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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0918; Project Identifier MCAI–2020–01335–T; Amendment 39–21299; AD 2020–22–03]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes. This AD was prompted by a report that during a certification exercise, it was identified that there was a risk of an engine bleed system over-temperature, without the engine bleed valve closing; the associated engine bleed valve should automatically close. This AD requires revising the existing airplane flight manual (AFM) to incorporate procedures to be applied if an engine bleed over-temperature occurs when the associated engine bleed valve is jammed open, and provides for the optional embodiment of updated flight warning computer (FWC) software, which would terminate the AFM revision, as specified in a European Union Aviation Safety Agency (EASA), which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective November 5, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 5, 2020.

The FAA must receive comments on this AD by December 7, 2020.

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

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

For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0918.

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–2020–0918; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

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

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0205, dated September 24, 2020 (''EASA AD 2020–0205'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes.

This AD was prompted by a report that during a certification exercise, it was identified that there was a risk of an engine bleed system over-temperature, without the engine bleed valve closing; the associated engine bleed valve should automatically close. The FAA is issuing this AD to address the possibility of a jammed engine bleed valve, which could lead to damage of the bleed manifold and the ducts downstream of the engine bleed system, exposure of the surrounding structure to heat stress, and possible reduced structural integrity of the airplane. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0205 describes procedures for amending the applicable AFM to incorporate procedures to be applied if an engine bleed over-temperature occurs when the associated engine bleed valve is jammed open. EASA AD 2020–0205 also specifies that embodiment of updated FWC software would eliminate the need for the AFM amendment. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2020–0205, described previously, as

incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0205 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0205 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0205 that is required for compliance with EASA AD 2020–0205 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0918.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because there is a possibility of a jammed engine bleed valve, which could lead to damage of the bleed manifold and the ducts downstream of the engine bleed system and exposure of the surrounding structure to heat stress, and possibly result in reduced structural integrity of the airplane. In addition, the compliance time for the required action is shorter than the time necessary for the public to comment and for publication of the final rule. Therefore this rule must be issued immediately, to ensure the safety of the flight crews conducting such flights. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

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

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, the FAA invites you to send any written comments, data, or views about this AD. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one copy of the comments. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0918; Project Identifier MCAI–2020–01355–T'' at the beginning of your comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, as well as a report summarizing each substantive public contact with FAA personnel concerning this AD. The FAA will consider all comments received by the closing date for comments. The FAA may amend this AD because of those comments.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

The FAA estimates that this AD affects 105 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
1 work-hour × $85 per hour = $85	$0	$85	$8,925

ESTIMATED COSTS FOR OPTIONAL SOFTWARE UPDATE

Labor cost	Parts cost	Cost per product
2 work-hours × $85 per hour = $170	$0	$170

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

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):

2020–22–03 Airbus SAS: Amendment 39–21299; Docket No. FAA–2020–0918; Project Identifier MCAI–2020–01335–T.

(a) Effective Date

This AD becomes effective November 5, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS Model airplanes, certificated in any category, as identified in paragraphs (c)(1) though (3) of this AD.

(1) Model A330–201, –202, –203, –223, and –243 airplanes.

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

(3) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 75, Air.

(e) Reason

This AD was prompted by a report that during a certification exercise, it was identified that there was a risk of an engine bleed system over-temperature, without the engine bleed valve closing; the associated engine bleed valve should automatically close. The FAA is issuing this AD to address the possibility of a jammed engine bleed valve, which could lead to damage of the bleed manifold and the ducts downstream of the engine bleed system and exposure of the surrounding structure to heat stress, and possibly result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0205, dated September 24, 2020 (''EASA AD 2020–0205'').

(h) Exceptions to EASA AD 2020–0205

(1) Where EASA AD 2020–0205 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0205 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or 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 (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the 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 Airbus'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 2020–0205 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

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

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0205, dated September 24, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0205, 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–2020–0918.

(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 13, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–23280 Filed 10–20–20; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0224; FRL–10015–13–Region 4]

Air Plan Approval; KY; Jefferson County Administrative Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving changes to the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Energy and Environment Cabinet (Cabinet), on March 4, 2020. The changes were submitted by the Cabinet on behalf of the Louisville Metro Air Pollution Control District (District or APCD) and make minor changes for clarity, remove an exemption for public hearings for permitting actions, and amend the procedures for open records requests to maintain consistency with the Kentucky Open Records Act (KORA). This action is being taken pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective November 20, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2020–0224. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials can either be retrieved electronically via *www.regulations.gov* or in hard copy at the at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

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

SUPPLEMENTARY INFORMATION:

I. Background

EPA is approving changes to APCD Regulation 1.08, *Administrative Procedures,* of the Jefferson County portion of the Kentucky SIP, submitted by the Commonwealth on March 4, 2020.[1] The March 4, 2020, SIP revision makes minor changes to Regulation 1.08 that do not alter the meaning of the regulation, for example, changes to clarify public hearing requirements, and relocation and reorganization of several sections. In addition, other changes strengthen the SIP by removing language exempting certain permitting actions from public hearings. Last, the SIP revision contains changes to sections related to public records to maintain consistency with the KORA. The SIP revision updates the current SIP-approved version of Regulation 1.08 (Version 13) to Version 14.

In a notice of proposed rulemaking (NPRM) published on July 22, 2020 (85 FR 44258), EPA proposed to approve changes to the Jefferson County portion of the Kentucky SIP, provided on March 4, 2020. The July 22, 2020, NPRM provides additional detail regarding the background and rationale for EPA's action. Comments on the July 22, 2020, NPRM were due on or before August 21, 2020. EPA received no adverse comments on the July 22, 2020, NPRM.

II. 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 APCD Regulation 1.08, *Administrative Procedures,* Version 14, effective November 20, 2019, which provides clarity, revises provisions related to Board meetings, and maintains consistency with KORA. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into the plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next updated to the SIP compilation.[2]

III. Final Action

EPA is approving the changes to APCD Regulation 1.08, *Administrative Procedures,* Version 14, of the Jefferson County portion of the Kentucky SIP, submitted by the Commonwealth on March 4, 2020. The March 4, 2020, SIP revision updates the current SIP-approved version of APCD Regulation 1.08, Version 13 to Version 14. EPA is approving these changes because they are minor edits to clarify provisions related to public hearing requirements, SIP strengthening by removing an exemption from public hearings for certain permitting requirements, and maintaining consistency with KORA.

[1] The submittal includes a courtesy copy of Regulation 2.08, *Fees,* Version 24 which was adopted by the Commonwealth at the same time; however, the Commonwealth did not request that EPA incorporate that regulation into the SIP.

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

IV. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 21, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: September 30, 2020.

Mary Walker,

Regional Administrator, Region 4.

For the reasons discussed in the preamble, the Environmental Protection Agency amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart S—Kentucky

■ 2. Section 52.920(c), Table 2, is amended under ''Reg 1—General Provisions'' by revising the entry for ''1.08'' to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	**Federal Register** notice	District effective date	Explanation
Reg 1—General Provisions					
*	*	*	*	*	*
1.08	Administrative Procedures	10/21/2020	[Insert citation of publication]	11/20/2019	
*	*	*	*	*	*

* * * * *

[FR Doc. 2020–22012 Filed 10–20–20; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 85, No. 204
Wednesday, October 21, 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 41

[Public Notice 11221]

RIN 1400–AE95

Visas: Temporary Visitors for Business or Pleasure

AGENCY: Department of State.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State (''Department'') proposes to amend its regulation governing nonimmigrant visas for temporary visitors for business, the B–1 nonimmigrant visa classification, by removing two sentences defining the term ''business'' that are outdated due to changes in the INA since 1952, from when the two sentences originate. With removal of these sentences, the Department would no longer authorize issuance of B–1 visas for certain aliens classifiable as H–1B or H–3 nonimmigrants, commonly referred to as the ''B–1 in lieu of H'' policy, unless the alien independently qualifies for a B–1 visa for a reason other than the B–1 in lieu of H policy.

DATES: Written comments must be received on or before December 21, 2020.

ADDRESSES: You may submit comments, identified by RIN 1400–AE95, by either of the following methods:

- *Internet (preferred):* At *www.regulations.gov,* you can search for the document using [Docket Number DOS–2020–0041] or using the proposed rule RIN 1400–AE95.
- *Email:* Megan Herndon, Senior Regulatory Coordinator, Office of Visa Services, Bureau of Consular Affairs, U.S. Department of State, *VisaRegs@state.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Herndon, Senior Regulatory Coordinator, Office of Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006, (202) 485–7586.

Public Participation

All interested parties are invited to participate in this rulemaking by submitting written views and comments on all aspects of this proposed rule. Comments must be submitted in English or an English translation must be provided. Comments that will provide the most assistance to the Department of State in implementing this change will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include information that supports the recommended change.

Instructions: If you submit a comment, you must include the agency name and RIN 1400–AE95 for this rulemaking in the title or body of the comment. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, because all submissions will be public, you may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission. The Department of State may withhold from public viewing information provided in comments that it determines may infringe privacy rights of an individual or is offensive. For additional information, please read the Privacy Act notice available in the footer at *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. What changes to 22 CFR 41.31 does the Department propose?

The Department proposes to eliminate two sentences from its regulation governing nonimmigrant visitors for business, 22 CFR 41.31(b)(1). The current regulation, in the paragraph defining ''business,'' includes the statement, ''An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of 22 CFR 41.53,'' which is the regulation governing H nonimmigrant temporary workers or trainees. The Department proposes to remove this language, as explained below, because, as the regulation states explicitly, ''business,'' as used in section 101(a)(15)(B) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1101(a)(15)(B) ''does not include local employment or labor for hire,'' so the referenced statement is confusing and potentially misleading. For the same reasons, the Department also proposes to eliminate from the current regulation the statement, ''An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other pre-arranged employment, may be classified as a nonimmigrant temporary visitor for business.''

II. Why is the Department proposing this rule?

A. Statutory Framework

The Department's proposal conforms the regulation with changes in the Immigration Act of 1990 (''IMMACT 90''),[1] the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (''MATINA''),[2] and the American Competitiveness and Workforce Improvement Act of 1998 (''ACWIA'').[3] The two sentences the Department proposes to eliminate from 22 CFR 41.31 date back to 1952, prior to enactment of these laws. *See* 22 CFR 41.40 (1952) (added by 17 FR 11574, Dec. 19, 1952). They no longer reflect the statutory framework governing nonimmigrants.

The primary statute governing the requirements for B visa classification is the Immigration and Nationality Act (''INA'') of 1952, as amended.[4] The Department's proposal takes into account the amendments to the INA effected by IMMACT 90, MATINA, and the ACWIA.

The statutory language authorizing the issuance of visas to temporary visitors for business (B–1 nonimmigrants) or pleasure (B–2 nonimmigrants) has remained unchanged since the 1952 Act. The B visa classification applies to temporary visitors for business or for pleasure and excludes individuals coming for the

[1] Public Law 101–649, 104 Stat. 4978 (1990).

[2] Public Law 102–232, 105 Stat. 1733 (1991).

[3] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105–277, div. C. tit. IV, 112 Stat. 2681–642 (1998).

[4] Reference to the ''1952 INA'' or ''1952 Act'' refers to the original Immigration and Nationality Act of 1952, Public Law 82–414, 66 Stat. 163 (June 27, 1952).

purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation. *See* INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B).

Under the 1952 Act, the H nonimmigrant classification pertained to individuals of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in the United States; or (iii) who is coming temporarily to the United States as an industrial trainee. *See* INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H) (1952).

IMMACT 90, as amended by the MATINA, created new nonimmigrant classifications, including two nonimmigrant classifications for certain aliens with extraordinary ability in the sciences, arts, business, or athletics and certain artists and entertainers, the O and P classifications.[5] Many such aliens were previously classified as H–1 nonimmigrants, corresponding to INA section 101(a)(15)(H)(i), 8 U.S.C. 1101(a)(15)(H)(i) (1952). Since INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H) was not originally designed to address these classes of activities, Congress determined that they should be separated from that classification and treated independently.[6] Most professional athletes and entertainers coming to the United States to work in their professions fall within the scope of these O and P classes under current law. All aliens applying for an O or P nonimmigrant visa as a principal alien require a petition approved by DHS prior to applying for a visa.

In addition to creating the O and P nonimmigrant classifications, IMMACT 90 and the MATINA amended the INA with regard to the H–1 classification for certain temporary workers by, in relevant part: (1) Restricting H–1B classification to nonimmigrants coming temporarily to perform services in a specialty occupation (as defined in INA section 214(i)(1), 8 U.S.C. 1184(i)(1)), or as a fashion model of distinguished merit and ability;[7] (2) adding the requirement of a labor condition application filed with respect to the nonimmigrant by the intending employer under INA section 212(n)(1), 8 U.S.C. 1182(n)(1), with the Secretary of Labor;[8] and (3) limiting the number of aliens who may be issued H–1B visas or otherwise provided H–1B nonimmigrant status during any fiscal year.[9]

The ACWIA, enacted in 1998, further amended the INA with respect to H–1 classification by, in relevant part: (1) Temporarily increasing numerical limits of H–1 visas;[10] (2) imposing new restrictions and requirements on H–1-dependent employers;[11] (3) instituting a new regime of penalties for petitioners whose attestations include misrepresentations;[12] (4) establishing a process to review complaints regarding failures to offer job opportunities to U.S. workers;[13] and (5) imposing a $500 fee for certain H–1B petitioners.[14]

Congress imposed an additional $2,000 fee in 2010 for certain H–1B petitioners through Public Law 111–230, section 402(b), 124 Stat. 2487 (2010). This fee authorization expired on September 30, 2015, and Congress subsequently reauthorized and increased it to $4,000 with the Consolidated Appropriations Act, 2016, Public Law 114–113, section 411, 129 Stat. 3006. This fee remains in effect until Sept. 30, 2025.

B. Policy

The proposed rule would increase clarity and transparency by removing confusing and outdated language about the scope of activity in the United States that is permissible on a B–1 visa. An example of the confusion—here to a qui tam relator—caused by this outdated language arose recently in *United States ex rel. Krawitt* v. *Infosys Technologies Limited, Incorporated,* 372 F.Supp. 3d 1078, 1086 (N.D. Cal 2019), in which the District Court found a fraud complaint misinterpreted the first sentence the Department proposes to remove related to labor pursuant to a contract or other prearrangement.[15] The court's interpretation properly highlighted that this sentence is in fact meaningless, although it is unclear whether the Court understood why this was the case. Reporting from posts abroad indicates confusion among aliens, attorneys, consular officers, and DHS officials at Ports of Entry about the application of these outdated sentences, specifically as they apply to the B–1 in lieu of H policy, described below in section (II)(D)(ii). Thus, the Department proposes removing the confusing and outdated sentences from the regulation.

Removing these two sentences, and thus removing any question about whether the referenced employment or labor might be permissible B–1 activity, not only conforms the regulation to the applicable statutory framework, but also furthers the goals of Executive Order (''E.O.'') 13788, *Buy American and Hire American. See* 82 FR 18837 (April 21, 2017). That E.O. articulates the executive branch policy to ''rigorously enforce and administer'' the laws governing entry of nonimmigrant workers into the United States ''[i]n order to create higher wages and employment rates for workers in the United States, and to protect their economic interests.'' *Id.* sec. 2(b). It directs federal agencies, including the Department, to protect U.S. workers by proposing new rules and issuing new guidance to prevent fraud and abuse in nonimmigrant visa programs. *Id.* sec. 5. The Department believes that eliminating any perceived gray area of acceptable local employment or labor for skilled foreign workers for the purpose of B–1 nonimmigrant visa issuance will better protect U.S. workers' economic interests and strengthen the integrity of the B–1 nonimmigrant visa classification

With greater clarity regarding the Department's policy and interpretation of the law concerning the availability of

[5] Nonimmigrant visas in the O classification are for certain aliens with extraordinary ability in sciences, arts, education, business or athletics, or a demonstrated record of achievement in the motion picture or television industry, as well as certain support staff and dependents. *See* IMMACT 90 section 207(a), INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O) and 22 CFR 41.55. *See also* 8 CFR 214.2(o). Nonimmigrant visas in the P classification are for certain types of artists and entertainers, as well as certain support staff and dependents. *See* INA section 101(a)(15)(P), 8 U.S.C. 1101(a)(15)(P) and 22 CFR 41.56. *See also* 8 CFR 214.2(p).

[6] *See* 136 Cong. Rec. H13203–01 (1990).

[7] IMMACT 90, Sec. 205(c)(1).

[8] IMMACT 90, Sec. 205(c)(1), (3). Prior to IMMACT 90, there was no prevailing wage requirement or other U.S. labor force protections concerning H–1B workers. Note that the H–1B category resulted from the split of the H–1 category into the H–1A (now defunct) and H–1B categories through amendments to the INA by the Immigration Nursing Relief Act of 1989, Public Law 101–238, 103 Stat. 2099 (1989).

[9] IMMACT 90, Sec. 205(a).

[10] ACWIA, Sec. 411.

[11] ACWIA, Sec. 412.

[12] ACWIA, Sec. 413a.

[13] ACWIA, Sec. 413b.

[14] ACWIA, Sec. 414.

[15] Krawitt, the qui tam relator, argued that one of the sentences in 22 CFR 41.31 the Department proposes to remove (''An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53'') prohibited two Infosys employees from providing training to Apple employees in the United States in B–1 status pursuant to a contract between the two companies. The court responded that ''Numerous authoritative sources contradict Krawitt's reading of the regulation,'' but did not offer an alternative reading of the confusing sentence, apparently giving the sentence no meaning at all.

a B–1 nonimmigrant visa for an alien seeking to engage in local employment or labor, employers will be on notice that they must pay prevailing wages for such labor performed in the United States, either by hiring a U.S. worker or by following the procedures established by Congress for the importation of a skilled worker in an appropriate visa category. The Department believes this will lead to an increase in wages for U.S. workers, because U.S. entities that previously may have paid less than the prevailing wage for services in a specialty occupation performed by foreign nationals who traveled to the United States on a B–1 nonimmigrant visa issued on the basis of the outdated regulatory language or under the B–1 in lieu of H policy (discussed in (II)(B)(2), below) will be compelled to align their business practices with the current statutory scheme and the policy expressed in this proposal.

C. Proposed Elimination of Statement That an Alien Seeking To Enter for Employment or Labor Pursuant to a Contract or Other Prearrangement Is Required To Qualify Under the Provisions of 22 CFR 41.53

Performance of skilled or unskilled labor is statutorily impermissible in the B nonimmigrant visa classification. INA section 101(a)(15)(B), 8 U.S.C 1101(a)(15)(B). The term ''labor'' is not defined in the INA or implementing regulations,[16] for the purpose of the B nonimmigrant classification. The statement in the Department's regulation that an alien seeking to enter for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of 22 CFR 41.53 (relating to H visas), fails to account for the other visa categories that permit the performance of labor in the United States (including, but not limited to the D, E, I, L, O, P, Q, and R classifications). Additionally, the requirement is under-inclusive, because INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), prohibits skilled or unskilled labor in the B nonimmigrant visa classification categorically, whether or not pursuant to a contract or other prearrangement. Because skilled and unskilled labor on a B visa are already generally prohibited by statute, the Department believes the referenced statement is confusing and misleading and therefore proposes to remove the sentence from the regulation.

D. Proposed Elimination of Statement Regarding Alien of Distinguished Merit and Ability

1. Proposal as it Relates to Aliens of Extraordinary Ability in the Sciences, Arts, Education, Business, or Athletics; and Athletes, Entertainers, and Artists Seeking Nonimmigrant Visas Relative to Their Professions

The Department proposes to eliminate the provision in 22 CFR 41.31 that currently provides that ''[a]n alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.'' This language has remained unchanged since 1952. *See* 22 CFR 41.40(b) (1952) added by 17 FR 11475 (Dec. 19, 1952)). Notwithstanding this regulatory language, the Department has long interpreted ''business'' activities permissible in the B–1 classification to exclude the activities of members of the entertainment profession seeking to perform services within the scope of their profession. For example, an acclaimed singer and accompanying musicians seeking to enter the United States to perform a concert in a stadium in the United States would be required to obtain O or P visas, after filing a petition with U.S. Citizenship and Immigration Services (USCIS), and would not be eligible for a B–1 visa for this purpose, as the existing regulation suggests.

The Department's interpretation of ''business,'' with respect to entertainers, dates back to the 1960s or 1970s, well before enactment of IMMACT 90, but the oldest published guidance currently available to the Department is from August 30, 1987, stating ''[o]rdinarily, a member of an entertainment occupation who seeks to enter the United States temporarily to perform services, whether or not the services will involve public appearance and regardless of the amount or source of compensation, will be accorded the appropriate H–1 classification.'' [17] Because this guidance was promulgated prior to the enactment of IMMACT 90, H–1 was the appropriate classification for aliens performing such services. Under IMMACT 90's targeted standards and procedures for professional entertainers, such performers would fall in the O and P categories. Notably, the 1987 guidance, which steers members of the entertainment profession away from B visas, is consistent with current FAM guidance; [18] the proposal serves to bring the regulation in line with the Department's long-standing policy. Therefore, with respect to entertainers of distinguished merit and ability who seek to perform in the United States, the Department does not expect that removing this language from the B nonimmigrant visa regulation will have any impact on visa issuance, because the statement does not align with current practice.[19]

While there is limited case law directly interpreting ''business'' as related to athletes, entertainers, and artists seeking to perform services within the scope of their professions,[20]

[16] The INA, including INA section 212(a)(5)(A)(i), 8 U.S.C. 1182(a)(15)(A)(i) (labor certification requirement for certain immigrants), and implementing regulations, such DOL regulations as 20 CFR 655.5 (defining agricultural labor) use the term labor without defining it.

[17] 9 FAM 41.31, Notes, N7.1 (TL:VISA–2, August 30, 1987). In the intervening decades, this guidance has become more nuanced to reflect certain situations where services in an entertainment profession are consistent with B–1 visa classification, as described in the following paragraphs and associated footnotes.

[18] 9 FAM 402.2–5(G) states that, with limited exception not affected by this proposal, ''B visa status is not appropriate for a member of the entertainment profession (professional entertainer) who seeks to enter the United States temporarily to perform services. Instead, performers should be accorded another appropriate visa classification, which in most cases will be P, regardless of the amount or source of compensation, whether the services will involve public appearance(s), or whether the performance is for charity or a U.S. based ethnic society.'' This proposal would not affect existing Department guidance on the situations in which professional entertainers and artists may be classified B–1, such as participants in cultural programs performing before a nonpaying audience and being paid by the sending government. See 9 FAM 402.2–5(G)(1)–(5).

[19] This proposal would not affect Department guidance to consular officers with regard to amateur athletes and entertainers. Under 9 FAM 402.2–4(A)(7), a person who is an amateur in an entertainment or athletic activity is, by definition, not a member of any of the profession associated with that activity. An amateur is someone who normally performs without remuneration (other than an allotment for expenses). A performer who is normally compensated for performing cannot qualify for a B–2 visa based the provisions of 9 FAM 402.2–4(A)(7) even if the performer does not make a living at performing, or agrees to perform in the United States without compensation. Thus, an amateur (or group of amateurs) who will not be paid for performances and will perform in a social and/or charitable context or as a competitor in a talent show, contest, athletic event, or other similar activity is eligible for B–2 classification, even if the incidental expenses associated with the visit are reimbursed.

This proposal would not change this understanding.

In proposing to remove this provision from the regulation, the Department recognizes that aliens of ''distinguished merit and ability'' in areas other than athletics, entertainment, and art may also be impacted. To the extent the proposal to eliminate this section overlaps with the proposal to eliminate the B–1 in lieu of H policy, see the discussion immediately below.

[20] The Board of Immigration Appeals held that a professional dancer was not eligible to enter the United States to fulfill a 6 month dancing contract as a temporary visitor for business in *In the Matter*

the Department's interpretation is consistent with case law interpreting ''business'' more generally. The Board of Immigration Appeals has repeatedly held that ''business,'' as used in INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), does not include ordinary labor for hire or local employment of a continuing nature, the extension of professional practice to the United States, or the regular performance of services in the United States not performed as an incident to any international commercial activity. *See, e.g., Matter of Neill,* 15 I. & N. Dec. 331, 334 (BIA 1975) (extending professional engineering practice to the United States was not permissible for the B nonimmigrant classification); *Matter of G—,* 6 I. & N. Dec. 255, 258 (BIA 1954) (holding that employment of a continuing nature as a receiving clerk and truck loader in the United States was not permissible B–1 activity even when the alien maintained a residence in Canada which he had no intent of abandoning and was paid entirely by the Canadian company); compare *Matter of Duckett,* 19 I. & N. Dec. 493, 498 (BIA 1987) (holding professional services regularly performed in the United States permissible B–1 activity because the function was a necessary incident to international trade).

The Department's existing guidance to consular officers provides some scenarios in which professional athletes, artists, and entertainers may qualify for B–1 visas for the purpose of performing services within the scope of their professions. These examples extend the reasoning of administrative decisions interpreting the scope of permissible B–1 activity to situations consular officers may encounter and do not rely on the regulatory language the Department proposes to remove; thus, these purposes of travel would not be affected by this proposal. For example, 9 FAM 402.2–5(C)(4) paragraph b explains that athletes or team members who seek to enter the United States as members of a foreign-based team in order to compete with another sports team are eligible for B–1 visas, provided that the foreign athlete and the foreign sports team have their principal place of business or activity in a foreign country and the income of the foreign-based team and the salary of its players are principally accrued in a foreign country. The referenced FAM guidance is consistent with *Matter of Hira,* 11 I&N 824 (BIA 1965; A.G. 1966), which identifies relevant factors for B–1 classification as, among others, the principal foreign place of business and the principal location of accrual of profits abroad.[21] A separate FAM provision, which is also not affected by this proposal, specifies that a professional entertainer may be classified B–1 if the entertainer (1) is coming to the United States to participate only in a cultural program sponsored by the sending country; (2) will be performing before a nonpaying audience; and (3) all expenses, including per diem, will be paid by the member's government. 9 FAM 402.2(G)(1). These criteria also align with the Attorney General's interpretation in *Matter of Hira.*

The Department's proposal seeks to bring the regulations into conformity with Department practice with respect to athletes, entertainers, and artists by removing the one sentence of regulatory language that has been superseded by Congress through the passage of IMMACT 90. Therefore, the Department does not expect that removing this language from the regulation will impact visa issuance with respect to athletes, entertainers, and artists of distinguished merit and ability who seek to compete or perform in the United States.

2. Proposal as It Relates to B–1 in Lieu of H Nonimmigrant Visas

Following elimination of the two outdated and misleading sentences from the regulation, there will be less confusion about whether the Department might permit B visa issuance for aliens seeking to engage in local employment, including labor appropriately classified as H–1B or H–3 activities. Employers, foreign workers, immigration attorneys, or others may have erroneously believed that such activity has been permissible for B–1 nonimmigrant visa issuance, in some cases, under a visa policy referred to as the B–1 in lieu of H policy. Agency guidance to consular officers on this policy, currently in 9 FAM 402.2–5(F),[22] will be withdrawn if the rule is finalized. Like the confusing and outdated regulatory language described above, the Department also seeks to terminate the B–1 in lieu of H policy, for reasons of law and policy. Eliminating the regulatory language described above and eliminating the FAM guidance supporting the B–1 in lieu of H policy will make clear that foreign workers seeking to engage in local employment or labor for hire must follow the procedural requirements enacted by Congress to protect U.S. workers. Temporary visits for business activities that are consistent with *Matter of Hira* will still be permissible purposes for B–1 visa issuance under this proposal. Aliens seeking to engage in such business activities will qualify for B–1 visa classification if their purpose of travel is consistent with the B–1 visa classification, irrespective of whether the applicant might qualify for an H visa. The Department believes this clarification will strengthen the integrity of the B–1 program and better align its regulation and guidance for consular officers with the statutory framework, administrative case law, and visa policy.

Under INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), aliens coming to the United States to perform skilled or unskilled labor are not eligible for B–1 nonimmigrant classification. The Senate Report accompanying the Immigration and Nationality Act of 1952 (S. Rept. No. 1515), p. 525, cited *Karnuth* v. *United States,* 279 U.S. 231 (1929), to indicate that ''visitor for business'' does not include a visitor coming to perform labor for hire, especially given the congressional intent of the 1924 Act ''to protect American labor against the influx of foreign labor.'' *Id.* at 243–44. In addition to carrying over that principle from the Immigration Act of 1924, Congress in the 1952 Act added a new nonimmigrant visa classification, the H classification, designed for temporary foreign workers to meet the needs of employers in the United States. *See* INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H). As noted above, in 1952, the H nonimmigrant classification was divided between ''aliens of distinguished merit and ability'' coming temporarily to the United States to ''perform temporary services of an exceptional nature requiring such merit and ability'' (H–1); other skilled or unskilled aliens to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in the United States (H–2); and trainees (H–3). All three H nonimmigrant sub-categories required a petition approved by the former Immigration and Naturalization Service (INS) to establish eligibility for the

of M—, 2 I. & N. Dec. 240 (BIA 1945), but the reasoning leading to that conclusion is opaque.

[21] 9 FAM 402.2–5(A) paragraph b explains the facts of *Matter of Hira* and its relevance to consular officers' determination of appropriate B–1 activity. It explains that in some situations, it can be difficult to distinguish between appropriate B–1 business activities, and activities that constitute skilled or unskilled labor in the United States that are not appropriate on B status. *Hira* involved a tailor measuring customers in the United States for suits to be manufactured and shipped from outside the United States. The decision stated that this was an appropriate B–1 activity, because the principal place of business and the actual place of accrual of profits, if any, was in the foreign country.

[22] See 9 FAM 402.2, available at *https://fam.state.gov/FAM/09FAM/09FAM040202.html* (last accessed October 14, 2020).

classification, and a labor market test was required for the H–2 nonimmigrant classification. The B–1 in lieu of H policy arose in the context of this framework in the 1960s.

The B–1 in lieu of H policy was adopted jointly by the INS and the Department's Visa Office in the 1960s. *See The Proposed Restriction of the ''B–1 in Lieu of H–1'' Concept,* Bernsen, 70 No. 35 Interpreter Releases 1189, Sept. 13, 1993. The purpose was to reduce unnecessary paperwork and facilitate international travel by eliminating the requirement for filing H–1 and H–3 petitions for cases within the purview of the concept, so that the alien could apply for a visa without any intervening INS action, in a one-step procedure.[23] *Id.*

a. B–1 in Lieu of H–1B

In proposing elimination of B–1 in lieu of H, which is related to the two sentences proposed for elimination, the Department finds that visa policy has lagged behind changes to the INA since the policy was first adopted. The Department's past failure to align its regulations with the statutory framework has created confusion about the limits of permissible activity on a B visa. Section 205 of IMMACT 90 amended the H–1B nonimmigrant classification in a number of respects. Among other amendments, it (1) imposed a numerical limitation on this classification for the first time; (2) modified the standard generally applicable to aliens seeking admission under the classification from ''distinguished merit and ability'' to ''specialty occupation'' as defined in INA section 214(i)(1); and (3) instituted a labor condition application requirement. *See* INA section 214(g)(1)(A) and section 212(n), 8 U.S.C. 1184(g)(1)(A) and 1182(n). The amendments made by section 205 expressed Congress' intent to limit availability of the H–1B visa classification in certain respects. MATINA further amended the H–1B category to include certain fashion models, placed conditions on eligibility for doctors, and narrowed the attestation requirements for labor condition applications.

