integrity of the program.

Section 124.204

This rule provides that SBA will suspend the time to process an 8(a) application where SBA requests clarifying, revised or other information from the applicant. While SBA is waiting on the applicant to provide clarifying or responsive information, the Agency is not continuing to process the application. This is not a change in policy, but rather a clarification of existing policy. Commenters did not have any issue with this change, believing that it already is SBA's existing practice and that the regulatory change will simply clarify/formalize this practice. As such, SBA adopts it as final in this rule.

Sections 124.205, 124.206 and 124.207

The proposed rule amended § 124.207 to allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. Under the current regulations, a firm is required to wait 12 months from the date of the final agency decision to reapply. SBA believes that this change will reduce the number of appeals to SBA's Office of Hearings and Appeals (OHA) and greatly reduce the costs associated with appeals borne by disappointed applicants. In addition, because a firm that is declined could submit a new application 90 days after the decline decision, SBA requested comments on whether the current

reconsideration process should be eliminated. Commenters enthusiastically supported the proposed change to allow firms to remedy eligibility deficits and reapply after 90 days instead of one year. In conjunction with this proposed change, many commenters supported eliminating the reconsideration process as unnecessary due to the shorter reapplication time period. A few commenters supported both the reduction in time to reapply and elimination of the reconsideration process, but asked SBA to ensure that SBA provide comprehensive denial letters to fully apprise applicants of any issues or shortcomings with their applications. SBA agrees that denial letters must fully inform applicants of any issues with their applications, and will continue to explain as specifically as possible the shortcomings in any declined application. Several commenters opposed changing the current reconsideration process because they believed that it could take longer for an applicant to ultimately be admitted to the program if all it had to do was change one or two minor things, and that doing so during reconsideration would be quicker than SBA looking at a re-application anew. Contrary to what some commenters believed, SBA looks at all eligibility criteria during reconsideration and may find additional reasons to decline an application during reconsideration that were not clearly identified in the initial application process. Where that occurs, a firm may be entitled to an additional reconsideration process which may potentially prolong the review process even further. SBA believes reducing the timeframe to address identified deficits and reapply from one year to 90 days will obviate the need for a separate, possibly drawn-out reconsideration process. One commenter believed that allowing the shortened 90-day waiting period to re-apply to the 8(a) BD program would encourage concerns that are clearly ineligible to repeatedly apply for certification. Although SBA does not believe that this would be a significant problem, SBA does understand that its limited resources could be overburdened if clearly ineligible business concerns are able to re-apply to the program every 90 days. As such, this final rule amends § 124.207 to incorporate a 90-day wait period to reapply generally, but adds language that provides that where a concern has been declined three times within 18 months of the date of the first final agency decision finding the concern ineligible, the concern cannot submit a new application for admission to the

program until 12 months from the date of the third final Agency decline decision. The final rule also amends § 124.205 to eliminate a separate reconsideration process and § 124.206 to delete paragraph (b) as unnecessary.

Section 124.300 and 124.301

The proposed rule redesignated the current § 124.301 (which discusses the various ways a business may leave the 8(a) BD program) as § 124.300 and added a new § 124.301 to specifically enunciate the voluntary withdrawal and early graduation procedures. The rule set forth SBA's current policy that a Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. In addition, where a Participant believes it has substantially achieved the goals and objectives set forth in its business plan, the Participant may elect to voluntarily early graduate from the 8(a) BD program. That too is SBA's current policy, and the proposed rule merely captured it in SBA's regulations.

The proposed rule, however, changed the level at which voluntary withdrawal and voluntary early graduation could be finalized by SBA. Prior to this final rule, a firm submitted its request to voluntarily withdraw or early graduate to its servicing SBA district office. Once the district office concurs, the request was sent to the Associate Administrator for Business Development (AA/BD) for final approval. SBA believes that requiring several layers of review to permit a concern to voluntarily exit the 8(a) BD program is unnecessary. SBA proposed that a Participant must still request voluntary withdrawal or voluntary early graduation from its servicing district office, but the action would be complete once the District Director recognizes the voluntary withdrawal or voluntary early graduation. SBA believes this will eliminate unnecessary delay in processing these actions. Commenters supported giving voluntary withdrawal and voluntary early graduation decisions to the district office level, agreeing with SBA that the change will assist in reducing processing times. As such, SBA adopts the proposed changes as final.

Section 124.304

The proposed rule clarified the effect of a decision made by the AA/BD to terminate or early graduate a Program Participant. Under SBA's current procedures, once the AA/BD renders a decision to early graduate or terminate a Participant from the 8(a) BD program, the affected Participant has 45 days to appeal that decision to SBA's OHA. If

no appeal is made, the AA/BD's decision becomes the final agency decision after that 45-day period. If the Participant appeals to OHA, the final agency decision will be the decision of the administrative law judge at OHA. There has been some confusion as to what the effect of the AA/BD decision is pending the decision becoming the final agency decision. The proposed rule clarified that where the AA/BD issues a decision terminating or early graduating a Participant, the Participant would be immediately ineligible for additional program benefits. SBA does not believe that it would make sense to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. If OHA ultimately overrules the AA/BD decision, SBA would treat the amount of time between the AA/BD's decision and OHA's decision on appeal similar to how it treats a suspension. Upon OHA's decision overruling the AA/BD's determination, the Participant would immediately be eligible for program benefits and the length of time between the AA/BD's decision and OHA's decision on appeal would be added to the Participant's program term. Commenters generally supported this clarification. One commenter opposed the change, believing ineligibility or suspension should not be automatic, but rather, occur only where SBA "determines that suspension is needed to protect the interests of the Federal Government, such as because where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists" as set forth in § 124.305(a). SBA believes this comment misses the point. The suspension identified in § 124.305(a) is an interim determination pending a final action by the AA/BD as to whether a Participant should be terminated from the program. The suspension identified here flows from the AA/BD's final decision that termination is appropriate. As noted above, SBA believes it is contradictory to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. As such, SBA adopts the proposed language as final in this rule.

Sections 124.305 and 124.402

Section 124.402 requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan and to submit that business plan to SBA. Currently, § 124.402(b) provides that a newly admitted Participant must submit its business plan to SBA as soon

as possible after program admission and that the Participant will not be eligible for 8(a) BD benefits, including 8(a) contracts, until SBA approves its business plan. Several firms have complained that they missed contract opportunities because SBA did not approve their business plans before procuring agencies sought to award contracts to fulfill certain requirements. The proposed rule amended § 124.402(b) to eliminate the provision that a Participant cannot receive any 8(a) BD benefits until SBA has approved its business plan. Instead, the proposed rule provided that SBA would suspend a Participant from receiving 8(a) BD program benefits if it has not submitted its business plan to the servicing district office and received SBA's approval within 60 days after program admission. A firm coming in to the 8(a) BD program with commitments from one or more procuring agencies will immediately be able to be awarded one or more 8(a) contracts. Commenters appreciated SBA's recognition of the delays and possible missed opportunities caused by the current requirements and supported this change. They believed that the change will enable Participants to start receiving the benefits of the program in a more timely manner and enjoy their full nine-year term. A few commenters recommended that a new Participant should not be suspended where it has submitted its business plan within 60 days of being certified into the program but SBA has not approved it within that time. These commenters believed that a Participant should be suspended in this context only for actions within the Participant's control (*i.e.*, where the Participant did not submit its business plan within 60 days, not where SBA has not approved it within that time). That is SBA's intent. The proposed rule provided that SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission. As long as a Participant has submitted its business plan to SBA within the 60-day timeframe, it will not be suspended. SBA believes that is clear in the regulatory text as proposed and that no further clarification is needed. As such, SBA adopts the proposed language as final in this rule.

This rule also corrects a typographical error contained in § 124.305(h)(1)(ii). Under § 124.305(h)(1)(ii), an 8(a) Participant can elect to be suspended from the 8(a) program where a disadvantaged individual who is involved in controlling the day-to-day

management and control of the Participant is called to active military duty by the United States. Currently, the regulation states that the Participant may elect to be suspended where the individual's participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period. That should read where the Participant elects not to designate another disadvantaged individual to control the concern during the call-up period. It was not SBA's intent to allow a non-disadvantaged individual to control the firm during the call-up period and permit the firm to continue to be eligible for the program. Finally, one commenter questioned why SBA required a suspension action to generally be initiated simultaneous with or after the initiation of a BD program termination action. The commenter believed that if the Government's interests needed to be protected quickly, SBA should be able to suspend a particular Program Participant without also simultaneously initiating a termination proceeding. The commenter argued that the Government should be able to stop inappropriate or fraudulent conduct immediately. Although SBA envisions initiating a termination proceeding simultaneously with a suspension action in most cases, SBA concurs that immediate suspension without termination may be needed in certain cases. As such, the final rule amends § 124.305(a) to allow the AA/BD to immediately suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government.

Sections 124.501 and 124.507

Section 124.501 is entitled "What general provisions apply to the award of 8(a) contracts?" SBA must determine that a Participant is eligible for the award of both competitive and sole source 8(a) contracts. However, the requirement that SBA determine eligibility is currently contained only in the 8(a) competitive procedures at § 124.507(b)(2). Although SBA determines eligibility for sole source 8(a) awards at the time it accepts a requirement for the 8(a) BD program, that process is not specifically stated in the regulations. The proposed rule moved the eligibility determination procedures for competitive 8(a) contracts from § 124.507(b)(2) to the general provisions of § 124.501 and specifically addressed eligibility determinations for sole source 8(a) contracts. To accomplish this, the

proposed rule revised current § 124.501(g). Commenters did not object to this clarification. One commenter sought further clarification regarding eligibility for 8(a) sole source contracts. The commenter noted that for a sole source 8(a) procurement, SBA determines eligibility of a nominated 8(a) firm at the time of acceptance. The commenter recommended that the regulation clearly notify 8(a) firms and procuring agencies that if a firm graduates from the program before award occurs, the award cannot be made. Although SBA believes that is currently included within § 124.501(g), this final rule adds additional clarifying language to remove any confusion. One commenter also sought further clarification for two-step competitive procurements to be awarded through the 8(a) BD program. The commenter noted that the solicitation has two dates, and asked SBA to clarify which date controls for eligibility for the 8(a) competitive award. In response, this final rule adds a new § 124.507(d)(3) that provides that for a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

Similarly, SBA believes that the provisions requiring a bona fide place of business within a particular geographic area for 8(a) construction awards should also appear in the general provisions applying to 8(a) contracts set forth in § 124.501. Section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires that to the maximum extent practicable 8(a) construction contracts "shall be awarded within the county or State where the work is to be performed." SBA has implemented this statutory provision by requiring a Participant to have a bona fide place of business within a specific geographic location. Currently, the bona fide place of business rules appear only in the procedures applying to competitive 8(a) procurements in § 124.507(c)(2). The proposed rule moved those procedures to a new § 124.501(k) to clearly make them applicable to both sole source and competitive 8(a) awards. Based on the statutory language, SBA believes that the requirement to have a bona fide place of business in a particular geographic area currently applies to both sole source and competitive 8(a) procurements, but moving the requirement to the general applicability section removes any doubt or confusion. Commenters did not object to these

changes and SBA adopts them as final in this rule.

In response to concerns raised by Participants, the proposed rule also imposed time limits within which SBA district offices should process requests to add a bona fide place of business. SBA has heard that several Participants missed out on 8(a) procurement opportunities because their requests for SBA to verify their bona fide places of business were not timely processed. In order to alleviate this perceived problem, SBA proposed to provide that in connection with a specific 8(a) competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical boundaries within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. SBA also requested comments on whether a Participant that has filed a request to have a bona fide place of business recognized by SBA in time for a particular 8(a) construction procurement may submit an offer for that procurement where it has not received a response from SBA before the date offers are due. Commenters supported imposing time limits in the regulations for SBA to process requests to establish bona fide places of business. Commenters also supported Participants being able to presume approval and submit an offer as an eligible Participant where SBA has not issued a decision within the specified time limits. One commenter asked SBA to clarify what happens if a Participant submits an offer based on this presumption and SBA later does not verify the Participant's bona fide place of business. SBA does not believe that verification will not occur before award. The final rule allows a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified. This allows a Participant to submit an offer where a bona fide place of business is required. However, clarification is added at 124.501(k)(2)(iii)(B) that in order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not acted prior to the time that a Participant is identified as the apparent successful offeror, SBA will make such a determination within 5 days of receiving a procuring activity's request for an eligibility determination unless the procuring activity grants additional time for review.

Several commenters recommended that SBA broaden the geographic

boundaries as to what it means to have a bona fide place of business within a particular area. As identified above, the bona fide place of business concept evolved from the statutory requirement that to the maximum extent practicable 8(a) construction contracts must be awarded within the county or State where the work is to be performed. Commenters believed that strict state line boundaries may not be appropriate where a given area is routinely served by more than one state. A commenter recommended that SBA use Metropolitan Statistical Areas (MSAs) to better define the area within which a business should be located in order to be deemed to have a bona fide place of business in the area. The Office of Management and Budget has defined an MSA as “A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000. The MSA comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting.” 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37246–37252 (June 28, 2010). The commenter noted that metropolitan areas frequently do not fit within one state and believed that a state does not always represent a single geography or economy. As an example, the commenter pointed to the Philadelphia, Pennsylvania MSA, which includes counties in four states, Delaware, Maryland, New Jersey and Pennsylvania. This MSA represents one regional economy, but is serviced by four different SBA District Offices: Baltimore, Philadelphia, Delaware and New Jersey. SBA believes that such an expansion makes sense in today’s complex business environment. However, the use of MSAs will mostly impact the more densely populated coasts of the country, and not necessarily more rural or less populated areas. SBA believes the same rationale could be used in those areas, but instead use contiguous counties. A Participant located on the other side of a state border may be closer to the construction site than a Participant located in the same state as the construction site. It does not make sense to exclude a Participant immediately across the border from where construction work is to be done merely because that Participant is serviced by a different SBA district office, but to allow another Participant that may be located on the other side of the state where

construction work is to be done (and be hundreds of miles further away from the construction site than the Participant in the other state) to be eligible because it is serviced by the correct SBA district office. As such this final rule defines bona fide place of business to be the geographic area serviced by the SBA district office, a MSA, or a contiguous county to (whether in the same or different state) where the work will be performed.

Section 124.503

The proposed rule amended § 124.503(e) to clarify SBA’s current policy regarding what happens if after SBA accepts a sole source requirement on behalf of a particular Participant the procuring agency determines, prior to award, that the Participant cannot do the work or the parties cannot agree on price. In such a case, SBA allows the agency to substitute one 8(a) Participant for another if it believes another Participant could fulfill its needs. If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency may withdraw the original offering letter and fulfill its needs outside the 8(a) BD program. This change to the regulatory text was merely an attempt to codify existing procedures to make the process more transparent. No one objected to this provision, and SBA adopts it as final in this rule.

Currently, § 124.503(g) provides that a Basic Ordering Agreement (BOA) is not a contract under the Federal Acquisition Regulation (FAR). Rather, each order to be issued under the BOA is an individual contract. As such, a procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself. Once a Participant leaves the 8(a) BD program or otherwise becomes ineligible for future 8(a) contracts (*e.g.*, becomes other than small under the size standard assigned to a particular contract) it cannot receive further 8(a) orders under a BOA. Similarly, a blanket purchase agreement (BPA) is also not a contract. A BPA under FAR part 13 is not a contract because it neither obligates funds nor requires placement of any orders against it. Instead, it is an understanding between an ordering agency and a contractor that allows the agency to place future orders more quickly by identifying terms and conditions applying to those orders, a description of the supplies or services to be provided, and methods for issuing and pricing each order. The government is not obligated to place any orders, and

either party may cancel a BPA at any time.

Although current § 124.503(g) addresses BOAs, it does not specifically mention BPAs. This rule amends § 124.503 to merely specifically recognize that BPAs are also not contracts and should be afforded the same treatment as BOAs.

Section 124.504

SBA proposed several changes to § 124.504.

The proposed rule amended § 124.504(b) to alter the provision prohibiting SBA from accepting a requirement into the 8(a) BD program where a procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and receiving SBA’s formal acceptance of the requirement. SBA believes that the restriction as written is overly harsh and burdensome to procuring agencies. Several contracting officers have not offered a follow-on procurement to the 8(a) program prior to conducting a competition restricted to eligible 8(a) Participants because they believed that because a follow-on requirement must be procured through the 8(a) program, such offer and SBA’s acceptance were not required. They issued solicitations identifying them as competitive 8(a) procurements, selected an apparent successful offeror and then sought SBA’s eligibility determination prior to making an award. A strict interpretation of the current regulatory language would prohibit SBA from accepting such a requirement. Such an interpretation could adversely affect an agency’s procurement strategy in a significant way by unduly delaying the award of a contract. That was never SBA’s intent. As long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) Participants, SBA should be able to accept that requirement regardless of when the offering occurred. Commenters supported this change as a logical remedy to an unintended consequence, and SBA adopts it as final in this rule.

The proposed rule clarified SBA’s intent regarding the requirement that a procuring agency must seek and obtain SBA’s concurrence to release any follow-on procurement from the 8(a) BD program. This is not a change in policy, but rather a clarification of SBA’s current policy and the position SBA has taken in several protests before the Government Accountability Office. Some agencies have attempted to remove a follow-on procurement from

the incumbent 8(a) contractor and re-procure the requirement through a different contract vehicle (a MAC or Government-wide Acquisition Contract (GWAC) that is not an 8(a) contract) without seeking release by saying that they intend to issue a competitive 8(a) order off the other contract vehicle. In other words, because the order under a MAC or GWAC would be offered to and accepted for award through the 8(a) BD program and the follow-on work would be performed through the 8(a) BD program, some procuring agencies believe that release is not needed. SBA does not agree. In such a case, the underlying contract is not an 8(a) contract. The procuring agency may be attempting to remove a requirement from the 8(a) program to a contract that is not an 8(a) contract. That is precisely what release is intended to apply to. Moreover, because § 124.504(d)(4) provides that the requirement to seek release of an 8(a) requirement from SBA does not apply to orders offered to and accepted for the 8(a) program where the underlying MAC or GWAC is not itself an 8(a) contract, allowing a procuring agency to move an 8(a) contract to an 8(a) order under a non-8(a) contract vehicle would allow the procuring agency to then remove the next follow-on to the 8(a) order out of the 8(a) program entirely without any input from SBA. A procuring agency could take an 8(a) contract with a base year and four one-year option periods, turn it into a one-year 8(a) order under a non-8(a) contract vehicle, and then remove it from the 8(a) program entirely after that one-year performance period. That was certainly not the intent of SBA's regulations.

SBA has received additional comments recommending that release should also apply even if the underlying pre-existing MAC or GWAC to which a procuring agency seeks to move a follow-on requirement is itself an 8(a) contract. These commenters argue that an 8(a) incumbent contractor may be seriously hurt by moving a procurement from a general 8(a) competitive procurement to an 8(a) MAC or GWAC to which the incumbent is not a contract holder. In such a case, the incumbent would have no opportunity to win the award for the follow-on contract, and, would have no opportunity to demonstrate that it would be adversely impacted or to try to dissuade SBA from agreeing to release the procurement. Commenters believe that this directly contradicts the business development purposes of the 8(a) BD program. In response, the rule provides that a procuring activity must notify SBA

where it seeks to re-procure a follow-on requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., any multiple award or Governmentwide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract). If an agency seeks to re-procure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence will not be required because such a competition would be available to all 8(a) BD Program Participants.

The proposed rule also clarified that in all cases where a procuring agency seeks to fulfill a follow-on requirement outside of the 8(a) BD program, except where it is statutorily or otherwise required to use a mandatory source (*see* FAR subpart 8.6 and 8.7), it must make a written request to and receive the concurrence of SBA to do so. In such a case, the proposed rule would require a procuring agency to notify SBA that it will take a follow-on procurement out of the 8(a) procurement because of a mandatory source. Such notification would be required at least 30 days before the end of the contract period to give the 8(a) Participant the opportunity to make alternative plans.

In addition, SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach. As such, SBA does not typically consider a bridge contract as part of the new requirement analysis, unless there is some basis to believe that the agency is altering the duration of the option periods to avoid particular regulatory requirements. Whether to consider the bridge contract is determined on a case-by-case basis given the facts of the procurement at issue. SBA sought comments as to whether this long-standing policy should also be incorporated into the regulations. Although SBA did not receive many comments on this issue, those who did comment believed it made sense to clarify this in the regulatory text. This final rule does so.

Section 124.505

As noted above, SBA received a significant number of comments recommending more transparency in the process by which procuring agencies seek to remove follow-on requirements from the 8(a) BD program. In particular, commenters believed SBA should be able to question whether a requirement

is new or a follow-on to a previously awarded contract. In response, the final rule adds language to § 124.505(a) authorizing SBA to appeal a decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d).

Section 124.509

The proposed rule revised § 124.509(e), regarding how a Participant can obtain a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts where the Participant does not meet its applicable non-8(a) business activity target. Currently, the regulations require the AA/BD to process a Participant's request for a waiver in every case. The proposed rule substituted SBA for the AA/BD to allow flexibility to SBA to determine the level of processing in a standard operating procedure outside the regulations. SBA believes that at least at some level, the district office should be able to process such requests for waiver.

The current regulation also requires the SBA Administrator on a non-delegable basis to decide requests for waiver from a procuring agency. In other words, if the Participant itself does not request a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts, but an agency does so because it believes that the award of a sole source contract to the identified Participant is needed to achieve significant interests of the Government, the SBA Administrator must currently make that determination. Requiring such a request to be processed by several levels of SBA reviewers and then by the Administrator slows down the processing. If a procuring agency truly needs something quickly, it could be harmed by the processing time. The proposed rule changed the Administrator from making these determinations to SBA. Commenters believed that waiver requests should be processed at the district office level, as adding additional layers of review significantly delays the processing time, which harms both the Participant and the procuring agency and causes additional work for SBA. SBA has adopted these changes as final in this rule. This should allow these requests to be processed more quickly.

SBA also received a few comments regarding the business activity targets contained in § 124.509. Commenters supported the proposed revisions that changed requiring Participants to make "maximum efforts" to obtain business outside the 8(a) BD program, and

“substantial and sustained efforts” to attain the targeted dollar levels of non-8(a) revenue, to requiring them to make good faith efforts. These commenters also felt that the non-8(a) business activity target percentages for firms in the transitional stage of program participation are too high. The commenters noted that the Small Business Act did not require any specific percentages of non-8(a) work and believed that SBA was free to adjust them in order to promote the business development purposes of the program. They also believed that the current rules rigidly apply sole source restrictions without taking into account extenuating circumstances such as a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, and having prime contractors award less work to small business subcontractors than originally contemplated. They recommended that the sole source restrictions should be discretionary, depending upon circumstances and efforts made by the Participant to obtain non-8(a) revenues. SBA first notes that although the Small Business Act itself does not establish specific non-8(a) business activity targets, the conference report to the Business Opportunity Development Reform Act of 1988, Public Law 100–656, which established the competitive business mix requirement, did recommend certain non-8(a) business activity targets. That report noted that Congress intended that the non-8(a) business activity targets should generally require about 25 percent of revenues from sources other than 8(a) contracts in the fifth and sixth years of program participation and about 50 percent in the seventh and eighth years of program participation. H. Rep. No. 100–1070, at 63 (1988), *as reprinted in* 1988 U.S.C.A.N. 5485, 5497. In response to the comments, this rule slightly adjusts the non-8(a) business activity targets to be more in line with the Congressional intent. In addition, SBA believes that the strict application of sole source restrictions may be inappropriate in certain extenuating circumstances. That same conference report provides that SBA “should consider a full range of options to encourage firms to achieve the competitive business targets,” and that these options might “include conditioning the award of future sole-source contracts or business development assistance on the firm’s taking specified steps, such as changes in marketing or financing strategies.” *Id.* In addition, the conference report

provides that SBA should take appropriate remedial actions, “including reductions in sole-source contracting,” to ensure that firms complete the program with optimum prospects for success in a competitive business environment. *Id.* Thus, Congress intended SBA to place conditions on firms to allow them to continue to receive one or more future 8(a) contracts and that sole source “reductions” should be an alternative. It appears that a strict ban on receiving any future 8(a) contracts is not appropriate in all instances. SBA believes that may make sense as a remedial measure if a particular Participant has made no efforts to seek non-8(a) awards, but it should not automatically occur if a firm fails to meet its applicable non-8(a) business activity target. The final rule recognizes that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Where a Participant has not met its applicable non-8(a) business activity target, however, SBA will condition the eligibility for new sole source 8(a) contracts on the Participant taking one or more specific actions, which may include obtaining business development assistance from an SBA resource partner such as a Small Business Development Center. The final rule also rearranges several current provisions for ease of use.

Section 124.513

Currently, § 124.513(e) provides that SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. This requirement applies to both competitive and sole source 8(a) procurements. SBA does not approve joint venture agreements in any other context, including a joint venture between an 8(a) Participant and its SBA-approved mentor (which may be other than small) in connection with a non-8(a) contract (*i.e.*, small business set-aside, HUBZone, SDVO small business, or WOSB contract). In order to be considered an award to a small disadvantaged business (SDB) for a non-8(a) contract, a joint venture between an 8(a) Participant and a non-8(a) Participant must be controlled by the 8(a) partner to the joint venture and otherwise meet the provisions of § 124.513(c) and (d). If the non-8(a) partner to the joint venture is also a small business under the size standard corresponding to the NAICS code assigned to the procurement, the joint

venture could qualify as small if the provisions of § 124.513(c) and (d) were not met (*see* § 121.103(h)(3)(i), where a joint venture can qualify as small as long as each party to the joint venture individually qualifies as small), but the joint venture could not qualify as an award to an SDB in such case. If the joint venture were between an 8(a) Participant and its large business mentor, the joint venture could not qualify as small if the provisions of § 124.513(c) and (d) were not met. The size of a joint venture between a small business protégé and its large business mentor is determined without looking at the size of the mentor only when the joint venture complies with SBA’s regulations regarding control of the joint venture. Where another offeror believes that a joint venture between a protégé and its large business mentor has not complied with the applicable control regulations, it may protest the size of the joint venture. The applicable Area Office of SBA’s Office of Government Contracting would then look at the joint venture agreement to determine if the small business is in control of the joint venture within the meaning of SBA’s regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. This size protest process has worked well in ensuring that small business joint venture partners do in fact control non-8(a) contracts with their large business mentors. Because size protests are authorized for competitive 8(a) contracts, SBA believes that the size protest process could work similarly for competitive 8(a) contracts. As such, the proposed rule eliminated the need for 8(a) Participants to seek and receive approval from SBA of every initial joint venture agreement and each addendum to a joint venture agreement for competitive 8(a) contracts. Commenters supported this change, noting that this will eliminate an unnecessary burden and noting that this will also eliminate the significant expense firms often incur during the SBA approval process. SBA believes that this will significantly lessen the burden imposed on 8(a) small business Participants. Participants will not be required to submit additional paperwork to SBA and will not have to wait for SBA approval in order to seek competitive 8(a) awards. This rule finalizes that change.

Section 124.515

The proposed rule amended § 124.515 regarding the granting of a waiver to the statutorily mandated termination for

convenience requirement where the ownership or control of an 8(a) Participant performing an 8(a) contract changes. The statute and regulations allow the ownership and control of an 8(a) Participant performing one or more 8(a) contracts to pass to another 8(a) Participant that would otherwise be eligible to receive the 8(a) contracts directly. Specifically, the proposed rule amended § 124.515(d) to provide that SBA determines the eligibility of an acquiring Participant by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern. A few commenters objected to this last provision in the context of an entity-owned firm seeking to acquire an 8(a) Participant currently performing one or more 8(a) contracts. These commenters believed that this provision should not apply to entity-owned Participants because prior performance in a specific industry is not required for entity-owned firms seeking to enter the program. SBA disagrees. Those are two entirely separate requirements. In the case of program entry, SBA allows an entity-owned applicant to be eligible for the program where the entity (tribe, ANC, NHO or CDC) demonstrates a firm commitment to back the applicant concern. In other words, SBA will waive the general potential for success provision requiring an applicant to have at least two years of business in its primary NAICS code where the entity represents that it will support the applicant concern. In such case, SBA is assured that the applicant concern will be able to survive despite having little or no experience in its designated primary NAICS code. The termination for convenience and waiver provisions are statutory and serve an entirely different purpose. The general rule is that an 8(a) contract must be performed by the 8(a) Participant to which that contract was initially awarded. Where the ownership or control of the Participant awarded an 8(a) contract changes, the statute requires a procuring agency to terminate that contract unless the SBA Administrator grants a waiver

based on one of five statutory reasons. One of those reasons is where the ownership and control of an 8(a) Participant will pass to another otherwise eligible 8(a) Participant. The proposed rule merely clarifies SBA's current policy that in order to be an "eligible" Participant, the acquiring firm must be responsible to perform the contract, and responsibility is determined prior to the transfer, just as responsibility is determined prior to the award of any contract. This has nothing to do with the entity-owned firm's potential for success in the program, but, rather, whether that firm would be deemed a responsible contractor and whether a procuring agency contracting officer would find the firm capable of performing the work required under the contract before any change of ownership or control occurs. Because SBA believes that this responsibility issue is relevant to all Participants acquiring another Participant that has been awarded one or more 8(a) contracts, the final rule adopts the language as proposed.

Section 124.518

The final rule clarifies when one 8(a) Participant can be substituted for another in order to complete performance of an 8(a) contract without receiving a waiver to the termination for convenience requirement set forth in of § 124.515. Specifically, the rule provides that SBA may authorize another Participant to complete performance of an 8(a) contract and, in conjunction with the procuring activity, permit novation of the contract where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded an 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

Section 124.519

Section 124.519 limits the ability of 8(a) Participants to obtain additional sole source 8(a) contracts once they have reached a certain dollar level of overall 8(a) contracts. Currently, for a firm having a receipts-based size standard corresponding to its primary NAICS code, the limit above which a Participant can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code, or \$100,000,000, whichever is less. For a firm having an employee-based size standard corresponding to its primary NAICS code, the limit is \$100,000,000. In order to simplify this requirement, this

proposed rule provided that a Participant may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of \$100,000,000 during its participation in the 8(a) BD program, regardless of its primary NAICS code. In addition, the proposed rule clarified that in determining whether a Participant has reached the \$100 million limit, SBA would consider only the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications. Finally, the proposed rule amended what types of small dollar value 8(a) contracts should not be considered in determining whether a Participant has reached the 8(a) revenue limit. Currently, SBA does not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the applicable 8(a) revenue limit. The proposed rule replaced the \$100,000 amount with a reference to the Simplified Acquisition Threshold (SAT). SBA has delegated to procuring agencies the ability to award sole source 8(a) contracts without offer and acceptance for contracts valued at or below the SAT. Because SBA does not accept such procurements into the 8(a) BD program, it is difficult for SBA to monitor these awards. The proposed rule merely aligned the 8(a) revenue limit with that authority. Commenters generally supported each of these changes. SBA adopts them as final in this rule.

Section 125.2

The proposed rule added a new paragraph (g) requiring contracting officers to consider the capabilities and past performance of first tier subcontractors in certain instances. This consideration is statutorily required for bundled or consolidated contracts (15 U.S.C. 644(e)(4)(B)(i)) and for multiple award contracts valued above the substantial bundling threshold of the Federal agency (15 U.S.C. 644(q)(1)(B)). Following the statutory provisions, the proposed rule required a contracting officer to consider the past performance and experience of first tier subcontractors in those two categories of contracts. The proposed rule did not require a contracting officer to consider the past performance, capabilities and experience of each first tier subcontractor as the capabilities and past performance of the small business prime contractor in other instances. Instead, it provided discretion to

contracting officers to consider such past performance, capabilities and experience of each first tier subcontractor where appropriate. SBA specifically requested comments as to whether as a policy matter such consideration should be required in all cases, or limited only to the statutorily required instances as proposed. The comments overwhelmingly supported the same treatment for all contracts. Most commenters believed that there was a valid policy reason to consider the capabilities and past performance of first tier subcontractors in every case since it is clear that those identified subcontractors will be responsible for some performance of the contract should the corresponding prime contractor be awarded the contract. Some commenters believed that small businesses may have the necessary capabilities, past performance and experience to perform smaller, non-bundled contracts on their own. Therefore, these commenters felt that it may not be necessary for an agency to consider the capabilities and past performance of first tier subcontractors in all cases. SBA believes that first tier subcontractors should be considered if the capabilities and past performance of the small business prime contractor does not demonstrate capabilities and past performance for award. As such this final rule adds language requiring a procuring agency to consider the capabilities and past performance of first tier subcontractors where the first-tier subcontractors are specifically identified in the proposal and the capabilities and past performance of the small business prime do not independently demonstrate capabilities and past performance necessary for award.

Section 125.3

The Small Business Act explicitly prohibits the Government from requiring small businesses to submit subcontracting plans. 15 U.S.C. 637(d)(8). This prohibition is set forth in § 125.3(b) of SBA's regulations and in FAR 19.702(b)(1). Under the Alaska Native Claims Settlement Act (ANCSA), a contractor receives credit towards the satisfaction of its small or small disadvantaged business subcontracting goals when contracting with an ANC-owned firm. 43 U.S.C. 1626(e)(4)(B). There has been some confusion as to whether an ANC-owned firm that does not individually qualify as small but counts as a small business or a small disadvantaged business for subcontracting goaling purposes under 43 U.S.C. 1626(e)(4)(B) must itself submit a subcontracting plan. SBA

believes that such a firm is not currently required to submit a subcontracting plan, but proposed to add clarifying language to § 125.3(b) to clear up any confusion. The proposed rule clarified that all firms considered to be small businesses, whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract or is deemed to be treated as a small business concern by statute, are not be required to submit subcontracting plans. Commenters supported this provision and this rule adopts it as final.

The final rule also fixes typographical errors contained in paragraphs 125.3(c)(1)(viii) and 125.3(c)(1)(ix).

Section 125.5

The proposed rule clarified that SBA does not use the certificate of competency (COC) procedures for 8(a) sole source contracts. This has long been SBA's policy. *See* 62 FR 43584, 43592 (Aug. 14, 1997). Instead of using SBA COC procedures, an agency that finds a potential 8(a) sole source awardee to be non-responsible should proceed through the substitution or withdrawal procedures in the proposed § 124.503(e). SBA did not receive any comments on this provision and adopts it as final in this rule.

Section 125.6

The final rule first fixes a typographical error contained in the introductory text of § 125.6(a). It also amends § 125.6(b). Section 125.6(b) provides guidance on which limitation on subcontracting requirement applies to a "mixed contract." The section currently refers to a mixed contract as one that combines both services and supplies. SBA inadvertently did not include the possibility that a mixed contract could include construction work, although in practice SBA has applied this section to a contract requiring, for example, both services and construction work. The proposed rule merely recognized that a mixed contract is one that integrates any combination of services, supplies, or construction. A contracting officer would then select the appropriate NAICS code, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. SBQ did not receive any comments on this change, and adopts it as final in this rule.

SBA also asked for comments in the proposed rule regarding how the nonmanufacturer rule should be applied in multiple item procurements (reference § 125.6(a)(2)(ii)). Currently, for a multiple item procurement where

a nonmanufacturer waiver is granted for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50 percent of the value of the products to be supplied by the nonmanufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors. The regulation gives an example where a contract is for \$1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. The projected value of the item that is waived is \$10,000. Under the current regulatory language, at least 50 percent of the value of the items not subject to a waiver, or \$495,000 (50 percent of \$990,000), must be supplied by one or more domestic small business manufacturers, and the prime small business nonmanufacturer may act as a manufacturer for one or more items. Several small business nonmanufacturers have disagreed with this provision. They believe that in order to qualify as a small business nonmanufacturer, at least 50 percent of the value of the contract must come from either small business manufacturers or from any businesses for items which have been granted a waiver (or that small business manufacturers plus waiver must equal at least 50 percent). In other words, in the above example, \$500,000 (50 percent of the value of the contract) must come from small business manufacturers or be subject to a waiver. If items totaling \$10,000 are subject to a waiver, then only \$490,000 worth of items must come from small business manufacturers, thus requiring \$5,000 less from small business manufacturers. The proposed rule asked for comments on whether this approach makes sense. Several commenters supported the change outlined in the proposed rule, believing that implementation of the change will provide less confusion to both small businesses and procuring agencies as the math is easier to understand. One commenter believed that was how the nonmanufacturer rule was already being applied in multiple item procurements, was concerned others too may have misinterpreted the rule, and, thus, supported the change. The final rule provides that a procurement should be set aside where at least 50 percent of the value of the contract comes from either small business manufacturers or from any business where a nonmanufacturer rule

waiver has been granted (or, in other words, a set aside should occur where small plus waiver equals at least 50 percent).