While IMMACT 90 did not alter the language of INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), the changes to the H–1B classification and the legislative history indicate that Congress intended the B–1 classification to be applied narrowly after enactment. The Senate report describes the reasoning as follows: ''For example, the committee has taken note of, and relied upon, the reasoning of *Bricklayers and Allied Craftsmen* v. *Meese,* 616 F. Supp. 1387 (N.D. Cal. 1985), with regard to the proper scope of the B temporary visa category . . . the committee's action in expanding immigration rests on this understanding of the narrow scope of the B temporary visa category, and consequently, the narrow scope of any implementing operations, instructions, or regulations.'' [24]

After the passage of IMMACT 90, the Department and the INS began to question the appropriateness of continuing the B–1 in lieu of H policy. *See* 91 STATE 312100, reproduced in 68 No. 37 Interpreter Releases 1263, Sept. 30, 1991. The Department proposed to eliminate the B–1 in lieu of H policy in an NPRM published in the summer of 1993. 58 FR 40024–30 (July 26, 1993). INS also published an NPRM proposing the elimination of the B–1 in lieu of H policy in the autumn of 1993. 58 FR 58982–88 (Nov. 5, 1993). Neither agency finalized its rule, although interagency discussions continued. *See* 12 STATE 101466, reproduced at 89 No. 42 Interpreter Releases 2013 (Oct. 29, 2012) (''The B–1 in lieu of H–1B and H–3 guidance in 9 FAM 41.31 N11 is under review in an interagency process, but remains in effect until further notice.'')

While the Department endeavored to interpret its B–1 in lieu of H policy in a manner consistent with the statutory framework, including by limiting the policy to apply only to those cases that most clearly met the definition of ''business'' set forth in *Matter of Hira* and subsequent Board of Immigration Appeals cases, the resulting changes to the policy's parameters were not well publicized and the relevant regulations were never updated. Additionally, with the development of new technology since the introduction of the B–1 in lieu of H policy in the 1960s, including increased standardization of electronic salary deposits through direct deposit, the policy has become more subject to exploitation. For example, a company can more easily ''pay salaries'' from abroad that circumvent the local wage and hour laws where actual labor is performed when contracting local labor for hire in the United States, which would have been impermissible during the early days of the B–1 in lieu of H policy due to restrictions on place of salary payment. As a result of the confusing regulatory language, changes in immigration laws over the years, and technological advancements, the Department believes some stakeholders may have come to believe the B–1 in lieu of H policy permits issuance of B–1 visas for broad categories of skilled labor, notwithstanding the greater specificity in labor and employment-related visa classifications under the INA, as amended by IMMACT 90. In light of E.O. 13788, as well as the numerical restrictions in the H–1B category, requirements of the labor condition application, and revised definition of the H–1B category contained in IMMACT 90, the Department is compelled to eliminate the B–1 in lieu of H policy and end the confusion that has surrounded it.

Efforts to limit the application of the B–1 in lieu of H policy have had unintended consequences, and the continuation of the policy would not align with Administration policy. The requirements of the B–1 in lieu of H policy outlined in 9 FAM 402.2–5(F), derived from the reasoning in *Matter of Hira,* focus on the physical location of the employer's office and the source of the worker's remuneration for services performed in the United States both being abroad. The Board of Immigration Appeals identified these factors, among others, as dispositive of whether the work in question was impermissible local employment or permissible business that is a necessary incident to international trade or commerce. The focus on these factors alone might lead to an incorrect conclusion that skilled labor is permissible in the B–1 classification, if these factors are met. To the contrary, the Department does not believe that a strategically structured contract between a U.S.

[23] In a version of the FAM available from March 31, 1980, 9 FAM 41.25, note 4.2(c) provided that ''[a]n alien already employed abroad coming to undertake training who would be classifiable H–3 but who will continue to receive a salary from the foreign employer and will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to his temporary stay'' is classifiable B–1. The H–3 petition process had been criticized for being too slow. *See* Nonimmigrant Business Visas and Adjustment of Status; Hearing before the Subcommittee on Immigration and Refugee Policy, Senate Judiciary Committee; Serial No. J–97–86, December 11, 1981; Preference System; Hearing before the Subcommittee on Immigration and Refugee Policy, Senate Judiciary Committee; Serial No. J–97–83, November 23, 1981. By March 31, 1980, Department guidance referenced B in lieu of H–3.

[24] Immigration Act of 1989; S. Rept. 101–55 on S. 358, June 19, 1989 *Congressional Reports: Doc. No. 15- June 19. 1989,* page 20. In the *Bricklayers* case, the Court struck down an INS operating instruction allowing admission as a business visitor of an alien coming to install, service, or repair commercial or industrial equipment sold by a foreign vendor to a U.S. purchaser, holding that the instruction was contrary to the plain language of the INA. The Ninth Circuit granted a joint motion to limit the injunction only to aliens coming to perform building or construction work of the kind performed by members of the plaintiff union, after which the parties agreed to dismiss the case. The validity of the U.S. government's interpretation of INA section 101(a)(15)(B) as extending to other types of skilled labor was never addressed.

business and a foreign employer can provide an acceptable basis for foreign workers to seek B–1 visas to perform skilled labor in the United States. Such an interpretation would undermine the interests of U.S. workers, the intent of Congress, and the goals of E.O. 13788. For these reasons and the reasons stated above, the Department seeks to end this longstanding policy, remove the regulatory sentences supporting it, and eliminate guidance to consular officers reflecting the policy.

One example that may illuminate the implications of retaining the B–1 in lieu of H policy could be a U.S. architecture firm seeking protection from rising labor costs in the United States. The firm might believe it could lay off its U.S. architects and contract for the same professional architectural services to be provided by a foreign architecture firm. If the foreign firm sought H–1B visas for its architects, it would be required to pay the prevailing wage for architects in the area of intended employment in the United States, presumably the same wage the U.S. architects had been paid, and meet the other requirements enacted by Congress to protect U.S. workers. But under the B–1 in lieu of H policy, the foreign architects could ostensibly seek B–1 visas and travel to the United States to fill a temporary need for architecture services, so long as they retained a residence in the foreign country and continued to receive a salary, perhaps significantly lower than what is customary for U.S. architects, dispersed abroad by the foreign firm (or under the auspices of a foreign parent or subsidiary). Under the Department's guidance as expressed in 9 FAM 402.2–5(F), visas could be issued for multiple architects planning temporary work in the United States, in certain situations; however, a foreign employer may succeed in undermining U.S. immigration law and policy by rotating architects between the United States and the foreign country to effectively fill the position of one U.S. architect at a significantly lower cost. If the architects who intended to perform skilled labor were ''of distinguished merit and ability . . . seeking to perform [temporary architectural services] of an exceptional nature requiring such merit and ability,'' one might argue the current regulatory language suggests this type of labor is a permissible basis for B–1 nonimmigrant visa issuance. As this potential outcome is harmful to U.S. workers and contrary to administration policy as expressed in E.O. 13788, and as expressed in longstanding FAM guidance to consular officers, the Department seeks to eliminate guidance that could be misunderstood to imply that such an arrangement might be permissible.

If finalized, this proposal will eliminate any misconception that the B–1 in lieu of H policy provides an alternative avenue for aliens to enter the United States to perform skilled labor that allows, and potentially even encourages, aliens and their employers to circumvent the restrictions and requirements relating to the H nonimmigrant classification established by Congress to protect U.S. workers.[25] The proposed changes and the resulting transparency would reduce the impact of foreign labor on the U.S. workforce of aliens performing activities in a specialty occupation without the procedural protections attendant to the H–1B classification. Specifically, these procedural protections include the numerical cap on the H–1B category in INA section 214(g)(1), 8 U.S.C. 1184(g)(1), which limits the number of foreign workers permitted to compete with U.S. workers. There are no such limits on the number of workers who may qualify for a B–1 visa under the B–1 in lieu of H–1B policy. Similarly, the labor condition application requirement added to INA section 212(n), 8 U.S.C. 1182(n), by IMMACT 90 requires employers to make attestations regarding the wages and working conditions of H–1B nonimmigrants and to provide notification to U.S. workers to mitigate the potential adverse effects of importing foreign labor through the H–1B program. In contrast, the application process for a B–1 visa does not include similar procedural requirements to protect U.S. workers. Further, while Congress required H–1B employers to pay significant fees to fund assistance to the U.S. workforce as well as prevention and detection of fraud related to skilled labor, employers are not required to pay comparable fees to employ skilled workers under the B–1 in lieu of H policy. *See* INA sections 214(c)(9), (12), and 286(s), (v), 8 U.S.C. 1184(c)(9), (12), and 1356(s), (v). To the extent the current regulatory language suggests that U.S. employers may seek foreign workers in the B–1 classification to perform local employment or labor, absent the procedural protections for U.S. workers Congress enacted, this practice affords lesser protections than Congress intended for U.S. workers filling and seeking similar position. The Department proposes eliminating the B–1 in lieu of H policy for these reasons, for greater consistency with U.S. law and congressional intent, and in furtherance of the policy expressed in E.O. 13788, all of which aim to protect U.S. workers' economic interests.

To the extent any U.S. entities may claim its business model relied on the B–1 in lieu of H policy to pay foreign skilled workers at rates below prevailing wages, the Department would note that consular officers are the sole arbiters of visa eligibility and no one may justifiably assume that a visa will be issued to a particular alien or for a particular purpose, prior to adjudication. Any such businesses could face costs, potentially significant costs, in conforming their hiring practices to the statutory scheme without the benefit of the B–1 in lieu of H policy. To mitigate harm that might follow immediate implementation, B–1 visas that are valid when this proposal is enacted will not be revoked on the basis of this policy change, and employers will be able to continue to benefit from the services of skilled workers appropriately issued B–1 visas under the guidance at 9 FAM 402.2–5(F) in place at the time of visa issuance, subject to the independent reviews by DHS at ports of entry. The Department hereby notifies U.S. businesses that following the effective date of a final rule, they no longer will be able to reference the B in lieu of H policy to defend obtaining services in a specialty occupation from workers being paid at a rate below prevailing wage. The Department has determined that policy must be eliminated to better protect U.S. workers' economic interests and strengthen the integrity of the B–1 visa program, in addition to conforming to current statutory requirements.

Setting aside legal considerations, the Department believes that the proposal is justified as a matter of policy, notwithstanding any possible reliance by U.S. entities and other costs to businesses of aligning the hiring of skilled foreign workers to the requirements of the INA, or alternatively of hiring U.S. workers, because of the

[25] The legal proceedings against Indian information technology company Infosys Limited provides one public example outside the context of the B–1 in lieu of H policy of the strong financial incentives for aliens and their employers to misuse the B–1 visa to circumvent the requirements of the H nonimmigrant classification. On December 17, 2019, the California Attorney General announced an $800,000 settlement against Infosys Limited to resolve allegations that approximately 500 Infosys employees worked in California on Infosys-sponsored B–1 visas rather than H–1B visas. According to the Attorney General's statement, the misclassification resulted in Infosys avoiding California payroll taxes and paying workers lower wages. See *https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-800000-settlement-against-infosys* (Last accessed December 26, 2019). The New York Attorney General announced a $1 million settlement with Infosys Corporation in June 2017 based on similar claims. See *https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-settlement-infosys-failing-follow-us-visa-requirements* (Last accessed December 26, 2019).

benefits that this proposed rule provides U.S. workers, which could be substantial. In calculating these benefits, the Department assumes that the wages paid to workers in the United States in B–1 status would generally be the minimum legally permissible, or the minimum wage in the work location. Similarly, due to lack of more specific data, the Department assumes the salary paid either to H–1B workers or to U.S. workers in specialty occupations generally would be the prevailing wage calculated by the Department of Labor.[26] The gap between this wage and the local minimum wage could be significant; for example, an employer in Silicon Valley could legally pay a computer network architect in B–1 status the minimum wage of $15 per hour, whereas the same employer would be required to pay a computer network architect in H–1B status the prevailing wage of at least $40.88 per hour. Presumably, the same employer would need to offer wages at least as high as the prevailing wage in order to secure the services of a qualified U.S. worker. The gap is even larger in Austin, Texas where the minimum wage is $7.50 per hour and the prevailing wage for a computer network architect is at least $37.15 per hour.[27] In enacting IMMACT 90 and requiring employers to pay the prevailing wage for skilled foreign workers, Congress determined that the gains of this policy to U.S. workers, who would see greater employment opportunities and higher wages without the downward pressure from underpaid foreign workers, outweighed the associated costs to U.S. employers. The Department proposes to remove the outdated regulatory language supporting the B–1 in lieu of H policy that erodes the protections for U.S. workers Congress sought to enact.

b. B–1 in Lieu of H–3

Likewise, and also taking into account E.O. 13788, the Department proposes to eliminate the B–1 in lieu of H–3 policy.[28] In addition to limiting the H–1B program, IMMACT 90 limited the H–3 program to exclude training programs ''intended primarily to provide productive employment.'' The H–3 petition process for trainees requires an immigration officer to evaluate whether a training program complies with this limitation and with applicable regulations, which limit the total time of a training program to two years and contains explicit protections for U.S. workers. Among other requirements, petitioners must explain why the training is required, demonstrate that the training is not available in the beneficiary's country, indicate how the training will benefit the beneficiary in pursuing a career abroad, identify the source of any remuneration the trainee will receive, and describe any benefit the petitioner will obtain by providing the training. *See* 8 CFR 214.2(h)(7).

As explained in the final rule establishing H–3 regulatory requirements, 55 FR 2602, 2618 (Jan. 26, 1990), ''[t]oo often, petitioners who cannot obtain H–1 or H–2B classification for workers will submit petitions for such workers under the H–3 classification with the intention of employing them under the guise of a training program.'' The aforementioned final rule was written before the enactment of IMMACT 90, which further restricted the H–3 classification to training programs that are ''not designed primarily to provide productive employment.'' IMMACT 90 section 205(d). While the regulatory requirements and statutory limitations discussed above prevented some of this abuse in the H–3 category, some employers misused the B–1 in lieu H policy to bypass the important protections built into the H–3 classification and described above. The Department's proposal ending the use of B–1 visas for these training programs in the future, even for trainings of a short duration, will assist in preventing abuse of the U.S. immigration system and protecting U.S. workers' economic interests.

For these reasons, the Department proposes to eliminate the referenced specific language from 22 CFR 41.31(b)(1), the outdated regulatory language that supported the B–1 in lieu of H–3 policy, and the related guidance at 9 FAM 402.2–5(F).

[26] For H–1B workers, the prevailing wage calculated by DOL is the minimum legally permissible wage. INA section 212(n)(1)(A)(i)(II). The Department of Labor's website explains that the prevailing wage rate is the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. See *https://flag.dol.gov/programs/prevailingwages,* last accessed January 22, 2020. This is the best available measure of the salary costs to employers of hiring a U.S. worker.

[27] *https://www.minimum-wage.org/,* last accessed November 4, 2019; *https://flcdatacenter.com,* last accessed November 4, 2019. Note that the prevailing wage cited is for workers in a specialty occupation with the lowest level of experience; employers are required to pay experienced H–1B workers a higher prevailing wage.

[28] The B–1 in lieu of H policy, as it relates to H–3s, has historically applied to only H–3 trainees, therefore the discussion of H–3 is specific to this type of H–3 nonimmigrant.

III. Regulatory Findings and Impact Statements

A. Administrative Procedure Act

The Department is providing 60 days for public comment on this proposed rule's elimination of two sentences in the regulation and the B in lieu of H policy.

B. Regulatory Flexibility Act/Executive Order 13272 (Small Business)

This proposed rule only regulates the category of individuals who qualify for B nonimmigrant visas. Businesses have no petition component for B visas and are outside the zone of interest of this rulemaking because the RFA deals with direct economic impacts on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (''UMRA'') is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This proposed rule does not exceed the $100 million expenditure in any one year when adjusted for inflation ($163 million in 2018 dollars), and this rulemaking does not contain such mandates. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

D. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Department has reviewed this proposal to ensure consistency with those requirements. The Department has not identified any available regulatory alternative to this proposal that would meet the Department's policy of rigorously interpreting the relevant

provisions of the INA, including provisions governing entry into the United States of workers from abroad.

This proposed rule would not directly regulate U.S. entities but may have indirect fiscal effects on those entities that use the services of foreign workers in specialty occupations in the United States in B–1 classification. Aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company.[29] However, the purpose of the travel is often to provide services in a specialty occupation for one or more U.S.-based clients. Generally, those U.S. entities might incur some additional costs if they instead seek U.S. workers to provide those services or, alternatively, seek H–1B or other classification for those foreign workers.

The Department estimates that this proposal will affect no more than 6,000 to 8,000 aliens per year, specifically aliens intending to provide services in a specialty occupation in the United States. Since February 22, 2017, the FAM has required consular officers to use a specific annotation on the face of any visa issued on the basis of the B–1 in lieu of H–1 or B–1 in lieu of H–3 policy. See 9 FAM 402.2–5(F). The Department searched annotations for Fiscal Years 2015 through 2019 using the currently required annotations and variations of B–1 in lieu of H and found the following numbers of annotated visas reflecting B–1 in lieu of H–1 or H–3: FY 2015: 6,323; FY 2016: 5,739; FY 2017: 6,287; FY 2018: 6,681; FY 2019: 7,940. Because the annotation has been required since February 2017, data collected on or after that date is more reliable than data for earlier periods. It is likely that data for earlier periods understated the number of visas issued on the basis of these policies, so we estimate annual visa issuance under the B–1 in lieu of H policy in some years could have been as high as 8,000. For purposes of providing baseline information about potential costs associated with this proposal, the Department therefore uses the upper estimate of 8,000. This is likely an overestimate because some aliens who received a B–1 visa under the B–1 in lieu of H policy would still qualify for B–1 visas. However, the assessment of their qualification for the B–1 visa classification would not take into consideration whether they would qualify for an H visa, but rather whether the B–1 visa classification is appropriate for other reasons, like adherence to the *Hira* standards.

The Department estimates that up to 28 percent of the approximately 8,000 annual B–1 visa issuances under the B–1 in lieu of H policy were to aliens who applied for a visa to perform services in a specialty occupation for a small entity in the United States. This estimate is based on the Department's analysis of a sample of 375 of the visa applications that resulted in visa issuance under the B–1 in lieu of H policy.[30] To determine whether the alien intended to perform services for a small U.S. entity, the Department analyzed the ''U.S. Point of Contact'' field on submitted DS–160 applications, the most relevant available information. The Department does not collect data on the legal name of the entity in the United States using the services to be provided by an alien applying for a B–1 visa.[31] This analysis showed that a maximum of 106 aliens, or 28.27% of the sample, listed a U.S. Point of Contact that was a small entity, as defined by the Small Business Administration. This includes 50 applications listing a U.S. Point of Contact about which the Department was unable to find sufficient information to determine whether the enterprise is small; in order to capture the maximum possible impact on small entities, the Department considered all 50 entities with insufficient information to be small entities.

The Department assumed that the up to 8,000 aliens benefitting from the B–1 in lieu of H policy provided services to a maximum of 8,000 distinct U.S. entities, though the exact number of distinct entities potentially indirectly affected by this proposal is unknown due to limited data availability, and because some aliens previously issued a B–1 visa under the B–1 in lieu of H policy may continue to qualify for the B–1 visa classification after termination of the policy. Based on the analysis described above, the Department estimates that a maximum of 2,262 (28.27% of 8,000) distinct small entities could be indirectly affected by this proposal.

U.S. entities seeking services in a specialty occupation will no longer be able to acquire those services from aliens in the United States in B–1 classification pursuant to the B–1 in lieu of H policy. Some, but not all, of those services could be performed by individuals in B–1 status, even after termination of the B–1 in lieu of H policy. Otherwise, U.S. entities could hire U.S. workers. Or, if relevant labor-related conditions were met, such entities could seek qualified foreign workers in H–1B status to perform the needed services.

In light of the uncertainty and lengthy wait time to secure H–1B status for a foreign worker, the Department assesses that an H–1B is not likely to be a viable option for many U.S. entities seeking an alien to perform services in a specialty occupation that were previously performed by an alien in B–1 status. Rather, the Department assesses that U.S. entities indirectly affected by this proposal will likely hire U.S. workers to perform required services in a specialty occupation previously provided by aliens in B–1 classification. For those H–1B petitions that are selected, approval is not guaranteed. For example, approval would require that the U.S. entity have the employer-employee relationship with the alien that is required for H–1B status.[32] Even those entities whose petitions are selected in the lottery and approved face a timeline much longer than the timeline for securing a B–1 visa under the B–1 in lieu of H policy. To begin, the employer must wait until the start of the next fiscal year for the employee to start work and, if the early April deadline for entering the lottery has already passed, the employee's start date will be delayed at least until the start of the following fiscal year. If a particular petition is not selected in the lottery, the employer must wait at least another year for the employee to start work.

Due to the labor-related requirements, uncertainty of selection under the numerical cap on the H–1B classification, the long timeline for H–1B adjudication, and the significant

[29] The Department's guidance on the B–1 in lieu of H policy at 9 FAM 402.2–5(F) prohibits B–1 visa issuance if the applicant will receive any salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. For purposes of this Section, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad.

[30] From the 14,621 total visa applications approved under the B–1 in lieu of H policy in fiscal years 2018 and 2019 combined, the Department randomly selected 375. That sample size was selected after the Department computed that a sample size of 374 would provide a 95% confidence level with 5% error.

[31] As noted above, under the Department's guidance at 9 FAM 402.2–5(F), aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company. Thus, while the DS–160 application contains a field for ''Present Employer or School Name,'' this field is not useful for determining the U.S. entity that will use the alien's services in the United States, which could be, for example, a parent, subsidiary, client, supplier, or business partner of the foreign employer.

[32] 8 CFR 214.2(h)(4)(ii). In contrast, under the Department's guidance at under the Department's guidance at 9 FAM 402.2–5(F), aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company.

paperwork and costs required to petition for the H–1B classification, the Department anticipates that the H–1B classification will not be a viable alternative for many U.S. entities that are currently able to obtain the services of skilled workers under the B–1 in lieu of H policy. Notwithstanding, the Department seeks to provide for informational purposes baseline data about the potential costs, to aliens and/or U.S. entities using the services of such aliens, of seeking H–1B visas.

The Department recognizes that the costs associated with the H–1B visa are higher than those associated with a B–1 visa. *See* Chart 1 below for a comparison of common costs. The Department notes the various costs associated with the H–1B and B–1 visas may be paid by different parties and thus are not directly comparable; for example, the costs associated with the nonimmigrant visa application listed in the first two rows of the chart may be paid by the alien, a foreign employer (in the case of a B visa application), or a U.S. employer (in the case of an H–1B visa application).

CHART 1

Cost type	Cost required for H–1B	Cost required for B (or "No" if not required for B)
Nonimmigrant visa application processing fee (non-refundable)	$190	$160.
Estimated cost of time required to complete nonimmigrant visa application [33].	$51.11	$51.11.
Filing an I–129, Petition for Nonimmigrant Worker	$460 *	No.
The American Competitive and Workforce Improvement Act fee (authorized under Sec. 414(c), Division C, of Pub. L. 105–277 for certain H–1B petitioners).	$1500 (for certain petitioners with more than 25 employees). $750 (for certain petitioners with 25 or fewer employees) *.	No.
Fraud Prevention and Detection Fee (authorized under Sec. 426(a), Division J, of Pub. L. 108–447 for employers seeking initial H–1B nonimmigrant status for a foreign worker).	$500 *	No.
Fee under Public Law 114–113 (temporarily authorized until September 30, 2025 under Sec. 411(b) of Pub. L. 114–113 for H–1B petitioners that employ 50 or more employees in the United States if more than 50 percent of these employees are in H–1B, L–1A or L–1B nonimmigrant status).	$4,000 *	No.
Estimated cost associated with completing Form I–129 [34]	$239.80 *	No.
Estimated cost of time required to complete H–1B petition	$220.89 *	No.
Visa reciprocity fees charged by the Department of State (authorized under INA § 281, 8 U.S.C. 1351).	Depending on nationality of applicant.	Depending on nationality of applicant.
Minimum Total Costs	$2,411.80–$9,311.80	$211.11.

An asterisk (*) indicates that the cost is generally paid by a U.S. entity (the H–1B petitioner), which is not regulated by this proposal, but which the Department includes for informational purposes.

The Department estimates the average time needed to complete and submit a DS–160, Online Application for Nonimmigrant Visa, is the same for B and H nonimmigrant visa applicants, and therefore there is no additional time burden to visa applicants under this proposal.[35] The Department estimates that the average additional time U.S. petitioners expend on the H–1 visa process, as compared to what foreign employers spend on the B–1 visa process, is 6.384 hours. This is based on an estimate that completing the I–129, Petition for Nonimmigrant Worker and associated supplements related to the H classification (according to the DHS supporting statement for the form) would take approximately 5.384 hours and one hour for the Department of Labor's Labor Certification Application, Form 9035/9035E.[36] Based on the weighted average hourly rate used by DHS of $34.84, the average cost of the time required to complete an H–1B petition is $220.89. No petition is required for B visas. Additionally, according to the Small Business Administration, over 90 percent of H–1B applicants utilize attorneys at fees of $5000–$10,000. (See email on file with Visa Office.)

As discussed above, Congress created certain requirements in the H–1B program to protect the economic interests of U.S. workers by ensuring that wages and working conditions of H–1B workers are at least as desirable as those for comparable U.S. workers. By eliminating the ''B–1 in lieu of H'' policy and requiring employers to use the H–1B process to obtain skilled foreign workers,[37] this regulation will impose upon those employers the costs of adhering to those protections, or alternatively of hiring U.S. workers. The cost associated with hiring a U.S. worker include paying the employee the

[33] *See* OMB Control Number 1405–0182, available at *https://www.reginfo.gov/public/do/PRAMain.*

[34] In its Supporting Statement for I–129, Petition for Nonimmigrant Worker, OMB Control No. 1615–0009, USCIS included the following paragraph about the costs of completing Form I–129: ''USCIS estimates that costs for form preparation, legal services, translations, required consultations, document search and generation, and postage to mail the completed package will vary widely. USCIS estimates that petitioners will pay an average of $239.80 per response.''

[35] *See* OMB Control Number 1405–0182, available at *https://www.reginfo.gov/public/do/PRAMain.*

[36] *See* OMB Control Number 1615–0009 (Petition for Nonimmigrant Worker); OMB Control Number 1205–0332 (Labor Certification Application), available at *https://www.reginfo.gov/public/do/PRAMain.*

[37] The Department recognizes that some U.S. entities seeking services from aliens in the United States in B–1 status under the B–1 in lieu of H policy may alternatively seek visa classifications other than B or H, depending on the circumstances of the proposed employment in the United States. Most employment-based nonimmigrant visa classifications have narrow eligibility requirements likely inapplicable to most aliens performing services in B–1 visa classification. For example, it is possible some aliens who qualify for B visas under the B–1 in lieu of H policy may qualify for L nonimmigrant visas. An alien applying for a L nonimmigrant visa would need to establish, among other eligibility requirements, that he or she has, within three years preceding the time of his or her application for admission into the United States, been employed abroad continuously for one year by a firm, corporation, or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily in order to render services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge. *See* INA section 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L); 22 CFR 21.54. L nonimmigrant visas also require petitions, and fees and costs that exceed the costs associated with B nonimmigrant visas.

prevailing wage and providing other common benefits such as health insurance, worker's compensation, and unemployment insurance. The difference between the costs incurred by employers paying the minimum wage to nonimmigrant workers in B–1 classification and the costs incurred under this proposal vary significantly depending on the proposed work location. Returning to the two examples detailed in section (II)(D)(2)(a) above, and applying the wage rate benefit multiplier of 1.46 to account for benefits provided, the increased cost of securing the services of U.S. worker as a computer network architect would be approximately $37.78 per hour in Silicon Valley and approximately $42.39 per hour in Austin, Texas. If all U.S. entities affected by this proposal seek a U.S. worker to provide services as an entry level computer network architect in Silicon Valley, the total additional annual cost of this proposal to U.S. employers would be approximately $604,480,000.[38] If all U.S. entities seek such a worker in Austin, the total additional annual cost of this proposal to U.S. employers would rise to $678,240,000.[39]

If all U.S. entities affected by this proposal do not seek another worker but rather suffer lost productivity comparable to the wages that would have been paid to a worker in B–1 status making the federal minimum wage of $7.25 per hour, the total additional annual cost of this proposal would be $116,000,000.[40] This analysis assumes that every worker admitted in B–1 status pursuant to a visa issued under the B–1 in lieu of H policy was admitted for one year, the maximum period permitted under 8 CFR 214.2(b)(1), and worked a normal U.S. work schedule of 40 hours per week for 50 weeks during that time. Anecdotal evidence indicates that the total hours worked by aliens admitted in this category is likely much less, but the Department does not have reliable data on typical admission periods or work weeks for aliens admitted in this category and includes the maximum possible cost for full transparency in keeping with the purpose of E.O. 12866. The Department invites comment on this analysis and the underlying assumptions.

[38] This is calculated from $37.78 per hour in Silicon Valley, California (includes 1.46 wage multiplier) × 2,000 hours per year × 8,000 workers.

[39] This is calculated from $42.39 per hour in Austin, Texas (includes 1.46 wage multiplier) × 2,000 hours per year × 8,000 workers.

[40] This is calculated from $7.25 per hour (federal minimum wage) × 2,000 hours per year × 8,000 workers.

The Department recognizes that employers may have to offer higher wages, greater benefits, or improved working conditions in order to find U.S. workers to complete the work previously done by aliens benefitting from the B–1 in lieu of H policy. Finally, some employers may forgo services in a specialty occupation that were previously provided by aliens in B–1 status, and may suffer lost productivity and profits as a result. However, the Department believes the benefits of this proposal outweigh those costs. To the extent U.S. entities may face increased costs, including those related to H–1B or other visa classification requirements, hiring U.S. workers, or forgone labor, the associated costs protect the economic interests of workers in the United States.[41]

The Department has also considered this proposed rule in light of Executive Order 13563 and affirms that this regulation is consistent with the guidance therein.

E. Executive Orders 12372 and 13132 (Federalism)

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. This proposed rule does not alter the standards and procedures for the Department's consideration of requests for waiver recommendations for waiver requests made by a State Department of Public Health, or its equivalent. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

F. Executive Order 12988 (Civil Justice Reform)

The Department has reviewed the regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

[41] This proposal advances the policy of the executive branch to ''buy American and hire American.'' *See* Section 2 of E.O. 13788, 82 FR 18837 (Buy American and Hire American). Section 3 of E.O. 13788 states the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad in order to create higher wages and employment rates for workers in the United States, and to protect their economic interests. *Id.* One potential benefit of this rule could be the creation of higher wages and employment rates for workers in the United States because employers that previously engaged the services of aliens admitted under the B–1 classification who are not subject to the wage and working conditions requirements and other protections under the H–1B classification may seek employees in the H–1B classification who are subject to those requirements, or may hire U.S. workers. *Id.* As described above, Congress required the current costs of seeking workers in the H–1B classification with the enactment of IMMACT 90, MATINA, and ACWIA.