Section 125.8

The proposed rule made conforming changes to § 125.8 in order to take into account merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program. The comments supported these changes, and those changes are finalized in this rule.

Proposed § 125.8(b)(2)(iv) permitted the parties to a joint venture to agree to distribute profits from the joint venture so that the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them. Although several commenters questioned whether mentors would be willing to agree to distribute profits in such a manner, most commenters supported this proposed change. As such, SBA adopts it as final in this rule.

In response to the proposed rule, SBA also received comments seeking clarification of certain other requirements applicable to joint ventures. First, commenters sought guidance regarding the performance of work or limitation on subcontracting requirements in § 125.8(c). Specifically, commenters questioned whether the same rules as those set forth in § 125.6 apply to the calculation of work performed by a protégé in a joint venture and whether the 40 percent performance requirement for a protégé firm could be met through performance of work by a similarly situated subcontractor. SBA has always intended that the same rules as those set forth in § 125.6 should generally apply to the calculation of a protégé firm's workshare in the context of a joint venture. This means that the rules concerning supplies, construction and mixed contracts apply to the joint venture situation and certain costs are excluded from the limitation on subcontracting calculation. For instance, the cost of materials would first be excluded in a contract for supplies or products before determining whether the joint venture is not subcontracting more than 50 percent of the amount paid by the Government. However, SBA has never intended that a protégé firm could subcontract its 40 percent performance requirement to a similarly situated entity. In other words, SBA has always believed that the protégé itself must perform at least 40 percent of the work to be performed by a joint venture between the protégé firm and its mentor, and that it cannot subcontract such work to a similarly situated entity. The

only reason that a large business mentor is able to participate in a joint venture with its protégé for a small business contract is to promote the business development of the protégé firm. Where a protégé firm would subcontract some or all of its requirement to perform at least 40 percent of the work to be done by the joint venture to a similarly situated entity, SBA does not believe that this purpose would be met. The large business mentor is authorized to participate in a joint venture as a small business only because its protégé is receiving valuable business development assistance through the performance of at least 40 percent of the work performed by the joint venture. Thus, although a similarly situated firm can be used to meet the 50 percent performance requirement, it cannot be used to meet the 40 percent performance requirement for the protégé itself. For example, if a joint venture between a protégé firm and its mentor were awarded a \$10 million services contract and a similarly situated entity were to perform \$2 million of the required services, the joint venture would be required to perform \$3 million of the services (*i.e.*, to get to a total of \$5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform \$3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of \$3 million or \$1.2 million. The final rule clarifies that rules set forth in § 125.6 generally apply to joint ventures and that a protégé cannot meet the 40 percent performance requirement by subcontracting to one or more similar situated entities.

Comments also requested further guidance on the requirement in § 125.8(b)(2)(ii) that a joint venture must designate an employee of the small business managing venture as the project manager responsible for performance of the contract. These commenters pointed out that many contracts do not have a position labeled "project manager," but instead have a position named "program manager," "program director," or some other term to designate the individual responsible for performance. SBA agrees that the title of the individual is not the important determination, but rather the responsibilities. The provision seeks to require that the individual responsible for performance must come from the small business managing venture, and this rule makes that clarification. For consistency purposes, SBA has made these same changes to § 124.513(c) for 8(a) joint ventures, to § 125.18(b)(2) for

SDVO small business joint ventures, to § 126.616(c) for HUBZone joint ventures, and to § 127.506(c) for WOSB joint ventures.

Several commenters sought additional clarification to the rules pertaining to joint ventures for the various small business programs. Specifically, these commenters believed that the rules applicable to small business set-asides in § 125.8(a) were not exactly the same as those set forth in §§ 125.18(b)(1)(i) (for SDVO joint ventures), 126.616(b)(1) (for WOSB joint ventures) and 127.506(a)(1) (for HUBZone joint ventures), and that a mentor-protégé joint venture might not be able to seek the same type of contract, subcontract or sale in one program as it can in another. In response, SBA has added language to § 125.9(d)(1) to make clear that a joint venture between a protégé and mentor may seek a Federal prime contract, subcontract or sale as a small business, HUBZone small business, SDB, SDVO small business, or WOSB provided the protégé individually qualifies as such.

One commenter recommended a change to proposed § 125.8(e) regarding the past performance and experience of joint venture partners. The proposed rule provided that when evaluating the past performance and experience of a joint venture submitting an offer for a contract set aside or reserved for small business, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. The commenter agreed with that provision, but recommended that it be further refined to prohibit a procuring activity from requiring the protégé to individually meet any evaluation or responsibility criteria. SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner. SBA

believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (e.g., each partner to have individually previously performed 5 contracts of at least \$10 million) is unreasonable, and should not be permitted. However, SBA disagrees that a procuring activity should not be able to require a protégé firm to individually meet any evaluation or responsibility criteria. SBA intends that the protégé firm gain valuable business development assistance through the joint venture relationship. The protégé must, however, bring something to the table other than its size or socio-economic status. The joint venture should be a tool to enable it to win and perform a contract in an area that it has some experience but that it could not have won on its own.

Section 125.9

This final rule first reorganizes some of the current provisions in § 125.9 for ease of use and understanding. The rule reorganizes and clarifies § 125.9(b). It clarifies that in order to qualify as a mentor, SBA will look at three things, whether the proposed mentor: Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; does not appear on the Federal list of debarred or suspended contractors; and can impart value to a protégé firm. Instead of requiring SBA to look at and determine that a proposed mentor possesses good character in every case, the rule amends this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character. The rule also clarifies that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. That has always been SBA's intent (the current rule specifies that a second mentor-protégé relationship cannot be a competitor of the first), but SBA wants to make this clear in response to questions SBA has received regarding this issue. Commenters generally supported these clarifications. One commenter asked SBA to clarify the provision prohibiting a mentor that has more than one protégé from submitting competing offers in response to a solicitation for a specific procurement. Specifically, the commenter noted that many multiple award procurements have separate pools of potential awardees. For example, an agency may have a single solicitation that calls for awarding

indefinite delivery indefinite quantity (IDIQ) contracts in unrestricted, small business, HUBZone, 8(a), WOSB, and SDVO small business pools. All offerors submit proposals in response to the same solicitation and indicate the pool(s) for which they are competing. The commenter sought clarification as to whether a mentor with two different protégés could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool. SBA first notes that in order for SBA to approve a second mentor-protégé relationship for a specific mentor, the mentor must demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm. In particular, the mentor must show that the second protégé will not be a competitor of the first protégé. Thus, the mentor has already assured SBA that the two protégés would not be competitors. If the two mentor-protégé relationships were approved in the same NAICS code, then the mentor must have already made a commitment that the two firms would not compete against each other. This could include, for example, a commitment that the one mentor-protégé relationship would seek only HUBZone and small business set-aside contracts while the second would seek only 8(a) contracts. That being the case, the same mentor could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool on the same solicitation because they would not be deemed competitors with respect to that procurement. SBA does not believe, however, that a change is needed from the proposed regulatory text since that is merely an interpretation of what "competing offers" means. SBA adopts the proposed language as final in this rule.

The proposed rule also sought comments as to whether SBA should limit mentors only to those firms having average annual revenues of less than \$100 million. Currently, any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor. This includes large businesses of any size. This proposal was in response to suggestions from "mid-size" companies (i.e., those that no longer qualify as small under their primary NAICS codes, but believe that they cannot adequately compete against the much larger companies) that a mentor-protégé program that excluded very large businesses would be beneficial to the

mid-size firms and allow them to more effectively compete. This was the single most commented-on issue in the proposed rule. SBA received more than 150 comments in response to this alternative. The vast majority of commenters strongly opposed this proposal. Commenters agreed with SBA's stated intent that the focus of the mentor-protégé program should be on the protégé firm, and how best valuable business development assistance can be provided to a protégé to enable that firm to more effectively compete on its own in the future. They believed that such a restriction would harm small businesses, as it would restrict the universe of potential mentors which could provide valuable business assistance to them. Commenters believed that the size of the mentor should not matter as long as that entity is providing needed business development assistance to its protégé. Commenters believed that SBA's priority should be to ensure that needed business development assistance will be provided to protégé firms through a mentor-protégé agreement, and the size of the mentor should not be a relevant consideration. All that should matter is whether the proposed mentor demonstrates a commitment and the ability to assist small business concerns. Several commenters believed that larger business entities actually serve as better mentors since they are involved in the program to help the protégé firm and not to gain further access to small business contracting (through joint ventures) for themselves. In response, SBA will not adopt the proposal, but rather will continue to allow any business entity, regardless of size, that demonstrates a commitment and the ability to assist small business concerns to act as a mentor.

This rule also implements Section 861 of the National Defense Authorization Act (NDAA) of 2019, Public Law 115–232, to make three changes to the mentor-protégé program in order to benefit Puerto Rican small businesses. First, the rule amends § 125.9(b) regarding the number of protégé firms that one mentor can have at any one time. Currently, the regulation provides that under no circumstances can a mentor have more than three protégés at one time. Section 861 of the NDAA provides that the restriction on the number of protégé firms a mentor can have shall not apply to up to two mentor-protégé relationships if such relationships are with a small business that has its principal office located in the Commonwealth of Puerto Rico. As such, § 125.9(b)(3)(ii) provides that a

mentor generally cannot have more than three protégés at one time, but that the first two mentor-protégé relationships between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico will not count against the limit of three protégés that a mentor can have at one time. Thus, if a mentor did have two protégés that had their principal offices in Puerto Rico, it could have an additional three protégés, or a total of five protégés, and comply with SBA's requirements. The rule also adds a new § 125.9(d)(6) to implement a provision of Section 861 of NDAA 2019, which authorizes contracting incentives to mentors that subcontract to protégé firms that are Puerto Rico businesses. Specifically, § 125.9(d)(6) provides that a mentor that provides a subcontract to a protégé that has its principal office located in Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor. Commenters supported these provisions, and SBA adopts them as final in this rule. A few commenters asked for clarification as to whether these provisions applied to entity-owned firms located in Puerto Rico. The statute and proposed regulatory text notes that it applies to any business concern that has its principal office in Puerto Rico. If a tribally-owned or ANC-owned firm has its principal office in Puerto Rico, then the provision applies to it. SBA does not believe further clarification is needed. The principal office requirement should be sufficient. One commenter also questioned the provision in the proposed rule allowing mentor training costs to count toward a mentor's small subcontracting goals, believing that training costs should never be allowed as subcontracting costs. That is not something SBA proposed on its own. That provision was specifically authorized by Section 861 of NDAA 2019. As such, that provision is unchanged in this final rule.

A few commenters also recommended that SBA allow a mentor to have more than three protégés at a time generally (*i.e.*, not only where small businesses in Puerto Rico are involved). These commenters noted that very large business concerns operate under multiple NAICS codes and have the capability to mentor a large number of small protégé firms that are not in competition with each other. Although SBA understands that many large

businesses have the capability to mentor more than three small business concerns at one time, SBA does not believe it is good policy for anyone to perceive that one or more large businesses are unduly benefitting from small business programs. The rules allow a mentor to joint venture with its protégé and be deemed small for any contract for which the protégé individually qualifies as small, and to perform 60 percent of whatever work the joint venture performs. Moreover, a mentor can also own an equity interest of up to 40 percent in the protégé firm. If a large business mentor were able to have five (or more) protégés at one time, it could have a joint venture with each of those protégés and perform 60 percent of every small business contract awarded to the joint venture. It also could (though unlikely) have a 40 percent equity interest in each of those small protégé firms. In such a case, SBA believes that it would appear that the large business mentor is unduly benefitting from contracting programs intended to be reserved for small businesses. As such, this rule does not increase the number of protégé firms that one mentor can have.

The proposed rule clarified the requirements for a firm seeking to form a mentor-protégé relationship in a NAICS code that is not the firm's primary NAICS code (§ 125.9(c)(1)(ii)). SBA has always intended that a firm seeking to be a protégé could choose to establish a mentor-protégé relationship to assist its business development in any business area in which it has performed work as long as the firm qualifies as small for the work targeted in the mentor-protégé agreement. The proposed rule highlighted SBA's belief that a firm must have performed some work in a secondary industry or NAICS code in order for SBA to approve such a mentor-protégé relationship. SBA does not want a firm that has grown to be other than small in its primary NAICS codes to form a mentor-protégé relationship in a NAICS code in which it had no experience simply because it qualified as small in that other NAICS code. SBA believes that such a situation (*i.e.*, having a protégé with no experience in a secondary NAICS code) could lead to abuse of the program. It would be hard for a firm with no experience in a secondary NAICS code to be the lead on a joint venture with its mentor. Similarly, a mentor with all the experience could easily take control of a joint venture and perform all of the work required of the joint venture. The proposed rule clarified that a firm may seek to be a protégé in any NAICS code

for which it qualifies as small and can form a mentor-protégé relationship in a secondary NAICS code if it qualifies as small and has prior experience or previously performed work in that NAICS code. Several commenters sought further clarification of this provision. Commenters noted that a procuring activity may assign different NAICS codes to the same basic type of work. These commenters questioned whether a firm needed to demonstrate that it performed work in a specific NAICS code or could demonstrate that it has performed the same type of work, whatever NAICS code was assigned to it. Similarly, other commenters again questioned whether a firm must demonstrate previous work performed in a specific NAICS code, or whether similar work that would logically lead to work in a different NAICS code would be permitted. SBA agrees with these comments. SBA believes that similar work performed by the prospective protégé to that for which a mentor-protégé relationship is sought should be sufficient, even if the previously performed work is in a different NAICS code than that for which a mentor-protégé agreement is sought. In addition, if the NAICS code in which a mentor-protégé relationship is sought is a logical progression from work previously performed by the intended protégé firm, that too should be permitted. SBA's intent is to encourage business development, and any relationship that promotes a logical business progression for the protégé firm fulfills that intent.

The proposed rule also responded to concerns raised by small businesses regarding the regulatory limit of permitting only two mentor-protégé relationships even where the small business protégé receives no or limited assistance from its mentor through a particular mentor-protégé agreement. SBA believes that a relationship that provides no business development assistance or contracting opportunities to a protégé should not be counted against the firm, or that the firm should not be restricted to having only one additional mentor-protégé relationship in such a case. However, SBA did not want to impose additional burdens on protégé firms that would require them to document and demonstrate that they did not receive benefits through their mentor-protégé relationships. In order to eliminate any disagreements as to whether a firm did or did not receive any assistance under its mentor-protégé agreement, SBA proposed to establish an easily understandable and objective basis for counting or not counting a

mentor-protégé relationship. Specifically, the proposed rule amended § 125.9(e)(6) to not count any mentor-protégé relationship toward a firm's two permitted lifetime mentor-protégé relationships where the mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement. The vast majority of commenters supported a specific, objective amount of time within which a protégé could end a mentor-protégé relationship without having it count against the two in a lifetime limit. Commenters pointed out, however, that the supplementary information to and the regulatory text in the proposed rule were inconsistent (*i.e.*, the supplementary information saying 18 months and the regulatory text saying one year). Several comments recommended increasing the lifetime number of mentor-protégé relationships that a small business concern could have. Finally, a few commenters opposed the proposed exemption to the two-in-lifetime rule because allowing protégé firms such an easy out within 18 months, whether or not the protégé received beneficial business development assistance, could act as a detriment to firms that would otherwise be willing to serve as mentors. One commenter was concerned that if a bright line 18-month test is all that is required, nothing would prevent an unscrupulous business from running through an endless chain of relatively short-lived mentor-protégé relationships. SBA does not believe that will be a frequent occurrence. Nevertheless, in response, the final rule provides that if a specific small business protégé appears to use the 18-month test as a means of using many short-term mentor-protégé relationships, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

The proposed rule also eliminated the reconsideration process for declined mentor-protégé agreements in § 125.9(f) as unnecessary. Currently, if SBA declines a mentor-protégé agreement, the prospective small business protégé may make changes to its agreement and seek reconsideration from SBA within 45 days of SBA's decision to decline the mentor-protégé relationship. The current regulations also allow the small business to submit a new (or revised) mentor-protégé agreement to SBA at any point after 60 days from the date of SBA's final decision declining a mentor-protégé relationship. SBA believes that this ability to submit a new or revised

mentor-protégé agreement after 60 days is sufficient. Most commenters supported this change, agreeing that a separate reconsideration process is unnecessary. A few commenters disagreed, believing that requiring a small business to wait 60 days to submit a revised mentor-protégé agreement and then start SBA's processing time instead of submitting a revised agreement within a few days of a decline decision could add an additional two months of wait time to an ultimate approval. SBA continues to believe that the small amount of time a small business must wait to resubmit a new/revised mentor-protégé agreement to SBA for approval makes the reconsideration process unnecessary. As such, this rule finalizes the elimination of a separate reconsideration process.

The proposed rule added clarifying language regarding the annual review of mentor-protégé relationships. It is important that SBA receive an honest assessment from the protégé of how the mentor-protégé relationship is working, whether the protégé has received the agreed-upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. SBA needs to know if the mentor is not providing the agreed-upon business development assistance to the protégé. This would affect that firm's ability to be a mentor in the future. Several commenters were also concerned about mentors that did not live up to their commitments. A few commenters recommended that a protégé firm should be able to ask SBA to intervene if it thought it was not receiving the assistance promised by the mentor or if it thought that the assistance provided was not of the quality it anticipated. SBA believes that makes sense and this rule adds a provision allowing a protégé to request SBA to intervene on its behalf with the mentor. Such a request would cause SBA to notify the mentor that SBA had received adverse information regarding its participation as a mentor and allow the mentor to respond to that information. If the mentor did not overcome the allegations, SBA would terminate the mentor-protégé agreement. The final rule also adds a provision that allows a protégé to substitute another firm to be its mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit. If two years had already elapsed in the mentor-protégé agreement, the protégé could substitute another firm to be its mentor for a total of four years.

Prior to the proposed rule, SBA had also received several complaints from small business protégés whose mentor-protégé relationships were terminated by the mentor soon after a joint venture between the protégé and mentor received a Government contract as a small business. The proposed rule asked for comments about the possibility of adding a provision requiring a joint venture between a protégé and its mentor to recertify its size if the mentor prematurely ended the mentor-protégé relationship. Commenters did not support this possible approach, believing that such a recertification requirement would have a much more serious impact on the protégé than on the mentor. In effect, such a provision would punish a protégé for its mentor's failure to meet its obligations under the mentor-protégé agreement. Upon further review, SBA believes that better options are provided in current § 125.9(h), which provides consequences for when a mentor does not provide to the protégé firm the business development assistance set forth in its mentor-protégé agreement. Under the current regulations, where that occurs, the firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement, SBA may recommend to the relevant procuring agency to issue a stop work order for each Federal contract for which the mentor and protégé are performing as a small business joint venture, and SBA may seek to substitute the protégé firm for the joint venture if the protégé firm is able to independently complete performance of any joint venture contract without the mentor. SBA believes that provision should be sufficient to dissuade mentors from terminating mentor-protégé agreements early.