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

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 pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

H. Paperwork Reduction Act

This proposed rule does not impose any new information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. chapter 35. The Department does not anticipate that there would be an increase in paperwork if this proposal is finalized. The Department acknowledges that, as discussed above in Section II(d)(2), one of the reasons behind the creation of the B–1 in lieu of H policy in the 1960's was to reduce unnecessary paperwork. However, because of the changes to the statute since the 1960s, an alien can no longer qualify for an H–1 visa on the basis of ''distinguished merit and ability,'' and the Department no longer considers the paperwork required for an alien to perform temporary labor in the United States under the current statutory scheme unnecessary in any circumstances. Given the numerical cap on H–1B visas, the Department does not anticipate an increase in respondents using existing approved information collections. It is possible that this regulation would shift application burden to the H–1B lottery and application process, but the Department notes that it is too speculative at this point to pursue amendments to any information collections under the Paperwork Reduction Act. Similarly, to the extent employers are likely to hire U.S. workers to replace some B–1 in lieu of H workers, the Department does not anticipate that would require any new information collections.

List of Subjects in 22 CFR Part 41

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Foreign relations, Students, Visas.

Text of the Proposed Rule

Accordingly, for the reasons stated in the preamble, the Department proposes to amend 22 CFR part 41 as follows:

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 41 continues to read as follows:

Authority: 8 U.S.C. 1101; 1102; 1104; 1182; 1184; 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295); 1323; 1361; 2651a.

■ 2. Revise § 41.31(b)(1) to read as follows:

§ 41.31 Temporary visitors for business or pleasure.

* * * * *

(b) * * *

(1) The term ''business,'' as used in INA 101(a)(15)(B), refers to conventions, conferences, consultations and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire. For the purposes of this section building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire; provided that the supervision or training of others engaged in building or construction work (but not the actual performance of any such building or construction work) shall not be deemed to constitute purely local employment or labor for hire if the alien is otherwise qualified as a B–1 nonimmigrant.

* * * * *

Carl C. Risch,

Assistant Secretary, Consular Affairs, Department of State.

[FR Doc. 2020–21975 Filed 10–20–20; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 27

[WT Docket No. 19–348; FCC 20–138; FRS 17121]

Facilitating Shared Use in the 3100–3550 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes rules to govern commercial wireless operations in the 3.45–3.55 GHz band. It proposes to add a new primary allocation for fixed and mobile (except aeronautical mobile) services and to adopt technical, licensing, and competitive bidding rules governing licenses in this band. The Commission proposes and seeks comment on coexistence and coordination between new commercial wireless licensees and incumbent federal radiolocation and radionavigation operations, which will continue to operate on a limited basis, but which will remain co-primary with commercial operations. The Commission also proposes and seeks comment on relocation and sunset procedures for incumbent non-federal, secondary operations, which are being cleared from the band.

DATES: Interested parties may file comments on or before November 20, 2020; and reply comments on or before December 7, 2020.

ADDRESSES: You may submit comments, identified by WT Docket No. 19–348, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/* in docket number WT Docket No. 19–348. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

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

FOR FURTHER INFORMATION CONTACT: Joyce Jones, Wireless Telecommunications Bureau, Mobility Division, (202) 418–1327 or *joyce.jones@fcc.gov,* or Ira Keltz, Office of Engineering and Technology, (202) 418–0616 or *ira.keltz@fcc.gov.* For information regarding the PRA information collection requirements, contact Cathy Williams, Office of Managing Director, at 202–418–2918 or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the *Further Notice of Proposed Rulemaking* (FNPRM) in WT Docket No. 19–348, FCC 20–138, adopted September 30, 2020, and released October 2, 2020. The full text of the FNPRM is available for public inspection at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-20-138A1.pdf.* Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice) or 202–418–0432 (TTY).

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document.

Ex Parte Rules

This proceeding shall continue to be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules (47 CFR 1.1200). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments

can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the FNPRM. It requests written public comment on the IRFA, contained at Appendix E to the FNPRM. Comments must be filed in accordance with the same deadlines as comments filed in response to the FNPRM as set forth on the first page of this document and have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the FNPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Paperwork Reduction Analysis

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

I. Introduction

The FNPRM is part of the Commission's comprehensive strategy to Facilitate America's Superiority in 5G Technology (the 5G FAST Plan). Collectively, the 3.45–3.55 GHz band and neighboring 3.5 GHz and 3.7 GHz bands could offer 530 megahertz of mid-band spectrum for flexible use.

II. Background

The lower 3 GHz band—and the 3,450 MHz to 3,550 MHz portion of the band (3.45–3.55 GHz band) in particular—has been targeted as spectrum to support 5G both here and abroad, and assessed within the federal government, across the legislative and executive branches, as well as within the Commission.

Congress addressed the pressing need for spectrum to support broadband, including mid-band spectrum, in the Fiscal Year 2018 omnibus spending bill, which included the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act) under Title VI of RAY BAUM'S Act. *See* Consolidated Appropriations Act, 2018, Public Law 115–141, Division P, the Repack Airwaves Yielding Better Access for Users of Modern Services (RAY BAUM'S) Act, Title VI (the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act or MOBILE NOW Act). The MOBILE NOW Act mandated that the Secretary of Commerce, working through NTIA: (1) Submit, in consultation with the Commission, a report by March 23, 2020, on the feasibility of ''allowing commercial wireless service, licensed or unlicensed, to share use of the frequencies between 3,100 megahertz and 3,550 megahertz, and (2) identify with the Commission ''at least 255 megahertz of Federal and non-Federal spectrum for mobile and fixed wireless broadband use'' by December 31, 2022. MOBILE NOW Act § 605(a). Shortly before Congress signed the 2018 omnibus spending bill, NTIA announced that it had identified the 3.45–3.55 GHz band for study for potential repurposing to spur commercial wireless innovation. In 2020, the White House and the DoD formed America's Mid-Band Initiative Team (AMBIT) with the goal of making 100 megahertz of contiguous mid-band spectrum available in the 3.45–3.55 GHz band for full commercial use.

III. Further Notice of Proposed Rulemaking

A. Reallocating the 3.45–3.55 GHz Band for Commercial Wireless Use

The Commission proposes to reallocate the 3.45–3.55 GHz band on a co-primary basis for non-federal fixed and mobile (except aeronautical mobile) services and seeks comment on its proposal. Under Section 303(y) of the Communications Act of 1934, as amended, the Commission is permitted to allocate spectrum for flexible uses if the allocation is consistent with international agreements and if the Commission finds that: (1) The allocation is in the public interest; (2) the allocation does not deter investment in communications services, systems, or the development of technologies; and (3) such use would not result in harmful interference among users. The Commission anticipates that its proposal to add co-primary allocations for non-federal fixed and mobile (except aeronautical mobile) services to the U.S. Table of Frequency Allocations for the 3.45–3.55 GHz band would meet these criteria.

The Commission tentatively concludes that its proposal would serve the public interest by advancing U.S. leadership in next-generation 5G networks. A key element of such leadership is making additional critical mid-band spectrum available for 5G services as proposed in the FNPRM. In addition, the Commission expects that its proposal will promote, rather than deter, investments in the band by flexible use licensees. Mid-band spectrum is particularly well-suited for 5G buildout due to its desirable coverage, capacity, and propagation characteristics and the Commission anticipates that this spectrum should attract investment from 5G network operators. Further, the actions the Commission takes in the accompanying Report and Order and proposes in the FNPRM should not result in harmful interference among users of the 3.45–3.55 GHz band. To the contrary, the Commission's decision in the *Report and Order* to remove all secondary allocations and relocate certain secondary operations from the band will minimize the potential for interference to new flexible use licensees; and the Commission's proposals in the FNPRM should enable coordination with incumbent federal operations. In addition, the Commission's proposed allocation would harmonize the Commission's allocation for the 3.45–3.55 GHz band with international allocations.

The Commission seeks comment on its proposal to add this allocation and on its initial assessment that doing so is consistent with the requirements of Section 303(y). The Commission also asks commenters to provide quantitative estimates of its proposal's costs and benefits to current and potential non-federal users of the band.

A. Future of Federal Incumbent Use in the 3.45–3.55 GHz Band

The 3.45–3.55 GHz band currently is used by the DoD for high-powered radar systems on fixed, mobile, shipborne, and airborne platforms. In July 2020, consistent with the requirements of the MOBILE NOW Act to provide an evaluation of the feasibility of sharing portions of the 3.1–3.55 GHz band, NTIA released a report identifying the 3.45–3.55 GHz band for such sharing. As directed by Section 605(d) of the MOBILE NOW Act, the Commission seeks comment on that report, specifically its findings as to the sharing of the 3.45–3.55 GHz band, with commercial wireless services. While NTIA has identified the uppermost 100 megahertz of the 3.1–3.55 GHz band for commercial wireless operations, consistent with the MOBILE NOW Act, the Commission seeks comment on whether such operations are feasible below 3.45 GHz. In particular, the Commission asks commenters to provide input on the feasibility of reallocating the 100 megahertz of spectrum between 3.35 GHz and 3.45 GHz for commercial wireless service at the same power levels that it proposes for the 3.45–3.55 GHz band throughout the contiguous United States and on what additional steps would be necessary to make such use feasible. The Commission seeks specific comment on whether clearing this spectrum of federal operations for exclusive commercial use is feasible, what steps need to be taken, what the timeline for such clearing would be, and whether limited sharing through geographic coordination zones could speed making this spectrum available to the commercial market.

Also consistent with Congress's directive in the MOBILE NOW Act, and following the Commission's proposal in 2019 to take the first steps to make the 3.1–3.55 GHz band available for flexible use commercial operations, the DoD recently indicated that it intends to promote cooperative sharing of the band with new fixed and mobile, except aeronautical mobile, systems to the extent possible. The DoD intends to allow for commercial deployments in the band by adjusting its concept of operations for many of these systems to the extent possible without fully vacating the band. To this end, the AMBIT selected the specific frequency band 3450–3550 MHz for commercial access. Consistent with the AMBIT study, the Commission proposes that federal systems operating in the band may not cause harmful interference to non-federal operations in the band, except in limited circumstances and locations. Non-federal systems are not entitled to protection against harmful interference from federal operations (and limited restrictions may be placed on non-federal operations), under the following circumstances: (1) In Cooperative Planning Areas; (2) in Periodic Use Areas; and (3) during times of National Emergency. The Commission seek comment on its proposal.

Upon completion of the AMBIT study, a number of circumstances were identified where the DoD will require continued access to the band. Specifically, the DoD has identified a list of ''Cooperative Planning Areas,'' in which it anticipates that federal operations will continue subsequent to the assignment of flexible use licenses in the band. These areas are limited in size and scope and include military training facilities, test sites, Navy home ports, and shipyards. The Commission will work with the DoD to minimize the size of Cooperative Planning Areas where possible. For each Cooperative Planning Area, the DoD intends to receive input from and provide information to the wireless industry, including commercial operators, in the near future (*i.e.,* before the spectrum is auctioned) regarding commercial network planning and deployments in order to minimize impacts from incumbent federal operation on future commercial operations and to enable effective federal operations. For example, the DoD anticipates holding workshops with wireless carriers to begin discussing such issues, similar to information sharing and transition planning that occurred with industry as part of the AWS–3 auction. The DoD anticipates that, once licenses are issued, it would reach mutual agreements with individual licensees for commercial network planning. In addition, the DoD has identified a number of ''Periodic Use Areas'' that overlap with certain Cooperative Planning Areas, in which the DoD will need episodic access to all or a portion of the band in identified, limited geographic areas. The DoD anticipates that it will need to coordinate federal usage of the spectrum with affected licensees for specific times, bandwidths, and locations. In both cases, the coordination procedures would need to ensure that the DoD has authority to radiate and that protection from interference would be adequate to preserve military readiness, capabilities, and national security. The Commission seeks comment on these concepts and how to incorporate them into future coordination procedures. Should the Commission also adopt a process for sharing of sensitive and classified information between federal and commercial operators? If so, should the Commission base this process on the procedures used in the AWS–3 proceeding?

In light of the AMBIT agreement recently reached between the DoD and the White House, the Commission seeks comment on an appropriate coordination regime that would promote productive ongoing negotiations between federal incumbents and new, commercial flexible use licensees. What aspects of network planning should be considered during coordination efforts and what are the ramifications of such negotiations? For example, should federal incumbents and new, commercial licensees be required to coordinate network architecture, power levels, shielding, antenna backlobe/sidelobe and/or filter requirements to minimize potential co- and adjacent channel interference to and from commercial systems? How should disagreements be resolved? Should timelines be applied to such negotiations? What other safeguards would be appropriate to ensure efficient and productive coordination negotiations? For Periodic Use Areas, how would commercial licensees be notified of each periodic use and with how much advance notice? Would cooperative agreements between federal and non-federal operators in Periodic Use Areas further increase the commercial utility of the spectrum in the vicinity of such areas? What costs would be involved in the proposed coordination regime, and how large would these costs be? What would be the benefits of such coordination regimes? In addition, the Commission notes that under certain environmental conditions tropospheric ducting could occur and harmful interference could be received at large distances from its source. In such instances, what notification and coordination mechanisms can be used by federal and non-federal users to identify and mitigate such interference? What steps, if any, can network operators and federal users take at system planning stages to account for the effects of

tropospheric ducting? Are there efforts federal users can undertake to optimize and encourage sharing? How should harmful interference in such instances be resolved? And should there be different procedures or requirements for Cooperative Planning and Periodic Use Areas and the rest of the contiguous U.S. that are not in such areas? Given that federal use of the radio spectrum is generally governed by NTIA while non-federal use is governed by the Commission, the Commission anticipates that any guidance or details concerning federal/non-federal coordination would be issued jointly by NTIA and the Commission. The Commission also seeks comment on directing the Wireless Telecommunications Bureau and the Office of Engineering and Technology to administer details of the coordination regime for the 3.45 GHz band, and on whether to codify such direction into the Commission's rules.

The Commission seeks comment on technical parameters that would inform federal and non-federal coordination in the band. The Commission invites commenters to discuss the likely costs and benefits of such parameters to ensure that new, co-primary commercial licensees are protected from harmful interference from incumbent federal operations. For example, what is the appropriate maximum co-channel received power from pulsed radar signals that could be tolerated as an input to commercial mobile cellular equipment (both base station and user equipment) without creating a significant impact on the user experience? Beyond the user experience, the Commission seeks comment on input power at which new commercial receivers, both base stations and mobile stations, would experience desensitization. What sensing mechanisms inherent in modern mobile cellular communication systems and networks could be used for identifying external interference caused by federal operators? Once identified, how should information about such interference and degradation to commercial operations be quantified and reported to the federal operators? What other mechanisms could be used to enable effective coordination in this band?

While the Institute for Telecommunications Science has published preliminary testing results about the likely impact of federal radars on commercial 4G LTE systems, additional data may be needed to further validate the conclusions and values for 5G systems. The Commission therefore seeks technical analyses and comparisons between LTE and 5G new radio (NR) receiver performance in the presence of interference from radar-type pulses. The Commission also seeks comment on the impact the differences between LTE and 5G systems could have on the technical parameters and rules that the Commission may consider and adopt for this band. In addition, the Commission invites commenters to submit technical studies and analyses that account for the new 5G physical layer designs, including symbol time and structure, subcarrier spacing, channel coding, and interleaving as it relates to the ability of 5G NR to operate in the presence of pulsed radar. The Commission also invites commenters to submit technical studies on other variabilities in radar waveforms, including frequency domain bandwidth and chirping, pulse duration, and duty cycle.

The Commission seeks comment additionally on how to assess and limit potential harmful interference to new 3.45–3.55 GHz flexible use licensees from federal operations in adjacent bands. Commenters who are concerned about adjacent band operations should identify the types of systems that they operate and provide information on measures that can be taken to lessen any effects. Are there filters that commercial and/or federal users could use to minimize the potential for harmful interference? What are the minimum filtering requirements necessary to ensure that commercial operations will not suffer harmful interference in the presence of ongoing federal operations? How would such filters affect the size of the areas where commercial operations may be impacted by ongoing federal operations? Should the rules require commercial systems to install filters with minimum performance specifications to enable use of the 3.45–3.55 GHz band by federal and non-federal users? What form of sensing or notification-based mechanisms would facilitate successful and automated coordination between federal and non-federal operations in the 3.45–3.55 GHz band? What are the costs and benefits of a sensing regime as compared to a notification-based regime?

What other techniques could federal incumbents and new commercial operators use to minimize interference to commercial operators? Are there additional steps that the DoD and commercial operators could take to adjust their operations to help block emissions to the non-federal fixed or mobile users and to federal users in areas where federal and non-federal operations will be in close proximity to one another? Could the DoD incorporate its efforts into Cooperative Planning Area negotiations? Could the sensing and notification-based mechanisms used in the 3.5 GHz band also be used in this band to enable successful coordination between federal and non-federal operations in the 3.45–3.55 GHz band? What would be the costs and benefits of these alternative approaches? The Commission also seeks comment on the potential impact that relocating DoD operations out of the 3.45–3.55 GHz band might have on commercial access to other spectrum bands.

If the Commission makes this band available for non-federal fixed and mobile (except aeronautical mobile) operations, it seeks comment on how to coordinate incumbent federal radar operations in the future. Specifically, the DoD will require access to the band during times of National Emergency to fulfill military operational needs. Accordingly, the Commission proposes that during times of National Emergency federal users are authorized to operate within the band as required to meet operational mission requirements. Further, the Commission proposes that upon notification, commercial licensees shall terminate or otherwise adjust their operations to prevent harmful interference to the federal operations. The Commission seeks comment on its proposal. How would commercial operators be informed of a National Emergency and how would continued coordination be facilitated? What should constitute a ''National Emergency'' in this context? How quickly would a commercial operator be required to terminate or adjust its operations following notification? How would the termination of a National Emergency be communicated to a commercial operator? What other coordination procedures would be beneficial under these circumstances? NTIA states that it is considering ''the development [of] an automated, real-time, incumbent-informing spectrum sharing system ('incumbent-informing system') that NTIA would operate in conjunction with DoD to notify commercial entities when the latter would need to cease operations.'' The Commission seeks comment on the appropriate means to coordinate operations of federal users and commercial licensees. The Commission seeks comment on the costs and benefits of such coordination regimes.

B. 3.45–3.55 GHz Band Plan

Block Sizes.—The Commission seeks comment on the appropriate block size to promote efficient and robust use of the band for next generation wireless technologies, including 5G. The Commission proposes to adopt 20

megahertz blocks for this band to align with the 3.7 GHz band, which it recently reallocated for fixed and mobile use, and for which it likewise adopted 20 megahertz spectrum blocks. The Commission seeks comment on this proposal. Alternatively, should the Commission license this band by 10 megahertz blocks akin to Priority Access Licenses (PALs) in the Citizens Broadband Radio Service operating in the 3.5 GHz band? If so, why? The Commission asks commenters to detail the advantages and disadvantages of their favored approach, including any costs and benefits. The Commission also seeks comment on potential alternatives.

Spectrum Block Configuration.—The Commission proposes to allocate the 3.45–3.55 GHz band as an unpaired band to promote a consistent spectral environment with the nearby mid-band allocations in the 3.5 GHz and 3.7 GHz bands, which are also unpaired in the United States. This approach is consistent with industry standards. The Commission seeks comment on its approach as well as alternative approaches, including the costs and benefits of a commenter's favored approach. What administrative measures would be necessary to keep track of how spectrum blocks are being used with time division duplexing (TDD) within the band or frequency division duplexing (FDD) paired with other bands? If the Commission anticipate that licensees will be using TDD, should it require licensees to synchronize or coordinate their transmissions with each other or with Citizens Broadband Radio Service users to the extent that the licensees both use TDD and one party requests synchronization? The Commission notes, however, that the Commission did not take this approach in the *3.7 GHz Service Order. See Expanding Flexible Use of the 3.7 to 4.2 GHz Band,* GN Docket No. 18–122, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343 (2020) (*3.7 GHz Service Order*). What are the consequences of adopting this flexible approach as compared to a more prescriptive approach? What other factors, including costs or benefits of this approach, should the Commission consider?

Use of Geographic Licensing.—Consistent with the Commission's approach in several other bands used to provide fixed and mobile services, the Commission proposes to license the 3.45–3.55 GHz band on an exclusive, geographic area basis. The Commission seeks comment on this approach, including the costs and benefits of adopting a geographic area licensing scheme. If a party opposes using geographic licensing, it should explain its position, describe the licensing scheme it supports, and identify the costs and benefits associated with its alternative licensing proposal.

Guard Bands.—The proposed 3.45–3.55 GHz band will be situated between two active bands. At the upper edge of the band, the Citizens Broadband Radio Service operates in the 3.55–3.7 GHz band, and federal incumbents use the 3.55–3.65 GHz band. At the lower edge of the band, the primary allocation for federal radiolocation operations will continue below 3.45 GHz. While the creation of guard bands is one option for protecting adjacent systems, such a use of valuable spectrum is inefficient and could be avoided using other technical solutions.

The proposed technical rules mirror many of those adopted in the *3.7 GHz Service Order,* in which the Commission likewise did not create a guard band for the lower edge of the 3.7 GHz band, which also abuts the 3.5 GHz band. The Commission expects that its proposed technical rules also would sufficiently protect adjacent operations at the lower edge of the band. Accordingly, the Commission does not propose creating guard bands at either end of the 3.45–3.55 GHz band. The Commission seeks comment on this proposed approach and its underlying assumptions. If a commenter supports the creation of one or more guard bands, then it should include a technical analysis justifying the need for such guard band(s), including the costs and benefits.

C. Relocation of Secondary Non-Federal Radiolocation Operations

In the accompanying Report and Order, the Commission removes the non-federal secondary allocations in the 3.3–3.55 GHz band for radiolocation operations and relocates them to the 2.9–3.0 GHz band. In the FNPRM, the Commission seeks comment on how it should relocate non-federal radiolocation operators to the 2.9–3.0 GHz band and the timing for doing so.

In the *Report and Order,* the Commission determined that secondary non-federal radiolocation licensees operating in this band as of the effective date of the Report and Order may continue to operate while the Commission finalizes plans to reallocate spectrum in the 3.45–3.55 GHz band. Authorization for these operations will sunset on a date consistent with the first possible grant of flexible use authorizations to new users in that portion of the band. For example, if the Commission adopts a licensing scheme that will result in an auction to assign licenses, non-federal radiolocation use would sunset within 90 days of the close of the auction. The Commission does not propose, however, to bifurcate the sunset of the secondary radiolocation allocation as it proposes for the amateur allocation, first sunsetting the allocation above 3.45 GHz, and later at 3.3–3.4 GHz. There are far fewer radiolocation operators in the lower 3 GHz band than amateur users, and their operations are higher power. The Commission seeks comment on this approach. Further, within this framework, the Commission seeks comment on the appropriate timing of transitioning such licenses to the 2.9 to 3.0 GHz band. What interim benchmarks or deadlines might be appropriate to best relocate such licensees without interruptions to their operations?

In order to clear the entire 3.3–3.55 GHz band for future flexible use licenses, the Commission proposes to use its section 316 authority to modify existing secondary, non-federal radiolocation licenses such that they are no longer authorized to operate in the 3.3–3.55 GHz band following adoption of final rules based on the proposals in this FNPRM. The Commission finds that such modifications are consistent with its statutory authority and would serve the public interest. Given the Commission's decision to sunset the allocation for these secondary, non-federal radiolocation operations, it proposes to modify their licenses accordingly to authorize use in the 2.9–3.0 GHz band, which would allow them to continue providing the same services as they do today. The Commission proposes that, once it finalizes procedures for the relocation of non-federal radiolocation licensees and determines the appropriate timing for the transition of such licensees to their new frequencies, it would issue an Order of Proposed Modification under section 316 to modify their licenses to operate on these new frequencies. The Commission seeks comment on this proposal.

The Commission also seeks comment on whether it should require new flexible use licensees to reimburse incumbent non-federal, commercial radiolocation operators for relocation costs they might incur. The Commission notes that non-federal radiolocation operations in the 3.3–3.55 GHz band are pursuant to a secondary allocation and that the Commission has previously found that such secondary users were not entitled to reimbursement. However, the Commission seeks comment on whether it should expand the *Emerging*

Technologies framework in this specific instance to include some reimbursement for secondary users relocating out of the 3.3–3.55 GHz band. The Commission recognizes that reimbursement would increase the costs of participating in its new flexible use licensing regime, and that it could therefore reduce investment in the band and proceeds generated by an auction of licenses in the band. The Commission seeks comment on this possibility and note that section 309(j) of the Communications Act only requires the Commission to recover a ''portion of the value of the public spectrum resource made available for commercial use.'' The Commission also seeks comment on the level of investment in these commercial operations, and the remaining useful life of the equipment used for such operations, as well as on the importance of the services they provide. The Commission therefore seeks comment on the costs and benefits of such reimbursement. If the Commission elects some form of reimbursement for these secondary users, should it require all incoming licensees to share in reimbursing such relocation costs? How should this shared reimbursement structure work? The Commission invites reference to prior shared reimbursement regimes.

Commenters should specify the extent to which the Commission should or should not expand the *Emerging Technologies* framework to include relocated secondary licensees. If the Commission should provide for reimbursement of relocation costs, to what extent is that decision specific to the secondary, non-federal radiolocation operations in the 3.3–3.55 GHz band or generally applicable to secondary users across other bands and services? The Commission notes that operators in this band perform important safety functions, in particular for weather forecasting and physical security, and, despite their secondary status, have operated without significant interference risks from primary federal operations. To what extent should these factors, or others, play a role in guiding the Commission's decision on reimbursement in this proceeding and otherwise?

Additionally, the Commission seeks comment on costs associated with relocating secondary, non-federal radiolocation operations. The Commission seeks comment on the nature of relocation costs and how best to quantify them. For example, what equipment or software would need to be modified or replaced? The Commission seeks comment on the frequency agility of existing radars; could such equipment be retuned to the relocated band or are other modifications required? If changes are needed, commenters should address the nature of such changes, *e.g.,* new filters, new antennas, etc. Are labor costs likely to be incurred in implementing the relocations? The Commission seeks comment on how long relocations would be expected to take and on any changes in operations that need to be made to operate in new bands. Commenters should discuss in detail any such specific costs. Commenters should also discuss how costs should be calculated and what, if any, costs should be excluded, as well as the most appropriate Commission implementation of any reimbursement regime.

Which of the relocation mechanisms that the Commission has used in the past would be appropriate here? Are there unique logistical concerns with relocation planning for these operations that the Commission should address by rule, as opposed to by public notices to be issued by the relevant bureaus? The Commission proposes to handle any mutually exclusive applications for new frequencies based on its existing part 90 shared spectrum use rules, but it seeks comment on alternatives.

D. Continued Operation of Amateur Stations in Part of the 3.3–3.45 GHz Band

In the accompanying *Report and Order,* the Commission sunsets the allocation for amateur operations in the 3–3.3.5 GHz band to allow for full commercial use of the spectrum to be made available through flexible use licenses. The Commission authorizes continued operations for amateur license holders only until the date consistent with the first possible grant of flexible use authorizations to new users in the band, consistent with the timeline for relocation of secondary radiolocation services.

Many amateur licensees argue that requiring them to cease operations earlier than necessary would be ''a waste of valuable spectrum resources.'' Many also argue that, since the focus of future flexible use licensing is above 3.45 GHz, the Commission at a minimum should allow amateur operators to continue below 3.45 GHz for the foreseeable future. In light of these concerns, and of the large number of amateur licensees currently operating in the band, the Commission seeks comment on sunsetting amateur use in the band in two separate phases.

The Commission proposes to sunset amateur operations in the 3.4–3.5 GHz band, pursuant to the accompanying Report and Order, but to allow amateur operations in the remainder of the band (*i.e.,* 3.3–3.4 GHz) to continue pending further decisions about the future of this portion of the spectrum. Specifically, the Commission proposes that amateur use in the upper portion of the 3.3–3.55 GHz band would sunset according to the procedures set out in the accompanying Report and Order (on a date consistent with the first possible grant of flexible use authorizations to new users in that portion of the band), while amateur use of the lower portion of the band would continue until a future date to be set later in this proceeding. If the Commission adopts this approach, it stresses that amateur operations in that lower portion of the band would remain on a secondary basis, and the allocation would continue to be subject to sunset at any time.

Would this approach of bifurcating the amateur allocation and sunsetting the two portions on different dates allow amateur operations to continue during the pendency of decisions about use of the band below 3.4 GHz, while still providing future flexible use licensees sufficient protection from harmful interference? What are the costs and benefits of this approach and of any alternatives? If the Commission were to adopt this approach, at what frequency should it split the band? Given the possibility that cross-service adjacent channel interference could result if the Commission allows amateur operations to continue immediately adjacent to 3.45 GHz, the Commission proposes to set the upper boundary of this lower portion of the allocation at 3.4 GHz in order to create a 50 megahertz guard band, and seeks comment on that proposal. Are there alternatives to this approach that would allow increased amateur use while also providing full protection to flexible use licensees?

Finally, the Commission seeks comment on whether any modifications pursuant to its Section 316 authority are necessary to accomplish its proposed changes to the amateur allocation. The Commission notes the unique nature of amateur licensing relative to other Commission licensees, and that it is not selecting new frequencies for amateur operations because there are many alternate bands available for amateurs to choose from.

E. Technical Issues

The Commission seeks comment on appropriate technical rules to maximize the potential uses of the 3.45–3.55 GHz band, particularly for the next generation of wireless services, while minimizing the impact on adjacent band incumbents, consistent with the public

interest. In order to promote maximum flexibility for 5G deployments, the Commission proposes to align the technical rules for this band with those adopted in the 3.7 GHz band. The Commission seeks comment on this overarching proposal and its potential impact on operations in adjacent bands. The Commission also seeks comment on alternative approaches. For example, fixed wireless providers may deploy fixed client devices in this band. What technical standards should apply to such devices, particularly when mounted outdoors? In order to prevent interference to fixed and mobile operations in the Citizens Broadband Radio Service, should the technical rules for this band more closely resemble those for the Citizens Broadband Radio Service in the 3.5 GHz band? Are there advantages to adopting technical rules that are harmonized with the rules applicable to Priority Access Licenses in the adjacent 3.5 GHz Citizens Broadband Radio Service band? The Commission seeks comment on the technical approach that will maximize the spectral efficiency of 3 GHz spectrum. In addition, the Commission seeks comment on appropriate power limits, out-of-band emissions limits, antenna height limits, service area boundary limits, international coordination requirements, and any other technical rules that would maximize flexible use of the band while protecting new, non-federal licensees and federal incumbents in adjacent bands.