Section 125.18

In addition to the revision to § 125.18(c) identified above, this rule amends the language in § 125.18(a) to clarify what representations and certifications a business concern seeking to be awarded a SDVO contract must submit as part of its offer.

Section 126.602

On November 26, 2019, SBA published a final rule amending the HUBZone regulations. 84 FR 65222. As part of that rule, SBA revised 13 CFR 126.200 by reorganizing the section to make it more readable. However, SBA inadvertently overlooked a cross-reference to section 126.200 contained in § 126.602(c). This rule merely fixes the cross-reference in § 126.602(c).

Section 126.606

The final rule amends § 126.606 to make it consistent with the release requirements of § 124.504(d). Current § 126.606 authorizes SBA to release a follow-on requirement previously performed through the 8(a) BD program for award as a HUBZone contract only where neither the incumbent nor any other 8(a) Participant can perform the requirement. SBA believes that is overly restrictive and inconsistent with the release language contained in § 124.504(d). As such, the final rule provides that a procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

Sections 126.616 and 126.618

This rule makes minor revisions to §§ 126.616 and 126.618 by merely deleting references to the 8(a) BD Mentor-Protégé Program, since that program would no longer exist as a separate program.

Sections 127.503(h) and 127.504

In addition to the revision to § 127.504(c) identified above, the proposed rule made other changes or clarifications to § 127.504. The proposed rule renamed and revised § 127.504 for better understanding and ease of use. It changed the section heading to “What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?”. SBA received no comments on these changes and adopts them as final in this rule.

This rule also moves the recertification procedures for WOSBs from § 127.503(h) to § 127.504(e).

Sections 134.318 and 121.1103

This rule amends § 134.318 to make it consistent with SBA's size regulations. In this regard, § 121.1103(c)(1)(i) of SBA's size regulations provides that upon receipt of the service copy of a NAICS code appeal, the contracting officer must “stay the solicitation.” However, when that rule was implemented, a corresponding change was not made to the procedural rules for SBA's OHA contained in part 134. As such, this rule simply requires that the contracting officer must amend the solicitation to reflect the new NAICS code whenever OHA changes a NAICS code in response to a NAICS code appeal. In addition, for clarity purposes, the rule revises § 121.1103(c)(1)(i) to provide that a contracting officer must stay the date of the closing of the receipt of offers instead of requiring that he or she must stay the solicitation.

III. Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

In combining the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program, SBA seeks to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. In addition, eliminating the requirement that SBA approve every joint venture in connection with an 8(a) contract will greatly reduce the time required for 8(a) BD Participants to come into and SBA to ensure compliance with SBA's joint venture requirements.

SBA is also making several changes to clarify its regulations. Through the years, SBA has spoken with small business and representatives and has determined that several regulations need further refinement so that they are easier to understand and implement. This rule makes several changes to ensure that the rules pertaining to SBA's various small business procurement programs are consistent. SBA believes that making the programs as consistent and similar as possible, where practicable, will make it easier for small businesses to understand what is expected of them and to comply with those requirements.

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

This rule seeks to address or clarify several issues, which will provide clarity to small businesses and contracting personnel. Further, SBA is eliminating the burden that 8(a) Participants seeking to be awarded a competitive 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those,

about 10 percent or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. Under the current rules, SBA must approve the initial joint venture agreement itself and each addendum to the joint venture agreement—identifying the type of work and what percentage each partner to the joint venture would perform of a specific 8(a) procurement—prior to contract award. SBA reviews the terms of the joint venture agreement for regulatory compliance and must also assess the 8(a) BD Participant's capacity and whether the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. It is difficult to calculate the costs associated with submitting a joint venture agreement to SBA because the review process is highly fact-intensive and typically requires that 8(a) firms provide additional information and clarification. However, in the Agency's best professional judgment, it is estimated that an 8(a) Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. That equates to approximately 1,350 hours at an estimated rate of \$44.06 per hour—the median wage plus benefits for accountants and auditors according to 2018 data from the Bureau of Labor Statistics—for an annual total cost savings to 8(a) Participants of about \$59,500. In addition to the initial joint venture review and approval process, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum. Not every joint venture is awarded more than one contract, but those that do are often awarded the maximum allowed of three contracts. SBA estimates that Participants submit an additional 300 addendum actions, with each action taking about 1.5 hours for the Participant. That equates to approximately 450 hours at an estimated rate of \$44.06 per hour for an annual total cost savings to 8(a) Participants of about \$19,800. Between both initial and addendum actions, this equates to an annual total cost savings to 8(a) Participants of about \$79,300.

In addition, merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program would also provide cost savings. Firms seeking a mentor-protégé relationship through the All Small Mentor-Protégé Program apply through an on-line, electronic application system. 8(a) Participants seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD

program do not apply through an on-line, electronic system, but rather apply manually through their servicing SBA district office. In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually, which equates to an annual savings to prospective protégé firms of about 300 hours. At an estimated rate of \$44.06 per hour, the annual savings in costs related to the reduced time for mentor-protégé applications through the All Small Mentor Protégé process is about \$13,000 per year. In a similar vein, eliminating the manual review and approval process for 8(a) BD Mentor-Protégé Program applications will provide cost savings to the Federal government. As previously noted, an 8(a) Participant seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD program must submit an application manually to its servicing district office. The servicing district office likewise conducts a manual review of each application for completeness and for regulatory compliance. This review process can be cumbersome since the analyst must first download and organize all application materials by hand. In contrast, the on-line, electronic application system available to prospective protégés in the All Small Mentor-Protégé Program has significantly streamlined SBA's review process in two ways. First, it logically organizes application materials for the reviewer, resulting in a more efficient and consistent review of each application. Second, all application materials are housed in a central document repository and are accessible to the reviewer without the need to download files. In the Agency's best professional judgment, this streamlined application review process delivers estimated savings of 30 percent per application as compared to the manual application review process under the 8(a) BD Mentor-Protégé Program. SBA further estimates that it takes approximately three hours to review an application for the All Small Mentor Protégé Program. That equates to approximately 135 hours (*i.e.*, 150 applications multiplied by three hours multiplied by 30 percent) at an estimated rate of \$44.06 per hour for an annual total cost savings to the Federal government of about \$5,900 per year. The elimination of manual application

process creates a total cost savings of \$18,900 per year.

Moreover, eliminating the 8(a) BD Mentor-Protégé Program as a separate program and merging it with the All Small Mentor-Protégé Program will eliminate confusion between the two programs for firms seeking a mentor-protégé relationship. When SBA first implemented the All Small Mentor-Protégé Program, it intended to establish a program substantively identical to the 8(a) BD Mentor-Protégé Program, as required by Section 1641 of the NDAA of 2013. Nevertheless, feedback from the small business community reveals a widespread misconception that the two programs offer different benefits. By merging the 8(a) BD Mentor-Protégé Program into the All Small-Mentor Protégé Program, firms will not have to read the requirements for both programs and try to decipher perceived differences. SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship. Based on approximately 600 mentor-protégé applications each year (about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program), this would equate to an annual cost savings to prospective protégé firms of about 600 hours. At an estimated rate of \$44.06 per hour, the annual savings in costs related to the elimination of confusion caused by having two separate programs is about \$26,400.

Thus, in total, the merger of the 8(a) BD mentor-protégé program into the All Small Business Mentor-Protégé Program would provide a cost savings of about \$45,300 per year.

In addition, it generally takes between 60 and 90 days for SBA to approve a mentor-protégé relationship through the 8(a) BD program. Conversely, the average time it takes to approve a mentor-protégé relationship through the All Small Mentor-Protégé Program is about 20 working days. To firms seeking to submit offers through a joint venture with their mentors, this difference is significant. Such joint ventures are only eligible for the regulatory exclusion from affiliation if they are formed after SBA approves the underlying mentor-protégé relationship. It follows that firms applying through the 8(a) BD Mentor-Protégé Program could miss out on contract opportunities waiting for their mentor-protégé relationships to be approved. These contract opportunity costs are inherently difficult to measure, but are certainly significant to the firms missing out on specific contract opportunities. However, in SBA's best

judgment, faster approval timeframes will mitigate such costs by giving program participants more certainty in planning their proposal strategies.

This rule will also eliminate the requirement that any specific joint venture can be awarded no more than three contracts over a two year period, but will instead permit a joint venture to be awarded an unlimited number of contracts over a two year period. The change removing the limit of three awards to any joint venture will reduce the burden of small businesses being required to form additional joint venture entities to perform a fourth contract within that two-year period. SBA has observed that joint ventures are often established as separate legal entities—specifically as limited liability corporations—based on considerations related to individual venture liability, tax liability, regulatory requirements, and exit strategies. Under the current rule, joint venture partners must form a new joint venture entity after receiving three contracts lest they be deemed affiliated for all purposes. The rule, which allows a joint venture to continue to seek and be awarded contracts without requiring the partners to form a new joint venture entity after receiving its third contract, will save small businesses significant legal costs in establishing new joint ventures and ensuring that those entities meet all applicable regulatory requirements.

This rule also makes several changes to reduce the burden of recertifying small business status generally and requesting changes of ownership in the 8(a) BD program. Specifically, the rule clarifies that a concern that is at least 51 percent owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) need not recertify its status as a small business when the ownership of the concern changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. In addition, the rule also provides that a Participant in SBA's 8(a) BD program that is owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. Both changes will save entity-owned small business concerns time and money. Similarly, the rule provides that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of a Participant in the 8(a) BD program will increase the percentage of his or her (its) ownership interest.

The rule will also allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. This changes the current rule which requires a concern to wait 12 months from the date of the final Agency decision to reapply. This will allow firms that have been declined from participating in the 8(a) BD program the opportunity to correct deficiencies, come into compliance with program eligibility requirements, reapply and be admitted to the program and receive the benefits of the program much more quickly. SBA understands that by reducing the re-application waiting period there is the potential to strain the Agency's resources with higher application volumes. In the Agency's best judgment, any costs associated with the increase in application volume would be outweighed by the potential benefit of providing business development assistance and contracting benefits sooner to eligible firms.

This rule also clarifies SBA's position with respect to size and socioeconomic status certifications on task orders under MACs. Currently, size certifications at the order level are not required unless the contracting officer, in his or her discretion, requests a recertification in connection with a specific order. The rule requires a concern to submit a recertification or confirm its size and/or socioeconomic status for all set-aside orders (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) under unrestricted MACs, except for orders or Blanket Purchase Agreements issued under any FSS contracts. Additionally, the rule requires a concern to submit a recertification or confirm its socioeconomic status for the order where the required socioeconomic status for the order differs from that of the underlying set aside MAC. The rule does not require recertification, however, if the agency issues the order under a pool or a reserve, and the pool or reserve already was set aside in the same category as the order.

If the firm's size and status in SAM is current and accurate when the firm submits its offer, the concern will not need to submit a new certification or submit any additional documentation with its offer. SBA recognizes that confirming accurate size and socioeconomic status imposes a burden on a small business contract holder, but the burden is minimal. SBA intends that confirmation of size and status under

this rule will be satisfied by confirming that the firm's size and status in SAM is currently accurate and qualifies the firm for award.

FPDS-NG indicates that, in Fiscal Year 2019, agencies set aside 1,800 orders under unrestricted MACs, excluding orders under FSS contracts. Agencies also set aside 15 pools or reserves using already-established MACs other than FSS contracts. SBA adopts the assumption from FAR Case 2014-002 that on average there are three offers per set-aside order. SBA also assumes that agencies will award five orders from each set-aside pool or set-aside reserve per year, using the same set-aside category as the pool or reserve. These pool or reserve orders do not require recertification at time of order; therefore, SBA subtracts the pool or reserve orders from the number of orders subject to the rule, leaving 1,725 orders subject to the rule.

The annual number of set-aside orders under unrestricted MACs, excluding FSS orders and orders under set-aside pools or reserves, therefore is calculated as $1,725 \text{ orders} \times 3 \text{ offers per order} = 5,175$. The ease of complying with the rule varies depending on the size of a firm. If the firm's size is not close to the size standard, compliance is simple; the firm merely confirms that it has a SAM registration. SBA estimates those firms spend 5 minutes per offer to comply with this rule. For a firm whose size is close to the size standard, compliance requires determining whether the firm presently qualifies for the set-aside—primarily, whether the firm is presently a small business. SBA adopts the estimate from OMB Control No. 9000-0163 that these firms spend 30 minutes per offer to comply with this rule.

The share of small businesses that are within 10 percent of the size standard is 1.3 percent. Therefore, the annual public burden of requiring present size and socioeconomic status is $(5,175 \text{ offers} \times 98.7 \text{ percent} \times 5 \text{ minutes} \times \$44.06 \text{ cost per hour}) + (5,175 \text{ offers} \times 1.3 \text{ percent} \times 30 \text{ minutes} \times \$44.06 \text{ cost per hour}) = \$20,250$.

FPDS-NG indicates that, in Fiscal Year 2019, agencies set aside about 130 orders under set-aside MACs (other than FSS contracts) in the categories covered by this rule. These categories are WOSB or EDWOSB set-aside/sole-source orders under small business set-aside MACs; SDVOSB set-aside/sole-source orders under small business set-aside MACs; and HUBZone set-aside/sole source orders set-aside/sole-source orders under small business set-aside MACs. The ease of complying on these set-aside within set-asides varies depending on whether the firm has had any of

these recent actions: (i) An ownership change, (ii) a corporate change that alters control of the firm, such as change in bylaws or a change in corporate officers, or (iii) for the HUBZone program, a change in the firm's HUBZone certification status under SBA's recently revised HUBZone program procedures. Although data is not available, SBA estimates that up to 25 percent of firms would have any of those recent actions. Firms in that category will spend 30 minutes per offer determining whether the firm presently qualifies for a set-aside order. The remaining 75 percent of firms will spend 5 minutes merely confirming that the firm has an active SAM registration.

Following the same calculations, the annual cost of requiring present socioeconomic status on set-aside orders under set-aside MACs is calculated as $(130 \text{ orders} \times 3 \text{ offers/order} \times 75 \text{ percent} \times 5 \text{ minutes} \times \$44.06 \text{ cost per hour}) + (130 \text{ orders} \times 3 \text{ offers/order} \times 25 \text{ percent} \times 30 \text{ minutes} \times \$44.06 \text{ cost per hour})$. This amounts to an annual cost of about \$3,220.

As reflected in the calculation, SBA believes that being presently qualified for the required size or socioeconomic status on an order, where required, would impose a burden on small businesses. A concern already is required by regulation to update its size and status certifications in SAM at least annually. As such, the added burden to industry is limited to confirming that the firm's certification is current and accurate. The Federal Government, however, will receive greater accuracy from renewed certification which will enhance transparency in reporting and making awards.

The added burden to ordering agencies includes the act of checking a firm's size and status certification in SAM at the time of order award. Since ordering agencies are already familiar with checking SAM information, such as to ensure that an order awardee is not debarred, suspended, or proposed for debarment, this verification is minimal. Further, checking SAM at the time of order award replaces the check of the offeror's contract level certification. SBA also recognizes that an agency's market research for the order level may be impacted where the agency intends to issue a set-aside order under an unrestricted vehicle (or a socioeconomic set-aside under a small business set-aside vehicle) except under FSS contracts. The ordering agency may need to identify MAC-eligible vendors and then find their status in SAM. This is particularly the case where the agency is applying the Rule of Two and verifying that there are at least two

small businesses or small businesses with the required status sufficient to set aside the order. SBA does not believe that conducting SAM research is onerous.

Using the same set-aside order data, the annual cost of checking certifications and conducting additional market research efforts is calculated as (1725 orders off unrestricted + 130 orders off set-asides) × 30 minutes × \$44.06/hours = \$46,600 in annual government burden.

Currently, recertification at the contract level for long term contracts is specifically identified only at specific points. This rule makes clear that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point for a long-term MAC. FPDS-NG indicates that, in Fiscal Year 2019, agencies awarded 399 MACs to small businesses. SBA estimates that procuring activities will use their discretion to request recertification at any point in a long term contract approximately 10% of the time. SBA adopts the estimate from OMB Control No. 9000-0163 that procuring activities will spend 30 minutes to comply with this rule. The annual cost of allowing recertification at any point on a long-term contract to procuring activities is calculated as (399 MACs × 10%) × 30 minutes × \$44.06 cost per hour. This amounts to an estimated annual cost of \$880. Where requested, this recertification would impose a burden on small businesses. Following this same calculation, SBA estimates that the impact to firms will also be \$880 ((399 number of MACs × 10%) × 30 minutes × \$44.06 per hour). The total cost is \$880 × 2 = \$1,760.

The annual cost is partially offset by the cost savings that result from other changes in this rule. This change goes more to accountability and ensuring that small business contracting vehicles truly benefit small business concerns. In addition, commenters responding to the costs associated with recertification supported the proposed rule that requires a firm to recertify its size and/or socioeconomic status for set-aside

task orders under unrestricted MACs. These commenters agreed that certifying in the System for Award Management (*sam.gov*) should meet this requirement.

3. What are the alternatives to this rule?

As noted above, this rule makes a number of changes intended to reduce unnecessary or excessive burdens on small businesses, and clarifies other regulatory provisions to eliminate confusion among small businesses and procuring activities. SBA has also considered other alternative proposals to achieve these ends. Concerning SBA's role in approving 8(a) joint venture agreements, the Agency could also eliminate the requirement that SBA must approve joint ventures in connection with sole source 8(a) awards. However, as noted above, SBA believes that such approval is an important enforcement mechanism to ensure that the joint venture rules are followed. With respect to the requirement that a concern must wait 90 days to re-apply to the 8(a) BD program after the date of the Agency's final decline decision, SBA could instead eliminate the application waiting period altogether. This would allow a concern to re-apply as soon as it reasonably believed it had overcome the grounds for decline. However, SBA believes that such an alternative would encompass significant administrative burden on SBA.