Power Limits for Base Stations.—The Commission seeks comment on transmit power limits for base stations in the 3.45–3.55 GHz band. The Commission proposes to adopt the same base station power limits that the Commission adopted in the 3.7 GHz band, 1640 watts and 3280 watts of equivalent isotropically radiated power (EIRP) per megahertz in non-rural and rural areas, respectively. These power levels were used in the AMBIT study, and any change can change the result of the study and produce a corresponding increase or decrease in Cooperative Planning Areas and Periodic Use Areas. The Commission believes these limits would support robust deployment of next-generation mobile broadband services. The Commission seeks comment on this proposal. Commenters should provide a technical evaluation of the impact of these proposed power levels on effective coexistence with all operations within the 3.45–3.55 GHz band and across adjacent bands, as well as its costs and benefits. The Commission also seeks comment on the potential effect on users in the adjacent 3.5 GHz band. Could asymmetrical EIRP limits between the 3.45–3.55 GHz and Citizens Broadband Radio Service operations result in interference to Priority Access Licensees or General Authorized Access users in the lower 50 megahertz of the Citizens Broadband Radio Service band? The Commission also seeks comment on whether the proposed EIRP would impact Environmental Sensing Capability sensors in the Citizens Broadband Radio Service band and, if so, what effect this could have for access to the lower 100 megahertz of the Citizens Broadband Radio Service band. Absent any coordination requirement, what power limits would be needed to avoid interference to existing or future Citizens Broadband Radio Service operations?

The Commission also seeks comment on alterative base station power limits. Should the power be composed of transmit conducted power and antenna gain with some flexibility to ''mix and match'' both, or should the rule only define the final power in EIRP? While higher power limits may provide additional flexibility for some deployments, what is the impact of high-power base stations on adjacent bands? Commenters that propose alternative base station transmit power limits should include a thorough technical justification for their proposal, including the effect on receiver blocking or other aggregate interference issues impacting receivers operating above and below the band. Commenters should also provide the costs and benefits of such proposals.

Power Limits for Mobile *Stations.*—The Commission seeks comment on appropriate power limits for mobile stations in the 3.45–3.55 GHz band. The Commission notes that most commercial services, including LTE, CDMA, and UMTS, commonly deploy mobile stations which operate at a maximum output power of 23 dBm (200 milliwatts), regardless of higher FCC power limits. 3GPP, however, has defined a higher power class for LTE and 5G at 26 dBm (400 milliwatts). This development may warrant continued flexibility in the Commission's rules to allow for a wider range of device types.

The Commission proposes to adopt 1 Watt EIRP as the maximum power limit consistent with the 3.7 GHz Service rules. The Commission anticipates that this mobile power limit would provide adequate power for robust mobile service deployment. Additionally, this limit would permit operation of mobile user equipment (UE) at two power levels—23 dBm and 26 dBm—as specified in the 3GPP standards for 5G systems, which are both lower than the proposed 1 Watt EIRP limit. The Commission seeks comment on its proposed limit and queries whether alternative mobile station power limits should be considered based on expected use cases. Commenters supporting specific mobile station transmit power limits should include a technical justification for such power limits and an evaluation of any coexistence issues. For each proposed power limit, The Commission also seeks comment on whether the proposed limit would affect operation of mobile stations in the adjacent Citizens Broadband Radio Service or affect federal users in the 3.5 GHz band. Commenters should provide an analysis of the costs and benefits of their proposals.

Out-of-Band Emission Limits.—The Commission seeks to adopt OOBE limits that would both protect incumbent services in adjacent bands while still allowing full commercial use in the new band. At the upper edge, this band is adjacent to the 3.5 GHz band's Citizens Broadband Radio Service and the DoD's shipborne radar operations in the 3.55–3.65 GHz portion of the band. At the lower edge, the DoD will continue radar operations in the 3.1–3.45 GHz range for the foreseeable future, and it may increase its use below 3.45 GHz as the DoD migrates some radar operation out of the 3.45–3.55 GHz band. In addition, the DoD's use below 3.45 GHz is expected to include ground-based and airborne operations, which may necessitate additional protection considerations.

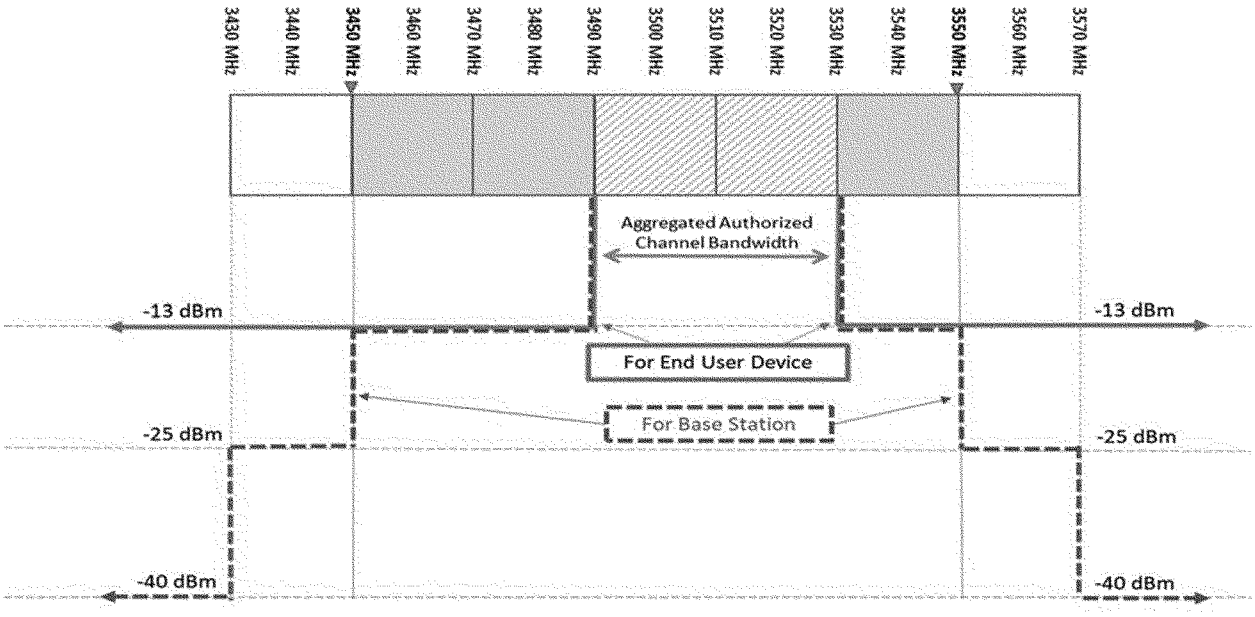
The Commission proposes to adopt an OOBE limit of −13 dBm/MHz at the authorized channel edge (as measured at the antenna terminals), consistent with the OOBE limit adopted for the 3.7 GHz band. Further, as a baseline for the 3.45 GHz band, the Commission proposes additional requirements beyond the upper and lower band edges such that base stations meet the same two-step limits consistent with the OOBE limits specified for the Citizens Broadband Radio Service as implemented for band n48. The Commission believes that these OOBE limits will be needed to facilitate widespread deployment of next generation wireless services in the 3.45–3.55 GHz band, while ensuring effective coexistence with the mission critical federal and other non-federal services operating in the adjacent bands. Specifically, the Commission proposes the following emissions limits for the 3.45–3.55 GHz band:

- −13 dBm/MHz at the authorized channel edge;

• Equal to or less than −25 dBm/MHz beyond the band edge down to 3430 megahertz and up to 3570 megahertz;

• Equal to or less than −40 dBm/MHz below 3430 megahertz and above 3570 megahertz.

The Commission summarizes its proposed approach in Figure 1 below.



The Commission seeks comment on its proposal. The Commission's proposal for a –13 dBm/MHz OOBE limit at the band edge is consistent with other commercial mobile bands and the additional requirements are consistent with OOBE limits for the nearby Citizens Broadband Radio Service, for which the Commission adopted a graduated emissions mask to, among other things, prevent adjacent channel interference from Citizens Broadband Radio Service users to federal radar operations in 3.45–3.55 GHz band. Although it does not propose a specific OOBE limit, NTIA recommends that the Commission consider ''tighter'' OOBE limits for commercial operations to better facilitate federal and non-federal operations on adjacent frequencies. Without additional emission limits to protect adjacent band operations, would new mobile broadband deployments in the 3.45–3.55 GHz band near federal radar usage areas and deployed Environmental Sensing Capability sensors experience operational impacts which could lower the spectrum's value and use in some high population areas? The Commission also seeks comment on what OOBE limits might be appropriate to protect users in the adjacent 3.5 GHz band. Would OOBE from 3.45–3.55 GHz emitters contribute to the aggregate interference for shipborne and inland DoD radars in the Citizens Broadband Radio Service band? If so, are SAS operators able to accurately model or manage this interference contribution? Would a TDD synchronization or coordination requirement enable less stringent OOBE limits? The Commission declined to adopt such a requirement in the 3.7 GHz proceeding.

Alternatively, should the Commission adopt an OOBE limit which only specifies the limit at the edge of the authorized channel (*i.e.,* −13 dBm/MHz) consistent with other commercial mobile bands? How would the graduated emission mask the Commission proposes here affect the ability of equipment to operate across other mid-band spectrum bands, such as the 3.7 GHz or 2.5 GHz bands?

The Commission's proposals recognize that 3GPP 5G standards, based on regional regulatory requirements, define similar basic and band-specific base station emission limits for certain mid-band spectrum bands. For example, the 3GPP standard for bands n77 and n78, which overlap with the 3.45–3.55 GHz band, requires emissions to be reduced below −52 dBm/MHz as measured from the edge of the spectrum band, while emissions for other bands must be reduced below −49 dBm/MHz. For band n48, which applies to 5G base stations in the Citizens Broadband Radio Service band in the U.S., the 3GPP standard is in line with the Commission's part 96 rules. The Commission's proposed approach, while more relaxed than what is required by 3GPP for similar bands in other regions, should provide more flexibility and consistency with its recent rules and 3GPP limits for adjacent band n48. The Commission believes that the limits proposed above are sufficient for expected coexistence scenarios without imposing unreasonable implementation costs. The Commission seeks comment on this notion.

The Commission seeks comment on this proposal and requests technical evaluation of this or any alternative approach including alternative limit values or use of slopes rather than steps. For example, should the emission limit only specify a flat −13 dBm/MHz requirement similar to other commercial mobile bands or start with −13 dBm or −25 dBm at the edge of the band and gradually lower to −40 dBm at a 20 megahertz offset from edge of the band? Are there other alternatives that achieve the same goal of protecting adjacent services without unduly impacting equipment in the 3.45–3.55 GHz band? The Commission also seeks comment on whether different limits should be applied based on the location of deployments. Commenters should provide an analysis of the costs and benefits of different options and provide detailed technical analysis in support of their proposals.

To fully define an OOBE limit, the Commission's rules generally specify how to measure the power of the emissions, such as the resolution

bandwidth. For most AWS bands, the resolution bandwidth used to determine compliance with the base station limit is one megahertz or greater, except that within one megahertz of the channel edge, a resolution bandwidth of at least 1% of the emission bandwidth of the fundamental emission of the transmitter can be employed. The Commission proposes to adopt the same approach here and seeks comment on its proposal. In addition, The Commission seeks comment on alternative approaches to defining resolution bandwidth. For example, the Upper Microwave Flexible Use Service (UMFUS) rules under part 30 instead specify use of a one megahertz resolution bandwidth but allow an OOBE limit of −5 dBm per megahertz from the channel edge out to 10% of the channel. Should the rules the Commission adopts in this band instead follow the UMFUS approach to defining the resolution bandwidth? Is another approach more appropriate? In addition, like other part 27 services, the Commission proposes to apply section 27.53(i), which states that the FCC, in its discretion, may require greater attenuation than specified in the rules if an emission outside of the authorized bandwidth causes harmful interference. The Commission seeks comment on this approach.

Mobile Out-of-Band Emissions.—As with base station OOBE limits, the Commission proposes to adopt mobile emission limits similar to its standard emission limits that apply to other mobile broadband services. Specifically, the Commission proposes that mobile units be required to suppress the conducted emissions to no more than −13 dBm/MHz outside their authorized frequency band. The Commission seeks comment on this proposal and on other alternative limits to ensure robust coexistence with federal and non-federal operations in adjacent bands, including any costs and benefits. Should the same OOBE limits apply to both base stations and mobile stations or are different OOBE requirements needed for each? The Commission notes that mobile stations and other end user equipment usually operate with power control and at lower maximum power levels than base stations, and that the implementation of more stringent emission limits could be complex and cost-prohibitive for the form factor. The Commission seeks comment on all aspects of the OOBE limits for base stations and mobile stations. The Commission also seeks comment on whether the same or different OOBE limits should be applied to emissions within the band as compared to those at either edge of the band. Commenters should address the costs and benefits of their proposals.

Coexistence with Federal and Non-federal Adjacent Band Operators.—The Commission seeks comment on whether additional coordination or technical protection criteria, beyond OOBE limits, are necessary to ensure effective coexistence with federal and non-federal adjacent band operators. Regarding federal adjacent band operators, what rules might be necessary to assess and avoid potential excessive receiver blocking that could occur from the aggregated power received from dense deployment of base stations and mobile stations to the federal radars operating below and above the 3.45–3.55 GHz band? Similarly, what rules would be necessary to assess and avoid potential receiver blocking to new flexible use fixed/mobile operations in the band from adjacent high-power radar systems below and above the band?

Field Strength Limit and Market Boundaries.—If the Commission decides to license the 3.45–3.55 GHz band based on geographic service areas, it would need to ensure that such licensees do not cause interference to co-channel systems operating along common geographic borders. The Commission proposes to adopt the same parameters that it adopted in the 3.7 GHz band. Specifically, the Commission proposes to adopt a −76 dBm/m2/MHz power flux density (PFD) limit at a height of 1.5 meters above ground at the border of the licensees' service area boundaries. In addition, the Commission proposes to allow licensees operating in adjacent geographic areas to agree voluntarily to higher field strength limits at their common boundaries. The Commission seeks comment on these proposals as well as alternative approaches to limit field strength or power level in the 3.45–3.55 GHz band. For example, the current rules for AWS–1, AWS–3, and AWS–4 address the possibility of harmful co-channel interference between geographically adjacent licenses by setting a field strength limit from base stations of 47 dBμV/m at the edge of the license area. In the 3.5 GHz band, the Commission limited aggregate power at PAL boundaries to be less than or equal to −80 dBm/10 MHz (with the measurement antenna placed at a height of 1.5 meters above ground level) or at a level mutually agreed upon by operators. Would one of these other approaches be preferable here? Should technical rules allow adjacent affected area licensees to agree voluntarily to higher signal levels like the Citizens Broadband Radio Service, PCS, and AWS services? Should such a power level or field strength limit be based on single node transmission or aggregate powers received? The Commission seeks comment on appropriate metrics to be used and the best approaches to determine the limits, including the costs and benefits of such approaches.

Antenna Height Limits.—The Commission seeks comment on the appropriate antenna height limits for the 3.45–3.55 GHz band. The Commission notes that while specific antenna height restrictions for AWS–1 and AWS–3 base stations are not set forth in part 27 of its rules, all such services are subject to section 27.56, which bans antenna heights that would be a hazard to air navigation. In the Citizens Broadband Radio Service, there is no height limit for base stations if they operate indoors or are professionally installed. Furthermore, the co-channel coexistence between adjacent networks and the adjacent channel coexistence between overlapping networks limit field strength at the geographical boundary of the license, which may also effectively limit deployable antenna heights. The Commission proposes to adopt the flexible antenna height rules that apply to AWS–1 and AWS–3 and seeks comment on its proposal and any alternatives. Should the antenna height limit for base stations operating in this band be tied to the base station maximum power limit? Should the Commission consider banning antenna heights that would be a hazard to air navigation or air-borne radars in adjacent bands? Commenters should address the costs and benefits of their proposals as well as include technical support.

Canadian and Mexican Coordination.—Section 27.57(c) of the Commission's rules provides that several AWS services, including WCS, AWS–1, AWS–3, AWS–4, and the H Block, are subject to international agreements with Mexico and Canada. The Commission proposes to apply the same limitation to the 3.45–3.55 GHz band. Until such time as adjusted agreements between the United States and Mexico, or the United States and Canada, can be successfully negotiated, operations would be prohibited from causing harmful interference across the border, consistent with the terms of the agreements currently in force. The Commission notes that further modification (of the proposed or final rules) might be necessary in order to comply with any future agreements with Canada and Mexico regarding the use of these bands. The Commission seeks comment on this issue, including the

costs and benefits of alternative approaches to this issue.

General Part 27 Rules.—There are several additional technical rules applicable to all part 27 services, including sections 27.51 (equipment authorization), 27.52 (RF safety), 27.54 (frequency stability), 27.56 (antennas structures; air navigation safety), and 27.63 (disturbance of AM broadcast station antenna patterns). The Commission proposes to apply these general part 27 rules to all 3.45–3.55 GHz band licenses. Further, the Commission proposes to apply these rules to licensees that acquire their licenses through partitioning or disaggregation (to the extent the service rules permit such aggregation). The Commission seeks comment on its proposals, including specific costs and benefits.

F. Licensing and Operating Rules; Regulatory Issues

The Commission proposes and seeks comment on service-specific rules for the 3.45–3.55 GHz band, including eligibility, mobile spectrum holdings policies, license term, performance requirements, renewal term construction obligations, and other licensing and operating rules. In addressing these issues, commenters should discuss the costs and benefits associated with these proposals and any alternatives that commenters propose. The Commission seeks comment generally on the appropriate approach or combination of approaches to encourage investment, promote efficient spectrum use, and facilitate robust deployment in the band. In general, the Commission proposes to align the licensing and operating rules for the 3.45–3.55 GHz band with the rules adopted in the 3.7–4.2 GHz band, but also seeks comment on alternative or different approaches, including aspects of the Part 96 rules, such as smaller license areas and shorter license terms.

Eligibility.— The Commission proposes to adopt an open eligibility standard for licenses in the 3.45–3.55 GHz band, consistent with established Commission practice. An open eligibility standard for the licensing of the 3.45–3.55 GHz band should encourage the development of new technologies, products, and services, while helping to ensure efficient use of this spectrum. The Commission seeks comment on this assumption. The Commission notes that an open eligibility approach would not affect citizenship, character, or other generally applicable qualifications that may apply under its rules. Commenters should discuss the costs and benefits of the open eligibility proposal on competition, innovation, and investment. The Commission proposes to apply the ineligibility provision which provides that a person who, for reasons of national security, has been barred by any agency of the Federal Government from bidding on a contract, participating in an auction, or receiving a grant is ineligible to hold a license that the Spectrum Act requires to be assigned by a system of competitive bidding under Section 309(j) of the Communications Act.

Mobile Spectrum Holding Policies.— Spectrum is an essential input for the provision of mobile wireless services, and the Commission has developed policies to ensure that spectrum is assigned in a manner that promotes competition, innovation, and efficient use. The Commission seeks comment generally on whether and how to address any mobile spectrum holdings issues involving 3.45–3.55 GHz band spectrum to meet its statutory requirements and to ensure competitive access to the band. Similar to the Commission's approach in the *2017 Spectrum Frontiers Order and FNPRM* and the *1675–1680 MHz NPRM,* the Commission proposes not to adopt a pre-auction, bright line limit on the ability of any entity to acquire spectrum in the 3.45–3.55 GHz band through competitive bidding. The Commission is not inclined to adopt such limits absent a clear showing that they are necessary to address a specific competitive concern; such pre-auction limits may restrict unnecessarily the ability of entities to participate in and acquire spectrum in an auction. The Commission seeks comment on any specific concerns of this type.

The Commission also seeks comment on whether this band should be included in the Commission's spectrum screen, which helps to identify markets that may warrant further competitive analysis, for evaluating proposed secondary market transactions. The Commission seeks comment on reviewing holdings on a case-by-case basis when long-form applications for initial licenses are filed to ensure that the public interest benefits of having a spectrum screen applicable to secondary market transactions are not rendered ineffective. And, the Commission seeks comment on whether and how the similarity of this spectrum to spectrum currently included in the screen should be factored into its analysis, including its suitability for use in the provision of mobile telephony or broadband services. Commenters should discuss and quantify any costs and benefits associated with any proposals on the applicability of mobile spectrum holdings policies to 3.45–3.55 GHz band spectrum.

Geographic License Area.— Considering the opportunity presented here to align the 3.45–3.55 GHz band with other mid-band spectrum, the Commission seeks comment on the appropriate geographic license area for the band to best facilitate robust band use. The Commission proposes to issue flexible use licenses on a Partial Economic Area (PEA) basis, as it recently adopted for the 3.7 GHz Service. The Commission asks commenters to discuss and quantify the economic, technical, and other public interest considerations of licensing on a PEA basis, or if offering alternatives (such as counties), to discuss and quantify the same considerations for that alternative. The Commission invites commenters to discuss which set of considerations is most applicable for the circumstances of the 3.45–3.55 GHz band. Or do the considerations in this band indicate a different geographic license area is more appropriate? As the Commission has for the adjacent Citizens Broadband Radio Service, should it allow ''license-by-rule'' use for some spectrum in the band? For areas where not all spectrum licenses are sold at auction, should the Commission permit opportunistic use of that spectrum? How would the Commission ensure adequate protection of incumbent and licensee operations under alternative licensing frameworks? Would the need for a database or other coordination techniques create unnecessary burdens on licensees or hinder the ability to protect incumbents? The Commission asks commenters to address the costs and benefits of their recommended licensing approach.

The Commission also recognizes that the AMBIT study focused on licensing for the contiguous United States and it therefore proposes that the states of Hawaii and Alaska and U.S. territories should be excluded from 3.45–3.55 GHz band licensing at this time. The Commission seeks comment on its proposal, including the costs and benefits. Going forward, NTIA and DoD plan to conduct additional analysis of federal operations in Alaska, Hawaii and the U.S. Territories and Possessions, in close cooperation with industry stakeholders to identify additional Cooperative Planning Areas and Periodic Use Areas outside of the contiguous United States. Pending the results of such future analysis, should the Commission consider extending any 3.45–3.55 GHz band regime adopted in this proceeding to additional areas at a

later date? Should the Commission delegate authority to the Wireless Telecommunications Bureau and Office of Engineering and Technology to make any future adjustments to Cooperative Planning Areas or Periodic Use Areas as they deem appropriate in consultation with NTIA and consistent with NTIA and DoD analysis? In addition, the Commission seeks comment on whether there are ways to mitigate the impact of possible future licensees in the Gulf of Mexico to federal operations. Could the Commission's past experiences in licensing under similar circumstances, such as in the AWS–3 band, prove useful here?

License Term.—Given the similarity in the flexible use goal of the Commission in opening the 3.7 GHz Service and opening this spectrum to commercial use, the Commission believes a 15-year term, as was adopted for licenses in the 3.7 GHz Service, would afford licensees sufficient time to make long-term investments in deployment. For that service, the Commission determined that additional time was necessary for relocation of services vacating the band. Here, a similar transition period may be necessary, given the anticipated need to coordinate federal usage of the spectrum with affected licensees under circumstances that may be particular to each licensee's individual situation. The Commission seeks comment on the appropriate license term for flexible use licenses in the 3.45–3.55 GHz band and on the costs and benefits of this proposal. Additionally, the Commission seeks comment on whether there are alternative license terms that might be better suited for this band. If an alternative license term is chosen, what impact would it have on investment or deployment, particularly for smaller or rural entities? The Commission seeks comment on the costs and benefits of the license term being discussed.

Renewal.—The Commission proposes to apply its general part 27 renewal requirements for wireless licenses, as in the *3.7 GHz Service Order* and the 3.5 GHz band. The Commission seeks comment on this proposal. Commenters should address the costs and benefits of the renewal term being advocated.

Performance Requirements.—The Commission seeks comment on the types of performance requirements that would be appropriate to encourage rapid deployment by flexible use licensees in the 3.45–3.55 GHz band. For example, in the *3.7 GHz Service Order,* the Commission adopted specific quantifiable benchmarks for different types of operations. The Commission proposes to adopt the same requirements here. Licensees offering mobile or point-to-multipoint services are required to provide reliable signal coverage and offer service to at least 45% of the population in each of their license areas within eight years of the license issue date (first performance benchmark), and to at least 80% of the population in each of their license areas within 12 years from the license issue date (second performance benchmark). Licensees providing fixed service must demonstrate within eight years of the license issue date (first performance benchmark) that they have four links operating and providing service, if the population within the license area is equal to or less than 268,000. If the population within the license area is greater than 268,000, a licensee relying on point-to-point service must demonstrate that it has at least one link in operation and providing service, either to customers or for internal use, per every 67,000 persons within a license area. The Commission requires licensees relying on point-to-point service to demonstrate within 12 years of the license issue date (final performance benchmark) that they have eight links operating and providing service, either to customers or for internal use, if the population within the license area is equal to or less than 268,000. If the population within the license area is greater than 268,000, the Commission requires a licensee relying on point-to-point service to demonstrate it is providing service and has at least two links in operation per every 67,000 persons within a license area. Would these metrics be appropriate in the 3450–3550 MHz band? If not, why? And how should they be adjusted?

For the 3.7 GHz Service, the Commission also adopted alternate Internet of Things (IoT) performance requirements in order to allow for flexibility to provide services potentially less suited to a population coverage metric. Specifically, licensees providing IoT-type services thus have flexibility to demonstrate that they offer geographic area coverage of 35% of the license area at the first (eight-year) performance benchmark, and geographic area coverage of 65% of the license area at the second (12-year) performance benchmark. Is it appropriate to adopt this—or a different—IoT metric here?

The Commission seeks comment on these types of requirements and any other requirements to achieve its goal of ensuring spectrum use. Commenters should discuss the appropriate metric to accommodate such service offerings or other innovative services in the 3.45–3.55 GHz band, as well as the costs and benefits of an alternative approach.

Failure to Meet Performance Requirements.—Along with performance benchmarks, the Commission proposes to adopt meaningful and enforceable penalties for failing to meet the benchmarks. The Commission proposes that, in the event a licensee fails to meet the first performance benchmark, the licensee's second benchmark and license term would be reduced by two years, thereby requiring it to meet the second performance benchmark two years sooner (at 10 years into the license term) and reducing its license term to 13 years. If a licensee fails to meet the second performance benchmark for a particular license area, its authorization for each license area in which it fails to meet the performance requirement shall terminate automatically without Commission action. The Commission seeks comment on this proposal and on which penalties will most effectively ensure timely build-out.

The Commission proposes that, in the event a 3.45–3.55 GHz band licensee's authority to operate terminates, its spectrum rights should become available for reassignment pursuant to the competitive bidding provisions of section 309(j). The Commission also seeks comment on whether, consistent with the Commission's rules for other part 27 licenses, it should require that any 3.45–3.55 GHz band flexible use licensee that forfeits its license for failure to meet its performance requirements be precluded from regaining that license. Finally, the Commission seeks comment on other performance requirements and enforcement mechanisms that would effectively ensure timely buildout.

Compliance Procedures.—The Commission proposes a rule requiring licensees to submit electronic coverage maps that accurately depict both the boundaries of each licensed area and the coverage boundaries of the actual areas to which the licensee provides service or, in the case of a fixed deployment, the locations of the fixed transmitters associated with each link. The Commission's proposal is consistent with the compliance procedures adopted in the *3.7 GHz Service Order,* in addition to compliance procedures applicable to all part 27 licensees, including the filing of electronic coverage maps and supporting documentation. If a licensee does not provide reliable signal coverage to an entire license area, the Commission proposes that it must provide a map that accurately depicts the boundaries of the area or areas within each license area

that are not being served. The Commission further proposes that each licensee must file supporting documentation certifying the type of service it is providing for each licensed area within its service territory and the type of technology used to provide such service. Supporting documentation must include the assumptions used to create the coverage maps, including the propagation model and the signal strength necessary to provide reliable service with the licensee's technology. The Commission seeks comment on this approach. Would such procedures confirm that the spectrum is being used consistently with the performance requirements? The Commission seeks comment on this assumption. The Commission also seeks comment on whether small entities face any special or unique issues with respect to the transition such that they would require additional time to comply.

Applicability of Other Part 27 Rules.—In establishing service rules for similar bands, the Commission has sought to afford licensees the flexibility to align licenses with other spectrum bands governed by part 27 of the Commission's rules. The Commission therefore proposes that licensees in the 3.45–3.55 GHz band should be governed by licensing and operating rules that are applicable to all part 27 services, including regulatory status, foreign ownership reporting, compliance with construction requirements, permanent discontinuance of operations, partitioning and disaggregation, and spectrum leasing. The Commission asks commenters to identify any aspects of its general part 27 service rules that should be modified to accommodate the particular characteristics of the 3.45–3.55 GHz band. Are there reasons that flexible use licensees in this band should *not* be subject to these general part 27 requirements? The Commission asks proponents of the various mechanisms described above whether there are issues specific to this section and their preferred approach. The Commission also asks commenters that support modifying certain part 27 rules as applied to licensees in the 3.45–3.55 GHz band to articulate the reasons why different treatment here is justified.

G. Competitive Bidding Procedures

The Commission proposes to assign the licenses through a system of competitive bidding. Consistent with the competitive bidding procedures the Commission has used in previous auctions, the Commission proposes to conduct any auction for licenses for spectrum in the band in conformity with the part 1, subpart Q general competitive bidding rules, subject to any modification of the part 1 rules that the Commission may adopt in the future. The Commission seeks comment on whether any of these rules would be inappropriate or should be modified for an auction of licenses in this band. The Commission seeks comment on the costs and benefits of these proposals.

Under the Commercial Spectrum Enhancement Act (CSEA), federal entities operating on certain frequencies that have been reallocated from federal to co-primary federal and non-federal use and assigned by the Commission through auction are eligible for reimbursement for the cost of relocating or sharing their operations. In order to provide for such reimbursement, the Communications Act requires that the ''total cash proceeds'' from the auction of these frequencies must equal at least 110% of the estimated relocation or sharing costs of incumbent federal operations. Based on the current use of the 3.45–3.55 GHz band by the DoD and DoD's planned sharing arrangements and relocation of some operations out of the band to make way for commercial use as part of the AMBIT agreement, this spectrum qualifies as eligible frequencies under the CSEA. Accordingly, the Commission proposes to set the reserve price for any auction of 3.45–3.55 GHz band licenses at 110% of expected federal relocation costs, based on the estimate of relocation costs provided to the Commission by NTIA under the CSEA.

The Commission also proposes to make bidding credits for designated entities available for this band and seeks comment on this proposal. If the Commission decides to offer small business bidding credits, it seeks comment on how to define a small business. In recent years, for other flexible use licenses, the Commission has adopted bidding credits for the two larger designated entity business sizes provided in the Commission's part 1 standardized schedule of bidding credits. The Commission proposes to use the same definitions here. Accordingly, the Commission proposes to define a small business as an entity with average gross revenues for the preceding five years not exceeding $55 million, and a very small business as an entity with average gross revenues for the preceding five years not exceeding $20 million. A qualifying ''small business'' would be eligible for a bidding credit of 15% and a qualifying ''very small business'' would be eligible for a bidding credit of 25%. The Commission also seeks comment on whether the characteristics of these frequencies and its proposed licensing model suggest that it should adopt different small business size standards and associated bidding credits than it has in the past. Finally, the Commission seeks comment on whether it should offer rural service providers a designated entity bidding credit for licenses in this band. The Commission proposes to offer rural service providers a bidding credit of 15% under its rules, consistent with its approach in other similar flexible use bands. Commenters addressing these proposals or advocating for any alternatives should consider what details of licenses in the band may affect whether designated entities will apply for them.

VI. Ordering Clauses

It is ordered, pursuant to sections 1, 4(i), 157, 301, 303, 307, 308, 309, 310, and 316, of the Communications Act of 1934, as amended, as well as the MOBILE NOW Act, Public Law 115–141, 132 Stat. 1098, Div. P, Title VI, § 603 (Mar. 23, 2018), 47 U.S.C. 151, 154(i), 157, 301, 303, 307, 308, 309, 310, 316, and 1502, that this Further Notice of Proposed Rulemaking *is adopted.*

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

Lists of Subjects in 47 CFR Parts 1, 2, and 27

Administrative practice and procedure, Common carriers, Communications common carriers, Radio, Table of Frequency Allocations, Wireless communication services, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

The Federal Communications Commission proposes to amend 47 CFR parts 1, 2, and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

■ 2. Amend § 1.907 by revising the definition of ''Covered geographic licenses'' to read as follows:

§ 1.907 Definitions.

* * * * *

Covered geographic licenses. Covered geographic licenses consist of the following services: 1.4 GHz Service (part 27, subpart I of this chapter); 1.6 GHz Service (part 27, subpart J); 24 GHz Service and Digital Electronic Message Services (part 101, subpart G of this chapter); 218–219 MHz Service (part 95, subpart F, of this chapter); 220–222 MHz Service, excluding public safety licenses (part 90, subpart T, of this chapter); 600 MHz Service (part 27, subpart N); 700 MHz Commercial Services (part 27, subparts F and H); 700 MHz Guard Band Service (part 27, subpart G); 800 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Broadband Service (part 27, subpart P); 3.45 GHz Service (part 27, subpart Q); 3.7 GHz Service (part 27, subpart O); Advanced Wireless Services (part 27, subparts K and L); Air-Ground Radiotelephone Service (Commercial Aviation) (part 22, subpart G, of this chapter); Broadband Personal Communications Service (part 24, subpart E, of this chapter); Broadband Radio Service (part 27, subpart M); Cellular Radiotelephone Service (part 22, subpart H); Citizens Broadband Radio Service (part 96, subpart C, of this chapter); Dedicated Short Range Communications Service, excluding public safety licenses (part 90, subpart M); Educational Broadband Service (part 27, subpart M); H Block Service (part 27, subpart K); Local Multipoint Distribution Service (part 101, subpart L); Multichannel Video Distribution and Data Service (part 101, subpart P); Multilateration Location and Monitoring Service (part 90, subpart M); Multiple Address Systems (EAs) (part 101, subpart O); Narrowband Personal Communications Service (part 24, subpart D); Paging and Radiotelephone Service (part 22, subpart E; part 90, subpart P); VHF Public Coast Stations, including Automated Maritime Telecommunications Systems (part 80, subpart J, of this chapter); Upper Microwave Flexible Use Service (part 30 of this chapter); and Wireless Communications Service (part 27, subpart D of this chapter).

* * * * *

■ 3. Amend § 1.9005 by:

■ a. Removing the word ''and'' at the end of paragraph (ll);

■ b. Removing the period at the end of paragraph (mm) and adding a semi-colon;

■ c. Removing the period at the end of paragraph (nn) and adding ''; and'' in its place; and

■ d. Adding paragraph (oo).

The addition reads as follows:

§ 1.9005 Included services.

* * * * *

(oo) The 3.45 GHz Service in the 3.45–3.55 GHz band (part 27 of this chapter).

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 4 The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 5. Amend § 2.106, the Table of Frequency Allocations, as follows:

■ a. Revise pages 40 and 41.

■ b. In the list of United States (U.S.) Footnotes, add footnotes US103 and US431B.

The additions and revisions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

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2670-2690 FIXED 5.410 MOBILE except aeronautical mobile 5.384A Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.412	2670-2690 FIXED 5.410 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.208B 5.415 MOBILE except aeronautical mobile 5.384A Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149	2670-2690 FIXED 5.410 FIXED-SATELLITE (Earth-to-space) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) 5.351A 5.419 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149	US205	US385	
2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.422			2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		
2700-2900 AERONAUTICAL RADIONAVIGATION 5.337 Radiolocation 5.423 5.424			2700-2900 METEOROLOGICAL AIDS AERONAUTICAL RADIONAVIGATION 5.337 US18 Radiolocation G2 5.423 G15	2700-2900 5.423 US18	Aviation (87)
2900-3100 RADIOLOCATION 5.424A RADIONAVIGATION 5.426 5.425 5.427			2900-3100 RADIOLOCATION 5.424A G56 MARITIME RADIONAVIGATION 5.427 US44 US316	2900-3100 MARITIME RADIONAVIGATION Radiolocation US44 5.427 US316	Maritime (80) Private Land Mobile (90)
3100-3300 RADIOLOCATION Earth exploration-satellite (active) Space research (active) 5.149 5.428			3100-3300 RADIOLOCATION G59 Earth exploration-satellite (active) Space research (active) US342	3100-3300 Earth exploration-satellite (active) Space research (active) Radiolocation US342	Private Land Mobile (90)
3300-3400 RADIOLOCATION 5.149 5.429 5.429A 5.429B 5.430	3300-3400 RADIOLOCATION Amateur Fixed Mobile 5.149 5.429C 5.429D	3300-3400 RADIOLOCATION Amateur 5.149 5.429 5.429E 5.429F	3300-3500 RADIOLOCATION G2	3300-3450 US103 US108 US342	
3400-3600 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.430A Radiolocation 5.341	3400-3500 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.431A 5.431B Amateur Radiolocation 5.433 5.282	3400-3500 FIXED FIXED-SATELLITE (space-to-Earth) Amateur Mobile 5.432 5.432B Radiolocation 5.433 5.282 5.432A	US103 US108 US342 US431B	3450-3600 FIXED MOBILE except aeronautical mobile US103 US105 US108 US433 US431B	Wireless Communications (27) Citizens Broadband (96)

Table of Frequency Allocations	3500-5460 MHz (SHF)				Page 41
International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
3400-3600 MHz: see previous page	3500-3600 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.431B Radiolocation 5.433	3500-3600 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.433A Radiolocation 5.433	3500-3550 RADIOLOCATION G59 AERONAUTICAL RADIONAVIGATION (ground-based) G110 US103 US108 US431B	3450-3600 MHz: see previous page	
			3550-3650 RADIOLOCATION G59 AERONAUTICAL RADIONAVIGATION (ground-based) G110 US105 US107 US245 US433	3600-3650 FIXED FIXED-SATELLITE (space-to-Earth) US107 US245 MOBILE except aeronautical mobile US105 US433	Satellite Communications (25) Citizens Broadband (96)
3600-4200 FIXED FIXED-SATELLITE (space-to-Earth) Mobile	3600-3700 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.434 Radiolocation 5.433	3600-3700 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile Radiolocation 5.435	3650-3700 US109 US349	3650-3700 FIXED FIXED-SATELLITE (space-to-Earth) NG169 NG185 MOBILE except aeronautical mobile US109 US349	
	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile		3700-4200	3700-4000 FIXED MOBILE except aeronautical mobile NG182 NG457A	Wireless Communications (27)
				4000-4200 FIXED FIXED-SATELLITE (space-to-Earth) NG457A NG182	Satellite Communications (25)
4200-4400 AERONAUTICAL MOBILE (R) 5.436 AERONAUTICAL RADIONAVIGATION 5.438 5.437 5.439 5.440			4200-4400 AERONAUTICAL RADIONAVIGATION 5.440 US261		Aviation (87)
4400-4500 FIXED MOBILE 5.440A			4400-4940 FIXED MOBILE	4400-4500	
4500-4800 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 MOBILE 5.440A				4500-4800 FIXED-SATELLITE (space-to-Earth) 5.441 US245	
4800-4990 FIXED MOBILE 5.440A 5.441A 5.441B 5.442 Radio astronomy 5.149 5.339 5.443			US113 US245 US342	4800-4940 US113 US342	
			4940-4990 5.339 US342 US385 G122	4940-4990 FIXED MOBILE except aeronautical mobile 5.339 US342 US385	Public Safety Land Mobile (90Y)
4990-5000 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY Space research (passive) 5.149			4990-5000 RADIO ASTRONOMY US74 Space research (passive) US246		

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United States (U.S.) Footnotes

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US103 In the band 3300–3550 MHz, the following provisions shall apply: Non-Federal stations in the radiolocation service that were licensed (or licensed pursuant to applications accepted for filing) before February 22, 2019, may continue to operate on a secondary basis until new flexible use licenses are issued for operation in the band 3450–3550 MHz. The date by which non-Federal stations in the radiolocation service will be required to cease operations in the band 3300–3550 MHz will be set when the Commission establishes procedures for assigning flexible use licenses. After [EFFECTIVE DATE OF FINAL RULE], no new assignments may be made to non-Federal stations in the radiolocation service.—In the band 3300–3500 MHz, stations in the amateur service may continue to operate on a secondary basis until new flexible use licenses are issued for operation in the band 3450–3550 MHz. The date by which stations in the amateur service will be required to cease operations in the band 3400–3500 MHz will be set when the Commission establishes procedures for assigning flexible use licenses. Stations in the amateur service may continue to operate in the band 3300–3400 MHz on a secondary basis while the band's future uses are finalized, and stations in the amateur service may be required to cease operations in the band 3300–3450 MHz at any time if the amateur service causes harmful interference to flexible use operations..

* * * * *

US431B In the 3450–3550 MHz band, the following provisions shall apply. In general, within the contiguous United States, the band is a shared co-primary allocation between the Federal Radiolocation service and non-Federal Fixed and Mobile, except aeronautical mobile, services. Federal operations in the 3450–3550 MHz band must protect non-Federal operations from harmful interference, except under the following circumstances.—*Military Operational Need in National Emergency.* In time of war or a threat of war, or a state of public peril or disaster or other national emergency (collectively ''national emergency''), Federal users are authorized to operate within the band as required to meet operational mission requirements. Upon notification, non-Federal licensees shall terminate or otherwise adjust their operations to prevent harmful interference to the Federal operations consistent with procedures established by the FCC in coordination with NTIA. During such operations and until the end of the national emergency, non-Federal licensees must adjust their operations to enable Federal use of the band and non-Federal users may not claim protection from harmful interference.—*Cooperative Planning Areas.* Cooperative Planning Areas are geographic locations in which non-Federal operations shall coordinate with Federal systems in the band to deploy non-Federal operations, in a manner that shall not cause harmful interference to Federal systems operating in the band and to protect non-Federal operations from potential harm caused by high powered Federal operations. In such areas, operators of non-Federal stations may be required to modify their operations (*e.g.,* reduce power, adjust antenna pointing angles, shielding, *etc.*) to protect themselves and to protect Federal operations from interference. In these areas, non-Federal operations may not claim interference protection from Federal systems outside of coordination procedures. To the extent possible, Federal use in Cooperative Planning Areas will be chosen to minimize operational impact on non-Federal users. Appendix A to part 2 identifies the locations of Cooperative Planning Areas. Cooperative Planning Areas may also be Periodic Use Areas as described below. Coordination between Federal users and non-Federal licensees in Cooperative Planning Areas shall be consistent with procedures established by the FCC in coordination with NTIA.—*Periodic Use Areas.* Periodic Use Areas are geographic locations where non-Federal operations in the band may not cause harmful interference to Federal systems operating in the band for episodic periods. During these times and in these areas, Federal users will require interference protection from non-Federal operations. Non-Federal operations may be required to temporarily modify their operations (*e.g.,* reduce power, adjust antenna pointing angles, *etc.*) to protect Federal operations from interference, which may include restrictions on non-Federal stations' ability to radiate at certain locations during specific periods of time. During such episodic time periods, non-Federal users in Periodic Use Areas must alter their operations to enable Federal systems' temporary use of the band, and during such times, non-Federal users may not claim interference protection from Federal systems outside of coordination procedures. To the extent possible, Federal use in Periodic Use Areas will be chosen to minimize operational impact to non-Federal users. Coordination between Federal users and non-Federal licensees in Periodic Use Areas shall be consistent with procedures established by the FCC in coordination with NTIA. While all Periodic Use Areas are co-located with Cooperative Planning Areas, the exact geographic area used during periodic use may differ from the co-located Cooperative Planning Area. The geographic locations of Periodic Use Areas are identified in Appendix A to part 2. Restrictions and authorizations for the Cooperative Planning Areas remain in effect during periodic use unless specifically relieved in the coordination process.

* * * * *

■ 6. Add Appendix A to part 2 to read as follows:

APPENDIX A TO PART 2—TABLE OF TABLE: DEPARTMENT OF DEFENSE COOPERATIVE PLANNING AREAS AND PERIODIC USE AREAS

Location name	State	CPA	PUA
Little Rock	AR	Yes.	
Yuma Complex (includes Yuma Proving Grounds and MCAS Yuma)	AZ	Yes	Yes.
Camp Pendleton	CA	Yes.	
Edwards Air Force Base	CA	Yes	Yes.
National Training Center	CA	Yes	Yes.
Naval Air Weapons Station, China Lake	CA	Yes	Yes.
Point Mugu	CA	Yes	Yes.
San Diego*	CA	Yes.	
Includes Point Loma SESEF range*			
Twentynine Palms	CA	Yes.	

APPENDIX A TO PART 2—TABLE OF TABLE: DEPARTMENT OF DEFENSE COOPERATIVE PLANNING AREAS AND PERIODIC USE AREAS—Continued

Location name	State	CPA	PUA
Eglin Air Force Base	FL	Yes	Yes.
Includes Santa Rosa Island and Cape San Blas site			
Mayport *	FL	Yes.	
Includes Mayport SESEF range *			
Pensacola	FL	Yes	Yes.
Joint Readiness Training Center	LA	Yes	Yes.
Chesapeake Beach	MD	Yes	Yes.
Naval Air Station, Patuxent River	MD	Yes	Yes.
St. Inigoes	MD	Yes	Yes.
Bath	ME	Yes	Yes.
Pascagoula	MS	Yes	Yes.
Camp Lejeune	NC	Yes.	
Cherry Point	NC	Yes.	
Fort Bragg	NC	Yes	Yes.
Portsmouth	NH	Yes	Yes.
Moorestown	NJ	Yes	Yes.
White Sands Missile Range	NM	Yes	Yes.
Nevada Test and Training Range	NV	Yes	Yes.
Fort Sill	OK	Yes	Yes.
Tobyhanna Army Depot	PA	Yes.	
Dahlgren	VA	Yes	Yes.
Newport News	VA	Yes	Yes.
Norfolk *	VA	Yes.	
Includes Fort Story SESEF range *			
Wallops Island	VA	Yes	Yes.
Bremerton	WA	Yes	Yes.
Everett *	WA	Yes.	
Includes Ediz Hook SESEF range *			

* Includes Shipboard Electronic Systems Evaluation Facility (SESEF) attached to each homeport.

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 7. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

■ 8. Amend § 27.1 by adding paragraph (b)(17) to read as follows:

§ 27.1 Basis and purpose.

* * * * *

(b) * * *

(17) 3450–3550 MHz.

* * * * *

■ 9. Amend § 27.4 by adding, in alphabetical order, the definition for ''3.45 GHz Service'' to read as follows:

§ 27.4 Terms and definitions.

3.45 GHz Service. A radiocommunication service licensed under this part for the frequency bands specified in § 27.5(n) (3450–3550 MHz band).

* * * * *

■ 10. Amend § 27.5 by adding paragraph (o) to read as follows:

§ 27.5 Frequencies.

* * * * *

(o) *3450–3550 MHz band.* The 3.45 GHz Service is licensed as five individual 20 megahertz blocks available for assignment in the contiguous United States on a Partial Economic Area basis, *see* § 27.6(n).

■ 11. Amend § 27.6 by adding paragraph (n) to read as follows:

§ 27.6 Service areas.

* * * * *

(n) *3450–3550 MHz Band.* Service areas in the 3.45 GHz Service are based on Partial Economic Areas (PEAs) as defined by appendix A to this subpart (*see* Wireless Telecommunications Bureau Provides Details About Partial Economic Areas, DA 14–759, Public Notice, released June 2, 2014, for more information).

■ 12. Amend § 27.11 by adding paragraph (m) to read as follows:

§ 27.11 Initial authorization.

* * * * *

(m) *3450–3550 MHz band.* Authorizations for licenses in the 3.45 GHz Service will be based on Partial Economic Areas (PEAs), as specified in § 27.6(n), and the frequency blocks specified in § 27.5(n).

■ 13. Amend § 27.13 by adding paragraph (o) to read as follows:

§ 27.13 License period.

* * * * *

(o) *3450–3550 MHz Band.* Authorization for the band will have a term not to exceed fifteen years from the date of issuance.

■ 14. Amend § 27.14 by revising the first sentence of paragraphs (a) and (k), and adding paragraph (w) to read as follows:

§ 27.14 Construction requirements.

(a) AWS and WCS licensees, with the exception of WCS licensees holding authorizations for the 600 MHz band, Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Block C, C1 or C2 in the 746–757 MHz and 776–787 MHz bands, Block A in the 2305–2310 MHz and 2350–2355 MHz bands, Block B in the 2310–2315 MHz and 2355–2360 MHz bands, Block C in the 2315–2320 MHz band, Block D in the 2345–2350 MHz band, in the 3450–3550 MHz band, and in the 3700–3980 MHz band, and with the exception of licensees holding AWS authorizations in the 1915–1920 MHz and 1995–2000 MHz bands, the 2000–2020 MHz and 2180–2200 MHz bands, or 1695–1710 MHz, 1755–1780 MHz and 2155–2180 MHz bands, must, as a performance requirement, make a showing of ''substantial service'' in their license area within the prescribed license term set forth in § 27.13. * * *

* * * * *

(k) Licensees holding WCS or AWS authorizations in the spectrum blocks

enumerated in paragraphs (g), (h), (i), (q), (r), (s), (t), (v) and (w) of this section, including any licensee that obtained its license pursuant to the procedures set forth in paragraph (j) of this section, shall demonstrate compliance with performance requirements by filing a construction notification with the Commission, within 15 days of the expiration of the applicable benchmark, in accordance with the provisions set forth in § 1.946(d) of this chapter. * * * * * * * * *

(w) The following provisions apply to any licensee holding an authorization in the 3450–3550 MHz band:

(1) Licensees relying on mobile or point-to-multipoint service shall provide reliable signal coverage and offer service within eight (8) years from the date of the initial license to at least forty-five (45) percent of the population in each of its license areas (''First Buildout Requirement''). Licensee shall provide reliable signal coverage and offer service within twelve (12) years from the date of the initial license to at least eighty (80) percent of the population in each of its license areas (''Second Buildout Requirement''). Licensees relying on point-to-point service shall demonstrate within eight years of the license issue date that they have four links operating and providing service to customers or for internal use if the population within the license area is equal to or less than 268,000 and, if the population is greater than 268,000, that they have at least one link in operation and providing service to customers, or for internal use, per every 67,000 persons within a license area (''First Buildout Requirement''). Licensees relying on point-to-point service shall demonstrate within 12 years of the license issue date that they have eight links operating and providing service to customers or for internal use if the population within license area is equal to or less than 268,000 and, if the population within the license area is greater than 268,000, shall demonstrate they are providing service and have at least two links in operation per every 67,000 persons within a license area (''Second Buildout Requirement'').

(2) In the alternative, a licensee offering Internet of Things-type services shall provide geographic area coverage within eight (8) years from the date of the initial license to thirty-five (35) percent of the license (''First Buildout Requirement''). A licensee offering Internet of Things-type services shall provide geographic area coverage within twelve (12) years from the date of the initial license to sixty-five (65) percent of the license (''Second Buildout Requirement'').

(3) If a licensee fails to establish that it meets the First Buildout Requirement for a particular license area, the licensee's Second Buildout Requirement deadline and license term will be reduced by two years. If a licensee fails to establish that it meets the Second Buildout Requirement for a particular license area, its authorization for each license area in which it fails to meet the Second Buildout Requirement shall terminate automatically without Commission action, and the licensee will be ineligible to regain it if the Commission makes the license available at a later date.

(4) To demonstrate compliance with these performance requirements, licensees shall use the most recently available decennial U.S. Census Data at the time of measurement and shall base their measurements of population or geographic area served on areas no larger than the Census Tract level. The population or area within a specific Census Tract (or other acceptable identifier) will be deemed served by the licensee only if it provides reliable signal coverage to and offers service within the specific Census Tract (or other acceptable identifier). To the extent the Census Tract (or other acceptable identifier) extends beyond the boundaries of a license area, a licensee with authorizations for such areas may include only the population or geographic area within the Census Tract (or other acceptable identifier) towards meeting the performance requirement of a single, individual license. If a licensee does not provide reliable signal coverage to an entire license area, the license must provide a map that accurately depicts the boundaries of the area or areas within each license area not being served. Each licensee also must file supporting documentation certifying the type of service it is providing for each licensed area within its service territory and the type of technology used to provide such service. Supporting documentation must include the assumptions used to create the coverage maps, including the propagation model and the signal strength necessary to provide reliable service with the licensee's technology.

■ 15. Amend § 27.50 by adding paragraph (k) to read as follows:

§ 27.50 Power limits and duty cycle.

* * * * *

(k) The following power requirements apply to stations transmitting in the 3450–3550 MHz band:

(1) The power of each fixed or base station transmitting in the 3450–3550 MHz band and located in any county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, is limited to an equivalent isotropically radiated power (EIRP) of 3280 Watts/MHz. This limit applies to the aggregate power of all antenna elements in any given sector of a base station.

(2) The power of each fixed or base station transmitting in the 3450–3550 MHz band and situated in any geographic location other than that described in paragraph (j)(1) of this section is limited to an EIRP of 1640 Watts/MHz. This limit applies to the aggregate power of all antenna elements in any given sector of a base station.

(3) Mobile and portable stations are limited to 1 Watt EIRP. Mobile and portable stations operating in these bands must employ a means for limiting power to the minimum necessary for successful communications.

(4) Equipment employed must be authorized in accordance with the provisions of § 27.51. Power measurements for transmissions by stations authorized under this section may be made either in accordance with a Commission-approved average power technique or in compliance with paragraph (j)(5) of this section. In measuring transmissions in this band using an average power technique, the peak-to-average ratio (PAR) of the transmission may not exceed 13 dB.

(5) Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an rms-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, and any other relevant factors, so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

■ 16. Amend § 27.53 by adding paragraph (o) to read as follows:

§ 27.53 Emission limits.

* * * * *

(o) *3.45 GHz Service.* The following emission limits apply to stations transmitting in the 3450–3550 MHz band:

(1) For base station operations in the 3450–3550 MHz band, the conducted power of any emission outside the licensee's authorized bandwidth shall not exceed −13 dBm/MHz. Compliance with this paragraph (o)(1) is based on the use of measurement instrumentation

employing a resolution bandwidth of 1 megahertz or greater. However, in the 1 megahertz bands immediately outside and adjacent to the licensee's frequency block, a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power. Notwithstanding the channel edge requirement of −13 dBm per megahertz, for base station operations in the 3450–3550 MHz band beyond the two edges of the band, the conducted power of any emission shall not exceed −25 dBm/MHz within a 20 megahertz offset from the top and bottom edges of the band, and shall not exceed −40 dBm/MHz beyond that 20 megahertz offset.

(2) For mobile operations in the 3450–3550 MHz band, the conducted power of any emission outside the licensee's authorized bandwidth shall not exceed −13 dBm/MHz. Compliance with this paragraph (o)(2) is based on the use of measurement instrumentation employing a resolution bandwidth of 1 megahertz or greater. However, in the 1 megahertz bands immediately outside and adjacent to the licensee's frequency block, the minimum resolution bandwidth for the measurement shall be either one percent of the emission bandwidth of the fundamental emission of the transmitter or 350 kHz. In the bands between 1 and 5 MHz removed from the licensee's frequency block, the minimum resolution bandwidth for the measurement shall be 500 kHz. The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power.

■ 17. Amend § 27.55 by adding paragraph (e) to read as follows:

§ 27.55 Power strength limits.

* * * * *

(e) *Power flux density for* stations *operating in the 3450–3550 MHz band.* For base and fixed stations operation in the 3450–3550 MHz band in accordance with the provisions of § 27.50(j), the power flux density (PFD) at any location on the geographical border of a licensee's service area shall not exceed −76 dBm/m^2/MHz. This power flux density will be measured at 1.5 meters above ground. Licensees in adjacent geographic areas may voluntarily agree to operate under a higher PFD at their common boundary.

■ 18. Amend § 27.57 by revising paragraph (c) to read as follows:

§ 27.57 International coordination.

* * * * *

(c) Operation in the 1695–1710 MHz, 1710–1755 MHz, 1755–1780 MHz, 1915–1920 MHz, 1995–2000 MHz, 2000–2020 MHz, 2110–2155 MHz, 2155–2180 MHz, 2180–2200 MHz, 3450–3550 MHz, and 3700–3980 MHz bands is subject to international agreements with Mexico and Canada.

■ 19. Add new Subpart Q to read as follows:

Subpart Q—3450–3550 MHz Band

Sec.

§ 27.1600 3450–3550 MHz band subject to competitive bidding.

Mutually exclusive initial applications for 3450–3550 MHz band licenses are subject to competitive bidding. The general competitive bidding procedures set forth in 47 CFR part 1, subpart Q of this chapter will apply unless otherwise provided in this subpart.

§ 27.1601 Designated entities in the 3450–3550 MHz band.

(a) *Definitions.* (1) *Small business.* A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $55 million for the preceding five (5) years.

(2) *Very small business.* A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $20 million for the preceding five (5) years.

(b) *Bidding credits.* A winning bidder that qualifies as a small business, as defined in this section, or a consortium of small businesses may use the bidding credit of 15 percent, as specified in § 1.2110(f)(2)(i)(C) of this chapter, subject to the cap specified in § 1.2110(f)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business, as defined in this section, or a consortium of very small businesses may use the bidding credit of 25 percent, as specified in § 1.2110(f)(2)(i)(B) of this chapter, subject to the cap specified in § 1.2110(f)(2)(ii) of this chapter.

(c) *Eligibility for rural service provider bidding credit.* A rural service provider, as defined in § 1.2110(f)(4)(i) of this chapter, that has not claimed a small business bidding credit may use the bidding credit of 15 percent specified in § 1.2110(f)(4) of this chapter.

§ 27.1602 Permanent discontinuance of 3450–3550 MHz licenses.

A 3450–3550 MHz band licensee that permanently discontinues service as defined in § 1.953 must notify the Commission of the discontinuance within 10 days by filing FCC Form 601 requesting license cancellation. An authorization will automatically terminate, without specific Commission action, if service is permanently discontinued as defined in § 1.953, even if a licensee fails to file the required form requesting license cancellation.

[FR Doc. 2020–22529 Filed 10–19–20; 4:15 pm]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2019–0070; FXES11130900000C2–189–FF09E42000]

RIN 1018–BD01

Endangered and Threatened Wildlife and Plants; Reclassification of Eugenia woodburyana as Threatened and Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), propose to reclassify the plant *Eugenia woodburyana* (no common name) from an endangered species to a threatened species under the Endangered Species Act of 1973, as amended (Act), due to improvements in the species' status since the original listing in 1994. This proposed action is based on a thorough review of the best available scientific and commercial information, which indicates that *E. woodburyana* is not currently in danger of extinction throughout all or a significant portion of its range, but it is likely to become so within the foreseeable future. If this proposal is finalized, *E. woodburyana* would remain protected as a threatened species under the Act. We seek information, data, and comments from the public on this proposal. We also propose to establish a rule under section 4(d) of the Act that will provide

measures that are necessary and advisable for conservation of the *E. woodburyana.*

DATES: We will accept comments received or postmarked on or before December 21, 2020. We must receive requests for public hearings in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by December 7, 2020.

ADDRESSES: You may submit comments on this proposed rule by one of the following methods:

Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the Docket Number for this proposed rule, which is FWS–R4–ES–2019–0070. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!'' Please ensure that you have found the correct rulemaking before submitting your comment. Comments submitted electronically using the Federal eRulemaking Portal must be received by 11:59 p.m. Eastern Time on the closing date.

By hard copy: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R4–ES–2019–0070; U.S. Fish and Wildlife Service Headquarters, MS: JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments *only* by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments below for more information).

Document availability: The proposed rule, list of literature cited, the 5-year review, and other supporting documents are available at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0070.

FOR FURTHER INFORMATION CONTACT: Edwin Muñiz, Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Boquerón, Puerto Rico 00622, telephone (787) 851–7297. Individuals who use a telecommunications device for the deaf (TDD), may call the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from the Lists of Endangered and Threatened Wildlife and Plants. To list, reclassify, or delist a species, we must issue a rule in the **Federal Register**. This rule proposes to reclassify the *E. woodburyana* from endangered to threatened on the List.

What this document does. We propose to reclassify the plant *Eugenia woodburyana* as threatened on the Federal List of Endangered and Threatened Plants and to establish provisions under section 4(d) of the Act to ensure the continued conservation of this species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any one or a combination of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In our May 2017 5-year status review, we made a recommendation to reclassify this plant from endangered to threatened based on our evaluation of these same five factors. Based on the status review, the current threats analysis, and evaluation of conservation measures discussed in this proposed rule, we conclude that the plant *E. woodburyana* no longer meets the Act's definition of endangered and should be reclassified to threatened because it is no longer in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future.

New information indicates that *Eugenia woodburyana* is now more abundant and more widely distributed than when it was listed in 1994, when only approximately 45 individuals were known from 3 localities in southwestern Puerto Rico. In the recovery plan for *E. woodburyana* (Service 1998), the species was identified as occurring in four locations in southwest Puerto Rico, totaling approximately 150 individuals. In the 2017 5-year review, it was known from 6 populations and 2,597 individuals (not including seedlings) (Service 2017, p. 13). Currently, self-sustaining *E. woodburyana* natural populations are known to occur in 6 localities along southern Puerto Rico, extending from the municipality of Cabo Rojo in the southwest eastward to the municipality of Salinas in the south, totaling approximately 2,751 not including seedlings (table 1). About 47 percent of the currently known individuals occur under protective status in areas managed for conservation and where threats due to habitat modification have been reduced. Recovery actions (*e.g.,* propagation and planting, habitat enhancement with native tree species, cattle exclusion, firebreaks) to control and reduce remaining threats have been successfully implemented in collaboration with several partners.

Our review of the best available scientific and commercial information indicates that some threats to *Eugenia woodburyana* still remain while others have been reduced or no longer occur. Remaining threats that will make this species likely to become endangered in the foreseeable future include habitat loss, degradation, and fragmentation, and other natural or manmade factors such as human-induced fires and landslides. For example, in May 2019, a large wildfire affected the upper forested hills of a private land in conservation in Sierra Bermeja (southwest Puerto Rico), affecting an undetermined number of individuals of *E. woodburyana* (Envirosurvey 2020, p. 52).