Under the rule, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), or the order is set aside in a different category than was the set-aside MAC, a concern must be qualified for the required size and socioeconomic status at the time it submits its initial offer, which includes price, for the particular order. In SBA's view, the order is the first time size or socioeconomic status is important where the underlying MAC is unrestricted or set aside in a different

category than the set-aside MAC, and therefore, that is the date at which eligibility should be examined. SBA considered maintaining the status quo; namely, allowing a one-time certification as to size and socioeconomic status (*i.e.*, at the time of the initial offer for the underlying contract) to control all orders under the contract, unless one of recertification requirements applies (*see* 121.404(g)). SBA believes the current policy does not properly promote the interests of small business. Long-term contracting vehicles that reward firms that once were, but no longer qualify as, small or a particular socioeconomic status adversely affect truly small or otherwise eligible businesses.

Another alternative is to require business concerns to notify contracting agencies when there is a change to a concern's socioeconomic status (*e.g.*, HUBZone, WOSB, etc.), such that they would no longer qualify for set-aside orders. The contracting agency would then be required to issue a contract modification within 30 days, and from that point forward, ordering agencies would no longer be able to count options or orders issued pursuant to the contract for small business goaling purposes. This could be less burdensome than recertification of socioeconomic status for each set-aside order.

Summary of Costs and Cost Savings

Table 1: Summary of Incremental Costs and Cost Savings, below, sets out the estimated net incremental cost/(cost saving) associated with this rule. *Table 2: Detailed Breakdown of Incremental Costs and Cost Savings*, below, provides a detailed explanation of the annual cost/(cost saving) estimates associated with this rule. This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule, discounted at 7% relative to 2016 over a perpetual time horizon, is \$37,166 in 2016 dollars with a net present value of \$530,947 in 2016 dollars.

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
1	Eliminating SBA approval of initial and addendums to joint venture agreements to perform competitive 8(a) contracts and eliminating approval for two additional contracts which would require additional submissions and explanations for any such joint venture addendum.	(\$79,300)
2	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of manual application process.	(18,900)
3	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of confusion among firms seeking a mentor-protégé relationship.	(26,400)
4	Requiring recertification for set-aside orders issued under unrestricted Multiple Award Contracts	20,250

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
5	Requiring recertification for set-aside orders issued under set-aside Multiple Award Contracts	3,220
6	Additional Government detailed market research to identify qualified sources for set-aside orders and verify status.	46,600
7	Contracting officer discretion to request size recertification at any point for a long-term MAC	1,760

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
1	<p><i>Regulatory change:</i> SBA is eliminating the burden that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. In addition, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum.</p> <p><i>Estimated number of impacted entities:</i> There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those, about 10% or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. There are approximately 300 addendums per year.</p> <p><i>Estimated average impact* (labor hour):</i> SBA estimates that an 8(a) BD Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. Each addendum requires 1.5 hours of time.</p> <p><i>2018 Median Pay** (per hour):</i> Most 8(a) firms use an accountant or someone with similar skills for this task.</p>	<p>450 entities and 300 additional addendums.</p> <p>3 hours and 1.5 hours per additional addendum.</p> <p>\$44.06 per hour.</p>
2	<p><i>Estimated Cost/(Cost Saving)</i></p> <p><i>Regulatory change:</i> SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program and eliminating the manual application process. This will reduce the burden on 8(a) Participants seeking a mentor-protégé agreement and on SBA to no longer process paper applications.</p> <p><i>Estimated number of impacted entities:</i> SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually.</p> <p><i>Estimated average impact* (labor hour):</i> In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. For SBA employees, reviewing the manual mentor-protégé agreements takes 3 hours and this change is expected to save SBA 30% of the time required.</p> <p><i>2018 Median Pay** (per hour):</i> Most 8(a) firms use an accountant or someone with similar skills for this task.</p>	<p>(\$79,300).</p> <p>150 entities.</p> <p>2 hours for applicants and less than 1 hour for SBA.</p> <p>44.06 per hour.</p>
3	<p><i>Estimated Cost/(Cost Saving)</i></p> <p><i>Regulatory change:</i> SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program. In doing so, firms will not have to read the requirements for both programs and try to decipher any perceived differences.</p> <p><i>Estimated number of impacted entities:</i> SBA receives approximately 600 mentor-protégé applications each year—about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program.</p> <p><i>Estimated average impact* (labor hour):</i> SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship.</p> <p><i>2018 Median Pay** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.</p>	<p>(\$18,900).</p> <p>600 entities.</p> <p>1 hour.</p> <p>\$44.06 per hour.</p>
4	<p><i>Estimated Cost/(Cost Saving)</i></p> <p><i>Regulatory change:</i> SBA is requiring that a firm be accurately certified and presently qualified as to size and/or status for set-aside orders issued under Multiple Award Contracts that were not set aside or set aside in a separate category, except for the Federal Supply Schedule.</p> <p><i>Estimated number of impacted entities:</i> Approximately 1,725 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, including the Federal Supply Schedule, outside of set-aside pools. SBA estimates that three offers are submitted for each order.</p> <p><i>Estimated average impact* (labor hour):</i> SBA estimates that a small business that is close to its size standard will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer. A small business that is not close to its size standard will spend an average of 5 minutes confirming that it has a SAM registration.</p> <p><i>2018 Median Pay** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.</p>	<p>(\$26,400).</p> <p>5,175 offers.</p> <p>0.5 hours for firms within 10 percent of size standard (1.3% of firms); 5 minutes otherwise (98.7% of firms).</p> <p>\$44.06 per hour.</p>
5	<p><i>Estimated Cost/(Cost Saving)</i></p> <p><i>Regulatory change:</i> SBA is requiring that a firm be accurately certified and presently qualified as to socioeconomic status for set-aside orders issued under Multiple Award Contracts that were set aside in a separate category, except for the Federal Supply Schedule contracts.</p>	<p>\$20,250.</p>

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
6	<i>Estimated number of impacted entities:</i> Approximately 130 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, other than on the Federal Supply Schedule, are affected by this rule. SBA estimates that three offers are submitted for each order for a total of 390 offers.	390 offers.
	<i>Estimated average impact * (labor hour):</i> SBA estimates that a small business will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer, if it has had a change in ownership, control, or certification. Otherwise, the small business will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms with a change in ownership, control, or HUBZone certification (25% of firms); 5 minutes otherwise (75% of firms).
	<i>2018 Median Pay ** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.	\$44.06 per hour.
	<i>Estimated Cost/(Cost Saving)</i>	\$3,220.
7	<i>Regulatory change:</i> SBA is requiring that firms be accurately certified and presently qualified as to size and socioeconomic status for certain set-aside orders issued under Multiple Award Contracts, except for the Federal Supply Schedule contracts. This change impacts the market research required by ordering activities to determine if a set-aside order for small business or for any of the socioeconomic programs may be pursued and whether the awardee is qualified for award.	
	<i>Estimated number of impacted entities:</i> Approximately 2,115 set-aside orders are issued annually as described in the rule.	2,115 orders.
	<i>Estimated average impact * (labor hour):</i> SBA estimates that ordering activities applying the Rule of Two will spend an average of 30 additional minutes to locate contractors awarded Multiple Award Contracts, looking up the current business size for each of the contractors in SAM to determine if a set-aside order can be pursued, and confirming the status of the awardee.	0.5 hours.
	<i>2018 Median Pay ** (per hour):</i> Contracting officers typically perform the market research for the acquisition plan.	\$44.06 per hour.
	<i>Estimated Cost/(Cost Saving)</i>	\$46,600.
	<i>Regulatory Change:</i> Contracting officer discretion to request size recertification at any point for a long-term MAC.	
	<i>Estimated number of impacted entities:</i> Approximately 400 long term MACs are awarded annually to small businesses. SBA estimates that contracting officers will exercise this discretion 10% of the time.	40 contracts.
	<i>Estimated average impact * (labor hour):</i> SBA estimates that ordering activities will spend an average of 30 additional minutes to request this recertification. Contractors will spend an average of 30 additional minutes to respond to the request.	0.5 hours for agencies; 0.5 hours for businesses.
	<i>2018 Median Pay ** (per hour):</i> Contracting officers will request this recertification	\$44.06.
	<i>Estimated Cost/(Cost Saving)</i>	\$1,760.

* This estimate is based on SBA's best professional judgment.

** Source: Bureau of Labor Statistics, Accountants and Auditors.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13175

As part of this rulemaking process, SBA held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. See 84 FR 66647. These consultations were in addition to those held by SBA in Anchorage, AK (see 83 FR 17626), Albuquerque, NM (see 83 FR 24684), and Oklahoma City, OK (see 83 FR 24684) before issuing a proposed rule. This executive order reaffirms the Federal Government's commitment to tribal sovereignty and requires Federal agencies to consult with Indian tribal governments when developing policies that would impact the tribal community. The purpose of the above-

referenced tribal consultation meetings was to provide interested parties with an opportunity to discuss their views on the issues, and for SBA to obtain the views of SBA's stakeholders on approaches to the 8(a) BD program regulations. SBA has always considered tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allow for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and ANC-owned firms participating in the 8(a) BD program.

In general, tribal stakeholders were supportive of SBA's intent to implement changes that will make it easier for small business concerns to understand and comply with the regulations

governing the 8(a) BD program, and agreed that this rulemaking will make the program more effective and accessible to the small business community. SBA received significant comments on its approaches to the proposed regulatory changes, as well as several recommendations regarding the 8(a) BD program not initially contemplated by this planned rulemaking. SBA has taken these discussions into account in drafting this final rule.

Executive Order 13563

This executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System—Next Generation (FPDS-NG), Dynamic Small Business Search (DSBS) and System for Award Management (SAM).

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on *Regulations.gov*; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received

several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289. All comments received were posted on *www.regulations.gov* to provide transparency into the rulemaking process. In addition, SBA submitted the final rule to the Office of Management and Budget for interagency review.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

Yes, the rule is intended to reduce unnecessary or excessive burdens on 8(a) Participants, and clarify other regulatory-related provisions to eliminate confusion among small businesses and procuring activities.

Executive Order 13771

This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule is \$37,166 in 2016 dollars with a net present value of \$530,947 over perpetuity, in 2016 dollars. A detailed discussion of the estimated cost of this proposed rule can be found in the above Regulatory Impact Analysis.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule imposes additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The rule provides a number of size and/or socioeconomic status recertification requirements for set-aside orders under MACs. The annual total public reporting burden for this collection of information is estimated to be 82 total hours (\$3,625), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 165.

Responses per respondent: 1.

Total annual responses: 165.

Preparation hours per response: 0.5 (30 min).

Total response burden hours: 82.

Cost per hour: \$44.06.

Estimated cost burden to the public: \$3,625.

Additionally, the rule adds procuring agency discretion to request recertification at any point for long term MACs. The annual total public reporting burden for this collection of information is estimated to be 20 total hours (\$880), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 40.

Responses per respondent: 1.

Total annual responses: 40.

Preparation hours per response: 0.5 (30 min).

Total response burden hours: 20.

Cost per hour: \$44.06.

Estimated cost burden to the public: \$880. This added information collection burden will be officially reflected through OMB Control Number 9000–0163 when the rule is implemented. SBA received no comments on the PRA analysis set forth in the proposed rule.

SBA also has an information collection for the Mentor-Protégé Program, OMB Control Number 3245–0393. This collection is not affected by these amendments.

Regulatory Flexibility Act, 5 U.S.C. 601–612

The Regulatory Flexibility Act (RFA) requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.”

This rule concerns aspects of SBA’s 8(a) BD program, the All Small Mentor-Protégé Program, and various other small business programs. As such, the rule relates to small business concerns but would not affect “small organizations” or “small governmental jurisdictions” because those programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns”

within the meaning of SBA's regulations.

There are currently approximately 4,500 8(a) BD Participants in the portfolio. Most of the changes are clarifications of current policy or designed to reduce unnecessary or excessive burdens on 8(a) BD Participants and therefore should not impact many of these concerns. There are about 385 Participants with 8(a) BD mentor-protégé agreements and about another 850 small businesses that have SBA-approved mentor-protégé agreements through the All Small Mentor-Protégé Program. The consolidation of SBA's two mentor-protégé programs into one program will not have a significant economic impact on small businesses. In fact, it should

have no affect at all on those small businesses that currently have or on those that seek to have an SBA-approved mentor-protégé relationship. The rule eliminates confusion regarding perceived differences between the two Programs, removes unnecessary duplication of functions within SBA, and establishes one unified staff to better coordinate and process mentor-protégé applications. The benefits of the two programs are identical, and will not change under the rule.

SBA is also requiring a business to be qualified for the required size and status when under consideration for a set-aside order off a MAC that was awarded outside of the same set-aside category. Pursuant to the Small Business Goaling Report (SBGR) Federal Procurement

Data System—Next Generation (FPDS—NG) records, about 236,000 new orders were awarded under MACs per year from FY 2014 to FY 2018. Around 199,000, or 84.3 percent, were awarded under MACs established without a small business set aside. For this analysis, small business set-asides include all total or partial small business set-asides, and all 8(a), WOSB, SDVOSB, and HUBZone awards. There were about 9,000 new orders awarded annually with a small business set-aside under unrestricted MACs. These orders were issued to approximately 2,600 firms. The 9,000 new orders awarded with a small business set-aside under a MAC without a small business set aside were 4.0 percent of the 236,000 new orders under MACs in a year (Table 3).

TABLE 3—0.47% OF NEW MAC ORDERS IN A FY ARE NON-FSS ORDERS SET ASIDE FOR SMALL BUSINESS WHERE UNDERLYING BASE CONTRACT NOT SET ASIDE FOR SMALL BUSINESS

	FY014	FY015	FY016	FY017	FY018	AVG
Total new orders under MACs in FY	244,664	231,694	245,978	234,304	223,861	236,100
Orders awarded with SB set aside under unrestricted MAC	10,089	9,347	9,729	9,198	8,666	9,406
Non-FSS orders awarded with SB set aside without MAC IDV SB set aside ..	902	780	1,019	1,422	1,400	1,105
Percent	0.37	0.34	0.41	0.61	0.63	0.47

If all firms receiving a non-FSS small business set-aside order under a MAC that was not itself set aside for small business were adversely affected by the rule (*i.e.*, every such firm receiving an award as a small business had grown to be other than a small business or no longer qualified as 8(a), WOSB, SDVO, or HUBZone), the rule requiring a business to be certified as small for non-FSS small business set-aside orders under MACs not set aside for small business would impact only 0.47 percent of annual new MAC orders. The proposed rule sought comments as to whether the rule would have a significant economic impact on a substantial number of small entities. SBA did not receive any comments responding to such request. As such, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, throughout the supplementary information to this proposed rule, SBA has identified the reasons why the changes are being made, the objectives and basis for the rule, a description of the number of small entities to which the rule will apply, and a description of alternatives considered.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal employment

opportunity, Lawyers, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

- 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

- 2. Amend § 121.103 by:
 - a. Revising the first sentence of paragraphs (b)(6) and (9);
 - b. Revising paragraph (f)(2)(i) and Example 2 to paragraph (f);
 - c. Revising the first sentence of paragraph (g);
 - d. Revising paragraph (h) introductory text and Examples 1, 2, and 3 to paragraph (h) introductory text;
 - e. Removing paragraphs (h)(1) and (h)(2);
 - f. Redesignating paragraphs (h)(3) through (h)(5) as paragraphs (h)(1) through (h)(3), respectively;
 - g. Revising the paragraph heading for the newly redesignated paragraph (h)(1) and adding two sentences to the end of newly redesignated paragraph (h)(1)(ii);

- h. Removing newly redesignated paragraph (h)(1)(iii);
- i. Adding a paragraph heading for redesignated paragraph (h)(2);
- j. Revising newly redesignated paragraph (h)(3); and
- k. Adding paragraph (h)(4).

The revisions and additions read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. * * *

* * * * *

(9) In the case of a solicitation for a bundled contract or a Multiple Award Contract with a value in excess of the agency's substantial bundling threshold, a small business contractor may enter into a Small Business Teaming Arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract. * * *

* * * * *

(f) * * *

(2) * * *

(i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser. * * *

* * * * *

Example 2 to paragraph (f). Firm A has been in business for five years and has approximately 200 contracts. Of those contracts, 195 are with Firm B. The value of Firm A's contracts with Firm B is greater than 70% of its revenue over the previous three years. Unless Firm A can show that its contractual relations with Firm B do not restrict it from selling the same type of products or services to another purchaser, SBA would most likely find the two firms affiliated.

(g) *Affiliation based on the newly organized concern rule.* Except as provided in § 124.109(c)(4)(iii),

affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. * * *

(h) Affiliation based on joint ventures.

A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. A joint venture: Must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract; may be in the form of a formal or informal partnership or exist as a separate limited liability company

or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.*, the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(4) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

Example 1 to paragraph (h)

introductory text. Joint Venture AB receives a contract on April 2, year 1. Joint Venture AB may receive additional contracts through April 2, year 3. On June 6, year 2, Joint Venture AB submits an offer for Solicitation 1. On July 13, year 2, Joint Venture AB submits an offer for Solicitation 2. On May 27, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. On July 22, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 2. Even though the award of the two contracts emanating from Solicitations 1 and 2 would occur after April 2, year 3, Joint Venture AB may receive those awards without causing general affiliation between its joint venture partners because the offers occurred prior to the expiration of the two-year period.

Example 2 to paragraph (h)

introductory text. Joint Venture XY receives a contract on August 10, year 1. It may receive two additional contracts through August 10, year 3. On March 19, year 2, XY receives a second contract. It receives no other contract awards through August 10, year 3 and has submitted no additional offers prior to August 10, year 3. Because two years have passed since the date of the first contract award, after August 10, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3 to paragraph (h)

introductory text. Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for

Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(1) *Size of joint ventures.* (i) * * *

(ii) * * * Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, at the time it submits its initial offer including price. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.

* * * * *

(2) *Ostensible subcontractors.* * * *

(3) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee count.

Example 1 to paragraph (h)(3). Joint Venture AB is awarded a contract for \$10M. The joint venture will perform 50% of the work, with A performing \$2M (40% of the 50%, or 20% of the total value of the contract) and B performing \$3M (60% of the 50% or 30% of the total value of the contract). Since A will perform 40% of the work done by the joint venture, its share of the revenues for the entire contract is 40%, which means that the receipts from the contract awarded to Joint

Venture AB that must be included in A's receipts for size purposes are \$4M. A must add \$4M to its receipts for size purposes, unless its receipts already account for the \$4M in transactions between A and Joint Venture AB.

(4) *Facility security clearances.* A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

* * * * *

■ 3. Amend § 121.402 by revising the first sentence of paragraph (b)(2), and paragraphs (c)(1)(i), (c)(2)(i), and (e) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

* * * * *

(b) * * *

(2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. * * *

(c) * * *

(1) * * *

(i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or

* * * * *

(2) * * *

(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases where an agency can

issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.