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Current or planned activities within the geographic range of *Eugenia woodburyana* that may impact or benefit the species.

(2) Factors (threats) that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species

and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) Information on regulations that are necessary and advisable to provide for the conservation of *Eugenia woodburyana* and that the Service can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule (to the extent permitted by Commonwealth law).

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that a determination as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments *only* by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the website. 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. Please note that comments posted to this website are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publically viewable until we post it, which might not occur until several days after submission.

Comments and materials we receive, as well as supporting documentation used in preparing this proposed rule will be available for public inspection at Docket No. FWS–R4–ES–2019–0070 on *http://www.regulations.gov.*

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by the date shown in **DATES.** We will schedule a public hearing on this proposal, if any are requested, and announce the date, time, and place of those hearings, as well as how to obtain reasonable accommodation, in the **Federal Register** at least 15 days before the first hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

Peer Review

In accordance with our policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek the expert opinions of at least three appropriate and independent specialists regarding the science in this proposed rule. The purpose of such review is to ensure that our determination is based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on both the proposed reclassification of *Eugenia woodburyana* and the proposed special rule. We will summarize the opinions of these reviewers in the final decision documents, and we will consider the comments and information received from peer reviewers during the public comment period on this proposed rule, as we prepare our final determination.

Because we will consider all comments and information received during the comment period, our final determination may differ from this proposal. Based on the new information we receive, we may conclude that the species status should not change and may choose to withdraw the proposal. Such a final decision would be a logical outgrowth of this proposal, as long as we: (a) Base the decisions on the best scientific and commercial data available after considering all of the relevant factors; (2) do not rely on factors Congress has not intended us to consider; and (3) articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion.

Previous Federal Actions

On September 9, 1994, we published a final rule in the **Federal Register** (59 FR 46715) listing *Eugenia woodburyana* as an endangered species. The final rule identified the following threats to *E. woodburyana:* Loss of habitat due to agricultural (grazing by cattle and goats), rural, and tourist development and possibly the use of off-road vehicles within the habitat; lack of State regulations to protect this species; and the limited distribution of the species. On October 6, 1998, we published the recovery plan for this endangered plant (USFWS 1998, entire). We completed a 5-year status review on May 7, 2017 (USFWS 2017, entire). In that review, we determined that the species no longer met the definition of an endangered species and should be reclassified to threatened because new occurrences of the species had been located since completion of the recovery plan, and a substantial number of individuals had been documented (*i.e.,* 2,567 individuals including adults and saplings).

The 5-year status review is available at *https://www.regulations.gov* at (Docket No. FWS–R4–ES–2019–0070).

For additional details on previous Federal actions, see discussion under Recovery, below. Also see *http://www.fws.gov/endangered/species/us-species.html* for the species profile for this plant.

I. Proposed Listing Determination

Background

Species Information

A thorough review of the taxonomy, life history, ecology, and overall viability of *Eugenia woodburyana* was presented in the 5-year review (USFWS 2017, entire). Below we present a summary of the biological and distributional information discussed in the 5-year review and new information published or obtained since.

Taxonomy and Species Description

Eugenia woodburyana is a small evergreen tree that belongs to the family Myrtaceae (Judd *et al.* 2002, p. 398). *Eugenia* is the largest genus of this family, which is very diverse in the Antilles and includes more native trees than any other genus of flowering plants in the flora of Puerto Rico (Breckon and Kolterman 1994, p. 5). *Eugenia woodburyana* was first collected by Roy O. Woodbury in October 31, 1977, in the municipality of Guánica, Puerto Rico, and later described as a new species (Liogier 1994, p. 407).

Eugenia woodburyana may reach up to 6 m (19.8 ft) (Liogier 1994, p. 407).

Its leaves are chartaceous (thin and stiff), pubescent on both sides, obovate or elliptic, rounded at the apex, and dark green and shining above, and paler beneath. The fruit is an eight-winged, globose berry with a diameter of 2 cm (0.08 in) that turns red when mature (Liogier 1994, p. 407).

Reproductive Biology

The reproductive biology of *Eugenia woodburyana* had not been thoroughly studied at the time it was listed. According to data in the recovery plan, herbarium specimens collected in October and May at the GCF contained buds and flowers, whereas specimens collected in February and April were sterile. However, a specimen collected in March in Sierra Bermeja (southwest Puerto Rico) had remnants of flowers (USFWS 1998, pp. 3–4).

Some information on the phenology and germination of *Eugenia woodburyana* has been gathered since the species was listed. This plant has been observed flowering in February, May, June, August, and October, and not all individuals flower at the same time and not all produce fruits (USFWS 2017, p. 17). Therefore, we suspect it could flower February through October, depending on rain levels. Flower bud development has been observed 3 to 5 days after rain events of greater than 1 inch (25.4 mm) in 1 day, and fruits are observed about 3 weeks later (USFWS 2017, p. 17). In the event water availability becomes a limiting factor, the immature fruits may become dormant for months until conditions are favorable for developing (Monsegur-Rivera 2012–2017, pers. obs.). Flowers of *E. woodburyana* are typically visited by honey bees (*Apis mellifera*), and pollination and fruit production appear to be the result of crosspollination, as few fruits are produced when single individuals flower (Monsegur-Rivera 2012–2017, per. obs.).

Eugenia woodburyana seeds can remain dormant for a considerable period of time, and likely vary in time of emergence (Santiago 2011, p.14). Recent germination trials indicate the species has a high germination rate (*i.e.,* 70 percent), and that germination success is greater if seeds are planted within 2 weeks following harvesting. Seeds start germinating by developing a long taproot, an adaptation to secure access to water, and in the case of a sudden drought, the seed may stop development of new growths and go dormant (Monsegur-Rivera 2012–2014, pers. obs.). Additional propagation efforts have been conducted because *Eugenia woodburyana* is relatively easy to propagate. Over the past 10 years, the Service has worked with local partners propagating and planting this species on lands managed for conservation in the Sierra Bermeja area (USFWS 2017, p. 11). These efforts need to be expanded to geographical areas in the proximity of the other natural populations (*e.g.,* Almácigo Bajo).

Distribution and Abundance

Eugenia woodburyana was originally known from dry thickets within the GCF (Liogier 1980, p. 185; Breckon and Kolterman 1994, p. 5). In 1981, this species was collected at an uncertain location within the CRNWR, and in 1984, at the dry serpentine slopes of Cerro Mariquita in Sierra Bermeja (Santiago-Blay *et al.* 2003, p. 1). At the time of listing, *E. woodburyana* was considered an endemic species of southwest Puerto Rico, known from only 45 individuals within the GCF, Sierra Bermeja, and an individual reported from the CRNWR. In addition, *E. woodburyana* was collected in 1996 at Peñones de Melones in Cabo Rojo (Breckon 4863; MAPR herbaria). Thirteen individuals of this species were recorded during a study at La Tinaja Tract (Laguna Cartagena National Wildlife Refuge [LCNWR]), which found the species was present in open forest on east-facing slopes, and that it did not occur in areas in transition from pasture to forest (Weaver and Chinea 2013, p. 279).

Following the finalization of the species' recovery plan in 1998, new populations within the geographical areas of Montes de Barinas, between the municipalities of Yauco and Guayanilla, and Punta Cucharas, and between the municipalities of Ponce and Peñuelas, were identified by local experts and the Service (Román-Guzman 2006, p. 25). These reports expanded the species' distribution further east within the subtropical dry limestone forest of Puerto Rico. The range of the species continued to expand: In 2008, it was located at Almácigo Bajo Ward in the municipality of Yauco (Sepúlveda 2008, pers. comm.). The species is also now known to extend to the Municipality of Salinas, as evidenced by a specimen collected within the boundaries of the Puerto Rico National Guard's Camp Santiago (Acevedo-Rodriguez 2014, p. 15; table 1). This locality is at least 18.6 miles (30 km) east of the previously nearest known site at Punta Cucharas in the municipality of Ponce. Below we discuss each of these areas in more detail.

TABLE 1—CURRENTLY KNOWN NATURAL POPULATIONS AND NUMBER OF INDIVIDUALS (ADULTS AND SAPLINGS) OF *Eugenia woodburyana* IN PUERTO RICO

[Asterisk (*) indicates localities that are considered as subpopulations. Puerto Rico Department of Natural and Environmental Resources is indicated as PRDNER]

Population name based on geographical range	Subpopulation name	Percent of the total (2,751) known adults/saplings per subpopulation [a]	Conservation status (protected, not protected)	Ownership
Sierra Bermeja	* La Tinaja Tract (within LCNWR)	808/271 (39.2%)	Protected	USFWS.
	* Finca María Luisa (also known as Finca Escabi).	692/90 (28.4%)	Not protected	Private land under conservation easement with Para La Naturaleza. Threats not managed.
	* El Conuco (also known as Finca Sollins).	88/8 (3.5%)	Protected	P.R. Conservation Trust (Para La Naturaleza).
	* Finca Lozada	300 estimated adults (10.9%)	Not protected	Private.
Almácigo Bajo, Yauco	Almácigo Bajo (Río Loco)	120/226 (12.6%)	Not protected	Private.
Guánica Commonwealth Forest	* Cañon Hoya Honda	10 estimated adults (0.36%)	Protected	PRDNER.
	* Cañon Eugenias	31/8 (1.4%)	Protected	PRDNER.
	* Cañon Murciélagos	27/39 (2.4%)	Protected	PRDNER.
	* Cañon Las Trichilias	1 (0.04%)	Protected	PRDNER.
Montes de Barinas	Finca Catalá	1 (0.04%)	Not protected	Private.
Punta Cucharas (Ponce-Peñuelas)	* Peñon de Ponce	20 (0.7%)	Not protected	Private.
	* Puerto Galexda	9 (0.3%)		Private.
	* Gasoducto Sur ROW	1 (0.04%)		Private.

TABLE 1—CURRENTLY KNOWN NATURAL POPULATIONS AND NUMBER OF INDIVIDUALS (ADULTS AND SAPLINGS) OF *Eugenia woodburyana* IN PUERTO RICO—Continued

[Asterisk (*) indicates localities that are considered as subpopulations. Puerto Rico Department of Natural and Environmental Resources is indicated as PRDNER]

Population name based on geographical range	Subpopulation name	Percent of the total (2,751) known adults/saplings per subpopulation [a]	Conservation status (protected, not protected)	Ownership
Salinas	Camp Santiago	1 (0.04%)	Not protected	P.R. National Guard. Threats not managed.

[a] Seedlings not included as part of the population numbers because available data do not allow us to determine the percentage of seedlings that is recruited into the population. Existing data are sporadic and the long term survival of seedlings is uncertain due to natural thinning and environmental variables (*e.g.,* drought stress).

As shown in Table 1, the largest population and suitable habitat of *Eugenia woodburyana* is found in Sierra Bermeja, southwest Puerto Rico, a mountain range that covers approximately 3,706–ac (1,500–ha) (USFWS 2011a, p. 17). *E. woodburyana* is known from at least four locations (subpopulations) within this area: La Tinaja Tract, Finca María Luisa (also known as Finca Escabi), Finca Lozada, and El Conuco (also known as Finca Sollins) (Envirosurvey 2020, p. 44). La Tinaja Tract is part of the LCNWR and occupies 263 ac (106.4 ha) in the foothills of Sierra Bermeja (USFWS 2011a, pp. 23 and 26), and lies within the Subtropical Dry Forest Life Zone (Ewel and Whitmore 1973, p. 10; Weaver and Chinea 2003, p. 273). Although the species is not specific to this type of habitat, drainages provide moist conditions (mesic) favorable for its establishment, which may explain the higher abundance of the species at these sites. In fact, an inventory of listed plant species at La Tinaja Tract accounted for 808 adults and 271 saplings of *Eugenia woodburyana,* associated to those mesic habitats that favor germination and recruitment (Morales-Pérez 2013, p. 4, Monsegur-Rivera 2009–2018, pers. obs.; table 1). The occurrence in Sierra Bermeja of multiple listed plants and rare endemics is the result of the little agricultural value of the steep slopes, hence little deforestation, which resulted in a refugia for those species, including *E. woodburyana.* Nonetheless, the lower slopes of Sierra Bermeja and surrounding valleys are subject to different land use practices that hinders the expansion of the species and associated native vegetation due to threats such as fires, invasive grasses, and grazing, along with dry climate conditions (Weaver and Chinea 2003, pp. 281–282).

Finca María Luisa is a private land that ranges from the upper slopes of Sierra Bermeja extending south to the coast near La Pitahaya in the Boquerón Commonwealth Forest. This property is composed of a mosaic of habitats with different land uses that include ranching, hay production, and remnants of forested habitats. The forested habitat is adjacent to the boundaries of the LCNWR (La Tinaja Tract) and provides connectivity to the *Eugenia woodburyana* subpopulations, particularly on La Tinaja Tract. An assessment of Finca María Luisa identified 629 adults and 90 saplings of *E. woodburyana* (Envirosurvey 2020, p. 47; table 1). A total of 105 seedlings also were documented during that same assessment. However, there is no information on the survival of those seedlings. This property is currently under a conservation easement managed by the nongovernmental organization Para La Naturaleza, Inc. (PLN), the operational unit of The Conservation Trust of Puerto Rico (PLN 2013). This easement should provide for the conservation of the natural resources of the property, including *E. woodburyana.* However, there are some agricultural practices (*e.g.,* grazing, forest conversion into grassland) that still threatening the species (PLN 2013, p. 56; USFWS 2017, p. 18; Envirosurvey 2020, p. 49). El Conuco is another property owned and managed for conservation by PLN in Sierra Bermeja, where *E. woodburyana* is also found (PLN 2014). This property is located on the west side of the mountain range, and in 2014, a subpopulation of *E. woodburyana* was reported with at least 41 individuals (USFWS 2014a, p. 2). The latest survey indicates that there are at least 88 adults and 8 saplings of *E. woodburyana* on this property (Envirosurvey 2020, p. 51; table 1). A total of 20 seedlings also were documented during this assessment, but there is no information on their long-term survival.

Finca Lozada is a private property located west of La Tinaja Tract, and with similar habitat to La Tinaja. In 2007, a rapid assessment of *Eugenia woodburyana* was conducted on this property and estimated the subpopulation at around 300 individuals (USFWS 2017, p. 9).

Eugenia woodburyana also was known from the area of Peñones de Melones in the Boquerón Ward of Cabo Rojo. This site is a western extension of the Sierra Bermeja habitat, but at lower elevations, and it has been subject to deforestation mainly for agriculture and urban development (USFWS 2017, p. 14). However, there are no current data on the status of this population, and *E. woodburyana* is presumed extirpated from this area due to the extensive deforestation and development that occurred during the early 2000s. In addition, there is a single record of the species from the CRNWR, but this locality has not been surveyed recently due to lack of information on the specific location of the individual. However, the CRNWR is currently a reintroduction site for *E. woodburyana.*

As previously stated, the known range of *Eugenia woodburyana* increased when the species was located on private land (Río Loco population) at the Almácigo Bajo Ward near the southeast boundary of the Susúa Commonwealth Forest (SCF). This is the only population that occurs in the boundaries of the subtropical dry and moist forests life zones (Ewel and Whitmore 1973, pp. 25 and 72). The latest information from this site indicates the *E. woodburyana* population is composed of at least 120 adults and 226 saplings (USFWS 2017, p. 9; table 1). Despite the relatively disturbed nature of this area, a total of 211 seedlings also were documented during the assessment, but their current survival is unknown (USFWS 2017, p. 9). In fact, due to the proximity of this population to the SCF, and the availability and continuity of suitable habitat, we would expect to find additional *E. woodburyana* individuals along the southeastern portion of the SCF.

The GCF is a natural area comprising one of the best remnants of subtropical dry forest vegetation in Puerto Rico (Monsegur-Rivera 2009, p. 3). Elevation ranges from 0 to 228 m (0 to 748 ft) above sea level (Murphy *et al.* 1995, p.

179), and the landscape includes a variable topography with a mixture of hills and deep canyons or ravines that provides adequate conditions for the occurrence of *Eugenia woodburyana.* There are four localities within the GCF where subpopulations of this species have been documented: Cañón Hoya Honda, Cañón Murciélagos, Cañón Las Eugenias, and Cañón Las Trichilias (Monsegur-Rivera 2009–2018, pers. obs.; table 1). The currently known number of *E. woodburyana* individuals at the GCF is approximately 69 adults and 47 saplings (USFWS 2017, pp. 8). Also, 31 seedlings were found in the forest, but no information is available regarding their survival (USFWS 2017, p. 8).

The range of *Eugenia woodburyana* extends north to the hills along Montes de Barinas in a habitat similar to the GCF (Monsegur-Rivera 2009–2018, pers. obs.). This tract of privately owned lands is located primarily along Indios Ward in the municipality of Guayanilla, and Cambalache Ward in the municipality of Yauco. Due to the marginal agricultural value of these areas, the forest was partially logged for charcoal production and ranching; fortunately, the prime habitat for native and endemic plant species remained undisturbed (79 FR 53326, September 9, 2014). The forested habitats at Montes de Barinas and the GCF are separated by an agricultural valley along the Yauco River. In fact, this geographical range overlaps with the designated critical habitat of *V. rupicola* (Montes de Barinas Unit; 79 FR 53326, September 9, 2014). The number of individuals of *E. woodburyana* at this location is limited to one record (table 1). However, the majority of the habitat remains unexplored; thus, further surveys are necessary to determine the size of this population (Monsegur-Rivera 2009–2018, pers. obs.).

Similar habitat extends east to private lands in the area of Punta Cucharas, along Encarnación and Canas Wards between the municipalities of Peñuelas and Ponce in southern Puerto Rico. This area also lies within the designated critical habitat for *V. rupicola* (Peñon de Ponce Unit) (79 FR 53326, September 9, 2014). Here, *Eugenia woodburyana* is known from at least three subpopulations: Peñon de Ponce, Puerto Galexda, and the former right of way of the proposed gas pipeline Gasoducto Sur, with an estimated minimum number of 30 individuals growing mainly along drainages on the northwest-facing slopes with greater moisture retention (Monsegur-Rivera 2009–2018, pers. obs.; Service 2017, p. 10; table 1). The current forest structure and absence of exotic plant species suggest this habitat has remained mainly undisturbed, explaining the presence of rare species like *Buxus vahlii* (an endemic species with limited seed dispersal mechanism) in the area. Thus, the presence of additional subpopulations of *E. woodburyana* in this area is very likely.

The newest record indicating the expansion of the species' known range is from a specimen collected at the Puerto Rico National Guard's Camp Santiago in the municipality of Salinas. This site is about 18.6 miles (30 km) east from the nearest known locality in Punta Cucharas in a habitat composed of remnants of native dry forest. Camp Santiago covers an area of 5,175 ha (12,787.6 ac), and is located south of the central mountain range of Puerto Rico (Acevedo-Rodríguez 2014, p. 15).

Population Summary

Available information indicates at least 808 adults and 271 saplings of *Eugenia woodburyana* occur within the boundaries of La Tinaja Tract (Morales-Pérez 2013, p. 4; table 1). The population of Finca María Luisa is composed of at least 692 adults and 90 saplings (Envirosurvey 2020, p. 47; table 1). In the case of El Conuco, the population is 88 adults and 8 saplings (Envirosurvey 2020, p. 51; table 1). When evaluating the combined data from La Tinaja Tract, Finca María Luisa, El Conuco, and Finca Lozada as the whole Sierra Bermeja population, the total number of adults (1,888) and saplings (369) consists of 2,257 individuals. In addition, at least 269 seedlings have been recorded in this population (Morales-Pérez 2013, p. 4; Envirosurvey 2020, pp. 47 and 51). Although we recognize the occurrence of seedlings, we did not include them part of the whole *E. woodburyana* population because their fate is unknown due to the lack of long term monitoring. For example, seedling survival can be compromised by environmental variables like droughts, particularly in the dry forest habitat where the species occurs. Still, the current number of adult individuals represents a demonstrable increase when compared to the overall number of individuals known at the time when the species was listed (45 individuals) or even at the time the recovery plan was published (150 individuals). The presence of different size classes shows that the *E. woodburyana* population in Sierra Bermeja has been resilient to past and current threats (*e.g.,* unsustainable agricultural practices, grazing, fires, invasive plant species) as suggested by its natural recruitment, reflected in the actual number of adults and saplings. Based on aerial images, and because the vegetation structure in neighboring lands is similar to areas with documented presence of *E. woodburyana,* we anticipate the species extends beyond our surveyed area in Sierra Bermeja. Nonetheless, *E. woodburyana* appears to be absent from areas previously deforested and degraded to grasslands dominated by exotics (*e.g., Megathyrsus maximus* [guinea grass]), and it is mainly restricted to those areas that provide favorable conditions for its establishment (*e.g.,* drainages) (Weaver and Chinea 2003, entire; Morales-Pérez 2013, p. 4; Monsegur-Rivera 2009–2018, pers. obs.; Envirosurvey 2020, pp. 46 and 51). Similar to Sierra Bermeja, the Almácigo Bajo (also known as Río Loco) population also shows evidence of natural recruitment and resiliency to previous habitat disturbance. The latest comprehensive survey of this population resulted in 346 individuals, corresponding to 120 adults and 226 saplings (USFWS 2017, p. 11; table 1). Despite the relatively disturbed nature of this area, it harbors a higher proportion of seedlings (38 percent) than that of Sierra Bermeja (10.5 percent) (USFWS 2016, p. 5; USFWS 2017, pp. 9 and 10), which most likely is the result of the moister understory conditions in the drainages where the species is found, and provides for better seed germination and seedling establishment. Nonetheless, even though this population is the more structurally proportionate, the recruitment of those seedling into the population is uncertain.

At the GCF, the subpopulation at Cañón Murciélagos (also known as Dinamita Trail) is relatively small (*i.e.,* 27 adults and 39 saplings (USFWS 2016, p. 8). Further assessment of the subpopulation at Cañón Las Eugenias (also known as Cueva Trail) in the GCF found 31 adults and 8 saplings (USFWS 2016, p. 8). A third subpopulation at Cañón Hoya Honda is predominantly composed of about 10 adult individuals (Monsegur-Rivera 2009–2018, pers. obs.). A total of 31 seedlings were found at Cañón Murciélagos (29), and Cañón Las Eugenias (2) (USFWS 2019, p. 8), but their current survival is unknown. The populations of Montes de Barinas, Punta Cucharas, and Camp Santiago are recent additions to the species' range, and further systematic inventories are needed in order to determine the extent and trends of these populations. Nonetheless, these very small populations are characterized by little or no recruitment (*e.g.,* Acevedo-Rodríguez 2014, p. 15).

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of threatened and endangered species unless we determine that such a plan will not promote the conservation of the species. Recovery plans are not regulatory documents and are instead intended to establish goals for long-term conservation of a listed species, define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act, and provide guidance to our Federal, State, and other governmental and non-governmental partners on methods to minimize threats to listed species. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may have been exceeded while other criteria may not have been accomplished, yet the Service may judge that, overall, the threats have been minimized sufficiently, and the species is robust enough, to reclassify the species from endangered to threatened or perhaps delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan.

Likewise, information on the species that was not known at the time the recovery plan was finalized may become available later. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Recovery of species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

The following discussion provides an analysis of the recovery criteria and goals as they relate to evaluating the status of the taxon.

Recovery Criteria

The recovery plan for this species did not provide downlisting criteria (USFWS 1998, entire). In 2019, the Service published an amendment to the original recovery plan, which amended the recovery criteria of this species by establishing that *Eugenia woodburyana* will be considered for delisting when the following criteria are met (USFWS 2019, p. 4): (1) Threat reduction and management activities have been implemented to a degree that the species will remain viable into the foreseeable future; (2) Existing natural populations of *E. woodburyana* (6 populations) show a stable or increasing trend, as evidenced by natural recruitment and multiple age classes; (3) Within the historic range, establish at least three (3) new populations of *E. woodburyana* on lands protected by a conservation mechanism that show a stable or increasing trend, evidenced by natural recruitment and multiple age classes. We apply our current understanding of the species' range, biology, and threats to these delisting criteria to support our rationale for why downlisting is appropriate.

Threat reduction and management activities described in delisting criterion number 1 have been partially met. Overall, about 47 percent of the currently known *Eugenia woodburyana* individuals occur within lands managed for conservation. As previously stated, the GCF is managed for conservation by PRDNER as recommended by the Master Plan for the Commonwealth Forests of Puerto Rico (DRN 1976, p. 56). In addition, *E. woodburyana* is currently listed as critically endangered under PRDNER regulations (PRDNER 2004, p. 52). Consequently, that agency reviews all proposed actions for the GCF that may adversely affect this and other listed species and their habitat within the forest. During an *E. woodburyana* rapid assessment conducted at the GCF, no changes in habitat or evidence of activities affecting this species were observed (USFWS 2017, p. 8). Thus, as *E. woodburyana* is protected in that forest, it appears to be stable based on consistent records of estimated individuals and because no modifications in the habitat that could affect the species have occurred lately (USFWS 2017, p. 8).

As for LCNWR, in 1996 the Service acquired La Tinaja Tract, a 263-ac (106.4-ha) piece of land in the foothills of Sierra Bermeja (USFWS 2011a, pp. 23, 26). This land is now protected and managed for the conservation of natural resources, with a comprehensive conservation plan that includes measures for the protection and recovery of threatened and endangered species, including *Eugenia woodburyana* (USFWS 2011a, p. 35, Service 2011b, p. 47). As part of an existing Service's Cooperative Recovery Initiative project, a new fence was built along the upper southeast and southwest boundaries of La Tinaja Tract to reduce the chances of habitat modification from cattle grazing (mostly trampling, which damages the species, erodes soil, and opens up space to invasive plant species), and allowing for the recovery of native vegetation.

Recovery actions like land acquisition and the establishment of conservation easements also have been undertaken to prevent habitat loss and degradation, and potential population decline. For example, PLN has two natural protected areas in Sierra Bermeja: The conservation easement Finca María Luisa (755.6 ac [305.8 ha]), and the Natural Protected Area El Conuco (37.4 ac [15.1 ha]) (PLN 2013, 85 pp.; PLN 2014, 58 pp.). As discussed above, both properties harbor subpopulations of *Eugenia woodburyana* (PLN 2014, p. 13; Envirosurvey 2020, p. 44). Habitat management practices implemented at El Conuco include cattle exclusion, firebreaks, and a reforestation plan, providing suitable conditions for natural recruitment and the expansion of the *E. woodburyana* population (PLN 2013, 85 pp.). However, in the case of the Finca María Luisa easement, the conservation practices included in the management plan developed by PLN for this property have not yet been implemented. The plan identifies the habitat that harbors *E. woodburyana* as a conservation area, and recommends the exclusion of cattle from those parcels (PLN 2014, pp. 36 and 56). The conservation easement also establishes that agricultural practices and urban development cannot be conducted on management units identified for conservation (PLN 2014, pp. 36 and 56). During an assessment of Finca María Luisa, we recommended the implementation of conservation actions such as cattle exclusion and establishments of firebreaks to protect *E. woodburyana,* and to avoid additional habitat degradation (USFWS 2014b, p. 3). At present, none of these actions have been implemented. The fourth *E. woodburyana* subpopulation in Sierra Bermeja (*i.e.,* Finca Lozada) remains under pressure of cattle grazing and trampling, competition with exotic grasses, human-induced fires, and bulldozing (Lange et al. 2017, p. 4; Monsegur-Rivera 2016, pers. obs.).

Information gathered post-listing indicated that the range of *Eugenia woodburyana* has expanded to new localities: Montes de Barinas, Almácigo Bajo, Punta Cucharas, and the Puerto Rico National Guard's Camp Santiago in the municipality of Salinas. These areas collectively comprise approximately 14 percent of the currently known number of adults and saplings of *Eugenia woodburyana.* However, all these locations are subject to habitat destruction or modification as described below in the section of biological status and threats, making the species vulnerable to habitat encroachment or even extirpation.

Therefore, we do not consider that threats reduction and management activities at Finca María Luisa, Finca Lozada, Montes de Barinas, Almácigo Bajo, Punta Cucharas, and the Puerto Rico National Guard's Camp Santiago have been implemented to a degree that these *Eugenia woodburyana* subpopulations are viable into the foreseeable future.

We look forward to improving implementation of management practices (*e.g.,* firebreaks, fencing, and reforestation) throughout the species' range, and to working with partners to continue monitoring *Eugenia woodburyana* and to survey suitable unexplored habitat in the forest in search for this species. We are also looking for opportunities to implement best management practices with private landowners to enhance habitat to establish additional *E. woodburyana* subpopulations.

We are showing increased progress in achieving Criterion 2 which requires that existing populations show a stable or increasing trend. The presence of different size classes in three (*i.e.,* Sierra Bermeja, Almácigo Bajo, and GCF) out of the six existing *Eugenia woodburyana* populations suggests certain degree of stability, and that the species has been resilient to past and current threats at these sites (*e.g.,* unsustainable agricultural practices, grazing, fires, invasive plant species). However, when considering the population structure, that stability has not been fully achieved.

For example, Sierra Bermeja is the largest known population, with 2,526 individuals, including seedlings, but the proportion of adults, saplings, and seedlings is 75, 14.5, and 10.5 percent, respectively. Despite it being the largest population, its structure is skewed towards adult individuals, with low frequency of saplings and seedlings (Envirosurvey 2020, pp. 51–52). Thus, it is reasonable to expect a reduced recruitment on this population, which can have negative implications for the long-term viability of the species. The relative low frequency of seedlings and saplings in this population may be the result of former and ongoing habitat modifications that have changed the microhabitat conditions favorable for *Eugenia woodburyana* (Envirosurvey 2020, p. 51–52). Under such habitat conditions it is unlikely the population can expand to adjacent native forest. In fact, recruitment is limited to the close proximity of parental trees, which is apparently driven by gravity in the drainages were the species is present (Morales-Pérez, 2013, p. 4).

Similar to Sierra Bermeja, the *E. woodburyana* population in the GCF is mostly found in drainages dominated by native forest vegetation, which provides adequate habitat conditions (*i.e.,* humidity) for the establishment of seedlings and saplings. However, there is little information about the ability of *E. woodburyana* to survive stochastic events such as landslides and heavy sediment runoff, particularly in these drainages. There is evidence of impacts on seedlings (*e.g.,* uprooting, covered by sediment) of other species that share habitat with *E. woodburyana* at the GCF due to runoff and sediments resulting from hurricane María in September, 2017 (Monsegur-Rivera 2018, pers. obs.). Hence, seedlings of *E. woodburyana* can also suffer these same impacts. Moreover, although this population may not face the same threats as in Sierra Bermeja because the habitat is protected, its expansion outside drainages may be limited by the dry climate of the forest as suggested for other areas (*e.g.,* Weaver and Chinea 2003, p. 281).

The Almácigo Bajo population appears to be relatively stable, with multiple age classes resulting from natural recruitment. The proportion of seedlings observed in Almácigo Bajo (38 percent) is higher than Sierra Bermeja (10.5 percent), and GCF (21 percent). Despite the relatively disturbed nature of this site, the population structure may be the result of the mesic understory conditions due to its geographical location in the transition between the subtropical dry and moist forest life zones (Ewel and Whitmore 1973, pp. 25 and 72).

In an effort to improve the conditions of existing populations of *Eugenia woodburyana,* the Service, PRDNER, and PLN have joint efforts to enhance or augment the natural population of Sierra Bermeja (*i.e.,* La Tinaja Tract and neighboring private lands). La Tinaja Tract was selected for planting based on its habitat suitability and reduced threats of habitat modification (protected land), and human-induced fires (existence of firebreaks), and to expand the natural subpopulation in that area. Despite past disturbances at this site, mainly due to cattle grazing, the area has recovered after over two decades of natural regeneration, as evidenced by a robust natural recruitment of native species (*e.g., Bucida buceras, Pisonia albida, E. spp.;* Envirosurvey 2017, p. 5). We estimate that a timeframe of 10–15 years is needed for the planted individuals to reach reproductive size. Planting to augment the number of individuals of natural populations will ensure the self-sustainability of the species and will help it withstand stochastic events (*e.g.,* severe droughts). Nonetheless, similar efforts need to be initiated at the GCF, Montes de Barinas, Punta Cucharas, and Almácigo Bajo to improve the species' status and secure its representation.

Based on the available information, despite the threats (*e.g.,* cattle grazing, fence posts harvesting) impacting the Almácigo Bajo population it is probably the closest to fulfilling this recovery criterion due to its relatively large number of individuals, multiple age classes, and geographic location. Therefore, efforts should be directed towards designing and implementing land conservation measures to address such threats at this site. In addition, the proximity of this population to suitable and protected habitat in the SCF provides favorable conditions for its natural expansion or for planting additional individuals to assist its expansion.

Criterion 3 is ongoing and requires the establishment of at least three new populations on lands protected by a conservation mechanism that show a stable or increasing trend. Currently, the Service and other partners have initiated the establishment of a new *Eugenia woodburyana* population at the CRNWR, where as of 2019, 191 *E. woodburyana* individuals had been planted (Envirosurvey 2020, p. 17). Here a drainage area was selected for planting this and other federally listed species (*e.g., Ottoschulzia rhodoxylon;* Envirosurvey 2020, p. 17). This habitat is forested with native vegetation, has low intrusion of exotic grasses (*e.g., Megathyrsus maximus*), and provides moisture that would facilitate the establishment of seedlings. Also, the CRNWR maintains firebreaks along the boundaries of the refuge, which help protect this site from human-induced fires. Two years of monitoring after planting have shown a survival rate greater than 96 percent (Envirosurvey 2020, p. 17), demonstrating that the proper selection of reintroduction sites is critical to maximize the survival of planted material. Further efforts are needed to establish two new self-sustainable populations within the species' range.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is

''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The 5-year review (USFWS 2017) documents the results of our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The following is a summary of the key results and conclusions from the 5-year review and information gathered since that time. The 5-year review can be found at Docket FWS–R4–ES–2019–0070 on *http://www.regulations.gov.*

Summary of Biological Status and Threats

Habitat destruction and modification (Factor A) were identified as factors affecting the continued existence of *Eugenia woodburyana* when it was listed in 1994 (59 FR 46715, September 9, 1994). The suitable habitat for *E. woodburyana* on privately owned lands at mid elevations and gentle slopes in Sierra Bermeja had been largely modified or destroyed through deforestation mainly for agricultural practices (*i.e.,* cattle and goats grazing), and some urban development (*i.e.,* construction of houses, and roads), thus affecting the species' recruitment in those areas (USFWS 1998, p. 6). As previously discussed, the Sierra Bermeja range comprises the core known natural population of *E. woodburyana,* with about 82 percent of the currently known adults and saplings being found in this area. Most of this mountain range was zoned by the Puerto Rico Planning Board as a District of Conservation of Resources and Rustic Soil Specially Protected, which has specific restrictions on development activities in order to protect the natural resources of the area (JPPR 2009, pp. 151–153). This zoning designation allows agricultural activities and construction of residential development (JPPR 2009, p. 151; JPPR 2015, pp. 118–129). Therefore, landowners continue to affect the habitat through activities like cutting new access roads on their properties (Pacheco and Monsegur-Rivera 2017, pers. obs.). In addition, deforestation for agricultural practices (*e.g.,* conversion of forested habitat to pasturelands) has led to invasion of exotic species like guinea grass (*Megathyrsus maximus*), thus promoting favorable conditions for wildfires that further adversely affect *E. woodburyana* habitat (Weaver and Chinea 2003, p. 281). Also, cattle, horses, and goats graze all over the Sierra Bermeja range, causing habitat modification by making trails while foraging on the slopes, which also increases erosion (Morales-Pérez, 2013, p. 4, Envirosurvey 2016, p. 9; Lange et al. 2017, p. 4; Envirosurvey 2020, p. 49). Cattle grazing has resulted in direct impacts to *E. woodburyana* due to predation and trampling of seedlings (Lange et al. 2017, p. 4). In fact, cattle trails were observed through a patch of *E. woodburyana* at Finca María Luisa, and at La Tinaja Tract horses trampled several planted individuals of the species (Morales-Pérez 2013, p. 7; Envirosurvey 2016, p. 8). Such impacts (*e.g.,* trampling and predation) from livestock is likely one of the reasons for the low number of seedlings of *E. woodburyana* in Sierra Bermeja (Envirosurvey 2020, p. 49).

Currently, two of the four subpopulations in Sierra Bermeja are protected since they occur on lands managed for conservation (*i.e.,* La Tinaja Tract and El Conuco), representing approximately 43 percent of all known adults and saplings. The remaining two subpopulations (*i.e.,* Finca María Luisa and Finca Lozada) represent about 39

percent of all known adults and saplings, and are subject to habitat destruction and modification for agricultural practices, which most likely has eliminated some *Eugenia woodburyana* individuals (USFWS 2017, p. 18). Based on a comparison of a recent aerial photograph (2019) of this area, habitat modification through bulldozing has occurred within the area identified for conservation in the conservation easement of Finca María Luisa (Monsegur-Rivera 2019, pers. obs.; PLN 2013, p. 56). In addition to direct impacts to the species, bulldozing results in habitat fragmentation and degradation that change the microhabitat conditions needed for the successful recruitment of *E. woodburyana.* It also facilitates the invasion of exotic plant species such as guinea grass (*Megathyrsus maximus*) that compete with *E. woodburyana* and promote favorable conditions for wildfires.

The *Eugenia woodburyana* populations at Punta Cucharas, Montes de Barinas, and Almácigo Bajo occur in privately owned lands that are vulnerable to habitat modification. For example, the habitat in the municipalities of Peñuelas and Ponce, including the area of Punta Cucharas, has been severely fragmented by urban development (79 FR 53303, September 9, 2014). In this area, the species occurs in at least three forested drainages located just north and close to highway PR 2, or adjacent to the right of way of a power line from the Puerto Rico Electric and Power Authority. Urban development has expanded north of highway PR 2, modifying the suitable habitat for the species (USFWS 2017, p. 20). On October 4, 2011, areas that harbored *E. woodburyana* individuals at Puerto Galexda (Ponce-Peñuelas) were bulldozed, and some individuals were gone (USFWS 2017, p. 20). We observed that sediment runoff from adjacent urban development was covering the bottom of the drainage and likely precluding the recruitment of *E. woodburyana* seedlings as the sediment buries the small plants and seeds (USFWS 2011, p. 3).

In Montes de Barinas, *Eugenia woodburyana* occurs on private properties subject to urban development, resulting in the encroachment of native dry forest areas, and thus in the isolation and possible extirpation of *E. woodburyana* individuals. These areas also are threatened by deforestation for cattle grazing and for the extraction of fence posts (Román-Guzmán 2006, pp. 1–2; Monsegur-Rivera 2005, pers. obs.; 79 FR 53303).

The *Eugenia woodburyana* population at Almácigo Bajo Ward in Yauco is located in a small forested drainage in a parcel of land used for cattle grazing, and adjacent to an abandoned quarry (USFWS 2017, p. 19). Approximately 80 percent of the property was cleared of vegetation and its surroundings are under pressure by agricultural and urban development (USFWS 2017, p. 19). Also, the reactivation of the quarry could negatively affect this population, which is less than 50 meters (164 ft) away in an adjacent natural drainage by further modifying the habitat or by direct impacts to the species (USFWS 2017, p. 19). In 2008, 72 seedlings and saplings of *E. woodburyana* were found in a human-made ditch located approximately 45 meters (148 ft) downhill of the Almácigo Bajo population (USFWS 2017, p. 19). A total of 46 saplings from this area were transplanted into the SCF to avoid being impacted by a project from the Puerto Rico Aqueduct and Sewage Authority (USFWS 2017, p. 11). The latest account of the success of the transplanting effort indicates that only 11 individuals survived, but appeared to be in good condition (USFWS 2017, p. 11). Habitat modification and adverse impacts to *E. woodburyana* individuals also have been documented as a result of extraction of fence posts from this site (Monsegur-Rivera 2011–2017, pers. obs.). The recently discovered site at Camp Santiago in Salinas is owned by the Puerto Rico National Guard (Acevedo-Rodriguez 2014, p. 15). The areas covered by vegetation at this camp are frequently impacted by human-induced fires, which compromise the survival of *E. woodburyana* (Acevedo-Rodriguez 2014, p. 15). According to Acevedo-Rodriguez (2014, p. 2), the predominant vegetation type are grasslands dominated by guinea grass, which are maintained by human-induced fires and grazing animals.

The area of Peñones de Melones in Cabo Rojo is the only historical site for which the Service has strong evidence that *Eugenia woodburyana* was extirpated. In 1996, an estimate of about 20 individuals of *E. woodburyana* was provided for this area (Breckon 1996, unpublished data). Approximately 80 percent of the suitable habitat for this species in Peñones de Melones has been impacted by residential and tourist development, and by agricultural practices such as livestock grazing (USFWS 2017, p. 18). These practices have resulted in habitat modification and degradation, soil erosion, and the extirpation of *E. woodburyana.* Only about 20 percent of the Peñones de Melones area remains in secondary forest, and the area is under potential development pressure from two projects: Bahía de Campomar and Monte Carlo Resort-Boquerón Bay Villas (USFWS 2017, p. 18). These two projects could affect approximately 510 acres (206.4 ha) of suitable habitat that could harbor undetected *E. woodburyana* individuals. Both projects were proposed more than 10 years ago and have not been developed; however, we have no information indicating that development plans were abandoned.

Human-induced fires have been documented in *Eugenia woodburyana* habitat, and were considered a threat to the species when listed (59 FR 46715, September 9, 1994; USFWS 2017, p. 23). Fires are not a natural event in the subtropical dry forests in Puerto Rico, and the native vegetation in the Caribbean is not adapted to this type of disturbance (Brandeis and Woodall 2008, p. 557; Santiago-García *et al.* 2008, p. 604). Human-induced fires could modify the landscape by promoting the establishment of exotic trees and grasses, and by diminishing the seed bank of native species (Brandeis and Woodall 2008, p. 557). For example, the exotic guinea grass is well adapted to fires and typically colonizes areas previously covered by native vegetation before a fire event. Furthermore, the presence of guinea grass and other grass species increases the amount of fuel, hence the intensity of the fires. Seedling mortality after fires is related to the differences in fuel loads and different fire intensities (Santiago-García *et al.* 2008, p. 607).

Eugenia woodburyana populations occur on the driest region of Puerto Rico where fires are sometimes ignited accidentally or deliberately, particularly during the dry season. Human-induced fires are a current threat to this and other native vegetation in Sierra Bermeja, Almácigo Bajo, Punta Cucharas, and Camp Santiago in Salinas (Envirosurvey 2020, p. 52). For example, the lowlands and gentle slopes of Sierra Bermeja are subject to human-induced fires on a yearly basis, encroaching on *E. woodburyana* and other native vegetation in this habitat (Monsegur-Rivera 2009–2019, pers. obs.; Envirosurvey 2020, p. 46). In May 2019, a large wildfire extended from the southern lowlands of Sierra Bermeja to the upper forested hills into El Conuco, affecting an undetermined number of individuals of *E. woodburyana,* encroaching suitable habitat of the species (Envirosurvey 2020, p. 52). In La Tinaja Tract, LCNWR staff maintains firebreaks on the lower slopes, reducing

the chance of fires reaching the upper part of the tract.

Fires also have occurred in *Eugenia woodburyana* habitat in Punta Cucharas, between the municipalities of Ponce and Peñuelas. Habitat disturbance due to urban development and the expansion of highway PR 2 in this area has promoted the establishment of guinea grass, resulting in favorable conditions for the occurrence of human-induced fires in the proximity of *E. woodburyana* (Monsegur-Rivera 2011 and 2013, pers. obs.). Camp Santiago is another area where fires have been identified as a threat to *E. woodburyana* due to anthropogenic disturbance (Acevedo-Rodríguez 2014, p. 15), and fires occur in the proximity of *E. woodburyana* basically on a yearly basis (Monsegur-Rivera 2009–2018, pers. obs.).

At the GCF, *Eugenia woodburyana* seems to be protected from fires as the species mostly occurs in mesic (humid) drainages dominated by native forested vegetation where the risk of fires is low (Monsegur-Rivera 2011, pers. obs.).

Nonnative plant species are another threat to *Eugenia woodburyana.* Some nonnative plants can be very aggressive and compete with native species for sunlight, nutrients, water, and ground cover (79 FR 53309, September 9, 2014). In fact, the impacts of invasive species are among the greatest threat to the persistence of native rare species and their habitat (Thomson 2005, p. 615). The exotic tree *Leucaena leucocephala* can remain as a dominant canopy species for at least 80 years (Wolfe 2009, p. 2). Other exotic species like guinea grass are known to colonize habitat and suppress native vegetation (Rojas-Sandoval and Meléndez-Ackerman 2013, p. 489). Both *L. leucocephala* and guinea grass are fire-adapted species that have widely colonized *Eugenia woodburyana* habitat and outcompete native vegetation (Monsegur-Rivera 2018, pers. obs.; Envirosurvey 2020, p. 46). In addition, some exotic plants create favorable conditions for fires, as in Camp Santiago in Salinas where degraded habitat is dominated by guinea grass, threatening *E. woodburyana* (Acevedo-Rodríguez 2014, p. 15).

As demonstrated by the research conducted in the GCF, restoring degraded habitat to native vegetation may require decades, and in some cases, such damage may be irreversible (Wolfe 2009, p. 2). Although the core *Eugenia woodburyana* individuals are found in protected areas dominated by native forest vegetation rather than invasive species, the threat of invasive or exotic plant species intruding into *E. woodburyana* habitat persists due to the vulnerability of the area to fires as explained above.

Based on the above information we believe that human-induced fires and invasive plants are a threat to *Eugenia woodburyana,* particularly to those populations extending into private lands where habitat modifications and human-induced fires commonly occur.

In summary, at present the *Eugenia woodburyana* population at the GCF occurs within an area managed for conservation, and thus it is not subject to habitat destruction and modification. The Sierra Bermeja population is the largest, and is partially protected as part of the individuals occur either in Federal (*i.e.,* La Tinja Tract-LCNWR) or private lands managed for conservation (*i.e.,* El Conuco). The remaining four populations (*i.e.,* Almácigo Bajo, Montes de Barinas, and Punta Cucharas and Camp Santiago) occur on private and State lands currently threatened by habitat destruction and modification (*e.g.,* urban development, vegetation clearing, road construction, grazing and trampling by cattle, horses, and goats, and military maneuvers (*i.e.,* Camp Santiago)). Losing these populations would result in a reduction of the genetic representation and redundancy of the species. In addition, human-induced fires and invasive species are considered as further stressors to the viability of *E. woodburyana.* Human-induced fires have been documented in *E. woodburyana* habitat, particularly on private lands where no fire management practices are implemented, and have the potential to adversely affect the species. Invasive species can preclude the establishment of *E. woodburyana* as they are very successful competing for sunlight, nutrients, water, and ground cover. Establishment of invasive species is facilitated by disturbances caused by fires and habitat modification. Fortunately there are *E. woodburyana* subpopulations in protected areas dominated by native forest vegetation that does not facilitate the invasion of exotic plant species. However, in lands where habitat modification activities do occur, invasive plant species colonize and make the habitat unsuitable for *E. woodburyana,* and also promote conditions for fires.

In the final listing rule, we identified the inadequacy of existing regulatory mechanisms (Factor D) as one of the factors affecting the continued existence of *Eugenia woodburyana.* At that time, the species had no legal protection because it had not been included in Puerto Rico's list of protected species. Once *E. woodburyana* was federally listed, it triggered the addition of the species as endangered to the Commonwealth's list of protected species. Thus, Federal listing assured the addition of *E. woodburyana* as endangered to the Commonwealth's list of protected species (DRNA 2004, p. 52).

Presently, *Eugenia woodburyana* is legally protected under Commonwealth's Law No. 241–1999 (12 L.P.R.A. Sec. 107), known as *Nueva Ley de Vida Silvestre de Puerto Rico* (New Wildlife Law of Puerto Rico). The purpose of this law is to protect, conserve, and enhance both native and migratory wildlife species; declare property of Puerto Rico all wildlife species within its jurisdiction; and regulate permits, hunting activities, and exotic species, among other activities. This law also has provisions to protect habitat for all wildlife species, including plants. In 2004, the PRDNER approved Regulation 6766 or *Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extinción en el Estado Libre Asociado de Puerto Rico* (Regulation 6766: To govern the management of threatened and endangered species in the Commonwealth of Puerto Rico). Article 2.06 of Regulation 6766 prohibits collecting, cutting, and removing, among other activities, listed plant individuals within the jurisdiction of Puerto Rico (DRNA 2004, p. 11). The provisions of Law No. 241 and Regulation 6766 extend to private lands.

As for the individuals found at the GCF, this area is protected under Law No. 133–1975 (12 L.P.R.A. Sec. 191), known as *Ley de Bosques de Puerto Rico* (Puerto Rico Forests' Law), as amended in 2000 (12 L.P.R.A. Sec. 191b). Section 8(a) of this law prohibits cutting, killing, destroying, uprooting, extracting, or in any way hurting any tree or vegetation within a Commonwealth forest (12 L.P.R.A. Sec. 191f). The PRDNER also identified the GCF as a Critical Wildlife Area (CWA). The CWA designation constitutes a special recognition by the Commonwealth with the purpose of providing information to Commonwealth and Federal agencies about the conservation needs of these areas, and to assist permitting agencies in precluding adverse impacts as a result of a project's endorsements or permit approvals (PRDNER 2005, pp. 211–216).

The LCNWR and CRNWR are managed in accordance with the National Wildlife Refuge Improvement Act of 1997. Collection of plants is prohibited per 50 CFR 27.51 as well as per the Endangered Species Act. Additionally, the comprehensive conservation plans for LCNWR and CRNWR include measures for the protection and recovery of threatened

and endangered species, including *Eugenia woodburyana,* within these Refuges (USFWS 2011a, p. 35; USFWS 2011b, p. 47).

Although there are legal mechanisms in place for the protection of *Eugenia woodburyana* (*e.g.,* laws, regulations, zoning), sometimes the enforcement of such mechanisms on private lands is challenging (*e.g.,* USFWS 2019, pp. 29–31). For example, accidental damage (*e.g.,* by cutting, pruning, or mowing) or even extirpation of *E. woodburyana* individuals may occur because private landowners may not be aware that it is a protected species (*e.g.,* fence posts harvesting in Almácigo Bajo (USFWS 2016, p. 8)). Another form of impact is from agriculture; for example, zoning may restrict subdivision of lots and dense urbanization in some areas where the species is present, but may allow agricultural practices that can result in habitat modification that can affect *E. woodburyana.* On the other hand, the knowledge of the natural range of *E. woodburyana* has increased since the time of listing. The species has been recorded in new areas subject to agriculture and urban development (USFWS 2016, entire; USFWS 2017, pp. 18–21). In such cases, despite the existence of regulatory mechanisms, habitat modification has occurred in these newly documented areas (*e.g.,* Almacigo Bajo site; USFWS 2017, pp. 18–21).

Outside of the protections provided by the Act, as described above, the species is protected from collection and provided management considerations by the National Wildlife Refuge Improvement Act on two refuges. In addition, the Commonwealth of Puerto Rico legally protects *Eugenia woodburyana* as an endangered species, including protections to its habitat, through Commonwealth Law No. 241 and Regulation 6766. If *E. woodburyana* is reclassified, we do not expect it to be removed from legal protection by the Commonwealth. Although these protections extend to both public and private lands, protection of this species on private land is challenging. Habitat that occurs on private land is subject to pressures like grazing and development. Accidental damage or extirpation of individuals has occurred due to lack of awareness by private landowners or other parties on the property (Román-Guzmán 2006, pp. 25–33; USFWS 2016, entire). Habitat modifications continue to occur on private lands, which can increase the chances of sediment runoff and human-induced fires (and subsequent spread of nonnative vegetation). In short, this plant is now more abundant and widely distributed and largely in conservation land, so effects due to inadequacy of regulatory mechanisms has been reduced. However, the occurrences of this species on private land continue to need enforcement, attention, and increased outreach to explain its importance.

At the time of listing, the Service considered small population size (Factor E) as a threat affecting the continued survival of *Eugenia woodburyana* (59 FR 46715, September 9, 1994) based on species' limited distribution (*i.e.,* only three isolated populations known at that time) coupled with low number of individuals (*i.e.,* only 45 individuals throughout the species' range). Information about the distribution and abundance gathered since this species was listed reflects that *E. woodburyana* is more abundant and widely distributed than previously thought (USFWS 2017, entire). Thus, we no longer consider limited distribution and low population numbers as threats to this species. Even though some of the known populations are small (*e.g.,* Montes de Barinas), there are other populations with large numbers of individuals (*e.g.,* Sierra Bermeja), and that show recruitment (*e.g.,* Almácigo Bajo), which with proper management will allow the species to persist into the future even if one of the very small populations is adversely affected.

Hurricanes and Other Weather Events (Factor E)

The islands of the Caribbean are frequently affected by hurricanes. Puerto Rico has been hit by four major hurricanes in recent years: Hugo (1989), Hortense (1996), Georges (1998), and most recently, María (2017). Successional responses to hurricanes can influence the structure and composition of plant communities in the Caribbean islands (Van Bloem *et al.* 2003, p. 137; Van Bloem *et al.* 2005, p. 572; Van Bloem *et al.* 2006, p. 517; Lugo 2000, p. 245). Examples of the visible effects of hurricanes on the ecosystem include massive defoliation, snapped and wind-thrown trees, large debris accumulations, landslides, debris flows, and altered stream channels among others (Lugo 2008, p. 368). Hurricanes can produce sudden and massive tree mortality, which varies among species, but average about 41.5 percent (Lugo 2000, p. 245). Hence, small populations of *Eugenia woodburyana* may be severely impacted by hurricanes, even resulting in extirpation of relic individuals. The recent hurricane María caused defoliation and uprooting of some *E. woodburyana* individuals planted at the CRNWR, and even though none have died, they are stressed due to the damage to the root system (Monsegur-Rivera, Service 2017, pers. obs.).

As an endemic to the Caribbean, *Eugenia woodburyana* is adapted to tropical storms and the prevailing environmental conditions. However, the reduced number of populations, and the small numbers of individuals in some populations (*e.g.,* Camp Santiago and Montes de Barinas), make the species more vulnerable to stochastic and catastrophic events such as hurricanes. Based on observations of the damage caused by hurricane María, small *E. woodburyana* populations such as those of the GCF, Montes de Barinas, Punta Cucharas, and Camp Santiago, may be extirpated if any of those areas is directly impacted by a category 4 or 5 hurricane that will cause high levels of wind, knocking over trees or uprooting them leading to stress or possible death. Therefore, we believe hurricanes can be a threat to *E. woodburyana,* particularly to small populations dominated by adult reproductive individuals, as the intensity and frequency of these natural disturbances is expected to increase due to climate change (see *Climate Change,* below).

Landslides and sediment runoff associated with atmospheric disturbances may also pose a threat to *Eugenia woodburyana,* particularly in Sierra Bermeja, GCF, Punta Cucharas, and Almácigo Bajo (Morales-Pérez 2013, pp. 5 and 12). At these locations, adult mature individuals, as well as seedlings and saplings, are mostly found on steeper slopes or along the bottom of deep natural drainages (USFWS 2016, p. 5). High rainfall associated with tropical storms and hurricanes may cause floods that, in combination with steep topography and highly erodible soils, may lead to mass wasting events (*e.g.,* land, mud, and debris slides; Lugo 2008, p. 368). In fact, in September 2009, three landslides resulting from heavy rains were recorded in Sierra Bermeja adjacent to the area where *E. woodburyana* occurs (USFWS 2010, p. 16). Moreover, Envirosurvey (2020, p. 51) observed that runoff and erosion exposed the roots of *E. woodburyana* in Sierra Bermeja (Envirosurvey, p. 51). As mentioned above, the Service has evidence of impacts to seedling recruitment by sediment runoff from adjacent urban development in the area of Punta Cucharas in Ponce (O. Monsegur-Rivera and R. González, 2011, p. 2). Events like this may be exacerbated by severe rains associated with hurricanes or storms. Recent observations identified uprooted and buried seedlings of the endangered Palo de Rosa (*Ottoschulzia rhodoxylon*) and

Bariaco (*Trichilia triacantha*), which shares habitat with *E. woodburyana* in the GCF, due to sediment runoff and flooding events associated with hurricane María on September 20, 2017 (Monsegur-Rivera 2018, pers. obs.). Similar observations have been recorded from the area of Punta Cucharas, where seedlings of Bariaco were adversely affected by sediment runoff (USFWS 2011, entire). There is little information about *E. woodburyana's* ability to survive stochastic events like landslides and heavy sediment runoff. However, the small size of some populations and the seedling establishment on moist drainages mean that events such as those mentioned may have adverse impacts on this species.

Effects of Climate Change (Factor E)

The Intergovernmental Panel on Climate Change (IPCC) concluded that evidence of warming of the climate system is unequivocal (IPCC 2014, p. 3). Observed effects associated with climate change include widespread changes in precipitation amounts and aspects of extreme weather including droughts, heavy precipitation, heat waves, and a higher intensity of tropical cyclones (IPCC 2014, p. 4). Rather than assessing climate change as a single threat in and of itself, we examined the potential consequences to the species viability and its habitat that arises from changes in environmental conditions associated with various aspects of climate change. Based on what it is known about the distribution of *Eugenia woodburyana* and the habitat where it is more abundant (*i.e.,* steep slopes and bottom of deep natural drainages), we believe climate change can have adverse effects on this species, particularly in its natural recruitment, hence populations expansion.

We examined a downscaled model for Puerto Rico based on three IPCC global emissions scenarios from the CMIP3 data set: Mid-high (A2), mid-low (A1B), and low (B1) as the CMIP5 data set was not available for Puerto Rico at that time (Khalyani et al. 2016, pp. 267 and 279–280). These scenarios are generally comparable and span the more recent representative concentration pathways (RCP) scenarios from RCP4.5 (B1) to RCP8.5 (A2) (IPCC 2014, p. 57). Under all these scenarios, emissions increase, precipitation declines, and temperature and total dry days increase, resulting in extreme drought conditions that would result in the conversion of sub-tropical dry forest into dry, and very dry forest (Khalyani et al. 2016, p. 280).

Modeling shows dramatic changes to Puerto Rico through 2100, the divergence in these projections increases dramatically after mid-century, making projections beyond 20 to 30 years more uncertain (Khalyani et al. 2016, p. 275). By mid-21st century, Puerto Rico is predicted to be subject to a decrease in rainfall, along with increase drought intensity (Khalyani et al. 2016 p. 265, U.S. Global Change Research Program (USGCRP) 2018, 20:820). As precipitation decreases influenced by warming, it will tend to accelerate the hydrological cycles, resulting in wet and dry extremes (Jennings et al. 2014, p. 4; Cashman et al. 2010, p. 1). There are indications that the western region of Puerto Rico, where *Eugenia woodburyana* occurs, has experienced negative trends in annual rainfall (PRCC 2013, p. 7). Downscaled general circulation models (GCMs) developed by Khalyani et al. (2016, p. 275) predicted dramatic shifts in the life zones of Puerto Rico with potential loss of subtropical rain, moist, and wet forest, and the appearance of tropical dry, and very dry forests are anticipated. This shift in life zones may result in potential species migration to higher elevations, however the extend of the species ability to redistribute will depend on their dispersal capability and forest connectivity (Khalyani et al. 2019, p. 11). Subtropical dry forests are already subject to water deficit for ten months of the year and are expected to become drier in the future, particularly in the Caribbean where oceans have a largest influence on local precipitation, climate models consistently project significant drying by the middle of the century (Miller and Lugo 2009, p. 86, USGCRP 2018, 20:820). For example, droughts may compromise seedling recruitment as it may reduce seed viability and result in increased seedling mortality. We have already seen a low proportion of *E. woodburyana* seedlings and saplings at lower elevations and outside drainages in areas like Sierra Bermeja and Punta Cucharas that are probably associated with anthropogenic impacts (*e.g.,* human-induced fires, habitat modification). The inability of *E. woodburyana* to migrate to moister habitats due to low seed dispersal capability and the lack of forest connectivity would reduce its survival.

Prolonged droughts can exacerbate those anthropogenic impacts by changing the microclimate conditions (*i.e.,* temperature and soil moisture retention) favorable for the establishment of seedlings, hence reducing the recruitment of *Eugenia woodburyana.* In Almácigo Bajo, where the Service has recorded a high proportion of seedlings and saplings compared to adults (Monsegur-Rivera 2009–2018, pers. obs.; table 1), mesic (humid) environmental conditions favor the natural recruitment of the species, contrasting with the low proportion of seedlings versus adult individuals of Sierra Bermeja (despite the partial protection of the habitat), where overall environmental conditions are drier. The lowlands and valleys surrounding Sierra Bermeja were covered by continuous forest, and these areas were deforested for agriculture, thus changing the microhabitat conditions and the moisture retention of the habitat, which are the natural conditions in which *E. woodburyana* evolved. For example, the populations of *E. woodburyana* at El Conuco that are located on the south-facing slope and more disturbed sites, show basically no recruitment when compared to the individuals of the same populations located on the north-facing slopes, which is a dense forested habitat with moist conditions and less intrusion by exotic species.

Climate model simulations indicate an increase in global tropical cyclone intensity as well as an increase in the number of very intense tropical cyclones (USGCRP 2018, 2:8). Thus, it is expected that the Caribbean will experience an increase in the amount of precipitation and extreme winds produced during hurricane events (Herrera et al. 2018, p. 1). Hurricanes, followed by extended periods of drought caused by climate change, may result in changes to microclimate that could allow other highly adaptive invasive species to get established and become harmful to the system (Lugo 2000, p. 246, Hopkinson et al. 2008, p. 255, IPCC report 2018, p. 244). In fact, as stated above, species like the exotic guinea grass can colonize and spread into *Eugenia woodburyana* habitat after a disturbance, increasing fire propensity and altering microclimate and nutrient cycling of the habitat on which this species depends. Additionally, increased heavy precipitation can augment the probability of landslides and sediment runoff in those steep areas where *E. woodburyana* is abundant and severely affect the species (Morales-Pérez 2013, pp. 5 and 12). In general, the increasing hurricane intensity and frequency, coupled with *E. woodburyana* showing reduced populations, low number of individuals in most populations, low recruitment rate, and habitat degradation and fragmentation, is likely to have adverse consequences for this species and its habitat.