* * * * *

(e) When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal.

* * * * *

■ 4. In § 121.404:

■ a. Amend paragraph (a) by:

■ i. Revising paragraphs (a) introductory text and (a)(1); and

■ ii. Adding a paragraph heading to paragraph (a)(2);

■ b. Revising paragraph (b);

■ c. Adding a paragraph heading to paragraph (c);

■ d. Revising paragraph (d);

■ e. Adding a paragraph heading to paragraph (e) and a sentence at the end of the paragraph;

■ f. Adding a paragraph heading to paragraph (f);

■ g. Amend paragraph (g) by:

■ i. Redesignating paragraph (g)(2)(ii)(D) as paragraph (g)(2)(iii);

■ ii. Revising paragraphs (g) introductory text, (g)(2)(ii)(C) and newly redesignated paragraph (g)(2)(iii); and

■ iii. Adding paragraph (g)(2)(iv) and a new third sentence to paragraph (g)(3) introductory text; and

■ h. Adding a paragraph heading to paragraph (h).

The additions and revisions read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) *Time of size*—(1) *Multiple award contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) *Single NAICS.* If a single NAICS code is assigned as set forth in § 121.402(c)(1)(i), SBA determines size status for the underlying Multiple Award Contract at the time of initial offer (or other formal response to a solicitation), which includes price, based upon the size standard set forth in the solicitation for the Multiple Award Contract, unless the concern was

required to recertify under paragraph (g)(1), (2), or (3) of this section.

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) *Multiple NAICS.* If multiple NAICS codes are assigned as set forth in § 121.402(c)(1)(ii), SBA determines size status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.*,

CLIN, SIN, Sector, FA or equivalent) for which the business concern submits an offer and represents that it qualifies as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section. If the business concern (including a joint venture) submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent).

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or Blanket Purchase Agreement for a discrete category under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract for discrete categories has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer

requests a size recertification for a specific order or Blanket Purchase.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or Agreement issued against a Multiple Award Contract if the contracting officer requests a new size certification for the order or Agreement.

(2) *Agreements.* * * *

(b) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business (under part 126 of this chapter), or as a women-owned small business concern (under part 127 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification.

(c) *Certificates of competency.* * * *

(d) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Size status is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes: compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

(e) *Subcontracting.* * * * A prime contractor may rely on the self-certification of subcontractor provided it does not have a reason to doubt the concern's self-certification.

(f) *Two-step procurements.* * * *

(g) *Effect of size certification and recertification.* A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business until throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business,

except that a required recertification as other than small under paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders. The following exceptions apply to this paragraph (g):

* * * * *

(2) * * *

(ii) * * *

(C) In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

(iii) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

(iv) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

Example 1 to paragraph (g)(2)(iii). Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(3) * * * A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term multiple award contract. * * *

* * * * *

(h) *Follow-on contracts.* * * *

§ 121.406 [Amended]

■ 5. Amend § 121.406 by removing the word “provided” and adding in its place the word “provide” in paragraph (a) introductory text.

■ 6. Amend § 121.603 by adding paragraph (c)(3) to read as follows:

§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?

* * * * *

(c) * * *

(3) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

* * * * *

■ 7. Amend § 121.702 by revising paragraph (c)(6) to read as follows:

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

* * * * *

(c) * * *

(6) *Size requirement for joint ventures.* Two or more small business concerns may submit an application as a joint venture. The joint venture will qualify as small as long as each concern is small under the size standard for the SBIR program, found at § 121.702(c), or the joint venture meets the exception at § 121.103(h)(3)(ii) for two firms approved to be a mentor and protégé under SBA's All Small Mentor-Protégé Program.

* * * * *

■ 8. Amend § 121.1001 by revising paragraphs (a)(1)(iii), (a)(2)(iii), (a)(3)(iv), (a)(4)(iii), (a)(6)(iv), (a)(7)(iii), (a)(8)(iv), (a)(9)(iv), (b)(7), and (b)(12) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(1) * * *

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

* * * * *

(2) * * *

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(3) * * *

(iv) The responsible SBA Government Contracting Area Director or the

Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

* * * * *

(4) * * *

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment Division, or the Associate General Counsel for Procurement Law.

* * * * *

(6) * * *

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

(7) * * *

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(8) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(9) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(b) * * *

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

* * * * *

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

* * * * *

■ 9. Amend § 121.1004 by revising paragraph (a)(2)(ii) and adding paragraph (a)(2)(iii) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(2) * * *

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any

Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

* * * * *

■ 10. Amend § 121.1103 by revising paragraph (c)(1)(i) to read as follows:

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

* * * * *

(c) * * *

(1) * * *

(i) Stay the date for the closing of receipt of offers;

* * * * *

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 11. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 12. Amend § 124.3 by adding in alphabetical order a definition for “Follow-on requirement or contract” to read as follows:

§ 124.3 What definitions are important in the 8(a) BD program?

* * * * *

Follow-on requirement or contract.

The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

* * * * *

■ 13. Amend § 124.105 by revising paragraph (g) and paragraphs (i)(2) and (4) to read as follows:

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

* * * * *

(g) *Ownership of another current or former Participant by an immediate family member.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and any of the following circumstances exist:

(i) The concerns are connected by any common ownership or management, regardless of amount or position;

(ii) The concerns have a contractual relationship that was not conducted at arm's length;

(iii) The concerns share common facilities; or

(iv) The concerns operate in the same primary NAICS code and the individual seeking to qualify the applicant concern does not have management or technical experience in that primary NAICS code.

Example 1 to paragraph (g)(1). X applies to the 8(a) BD program. X is 95% owned by A and 5% by B, A's father and the majority owner in a former 8(a) Participant. Even though B has no involvement in X, X would be ineligible for the program.

Example 2 to paragraph (g)(1). Y applies to the 8(a) BD program. C owns 100% of Y. However, D, C's sister and the majority owner in a former 8(a) Participant, is acting as a Vice President in Y. Y would be ineligible for the program.

Example 3 to paragraph (g)(1). X seeks to apply to the 8(a) BD program with a primary NAICS code in plumbing. X is 100% owned by A. Z, a former 8(a) participant with a primary industry in general construction, is owned 100% by B, A's brother. For general construction jobs, Z has subcontracted plumbing work to X in the past at normal commercial rates. Subcontracting work at normal commercial rates would not preclude X from being admitted to the 8(a) BD program. X would be eligible for the program.

(2) If the AA/BD approves an application under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm from further participation in the

8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD at the time of application or that came into existence after program admittance.

* * * * *

(i) * * *

(2) Prior approval by the AA/BD is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction, the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, or the disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest. The concern must notify SBA within 60 days of such a change in ownership.

Example 1 to paragraph (i)(2). Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 80%, B would own 10% and C would own 10%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 20% of X both before and after the transaction.

Example 2 to paragraph (i)(2). Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged individual D owns 30% of Y; and non-disadvantaged individual E owns 10% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 20% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 20% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2). Disadvantaged individual A owns 85% of 8(a) Participant X; non-disadvantaged individual B owns 15% of X. A seeks to transfer 15% of X to B. Prior SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 20% of X prior to the transaction, prior approval is needed because B would own more than 20% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 60% of 8(a) Participant X; non-disadvantaged individual B owns 40% of X. B seeks to transfer 15%

to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 20% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

* * * * *

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA may suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

* * * * *

■ 14. Amend § 124.109 by:

- a. Revising the section heading;
- b. Adding paragraph (a)(7);
- c. Revising paragraph (c)(3)(ii);
- d. Adding paragraphs (c)(3)(iv) and (c)(4)(iii)(C); and
- e. Revising paragraphs (c)(6)(iii) and (c)(7)(ii).

The revisions and additions to read as follows:

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) * * *

(7) Notwithstanding § 124.105(i), where an ANC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 60 days of the transfer.

* * * * *

(c) * * *

(3) * * *

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary

business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern.

(A) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(B) If the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe can submit an application and qualify another firm owned by the tribe for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Example 1 to paragraph (c)(3)(ii)(B). Tribe X owns 100% of 8(a) Participant A. A entered the 8(a) BD program with a primary NAICS code of 236115, New Single-Family Housing Construction (except For-Sale Builders). After four years in the program, SBA noticed that the vast majority of A's revenues were in NAICS Code 237310, Highway, Street, and Bridge Construction, and notified A that SBA intended to change its primary NAICS code pursuant to § 124.112(e). A agreed to change its primary NAICS Code to 237310. Once the change is finalized, Tribe X can immediately submit a new application to qualify another firm that it owns for participation in the 8(a) BD program with a primary NAICS Code of 236115.

* * * * *

(iv) Notwithstanding § 124.105(i), where a Tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the Tribe and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(4) * * *

(iii) * * *

(C) Because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants.

* * * * *

(6) * * *

(iii) The Tribe, a tribally-owned economic development corporation, or

other relevant tribally-owned holding company vested with the authority to oversee tribal economic development or business ventures has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) * * *

(ii) The officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (*see* § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (*see* § 124.108(e)).

■ 15. Amend § 124.110 by revising the section heading and paragraph (e) to read as follows:

§ 124.110 Do Native Hawaiian Organizations (NHOs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(e) An NHO cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. An NHO may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO. However, an NHO-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(2) If the primary NAICS code of a Participant owned by an NHO is changed pursuant to § 124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

■ 16. Amend § 124.111 by revising the section heading, adding paragraph

(c)(3), and revising paragraph (d) to read as follows:

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(c) * * *

(3) Notwithstanding § 124.105(i), where a CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. However, a CDC-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program.

(2) If the primary NAICS code of a Participant owned by a CDC is changed pursuant to § 124.112(e), the CDC can submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

■ 17. Amend § 124.112 by revising paragraph (d)(5), redesignating paragraph (e)(2)(iv) as paragraph (e)(2)(v), and adding a new paragraph (e)(2)(iv).

The revision and addition read as follows:

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

* * * * *

(d) * * *

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. However, a non-disadvantaged minority owner may receive a payout in excess of the excessive withdrawal amount if it is a pro rata distribution paid to all shareholders (*i.e.*, the only way to increase the distribution to the Tribe, ANC, NHO or CDC is to increase the distribution to all shareholders) and it does not adversely affect the business development of the Participant.

Example 1 to paragraph (d)(5). Tribally-owned Participant X pays \$1,000,000 to a non-disadvantaged manager. If that was not part of a pro rata distribution to all shareholders, that would be deemed an excessive withdrawal.

Example 2 to paragraph (d)(5). ANC-owned Participant Y seeks to distribute \$550,000 to the ANC and \$450,000 to non-disadvantaged individual A based on their 55%/45% ownership interests. Because the distribution is based on the pro rata share of ownership, this would not be prohibited as an excessive withdrawal unless SBA determined that Y would be adversely affected.

(e) * * *

(2) * * *

(iv) A Participant may appeal a district office's decision to change its primary NAICS code to SBA's Associate General Counsel for Procurement Law (AGC/PL) within 10 business days of receiving the district office's final determination. The AGC/PL will examine the record, including all information submitted by the Participant in support of its position as to why the primary NAICS code contained in its business plan continues to be appropriate despite performing more work in another NAICS code, and issue a final agency decision within 15 business days of receiving the appeal.

* * * * *

■ 18. Amend § 124.203 by revising the first two sentences and adding a new third sentence to read as follows:

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit information and supporting documents required by SBA when applying for admission to the 8(a) BD program. This information may include, but not be limited to, financial data and statements, copies of filed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional information or documents SBA deems necessary to determine eligibility. Each individual claiming disadvantaged status must also authorize SBA to request and receive tax return information directly from the Internal Revenue Service. * * *

■ 19. Amend § 124.204 by adding a sentence to the end of paragraph (a) to read as follows:

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) * * * Where during its screening or review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

* * * * *

■ 20. Revise § 124.205 to read as follows:

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

There is no reconsideration process for applications that have been declined. An applicant which has been declined may file an appeal with SBA's Office of Hearings and Appeals pursuant to § 124.206, or reapply to the program pursuant to § 124.207.

§ 124.206 [Amended]

■ 21. Revise § 124.206 by removing and reserving paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

■ 22. Revise § 124.207 to read as follows:

§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline. However, a concern that has been declined three times within 18 months of the date of the first

final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline.

§ 124.301 [Redesignated as § 124.300]

- 23. Redesignate § 124.301 as § 124.300.
- 24. Add new § 124.301 to read as follows:

§ 124.301 Voluntary withdrawal or voluntary early graduation.

(a) A Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. Where a Participant has substantially achieved the goals and objectives set forth in its business plan, it may elect to voluntarily early graduate from the 8(a) BD program.

(b) To initiate withdrawal or early graduation from the 8(a) BD program, a Participant must notify its servicing SBA district office of its intent to do so in writing. Once the SBA servicing district office processes the request and the District Director recognizes the withdrawal or early graduation, the Participant is no longer eligible to receive any 8(a) BD program assistance.

- 25. Amend § 124.304(d) by revising the paragraph heading and adding a sentence at the end of paragraph (d) to read as follows:

§ 124.304 What are the procedures for early graduation and termination?

* * * * *

(d) *Notice requirements and effect of decision.* * * * Once the AA/BD issues a decision to early graduate or terminate a Participant, the Participant will be immediately ineligible to receive further program assistance. If OHA overrules the AA/BD's decision on appeal, the length of time between the AA/BD's decision and OHA's decision on appeal will be added to the Participant's program term.

* * * * *

- 26. Amend § 124.305 by:
 - a. Revising paragraph (a);
 - b. Revising the introductory text of paragraph (d);
 - c. Revising paragraph (d)(3);
 - d. Revising the introductory text of paragraph (h)(1);
 - d. Revising paragraphs (h)(1)(ii) and (iv);
 - e. Adding paragraph (h)(1)(v);
 - f. Redesignating paragraph (h)(6) as (h)(7); and
 - g. Adding a new paragraph (h)(6).
 The revisions and additions read as follows:

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) Except as set forth in paragraph (h) of this section, the AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

* * * * *

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.

* * * * *

(3) OHA's review is limited to determining whether the Government's interests need to be protected, unless a termination action has also been initiated and the Administrative Law Judge consolidates the suspension and termination proceedings. In such a case, OHA will also consider the merits of the termination action.

* * * * *

(h)(1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:

* * * * *

(ii) A disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, the Participant does not designate another disadvantaged individual to control the concern during the call-up period, and the Participant requests to be suspended during the call-up period;

* * * * *

(iv) Federal appropriations for one or more Federal departments or agencies have lapsed, a Participant would lose an 8(a) sole source award due to the lapse in appropriations (e.g., SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant or an agency could not offer a sole source 8(a) requirement to the program on behalf of the Participant due to the lapse in appropriations, and the Participant's program term would end during the lapse), and the Participant elects to suspend its participation in the

8(a) BD program during the lapse in Federal appropriations; or

(v) A Participant has not submitted a business plan to its SBA servicing office within 60 days after program admission.

* * * * *

(6) Where a Participant is suspended pursuant to paragraph (h)(1)(iii) or paragraph (h)(1)(v) of this section, the length of the suspension will be added to the concern's program term.

* * * * *

- 27. Amend § 124.402 by revising paragraph (b) to read as follows:

§ 124.402 How does a Participant develop a business plan?

* * * * *

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission.

* * * * *

- 28. Amend § 124.501 by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, by adding new paragraphs (g) and (k), and by revising newly redesignated paragraph (h) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

* * * * *

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Eligibility is based on 8(a) BD program criteria, including whether the Participant:

(1) Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;

(2) Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by § 124.509 that does not include the denial of future sole source 8(a) contracts;

(3) Complies with the continued eligibility reporting requirements set forth in § 124.112(b);

(4) Has a bona fide place of business in the applicable geographic area if the procurement is for construction;

(5) Has not received 8(a) contracts in excess of the dollar limits set forth in § 124.519 for a sole source 8(a) procurement;

(6) Has complied with the provisions of § 124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and

(7) Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 124.510.

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award. If a firm's term of participation in the 8(a) BD program ends (or the firm otherwise exits the program) before a sole source 8(a) contract can be awarded, award cannot be made to that firm. This applies equally to sole source orders issued under multiple award contracts. For a competitive 8(a) procurement, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation as provided in § 124.507(d).

* * * * *

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), or a contiguous county to (whether in the same or different state) where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

(1) A Participant may have bona fide places of business in more than one location.

(2) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if the location in fact qualifies as a bona fide place of business under SBA's requirements.

(i) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it. Such request may, but need not, relate to a specific 8(a) requirement. In order to apply to a specific competitive 8(a) solicitation, such

request must be submitted at least 20 working days before initial offers that include price are due.

(ii) The servicing district office will immediately forward the request to the SBA district office serving the geographic area of the particular location for processing. Within 10 working days of receipt of the submission, the reviewing district office will conduct a site visit, if practicable. If not practicable, the reviewing district office will contact the Participant within such 10-day period to inform the Participant that the reviewing office has received the request and may ask for additional documentation to support the request.

(iii) In connection with a specific competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical area within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. If the request is not related to a specific procurement, the reviewing office will make a determination within 30 working days of its receipt of the request from the servicing district office, if practicable.

(A) Where SBA does not provide a determination within the identified time limit, a Participant may presume that SBA has approved its request for a bona fide place of business and submit an offer for a competitive 8(a) procurement that requires a bona fide place of business in the requested area.

(B) In order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not provided a determination prior to the time that a Participant is identified as the apparent successful offeror, SBA will make the bona fide place of business determination as part of the eligibility determination set forth in paragraph (g)(4) of this section within 5 days of receiving a procuring activity's request for an eligibility determination, unless the procuring activity grants additional time for review. If, due to deficiencies in a Participant's request, SBA cannot make a determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the Participant's eligibility for award and the Participant will be ineligible for award.

(3) The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(4) Except as provided in paragraph (k)(2)(iii) of this section, in order for a Participant to be eligible to submit an offer for an 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(5) Once a Participant has established a bona fide place of business, the Participant may change the location of the recognized office without prior SBA approval. However, the Participant must notify SBA and provide documentation demonstrating an office at that new location within 30 days after the move. Failure to timely notify SBA will render the Participant ineligible for new 8(a) construction procurements limited to that geographic area.

■ 29. Amend § 124.503 by:

■ a. Removing the phrase "in § 124.507(b)(2)" and adding in its place the phrase "in § 124.501(g)" in paragraph (a)(1);

■ b. Redesignating paragraphs (e) through (j) as paragraphs (f) through (k), respectively;

■ c. Adding a new paragraph (e);

■ d. Revising newly redesignated paragraph (g);

■ e. Revising the introductory text of the newly redesignated paragraph (h);

■ f. Adding the phrase "or BPA" after the phrase "BOA", wherever it appears, in the newly redesignated paragraphs (h)(1) through (4);

■ g. Revising newly redesignated paragraph (i)(1)(iii);

■ h. Adding a sentence at the end of newly redesignated paragraph (i)(1)(iv); and

■ i. Revising newly redesignated paragraphs (i)(2)(ii) and (i)(2)(iv).

The additions and revisions read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

* * * * *

(e) *Withdrawal/substitution of offered requirement or Participant.* After SBA has accepted a requirement for award as a sole source 8(a) contract on behalf of a specific Participant (whether nominated by the procuring agency or identified by SBA for an open requirement), if the procuring agency believes that the identified Participant is not a good match for the procurement—including for such reasons as the procuring agency finding the Participant non-responsible or the negotiations between the procuring agency and the Participant otherwise failing—the procuring agency may seek to substitute another Participant for the originally

identified Participant. The procuring agency must inform SBA of its concerns regarding the originally identified Participant and identify whether it believes another Participant could fulfill its needs.

(1) If the procuring agency and SBA agree that another Participant can fulfill its needs, the procuring agency will withdraw the original offering and reoffer the requirement on behalf of another 8(a) Participant. SBA will then accept the requirement on behalf of the newly identified Participant and authorize the procuring agency to negotiate directly with that Participant.

(2) If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency will withdraw the original offering letter and fulfill its needs outside the 8(a) BD program.

(3) If the procuring agency believes that another Participant cannot fulfill its needs, but SBA does not agree, SBA may appeal that decision to the head of the procuring agency pursuant to § 124.505(a)(2).

* * * * *

(g) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award.

(1) This enables SBA to determine:

(i) Whether the requirement should be a competitive 8(a) award;

(ii) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(iii) The effect that contract award would have on the equitable distribution of 8(a) contracts; and

(iv) Whether the requirement should continue under the 8(a) BD program.

(2) Where a procuring agency seeks to reprocur a follow-on requirement through an 8(a) contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., a multiple award or Governmentwide acquisition contract that is itself an 8(a) contract), and the previous/current 8(a) award was not so limited, SBA will consider the business development purposes of the program in determining how to accept the requirement.

* * * * *

(h) *Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs).* Neither a Basic Ordering Agreement (BOA) nor a Blanket Purchase Agreement (BPA) is a contract under the FAR. See 48 CFR 13.303 and 48 CFR 16.703(a). Each order to be issued under a BOA or BPA is an individual contract. As such, the

procuring activity must offer, and SBA must accept, each order under a BOA or BPA in addition to offering and accepting the BOA or BPA itself.

* * * * *

(i)
(1) * * *

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take SDB credit toward their prime contracting goals for orders awarded to 8(a) Participants. A procuring agency may seek to award an order only to a concern that is a current Participant in the 8(a) program at the time of the order. In such a case, the procuring agency will announce its intent to limit the award of the order to current 8(a) Participants and verify a contract holder's 8(a) BD status prior to issuing the order. Where a procuring agency seeks to award an order to a concern that is a current 8(a) Participant, a concern must be an eligible Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation.

(iv) * * * To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award.

(2) * * *

(ii) The order must be competed exclusively among only the 8(a) awardees of the underlying multiple award contract;

* * * * *

(iv) SBA must verify that a concern is an eligible 8(a) Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation. If a concern has exited the 8(a) BD program prior to that date, it will be ineligible for the award of the order.

* * * * *

■ 30. Amend § 124.504 by:

■ a. Revising the section heading and paragraph (b);

■ b. Removing the term "Simplified Acquisition Procedures" and adding in its place the phrase "the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)" in paragraph (c) introductory text;

■ c. Removing the word "will" and adding in its place the word "may" in paragraph (c)(1)(ii)(C);

■ d. Adding a paragraph (c)(4); and

■ e. Revising the paragraph heading for paragraph (d) and paragraphs (d)(1) introductory text and (d)(4).

The revisions and addition read as follows:

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?

* * * * *

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

* * * * *

(c) * * *

(4) SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach.

(d) *Release for non-8(a) or limited 8(a) competition.* (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must notify SBA that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Additionally, a procuring agency must notify SBA where it seeks to reprocur a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

* * * * *

(4) The requirement that a follow-on procurement must be released from the

8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply:

(i) Where previous orders were offered to and accepted for the 8(a) BD program pursuant to § 124.503(i)(2); or
(ii) Where a procuring agency will use a mandatory source (*see* FAR Subparts 8.6 and 8.7(48 CFR subparts 8.6 and 8.7)). In such a case, the procuring agency should notify SBA at least 30 days prior to the end of the contract or order.

■ 31. Amend § 124.505 by:

- a. Removing the word “and” at the end of paragraph (a)(2);
- b. Redesignating paragraph (a)(3) as paragraph (a)(4); and
- c. Adding new paragraph (a)(3).

The addition reads as follows:

§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?

(a) * * *

(3) A decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d); and

* * * * *

■ 32. Amend § 124.507 by:

- a. Revising paragraph (b)(2);
- b. Removing paragraph (b)(3);
- c. Redesignating paragraphs (b)(4) through (6) as paragraphs (b)(3) through (5), respectively;
- d. Removing paragraph (c)(1);
- e. Redesignating paragraphs (c)(2) and (3) as paragraphs (c)(1) and (2), respectively;
- f. Revising newly redesignated paragraph (c)(1); and
- g. Adding a new paragraph (d)(3).

The revisions and addition read as follows:

§ 124.507 What procedures apply to competitive 8(a) procurements?

* * * * *

(b) * * *

(2) SBA determines a Participant's eligibility pursuant to § 124.501(g).

* * * * *

(c) * * *

(1) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only

those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

* * * * *

(d) * * *

(3) For a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

■ 33. Amend § 124.509 by:

- a. Removing the word “maximum” and adding in its place the words “good faith” in paragraph (a)(1);
- b. Removing the words “substantial and sustained” and adding in their place the words “good faith” in paragraph (a)(2);
- c. Revising the table in paragraph (b)(2);
- d. Revising paragraph (d); and
- e. Revising paragraph (e).

The revisions read as follows:

§ 124.509 What are non-8(a) business activity targets?

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

Participants year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

* * * * *

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.

(3) As a condition of eligibility for new 8(a) sole source contracts, SBA may

require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.

(4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year.

SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(4)(i) and (ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current

program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (*i.e.*, at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (*i.e.*, at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(4). Firm A had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of \$8.5 million and non-8(a) revenues of \$1.5 million (15 percent). Based on total revenues of \$10 million, Firm A should have had at least \$2.5 million in non-8(a) revenues. Thus, Firm A missed its target by \$1 million (its target (\$2.5 million) minus its actual non-8(a) revenues (\$1.5 million)). Because Firm A did not achieve its non-8(a) business activity target and SBA determined that it did not make good faith efforts to obtain non-8(a) revenue, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling \$1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(4). Firm B had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which \$8.5 million were 8(a) revenues and \$1.5

million were non-8(a) revenues, and SBA determined that Firm B did not make good faith efforts to meet its non-8(a) business activity target. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least \$1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(5) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(6) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) *Waiver of sole source prohibition.*

(1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.

(2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

(3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific

procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

■ 34. Amend § 124.513 by revising paragraphs (c)(2) and (4), the second sentence of paragraph (c)(5), and paragraph (e) to read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the

joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards (*but see* § 124.501(g) for SBA's determination of Participant eligibility).

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in § 121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

* * * * *

■ 35. Amend § 124.514 by revising paragraph (b) to read as follows:

§ 124.514 Exercise of 8(a) options and modifications.

* * * * *

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

* * * * *

■ 36. Amend § 124.515 by revising paragraph (d) to read as follows:

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

* * * * *

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must

certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern.

* * * * *

■ 37. Amend § 124.518 by revising paragraph (c) to read as follows:

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

* * * * *

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515 where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

■ 38. Amend § 124.519 by:

- a. Revising paragraph (a);
- b. Removing paragraph (c);
- c. Redesignating paragraph (b) as paragraph (c); and
- d. Adding a new paragraph (b).

The revision and addition read as follows:

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian Tribe, ANC, NHO, or CDC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of \$100,000,000 during its participation in the 8(a) BD program.

(b) In determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA:

(1) Looks at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications; and

(2) Will not consider 8(a) contracts awarded under the Simplified Acquisition Threshold.

* * * * *

■ 39. Revise § 124.520 to read as follows:

§ 124.520 Can 8(a) BD Program Participants participate in SBA's Mentor-Protégé program?

(a) An 8(a) BD Program Participant, as any other small business, may participate in SBA's All Small Mentor-Protégé Program authorized under § 125.9 of this chapter.

(b) In order for a joint venture between a protégé and its SBA-approved mentor to receive the exclusion from affiliation with respect to a sole source or competitive 8(a) contract, the joint venture must meet the requirements set forth in § 124.513(c) and (d).

■ 40. Amend § 124.521 by revising the last sentence of paragraph (e)(1) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) *Recertification.* (1) * * * Except as set forth in paragraph (e)(2) of this section, where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 41. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657(f), and 657r.

■ 42. Amend § 125.2 by revising paragraph (e)(6)(i) and adding a new paragraph (g) to read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

* * * * *

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer may set aside orders for small businesses, eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against full and open Multiple Award Contracts. In addition, a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs

against total small business set-aside Multiple Award Contracts, partial small business set-aside Multiple Award Contracts, and small business reserves of Multiple Award Contracts awarded in full and open competition. Although a contracting officer can set aside orders issued under a small business set-aside Multiple Award Contract or reserve to any subcategory of small businesses, contracting officers are encouraged to review the award dollars under the Multiple Award Contract and aim to make available for award at least 50% of the award dollars under the Multiple Award Contract to all contract holders of the underlying small business set-aside Multiple Award Contract or reserve. However, a contracting officer may not further set aside orders for specific types of small business concerns against Multiple Award Contracts that are set-aside or reserved for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs (e.g., a contracting officer cannot set-aside an order for 8(a) Participants that are also certified HUBZone small business concerns against an 8(a) Multiple Award Contract).

* * * * *

(g) *Capabilities, past performance, and experience.* When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

■ 43. Amend § 125.3 by adding a sentence to the end of paragraph (b)(2), and by revising the first sentence of paragraph (c)(1)(viii) and paragraph (c)(1)(ix) to read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(b) * * *

(2) * * * This applies whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract, or is deemed to be treated as a small business concern

by statute (see e.g., 43 U.S.C. 1626(e)(4)(B)).

* * * * *

(c) * * *

(1) * * *

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) for which a small business concern received a preference.

* * *
(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) and should do so whenever practical; and

* * * * *

■ 44. Amend § 125.5 by:

■ a. Revising the third sentence of paragraph (a)(1);

■ b. Redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(3) and (f)(4) respectively;

■ c. Adding a new paragraph (f)(2);

■ d. Removing the phrase “\$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures” and adding in its place the phrase “Less than or equal to the Simplified Acquisition Threshold” in paragraph (g);

■ e. Removing the phrase “Between \$100,000 and \$25 million” and adding in its place the phrase “Above the Simplified Acquisition Threshold and less than or equal to \$25 million” in paragraph (g);

■ f. Removing the term “\$100,000” and adding in its place “the simplified acquisition threshold” in paragraphs (h) and (i).

The revision and addition read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) * * *

(1) * * * The COC Program is applicable to all Government procurement actions, with the exception of 8(a) sole source awards but including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award.

* * * * *

(f) * * *

(2) An offeror seeking a COC has the burden of proof to demonstrate that it possesses all relevant elements of

responsibility and that it has overcome the contracting officer's objection(s).

* * * * *

■ 45. Amend § 125.6 by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(2)(ii)(B);

■ c. Revising Examples 2, 3 and 4 to paragraph (a)(2);

■ d. Revising the paragraph (b) introductory text; and

■ e. Adding Example 3 to paragraph (b).

The revisions and addition read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVO SBC contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

* * * * *

(2) * * *

(ii) * * *

(B) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter is granted for one or more items, compliance with the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

* * * * *

Example 2 to paragraph (a)(2). A procurement is for \$1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the item for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of \$1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the one item for which

class waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 3 to paragraph (a)(2). A contract is for \$1,000,000 and calls for the acquisition of 10 items. Market research shows that only four of these items are manufactured by small businesses. The value of the items manufactured by small business is estimated to be \$400,000. The contracting officer seeks and is granted contract specific waivers on the other six items. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the items for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of \$1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the six items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 4 to paragraph (a)(2). A contract is for \$1,000,000 and calls for the acquisition of 10 items. Market research shows that three of the items can be sourced from small business manufacturers at this particular time, and the estimated value of these items is \$300,000. There are no class waivers subject to the remaining seven items. In order for this procurement to be set aside for small business, a contracting officer must seek and be granted a contract specific waiver for one or more items totaling \$200,000 (so that \$300,000 plus \$200,000 equals 50% of the value of the entire procurement). Once a contract specific waiver is received for one or more items, at least 50% of the value of the contract, or 50% of \$1,000,000, must be supplied by one or more domestic small business manufacturers or processors or by manufacturers or processors of the items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

* * * * *

(b) *Mixed contracts.* Where a contract integrates any combination of services, supplies, or construction, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter. The contracting officer's selection of the applicable NAICS code is determinative

as to which limitation on subcontracting and performance requirement applies. Based on the NAICS code selected, the relevant limitation on subcontracting requirement identified in paragraphs (a)(1) through (4) of this section will apply only to that portion of the contract award amount. In no case shall more than one limitation on subcontracting requirement apply to the same contract.

* * * * *

Example 3 to paragraph (b). A procuring activity is acquiring both services and general construction through a small business set-aside. The total value of the requirement is \$10,000,000, with the construction portion comprising \$8,000,000, and the services portion comprising \$2,000,000. The contracting officer appropriately assigns a construction NAICS code to the requirement. The 85% limitation on subcontracting identified in paragraph (a)(3) would apply to this procurement. Because the services portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the limitation on subcontracting requirement is \$8,000,000. As such, the prime contractor cannot subcontract more than \$6,800,000 to non-similarly situated entities, and the prime and/or similarly situated entities must perform at least \$1,200,000.

* * * * *

- 46. Amend § 125.8 by:
 - a. Revising paragraphs (b)(2)(ii) and (iv), the second sentence of paragraph (b)(2)(v), and paragraphs (b)(2)(xi) and (xii);
 - b. Adding a new sentence at the end of paragraph (c)(1);
 - c. Adding paragraph (c)(4); and
 - d. Revising paragraphs (e), and (h)(2).

The revisions and additions read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

* * * * *

(b) * * *

(2) * * *

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint

venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them, and that at the conclusion of the joint venture contract(s) and/or the termination of a joint venture, any funds remaining in the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(xi) Stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture; and

(xii) Stating that the project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer not later than 90 days after completion of the contract.

* * * * *

(c) * * *

(1) * * * Except as set forth in paragraph (c)(4) of this section, the 40% calculation for protégé workshare

follows the same rules as those set forth in § 125.6 concerning supplies, construction, and mixed contracts, including the exclusion of the same costs from the limitation on subcontracting calculation (e.g., cost of materials excluded from the calculation in construction contracts).

* * * * *

(4) Work performed by a similarly situated entity will not count toward the requirement that a protégé must perform at least 40% of the work performed by a joint venture.

* * * * *

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

* * * * *

(h) * * *

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, and upon request by SBA or the relevant contracting officer, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

* * * * *

■ 47. Amend § 125.9 by:

■ a. Revising paragraphs (b), (c)(1)(ii), and (c)(2) introductory text;

■ b. Removing paragraph (c)(4);

■ c. Revising paragraphs (d)(1) introductory text, (d)(1)(iii) introductory text, and (d)(1)(iii)(B);

■ d. Adding paragraph (d)(6);

■ e. Removing “(e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor)” in paragraph (e)(1) introductory text, and adding in its place “(e.g., management and/or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor)”.

■ f. Revising paragraphs (e)(1)(i) and (e)(5);

■ g. Redesignating paragraphs (e)(6) through (8) as paragraphs (e)(7) through (9), respectively;

■ h. Adding new paragraph (e)(6);

■ i. Revising paragraph (f);

■ j. Revising paragraph (g) introductory text;

■ k. Revising paragraph (g)(4);

■ l. Adding paragraph (g)(5); and

■ m. Revising paragraph (h)(1) introductory text.

The revisions and additions to read as follows:

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

* * * * *

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Does not appear on the Federal list of debarred or suspended contractors; and

(iii) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers of the protégé, or is otherwise affiliated with the protégé. Once approved, SBA may terminate the mentor-protégé agreement if the mentor does not possess good character or a favorable financial position, was affiliated with the protégé at time of application, or is affiliated

with the protégé for reasons other than the mentor-protégé agreement or assistance provided under the agreement.

(3) In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm).

(i) A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.

(ii) A mentor generally cannot have more than three protégés at one time. However, the first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three protégés that a mentor can have at one time.

(c) * * *

(1) * * *

(ii) Where a small business concern seeks to qualify as a protégé in a secondary NAICS code, the concern must demonstrate how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the small business concern has no prior experience. SBA may approve a mentor-protégé relationship where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

* * * * *

(d) * * * (1) A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (i.e., small business set-aside, 8(a), HUBZone, SDVO, or

WOSB) for which the protégé firm qualifies (e.g., a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such.

* * * * *

(iii) A joint venture between a protégé and its mentor will qualify as a small business for any procurement for which the protégé individually qualifies as small. Once a protégé firm no longer qualifies as a small business for the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will no longer be able to seek additional contracts or subcontracts as a small business for any NAICS code having the same or lower size standard. A joint venture between a protégé and its mentor could seek additional contract opportunities in NAICS codes having a size standard for which the protégé continues to qualify as small. A change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

* * * * *

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to the NAICS code assigned to the contract, the joint venture will not be able re-certify itself to be a small business for that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(6) A mentor that provides a subcontract to a protégé that has its principal office located in the Commonwealth of Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor.

(e) * * *

(1) * * *

(i) Specifically identify the business development assistance to be provided

and address how the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities;

* * * * *

(5) The term of a mentor-protégé agreement may not exceed six years. If an initial mentor-protégé agreement is for less than six years, it may be extended by mutual agreement prior to the expiration date for an additional amount of time that would total no more than six years from its inception (e.g., if the initial mentor-protégé agreement was for two years, it could be extended for an additional four years by consent of the two parties; if the initial mentor-protégé agreement was for three years, it could be extended for an additional three years by consent of the two parties). Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.

(6) A protégé may generally have a total of two mentor-protégé agreements with different mentors.

(i) Each mentor-protégé agreement may last for no more than six years, as set forth in paragraph (e)(5) of this section.

(ii) If a mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement, that mentor-protégé relationship will generally not count as one of the two mentor-protégé relationships that a small business may enter as a protégé. However, where a specific small business protégé appears to enter into many short-term mentor-protégé relationships as a means of extending its program eligibility as a protégé, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

(iii) If during the evaluation of the mentor-protégé relationship pursuant to paragraphs (g) and (h) of this section SBA determines that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided was not satisfactory, SBA may allow the protégé to substitute another mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit.

* * * * *

(f) *Decision to decline mentor-protégé relationship.* Where SBA declines to approve a specific mentor-protégé agreement, SBA will issue a written

decision setting forth its reason(s) for the decline. The small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* SBA will review the mentor-protégé relationship annually. SBA will ask the protégé for its assessment of how the mentor-protégé relationship is working, whether or not the protégé received the agreed upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

* * * * *

(4) At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(5) SBA may decide not to approve continuation of a mentor-protégé agreement where:

(i) SBA finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement;

(ii) SBA finds that the assistance provided by the mentor has not resulted in any material benefits or developmental gains to the protégé; or

(iii) A protégé does not provide information relating to the mentor-protégé relationship, as set forth in paragraph (g).

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor may not have provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided may not have been satisfactory, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The

mentor must respond within 30 days of the notification, presenting information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement or explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not adequately provide information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

* * * * *

■ 48. Amend § 125.18 by:

■ a. Revising paragraph (a);

■ b. Removing “(see §§ 125.9 and 124.520 of this chapter)” in paragraph (b)(1)(ii) and adding in its place “(see § 125.9)”;

■ c. Removing “§ 124.520 or § 125.9 of this chapter” in paragraph (b)(2) introductory text and adding in its place “§ 125.9”;

■ d. Revising paragraphs (b)(2)(ii) and (iv) and the second sentence of paragraph (b)(2)(v);

■ e. Removing “or § 124.520 of this chapter” in paragraph (b)(3)(i);

■ f. Redesignating paragraphs (d)(1) through (4) as paragraphs (d)(2) through (5), respectively; and

■ g. Adding a new paragraph (d)(1).

The revisions and addition read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) *General.* In order for a business concern to submit an offer and be eligible for the award of a specific SDVO contract, the concern must submit the appropriate representations and certifications at the time it submits its initial offer which includes price (or other formal response to a solicitation) to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;

(2) It is an SDVO SBC; and

(3) There has been no material change in any of its circumstances affecting its SDVO SBC eligibility.

* * * * *

(b) * * *

(2) * * *

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and designating a named employee of the SDVO SBC managing venturer as the manager with ultimate responsibility for

performance of the contract (the “Responsible Manager”).

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the SDVO SBC for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture’s Responsible Manager.

* * * * *

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or a percentage agreed to by the parties to the joint venture whereby the SDVO SBC receives profits from the joint venture that exceed the percentage commensurate with the work performed by the SDVO SBC;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(d) *Multiple Award Contracts.* (1) *SDVO status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines SDVO small business eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as an SDVO small business concern as part of its initial offer (or other formal response to a solicitation), which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) *Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than SDVO.* For an

unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for SDVO, if a business concern is an SDVO small business concern at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business concern for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for SDVO small business, a concern must recertify that it qualifies as an SDVO small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which SDVO small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the SDVO small business pool, concerns need not recertify their status as SDVO small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *SDVO Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for SDVO small business, if a business concern is an SDVO small business at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine SDVO small business status at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new SDVO small business certification for the order or Agreement.

* * * * *

■ 49. Amend § 125.28 by revising the section heading and adding a sentence to the end of paragraph (d)(1) to read as follows:

§ 125.28 What are the requirements for filing a service-disabled veteran-owned status protest?

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, for an order or a Blanket Purchase Agreement that is set-aside for SDVO small business under a Multiple Award Contract that is not itself set aside for SDVO small business or have a reserve for SDVO small business (or any SDVO order where the contracting officer has requested recertification of SDVO status), an interested party must submit its protest challenging the SDVO status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 126—HUBZONE PROGRAM

■ 50. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

§ 126.500 [Amended]

■ 51. Amend § 126.500 by removing the words “(whether by SBA or a third-party certifier)” in paragraph (b) introductory text.

§ 126.602 [Amended]

■ 52. Amend 126.602 in paragraph (c) by removing “§ 126.200(a)” and adding in its place “§ 126.200(c)(2)(ii)”.

■ 53. Revise § 126.606 to read as follows:

§ 126.606 May a procuring activity request that SBA release a requirement from the 8(a) BD program for award as a HUBZone contract?

A procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

■ 54. Amend § 126.616 by removing “(or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter)” in paragraph (a), and by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

* * * * *

(c) * * *

(2) Designating a certified HUBZone small business concern as the managing venturer of the joint venture, and

designating a named employee of the certified HUBZone small business managing venturer as the manager with ultimate responsibility for performance of the contract (the “Responsible Manager”).

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified HUBZone small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified HUBZone small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified HUBZone small business concern for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture’s Responsible Manager.

* * * * *

(4) Stating that the certified HUBZone small business concern must receive profits from the joint venture commensurate with the work performed by the certified HUBZone small business concern, or a percentage agreed to by the parties to the joint venture whereby the certified HUBZone small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified HUBZone small business concern;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

§ 126.618 [Amended]

■ 55. Amend § 126.618 by removing “(or, if also an 8(a) BD Participant, under § 124.520 of this chapter)” in paragraph (a).

■ 56. Amend § 126.801 by adding a sentence to the end of paragraph (d)(1) to read as follows:

§ 126.801 How does an interested party file a HUBZone status protest?

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, in connection with an order or an Agreement that is set-aside for a certified HUBZone small business concern under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns or have a reserve for certified HUBZone small business concerns, (or any HUBZone set-aside order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the HUBZone status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

* * * * *

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 57. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

§ 127.503 [Amended]

■ 58. Amend § 127.503 by removing paragraph (h).

■ 59. Revise § 127.504 to read as follows:

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA’s D/GC. SBA will then prioritize the concern’s WOSB or EDWOSB application and make a

determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) *Sole source EDWOSB or WOSB requirements.* In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to § 127.300 and qualify as small under the size standard corresponding to the requirement being sought.

(c) *Joint ventures.* A business concern seeking an EDWOSB or WOSB contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in § 127.506.

(d) *Multiple Award Contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(1) SBA determines EDWOSB or WOSB eligibility for the underlying Multiple Award Contract as of the date a concern certifies its status as an EDWOSB or WOSB as part of its initial offer (or other formal response to a solicitation), which includes price, unless the concern was required to recertify its status as a WOSB or EDWOSB under paragraph (f) of this section.

(i) *Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than EDWOSB or WOSB.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement. Except for orders and

Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for EDWOSB or WOSB, a concern must recertify it qualifies as an EDWOSB or WOSB at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of WOSB or EDWOSB concerns for which WOSB or EDWOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the WOSB or EDWOSB pool, concerns need not recertify their status as WOSBs or EDWOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(ii) *EDWOSB or WOSB Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement.

(2) SBA will determine EDWOSB or WOSB status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new EDWOSB or WOSB certification for the order or Agreement.

(e) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB requirement must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of EDWOSB or WOSB contracts (both sole source and those totally set aside for EDWOSB or WOSB), the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for EDWOSB or WOSB.

(f) *Non-manufacturers.* An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, this issue may be a ground for a size protest, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

(h) *Recertification.* (1) Where a contract being performed by an EDWOSB or WOSB is novated to another business concern, the concern that will continue performance on the contract must recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, (or qualify as a certified EDWOSB or WOSB for a WOSB contract) within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(2) Where an EDWOSB or WOSB concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a

WOSB contract). If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(3) For purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(4) A business concern that did not certify as an EDWOSB or WOSB, either initially or prior to an option being exercised, may recertify as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) for a subsequent option period if it meets the eligibility requirements at that time. The agency must modify the contract to reflect the new status, and may count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(5) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(6) A concern's status will be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

■ 60. Amend § 127.506 by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(c) * * *
(2) Designating a WOSB or EDWOSB as the managing venturer of the joint venture, and designating a named employee of the WOSB or EDWOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the WOSB or EDWOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB or EDWOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the WOSB or EDWOSB for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the WOSB or EDWOSB must receive profits from the joint venture commensurate with the work performed by the WOSB or EDWOSB, or a percentage agreed to by the parties to the joint venture whereby the WOSB or EDWOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the WOSB or EDWOSB;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

■ 61. Amend § 127.603 by revising the section heading and adding a sentence

to the end of paragraph (c)(1) to read as follows:

§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

* * * * *

(c) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, for an order or a Blanket Purchase Agreement that is set-aside for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business or have a reserve for EDWOSB or WOSB small business (or any EDWOSB or WOSB order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the EDWOSB or WOSB status of a concern for the order or Blanket Purchase Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 62. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t, and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

■ 63. Amend § 134.318 by adding a paragraph heading to paragraph (a) and revising paragraph (b) to read as follows:

§ 134.318 NAICS Appeals.

(a) *General.* * * *

(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

* * * * *

Jovita Carranza,
Administrator.

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Friday, October 16, 2020

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FEDERAL REGISTER PAGES AND DATE, OCTOBER

61805-62186.....	1
62187-62538.....	2
62539-62920.....	5
62921-63186.....	6
63187-63422.....	7
63423-63992.....	8
63993-64374.....	9
64375-64942.....	13
64943-65186.....	14
65187-65632.....	15
65633-66200.....	16

CFR PARTS AFFECTED DURING OCTOBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR	54.....	62934			
910.....	64943	56.....	62934		
3 CFR	62.....	62934	70.....	62934	
Proclamations	90.....	62934	91.....	62934	
10085.....	62921	201.....	65190	301.....	61806
10086.....	62923	319.....	61806	1205.....	62545
10087.....	62925	1250.....	62942	1470.....	63993
10088.....	62927	1779.....	62195	3575.....	62195
10089.....	62929	4279.....	62195	4287.....	62195
10090.....	62931	5001.....	62195	Proposed Rules:	
10091.....	63187	905.....	63039	946.....	64415
10092.....	63969	983.....	62615	1280.....	62617
10093.....	63971	8 CFR		Ch. I.....	65653
10094.....	63973	214.....	63918	Proposed Rules:	
10095.....	64373	213a.....	62432	9 CFR	
10096.....	65181	56.....	62559	145.....	62559
10097.....	65185	146.....	62559	147.....	62559
10098.....	65633	10 CFR		Ch. I.....	65656
10099.....	65635	50.....	62199	Proposed Rules:	
10100.....	65637	50.....	62234, 63039	430.....	64071, 64981
10101.....	65639	431.....	62816	12 CFR	
Executive Orders:		3.....	63423, 64003	32.....	61809
13951.....	62179	34.....	65666	217.....	63423, 64003
13952.....	62187	225.....	65666	252.....	63423
13953.....	62539	323.....	65666	324.....	63423, 64003
13954.....	63977	615.....	62945	620.....	63428
13955.....	65643	624.....	61811	700.....	62207
13956.....	65647	701.....	62207	702.....	62207
Administrative Orders:		704.....	62207	705.....	62207
Memorandums:		707.....	62207	708a.....	62207
Memorandum of		708b.....	62207		
October 9, 2020.....	65631				
Notices:					
Notice of October 8,					
2020.....	64941				
Presidential Permits:					
Presidential Permit of					
September 28,					
2020.....	62191				
Permit of October 3,					
2020.....	63981				
Permit of October 3,					
2020.....	63985				
Permit of October 3,					
2020.....	63989				
5 CFR					
120.....	65651				
302.....	63189				
315.....	65940				
432.....	65940				
531.....	65187				
752.....	65940				
1650.....	61805				
Proposed Rules:					
550.....	63218				
6 CFR					
5.....	62933				
7 CFR					
2.....	65500				

709.....62207	310.....62596	1626.....65214	180.....63450, 63453, 65729
717.....62207	Proposed Rules:	2200.....65220	423.....64650
722.....64945	640.....63462	2400.....65221	1042.....62218
725.....62207	17 CFR	4022.....65224	Proposed Rules:
740.....62207	200.....65470	4902.....63445	52.....62679, 62687, 63064,
741.....62207	201.....65470	Proposed Rules:	63066, 64084, 64089, 65008,
747.....62207	210.....66108	102.....64078	65013, 65755
748.....62207	229.....63726, 66108	402.....64726	60.....65774
750.....62207	230.....64234	403.....64726	147.....64437
Proposed Rules:	239.....63726	408.....64726	174.....64308
225.....63222	240.....63726, 64234, 65470	1601.....64079	257.....65015
238.....63222	242.....65470	1626.....64079	721.....64280, 65782
252.....63222	249.....66108	2700.....63047	42 CFR
271.....65262	18 CFR	4001.....64425	414.....65732
303.....65270	40.....65207	4901.....64425	417.....64401
390.....65270	Proposed Rules:	30 CFR	422.....64401
13 CFR	292.....62632	1202.....62016	423.....64401
119.....62950	19 CFR	1206.....62016	Proposed Rules:
121.....66146	12.....64020	Proposed Rules:	110.....65311
124.....66146	20 CFR	250.....65904	43 CFR
125.....66146	645.....65693	290.....65904	3000.....64056
126.....66146	655.....63872	550.....65904	Proposed Rules:
127.....66146	656.....63872	556.....65904	17.....64090
134.....63191, 66146	21 CFR	1206.....62054	45 CFR
Proposed Rules:	1.....62094	1241.....62054	1304.....65733
121.....62239, 62372	251.....62094	31 CFR	1305.....65733
14 CFR	1308.....62215, 63014	520.....61816	1610.....63209
21.....62951	1401.....65694	544.....61823	1630.....63209
39.....61811, 62975, 62979,	Proposed Rules:	560.....61823	2500.....65239
62981, 62990, 62993, 63002,	1.....62632	32 CFR	46 CFR
63193, 63195, 63431, 63434,	1300.....62634	589.....64966	16.....61825
63438, 63440, 63443, 64009,	1301.....62634	33 CFR	Proposed Rules:
64375, 64949, 64952, 64955,	1304.....62634	165.....63447, 64394	121.....62842
64958, 64961, 64963, 65190,	1306.....62634	Proposed Rules:	160.....62842
65193, 65197, 65200, 65672,	1307.....62634	127.....62651	169.....62842
65674	22 CFR	334.....64434	184.....62842
61.....62951	Proposed Rules:	34 CFR	199.....62842
63.....62951	22.....65750	9.....62597	540.....65020
65.....62951	24 CFR	77.....62609	47 CFR
71.....62572, 62573, 62575,	100.....64025	36 CFR	0.....63116, 64404
62577, 62578, 64014, 64377,	Proposed Rules:	Proposed Rules:	1.....63116, 64061, 64404
65203, 65677	888.....63664	7.....63062	2.....61825, 64062, 64404
73.....63007	982.....63664	37 CFR	3.....64404
91.....62951, 65678, 65686	983.....63664	Proposed Rules:	11.....64404
97.....62579, 62580, 65204,	985.....63664	201.....65293	15.....64404
65205	25 CFR	38 CFR	20.....64404
107.....62951	63.....65704	1.....64040	24.....64404
125.....62951	Proposed Rules:	9.....63208	25.....64404
141.....62951	48.....65000	39 CFR	27.....64404
Proposed Rules:	26 CFR	20.....65225	52.....64404
39.....61877, 61879, 61881,	1.....64026, 64040, 64346,	Proposed Rules:	64.....64404, 64971
61884, 61886, 61889, 61892,	64383, 64386	20.....65225	67.....64404
62266, 62626, 63235, 63238,	31.....61813, 63019	111.....65311	68.....64404
63240, 64417, 64419, 64984,	35.....61813	3050.....63473	73.....61871, 64404
64987, 64993, 64995, 65282,	53.....65526	40 CFR	74.....64404
65285	301.....64386	51.....63394	76.....63116, 64404
71.....62269, 62630, 64422,	27 CFR	52.....64044, 64046, 64050,	79.....64404
64424, 64998	Proposed Rules:	64966, 64969, 65236, 65706,	80.....64404
15 CFR	9.....61895, 61899, 61907	65722, 65727	87.....64404
Ch. VII.....62214	28 CFR	60.....63394, 64398	90.....64062, 64404
705.....64377	50.....63200	61.....63394	95.....64404
720.....62583	68.....63204	62.....63447	97.....64062
742.....63007, 63009	29 CFR	63.....63394, 64398	101.....64404
744.....64014	1601.....65214	147.....64053	Proposed Rules:
756.....63011	16 CFR	170.....63449	1.....65566
772.....62583			64.....64091
774.....62583, 63009			48 CFR
Proposed Rules:			Ch. 1.....62484
742.....64078			1.....62485
774.....64078			
1500.....65288			

2.....62485	252.....65733	16.....65610	49 CFR
3.....62485	515.....62612	18.....65610	213.....63362
5.....62485	532.....61871	19.....65610	Proposed Rules:
6.....62485	538.....62612	22.....65610	191.....65142
8.....62485	552.....62612	23.....65610	192.....65142
9.....62485	Ch. 7.....65734	25.....65610	1039.....62689
10.....62485	852.....61872	26.....65610	1201.....62271
12.....62485	1845.....64069	27.....65610	
13.....62485	Proposed Rules:	28.....65610	
15.....62485	1.....65610	29.....65610	50 CFR
16.....62485	2.....65610	30.....65610	17 .....63764, 63806, 65241
17.....62485	3.....65610	31.....65610	622.....64978, 65740
19.....62485	4.....65610	32.....65610	635 .....61872, 64411, 65740
22.....62485	5.....65610	37.....65610	648.....62613, 63460
26.....62485	6.....65610	38.....65610	665.....63216
32.....62485	7.....65610	39.....65610	679 .....61875, 62613, 63037,
36.....62485	8.....65610	42.....65610	63038, 64070, 64413
42.....62485	9.....65610	44.....65610	Proposed Rules:
50.....62485	10.....65610	46.....65610	17 .....63474, 64618, 64908
52.....62485	11.....65610	47.....65610	20.....64097
53.....62485	12.....65610	49.....65610	36.....64106
204.....65733	13.....65610	52.....65610	660.....61913, 62492
212.....65733	14.....65610	53.....65610	665.....65336
217.....65733	15.....65610	252.....65787	

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 15, 2020

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