As stated above, projected climate conditions will likely have direct or at least indirect adverse effects on *Eugenia*

woodburyana and its habitat. Some general patterns associated with forest ecosystems in Puerto Rico (PRCC 2013, p. 14), and that can be reflected on *E. woodburyana* are as follows: Increased seasonality in precipitation and decreased soil moisture availability will alter flowering and fruiting patterns, affecting seedlings germination and survival, which will result in changes in forest's species composition, structure, and ecological functions. Also, an increment in intense storms will increase disturbance, hence, will cause changes in plant successional direction and biomass, leading to novel communities (likely dominated by exotic plant species).

Despite the evidence that some terrestrial plant populations have the ability to adapt and respond to changing climatic conditions (Franks *et al.* 2013, entire), a sound long-term monitoring of known *Eugenia woodburyana* populations is needed to determine whether this species will have the ability to cope with the stressors indicated above and adapt to such changes.

In summary, the limited distribution and low number of individuals were considered a threat to *Eugenia woodburyana* when listed. Recent information indicates the species is more abundant and widely distributed than previously thought. Currently, other natural and manmade factors, such as hurricanes and climate change are considered stressors to *E. woodburyana.*

Hurricanes can result in massive mortality of trees, and particularly can affect or even extirpate small populations of *Eugenia woodburyana.* Hurricane María caused defoliation and uprooting of *E. woodburyana* individuals at the CRNWR (Monsegur-Rivera 2017, pers. obs.). Stochastic events, such as landslides and heavy sediment runoff, particularly caused by hurricanes, also can threaten *E. woodburyana* because of the occurrence of core populations of this species in steep areas in Sierra Bermeja where landslides have been documented near them.

Also, it is expected that *Eugenia woodburyana* will be affected by changes in climatic conditions. Effects associated with climate change include droughts, heavy precipitation, and intense tropical storms and hurricanes. For *E. woodburyana,* a reduction in precipitation in a subtropical dry forest where precipitation is already reduced, compromise its phenology, seed viability, seedling recruitment, and seedling survival. Intense hurricanes, followed by extended periods of drought may result in changes in microclimate conditions that can favor the establishment invasive species that can compete with *E. woodburyana.* Additionally, increased heavy precipitation during hurricanes can produce landslides and sediment runoff in steep areas where *E. woodburyana* occurs, affecting its survival and recruitment (Morales-Pérez 2013, pp. 5 and 12; Envirosurvey 2020, p. 51). Moreover, extreme wind events may result in the direct mortality of individuals and extirpation of small populations (*e.g.,* Montes de Barinas and Salinas). Overall, the effects of a changing climate on *E. woodburyana* can be exacerbated by its reduced number of populations, low number of individuals in most populations, and habitat degradation and fragmentation, which can affect the viability of the species into the future.

Overall Summary of Factors Affecting *Eugenia woodburyana*

We have carefully assessed the best scientific and commercial information available regarding the threats faced by *Eugenia woodburyana* in developing this proposed rule. Based on the analysis above, even though we no longer consider limited distribution as a threat to this species, we believe that habitat destruction and modification (*e.g.,* forest conversion into pasturelands) on privately owned lands, and other factors such as human-induced fires, livestock, invasive plant species, hurricanes, and climate change (droughts), continue to threaten *E. woodburyana* populations despite these threats being reduced in some areas.

Species viability, or its ability to survive long term, is related to the species' ability to withstand catastrophic population and species-level events (redundancy), to adapt to changing environmental conditions (representation), and to withstand disturbances of varying magnitude and duration (resiliency). The viability of a species is also dependent on the likelihood of new stressors or continued threats now and in the future that act to reduce a species' redundancy, representation, and resiliency. Redundancy of populations is needed to provide a margin of safety for a species to withstand catastrophic events.

We further evaluated the biological status of this species both currently and into the future, considering the species' viability as characterized by its resiliency, redundancy, and representation (*i.e.,* 3Rs). *Eugenia woodburyana* has demonstrated to be resilient to both natural and anthropogenic disturbances. However, although adult individuals have overcome stochastic events such as droughts, seedlings are susceptible to the effects of droughts and habitat modification, which can affect the recruitment and long-term viability of *E. woodburyana.*

Currently, three (*i.e.,* Sierra Bermeja, GCF, and Almácigo Bajo) of the six known *Eugenia woodburyana* populations show some degree of natural recruitment. The observed resiliency of the species may have been achieved by the availability of suitable habitat where some of the subpopulations are found, which have allowed some recruitment. Thus, in order to maintain and improve such resiliency, habitat protection and enhancement to increase connectivity between subpopulations are important to maximize the likelihood of crosspollination and gene flow, and to increase fruit production, viable seeds, and the chances of natural recruitment. In addition, in order to secure the long-term resiliency of *E. woodburyana,* remaining small and isolated populations (*i.e.,* Monte Barinas, Punta Cucharas, and Camp Santiago) need to be enhanced and protected.

In terms of the representation of *Eugenia woodburyana,* we have no data on its genetic variability. This species occurs in a wide range of habitats and environmental conditions, suggesting that the species was widely distributed in the past and it may have an ample genetic plasticity that would allow the species to adapt to different habitat and environmental changes. However, although the *E. woodburyana* is still thriving in these environments, its representation basically relies on the genetic contribution of only two populations—Sierra Bermeja and GCF—as a result of the connectivity among subpopulations in these two areas. The remaining four populations are isolated, with only a very few individuals and lack of recruitment, except for the Almácigo Bajo population. However, this population occurs on a private land adjacent to a former quarry and where harvesting of *E. woodburyana* and other species for fence posts has been documented (USFWS 2017, p. 19). The loss or reduction of the Almácigo Bajo population would represent an important impact to the species' conservation due to its higher recruitment rate, and its presumed genetic uniqueness as it is the only one occurring within the subtropical moist forest life zone. Three of the known populations are small in numbers, isolated, and not effectively reproducing. Therefore, we believe the

overall representation of *E. woodburyana* is low to moderate.

We consider that *Eugenia woodburyana's* redundancy has increased since listing, but remains low to moderate as it is only known from six populations throughout its geographical range. Moreover, three of these populations—Montes de Barinas (1 individual), Punta Cucharas (30 individuals), and Camp Santiago (1 individual)—are very small with no current evidence of natural recruitment, making them more vulnerable to catastrophic and stochastic events such as human-induced fires, hurricanes, and droughts, which affect seedling establishment (Acevedo-Rodríguez 2014, p. 15). In fact, E. woodburyana has not been observed naturally expanding or colonizing into degraded habitat outside the areas where it is known to occur, particularly where the largest populations are found (*i.e.,* Sierra Bermeja, GCF, and Almácigo Bajo). The populations on Montes de Barinas and Camp Santiago are the most vulnerable to extirpation if not managed and enhanced. The loss of the Montes de Barinas, Punta Cucharas, and Camp Santiago individuals (the easternmost populations) will reduce the redundancy of the species.

Although population numbers and abundance of *Eugenia woodburyana* have increased, and some identified threats have decreased, our analysis indicates that, because of the remaining threats and stressors, the species remains likely to become in danger of extinction in the foreseeable future throughout all of its range. Based on biological factors and stressors to the species viability, we consider 30 years to be the foreseeable future within which we can reasonably determine the identified threats and the species response to those threats is likely. The foreseeable future for the individual threats vary. Projections out to the year 2100 show increases in temperature and decreases in precipitation (Khalyani et al. 2016, pp. 274–275). However, divergence in temperature and precipitation projections increases dramatically after mid-century, depending on the scenario (Khalyani et al. 2016, p. 275), making projections beyond 20 to 30 years uncertain. Therefore, our ability to predict stressors associated with climate change is reduced beyond mid-century. Thus, the 30-years foreseeable future we are proposing, would account for the effects of predicted changes in temperature, life zone's shifting, and increasing droughts. Additionally, the species has been listed for over 25 years, so we have a baseline to understand how populations have performed in that period.

This time period includes multiple generations of the species and allows adequate time for impacts from conservation efforts or changes in threats to be observed through population responses. For example, this timeframe accounts for the species reproductive biology, and thus the time required by an individual plant of *E. woodburyana* to reach a reproductive size and effectively contribute to the next generations. It accounts for reaching maturity, the probability of flowering, effective crosspollination, setting viable fruits, seed germination, and seedling survival and establishment, considering environmental stochastic events such as drought. Furthermore, the established timeframe provides for the design and implementation of conservation strategies to protect and enhance currently known populations. It also accounts for the continued collaborating with partners (*e.g.,* PRDNER and PLN) to implement effective propagation and reintroduction of *E. woodburyana,* and to implement best management practices to reduce impacts from agricultural practices that will reduce incidence of human-induced fires and will promote habitat connectivity until such time as we find it no longer requires protections under the Act.

Determination of *Eugenia woodburyana* Status

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered in the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by this plant. We reviewed the information available in our files and other available published and unpublished information, and we consulted with recognized experts and State agencies. In considering factors that might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether it responds to the factor in a way that causes impacts to the species or is likely to cause impacts in the future. If a species responds negatively to such exposure, the factor may be a threat and, during the status review, our aim is to determine whether impacts are or will be of an intensity or magnitude to place the species at risk. The factor is a threat if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as an endangered or threatened species as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely affected could suffice. In sum, the mere identification of factors that could affect a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors act on the species to the point that the species meets the definition of an endangered or threatened species.

At the time of listing, the known range of *Eugenia woodburyana* consisted of 45 individuals distributed along 3 localities in southwestern Puerto Rico. The most serious threats to such a small number of individuals were habitat destruction and modification, inadequacy of existing regulatory mechanisms, and limited distribution. Currently, *E. woodburyana* exists across a broader geographic range in six populations composed of several sub-populations. Increased survey efforts and implementation of recovery actions have resulted in more occupied habitat identified, leaving open the potential of finding even more *E. woodburyana* individuals. Protection under the Act, and Commonwealth laws and regulations has reduced the unauthorized take, although accidental damage to the species has occurred due to lack of knowledge of the species by private landowners. Also, about 47

percent of the total known natural adults and saplings are found on Federal, Commonwealth, and private lands managed for conservation and where the species is protected.

However, although now known to be more widespread and abundant than previously thought, the other 53 percent of known adult and saplings occur on lands where they are threatened by habitat destruction and modification (*e.g.,* conversion of forested habitat into pasturelands, grazing by cattle, horses, and goats, and urban development). In addition, recent information indicates that threats from invasive species, human-induced fires, droughts, hurricanes, landslides, and sediment runoff are currently acting upon *Eugenia woodburyana.* Some of these threats could be more severe for the populations on lands where, for example, there are no fire management prevention practices implemented, making the species more vulnerable to impacts.

We have determined that the previously recognized impacts to *Eugenia woodburyana* from inadequacy of existing regulatory mechanisms that occurred prior to listing by the Commonwealth of Puerto Rico has been reduced and limited distribution is no longer impacting *E. woodburyana.* In summary, there continues to be concern about present or threatened destruction, modification, or curtailment of its habitat or range (specifically, conversion of forested land into pasturelands, grazing by cattle, horses, and goats, and urban development); and other natural or manmade factors affecting its continued existence (specifically, invasive species, human-induced fires, droughts, hurricanes, landslides, and sediment runoff) throughout the range of *E. woodburyana,* particularly for those populations on private lands. The existing regulatory mechanisms are not adequate to address these threats at this time. The species is not affected by stressors related to over collection, and disease and predation. Still, none of these is an imminent threat or at a magnitude such that the taxon warrants endangered status across its range. Thus, after assessing the best available information, we conclude that *E. woodburyana* is not currently in danger of extinction throughout all of its range, but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Everson*), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for *Eugenia woodburyana,* we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For *Eugenia woodburyana,* we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. We examined the following threats: Habitat destruction and modification (particularly by urban development, and grazing by cattle, horses, and goats); human-induced fires; invasive species; hurricanes, lands slides and sediment runoff; and the effects of climate change (*e.g.,* prolonged droughts and expected shits of life zones). As discussed above, these threats are acting upon the species across its range. We have identified that habitat modification is threatening four of the six *E. woodburyana* known populations. In addition, human-induced fires and invasive plant species are considered as further stressors to the viability of *E. woodburyana,* particularly on private lands throughout the range of the species where no fire management practices are implemented. It is also expected that *E. woodburyana* will be affected by changes in climatic conditions as suggested by downscaled models developed for Puerto Rico, particularly by generalized changes in precipitation and drought conditions, and shifting of life zones in the Island. In fact, climate change is expected to result in more intense hurricanes and extended periods of droughts that can be exacerbated by a reduced number of populations, low number of individuals in most populations, and habitat degradation and fragmentation.

Narrow endemics are generally more likely to experience the same kinds and levels of threats in all parts of their ranges, and thus, no portion would likely have an increased level of threats and, accordingly, a different status. Here, we found no concentration of threats in any portion of *E. woodburyana's* range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the *Eugenia woodburyana* meets the definition of a threatened species. Therefore, we propose to reclassify *E. woodburyana* as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. The Act encourages cooperation with the States and requires that recovery actions be implemented for all listed species. The protections required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate

goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystem.

Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered, or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. All planning documents can be found on our website (*http://www.fws.gov/endangered*) or from our Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States (in this case, the Commonwealth of Puerto Rico), Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation, and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands (like Commonwealth-owned forests). To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands where appropriate. Funding for recovery actions could become available from a variety of sources, including Federal budgets, Commonwealth programs, and cost share grants from non-Federal landowners, the academic community, and nongovernmental organizations. We invite you to submit any new information of this species whenever it becomes available (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species. If a Federal action may affect a listed species, the responsible Federal agency must enter into consultation with the Service.

Proposed 4(d) Rule

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, the second sentence of section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants.'' Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (*see State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under 4(d) the Service has developed a proposed rule that is designed to address *Eugenia woodburyana's* specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the *E. woodburyana.* As discussed under Overall Summary of Factors Affecting *Eugenia woodburyana,* the Service has concluded that the *Eugenia woodburyana* is at risk of extinction within the foreseeable future primarily due to habitat destruction and modification, particularly by urban development, and grazing by cattle, horses, and goats; human-induced fires; and invasive species. Additionally, other natural or manmade factors like hurricanes, lands slides, sediment runoff, and the effects of climate change can cause the species to be in the risk of extinction in the foreseeable future. The provisions of this proposed 4(d) rule would promote the conservation of the *E. woodburyana* by encouraging the conservation of the habitat considering land use and the species' needs. The provisions of this proposed rule are one of many tools that the Service will use to promote the conservation of *E. woodburyana.* This proposed 4(d) rule would apply only if and when the Service makes final the listing of *E. woodburyana* as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of the *Eugenia woodburyana* by prohibiting the following activities, except as otherwise authorized or permitted: Importing or exporting; certain acts related to removing, damaging, and destroying; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; selling or offering for sale in interstate or foreign

commerce; or collecting plant material (seeds, seedlings, propagules, or cuttings) and natural individuals or those planted to enhance the status of the species in the wild.

As discussed under the Overall Summary of Factors Affecting *Eugenia woodburyana* (above), the present or threatened destruction, modification, or curtailment of its habitat or range (specifically, urban development; grazing by cattle, horses, and goats; human-induced fires; and invasive species), the inadequacy of existing regulatory mechanisms, and other natural or manmade factors affecting its continued existence (specifically, hurricanes, landslides, sediment runoff, and the effects of climate change) are affecting the status of *E. woodburyana.* A range of activities have the potential to impact *E. woodburyana,* including: Habitat conversion from forested habitat to pasture for grazing, fence posts harvesting, and land clearing for development. Regulating these activities will help preserve the species' remaining populations, slow their rate of potential decline, and decrease synergistic, negative effects from other stressors.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.72. With regard to threatened plants, a permit may be issued for the following purposes: Scientific purposes, to enhance propagation or survival, for economic hardship, for botanical or horticultural exhibition, for educational purposes, or for other purposes consistent with the purposes of the Act. Additional statutory exemptions from the prohibitions are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities with the range of listed species. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements (this list is not comprehensive): (1) Engaging in sustainable agricultural and grazing practices; (2) conducting low-impact residential development (*e.g.,* single-family units); and (3) minimizing areas of rights of way for infrastructure development projects. Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Southeast Region Recovery Permit Coordinator at (404) 679–7097, or to the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The Service recognizes the special and unique relationship with our State and Territorial natural resource agency partners in contributing to conservation of listed species. State and Territorial agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State and Territorial agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Service in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a Territorial conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve *Eugenia woodburyana* that may result in otherwise prohibited activities for plants without additional authorization.

The Service recognizes the beneficial and educational aspects of activities with seeds of cultivated plants, which generally enhance the propagation of the species, and therefore would satisfy permit requirements under the Act. The Service intends to monitor the interstate and foreign commerce and import and export of these specimens in a manner that will not inhibit such activities, providing the activities do not represent a threat to the survival of the species in the wild. In this regard, seeds of cultivated specimens would not be regulated provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container (*e.g.,* the seeds could be moved across State lines or between territories for purposes of seed banking or use for outplanting without additional regulations).

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the *Eugenia woodburyana.* However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

Effects of This Proposed Rule

This proposed rule, if made final, would revise 50 CFR 17.12(h) to reclassify *Eugenia woodburyana* from endangered to threatened on the Federal List of Endangered and Threatened Plants. It would also recognize that this plant is no longer in danger of extinction throughout all or a significant portion of its range. This reclassification does not significantly change the protections afforded to this species under the Act. The prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, continue to apply to *E. woodburyana.* Federal agencies are required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect *E. woodburyana.*

As applicable, recovery actions directed at *Eugenia woodburyana* will continue to be implemented as outlined in the recovery plan for this plant (USFWS 1998). Highest priority actions (also recommended as future actions in our 5-year review (USFWS 2017) include:

(1) Develop more measurable and objective criteria to delist this species based on best available information;

(2) Continue conducting comprehensive surveys for this species within traditional and non-traditional sites to determine more details on abundance and distribution of the species;

(3) Promote conservation agreements with private landowners to protect and enhance existing populations;

(4) Work closely with the Puerto Rico Department of Natural and Environmental Resources and landowners to ensure the protection of the species and its habitat on private lands; and

(5) Continue implementing fire prevention practices in Sierra Bermeja, CRNWR, and GCF during the dry season.

Required Determinations

Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal interests affected by this proposal.

References Cited

A complete list of references cited is available on *http://www.regulations.gov* under Docket Number FWS–R4–ES–2019–0070.

Authors

The primary authors of this document are members of the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245; unless otherwise noted.

■ 2. Amend § 17.12 in paragraph (h) by revising the entry for ''*Eugenia woodburyana*'' under FLOWERING PLANTS in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
*	*	*	*	*
Eugenia woodburyana ..	No common name	Wherever found	T	59 FR 46715, 9/9/1994; [**FEDERAL REGISTER** CITATION OF FINAL RULE]; 50 CFR 17.73(e).[4d]
*	*	*	*	*

* * * * *

■ 3. Revise § 17.73 to read as follows:

§ 17.73 Special rules—flowering plants.

(a) through (d) [Reserved]

(e) *Eugenia woodburyana* (no common name)—(1) *Prohibitions.* The following prohibitions that apply to endangered plants also apply to *Eugenia woodburyana.* Except as provided under paragraph (e)(2) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as provided in § 17.61(b).

(ii) Remove and reduce to possession the species from areas under Federal jurisdiction, as set forth at § 17.61(c)(1).

(iii) Maliciously damage or destroy the species on any areas under Federal jurisdiction, or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of the Territory or in the course of any violation of a Territorial criminal trespass law as set forth at at section 9(a)(2)(B) of the Act.

(iv) Engage in interstate or foreign commerce in the course of commercial activity, as provided in § 17.61(d).

(v) Sell or offer for sale in interstate or foreign commerce, as provided in § 17.61(e).

(2) *Exceptions from prohibitions.* The following exceptions from prohibitions apply to *Eugenia woodburyana:*

(i) Persons that have been issued permits in accordance with the provisions set forth in § 17.72 may conduct activities as authorized by the permit.

(ii) Any employee or agent of the Service or of a State or Territorial Conservation Agency that is operating in a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction members of *Eugenia woodburyana* that are covered by an approved cooperative agreement to carry out conservation programs.

(iii) Entities may engage in any act prohibited under paragraph (e)(1) of this section with seeds of cultivated specimens, provided that a statement that the seeds are of ''cultivated origin''

accompanies the seeds or their container.

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–20300 Filed 10–20–20; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 85, No. 204

Wednesday, October 21, 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

[Document Number AMS–SC–19–0058, SC–19–332]

United States Standards for Grades of Frozen Corn on the Cob

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) is soliciting comments on its proposal to revise the U.S. Standards for Grades of Frozen Corn on the Cob (July 27, 1970). AMS is proposing to replace the two-term grading system (dual nomenclature) with a single term to describe each quality level in the grade standards. Terms using the letter grade would be retained and the descriptive term would be eliminated. Editorial changes would also be made to the grade standards that conform to recent changes made in other grade standards, returning previously omitted headers and language, and adding language to bring the standards up to date with current industry practices. These changes would bring the grade standards in line with the present quality levels being marketed today and provide guidance in the effective use of these products.

DATES: Comments must be submitted on or before December 21, 2020.

ADDRESSES: Interested persons are invited to submit written comments to the USDA, Specialty Crops Inspection Division, 100 Riverside Parkway, Suite 101, Fredericksburg, VA 22406; by fax to (202) 690–1527; or at *www.regulations.gov.* Comments should reference the dates and page number of this issue of the **Federal Register**. Comments will be posted without change, including any personal information provided. All comments received within the comment period will become part of the public record maintained by the Agency and will be made available to the public via *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Brian E. Griffin, at the address above, by phone to (202) 748–2155; fax to (202) 690–1527; or email to *Brian.Griffin@usda.gov.* Copies of the proposed revised U.S. Standards for Grades of Frozen Corn on the Cob are available at *www.regulations.gov.* Copies of the current U.S. Standards for Grades of Frozen Corn on the Cob are available on the Specialty Crops Inspection Division website at *www.ams.usda.gov/grades-standards/vegetables.*

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627) as amended, directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.''

AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official standards available upon request. The U.S. Standards for Grades of Fruits and Vegetables that no longer appear in the Code of Federal Regulations are maintained by AMS at: *www.ams.usda.gov/grades-standards/vegetables.* AMS is proposing revisions to these U.S. Standards for Grades using the procedures that appear in part 36 of Title 7 of the Code of Federal Regulations (7 CFR part 36).

Background: AMS periodically reviews the grade standards for usefulness in serving the industry. More recently developed grade standards use a single term, such as ''U.S. Grade A'' or ''U.S. Grade B,'' to describe each level of quality within a grade standard. Older grade standards used dual nomenclature, such as ''U.S. Grade A or U.S. Fancy'' and ''U.S. Grade B or U.S. Extra Standard'' to describe the same level of quality. The terms ''U.S. Fancy,'' and ''U.S. Extra Standard'' would be removed and the terms ''U.S. Grade A,'' U.S. Grade B,'' and ''Substandard (Sstd)'' would be used exclusively.

AMS is also proposing editorial changes to these grade standards, *i.e.,* updating section headings omitted in previous revisions, and the inclusion of language and allowances for mixed color varieties to align the standards with use of mixed color varieties by industry. The addition of language and allowances differentiating between conventional sweet and supersweet types incorporates language from USDA internal guidance documents A–412, September 1967 Frozen Whole Kernel Whole-Grain Corn Evaluation of Tenderness and Maturity, and A–493, October 1997, Interpretative Guide for Frozen Supersweet Whole Kernel Corn to Determine: Tenderness and Maturity; and Flavor. These internal USDA documents were created with the intention of incorporating them into the standards to reflect current industry practices. The proposed revisions to these grade standards would provide a common language for trade and better reflect the current marketing of frozen corn on the cob.

A 60-day period is provided for interested persons to submit comments on the proposed grade standards. Copies of the proposed revised U.S. Standards for Grades of Frozen Corn on the Cob are available at *www.regulations.gov.* After the 60-day comment period, AMS will move forward in accordance with 7 CFR 36.3(a)(1–3).

(Authority: 7 U.S.C. 1621–1627.)

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–23220 Filed 10–20–20; 8:45 am]

BILLING CODE 3410–02–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the South Dakota Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of briefing.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a briefing of the South Dakota Advisory Committee to the Commission will convene by conference call and/or video conference on

Wednesday, November 18, 2020 at 3:00 p.m. (CDT), via teleconference and web platform. The purpose of the meeting is hearing from speakers on the Committee's topic on maternal health disparities of Native American women.

DATES: Wednesday, November 18, 2020 from 3:00 p.m.–4:30 p.m. (CDT).

Public Call-In Information: For audio, dial: 1–800–367–2403; conference ID: 9800799. Video conference is also available by registering here: *https://bit.ly/3iZpn2e.* Please use an alias while registering for the video conference if you wish to remain anonymous.

Note: although video conference is available, it is not required in order to listen to the conference call at the public call-in numbers listed above.

TDD: Dial Federal Relay Service 1–800–877–8339 and give the operator the above conference call number and conference ID.

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg, *mtrachtenberg@usccr.gov,* (202) 809–9618.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion by dialing the following Conference Call Toll-Free Number: 1–800–367–2403; conference ID: 9800799. Please be advised that before being placed into the conference call, the operator will ask callers to provide their names, their organizational affiliations (if any), and an email address (if available) prior to placing callers into the conference room. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free phone number.

Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Federal Relay Service operator with the conference call-in numbers: 1–800–437–2398; Conference ID: 5226726. Members of the public are invited to submit written comments; the comments must be received within 30 days of the meeting date. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618.

Records and documents discussed during the meeting will be available for public viewing as they become available at the FACA Link and clicking on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Office at (202) 809–9618 or *mtrachtenberg@usccr.gov.*

Agenda

Wednesday, November 18, 2020 at 3:00 p.m. (CDT)

I. Welcome and Roll Call
II. Announcements and Updates
III. Approval of Minutes from the Last Meeting
IV. Briefing: Maternal Health Disparities of Native American Women
V. Next Steps
VI. Public Comment
VII. Adjournment

Dated: October 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–23240 Filed 10–20–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Indiana Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Indiana State Advisory Committee to the Commission will convene by conference call, on Thursday, November 12, 2020 at 2:00 p.m. (EST). The purpose is to discuss the Committee's project on lead poisoning in Indiana and next steps.

DATES: Thursday, November 12, 2020 at 2:00 p.m. (EST).

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg at *mtrachtenberg@usccr.gov* or by phone at 202–809–9618.

SUPPLEMENTARY INFORMATION:

Call-In Information: 800–353–6461 and conference call ID: 2578132.

This meeting is available to the public through the telephone number and conference ID listed above. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call-in numbers: 800–263–0877 and conference call ID: 2578132.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at 202–809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at *https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzlgAAA;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Midwestern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Midwestern Regional Office at the above phone number or email.

Agenda

I. Welcome and Roll Call
II. Announcements and Updates
III. Discussion: Project on Lead Poisoning in Indiana
IV. Public Comment
V. Next Steps
VI. Adjournment

Dated: October 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–23236 Filed 10–20–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Minnesota Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights and the Federal Advisory Committee Act that the Minnesota Advisory Committee (Committee) will hold a meeting via teleconference on Thursday, November 12, 2020 at 12:00 p.m. Central Time, the

purpose of the meeting is to discuss civil rights in the state, and to review the policing proposal.

DATES: The meeting will be held on Thursday, November 12, 2020 at 12:00 p.m. Central Time.

Public Call Information: Dial: 800–367–2403, Conference ID: 2393196.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Official, at *dbarreras@usccr.gov* or 202–499–4066.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the call in information listed above. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement to the Committee as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to *dbarreras@uccr.gov* in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Program Unit at 202–499–4066.

Records generated from this meeting may be inspected and reproduced at the Chicago office, as they become available, both before and after the meeting. Records of the meeting will be available via *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzm3AAA* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Program Unit at the above email or phone number.

Agenda

I. Welcome and Roll Call, and Chair's Comments
II. Approval of Minutes
III. Committee Discussion: Civil Rights in the state and to review the policing proposal.
IV. Public Comment
V. Adjournment

Dated: October 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–23239 Filed 10–20–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the West Virginia Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the West Virginia Advisory Committee to the Commission will convene by conference call at 11:30 a.m. (ET) on Tuesday, November 10, 2020. The purpose of the meeting is to discuss and approve the Committee's civil rights project proposal to submit to the staff director for approval.

DATES: Tuesday, November 10, 2020 at 11:30 a.m. (ET).

Public Call-In Information: Conference call-in number: 1–800–367–2403 and conference call ID number: 7966318.

FOR FURTHER INFORMATION CONTACT: Ivy Davis at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–800–367–2403 and conference call ID number: 7966318. Please be advised that before being placed into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Individual who is deaf, deafblind and hard of hearing may also follow the discussion by first calling the Federal Relay Service at 1–888–364–3109 and providing the operator with the toll-free conference call-in number: 1–800–367–2403 and conference call ID number: 2629531.

Members of the public are invited to make statements during the Public Comments section of the Agenda. They are also invited to submit written comments, which must be received in the regional office approximately 30 days after the scheduled meeting. For the foreseeable future, written comments may be emailed to Corrine Sanders at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at: *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzmCAAQ;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda: November 10, 2020 at 11:30 a.m. (EST)

I. Rollcall
II. Welcome
III. Project Planning
IV. Other Business
V. Next Meeting
VI. Open Comments
VII. Adjourn

Dated: October 16, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–23331 Filed 10–20–20; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Pennsylvania Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the

Pennsylvania Advisory Committee to the Commission will convene by conference call at 11:30 a.m. (ET) on Tuesday, November 17, 2020. The purpose of the project planning meeting is to discuss the Committee's draft report on its civil rights project titled, School Discipline and the School-to-Prison Pipeline in PA. It is the final meeting of the current members; their appointment terms end on November 17.

Public Call-In Information: Conference call-in number: 800–367–2403 and conference call ID number: 5859731.

FOR FURTHER INFORMATION CONTACT: Ivy Davis at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 800–367–2403 and conference call ID number: 5859731. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Individuals who are deaf, deafblind and hard of hearing may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call-in number: 800–367–2403 and conference call ID number: 5859731.

Members of the public are invited to make brief statements during the Public Comment section of the meeting or submit written comments. The written comments must be received in the regional office approximately 30 days after the scheduled meeting. Because of the COVID–19 Pandemic, written comments may submitted by or emailed to the attention of Corrine Sanders at *ero@usccr.gov.* Persons who desire additional information may phone the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at: *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzjZAAQ*; click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda

I. Rollcall
II. Welcome
III. Project Planning
IV. Other Business
V. Next Meetings
VI. Public Comments
VII. Adjourn

Dated: October 16, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–23328 Filed 10–20–20; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–61–2020]

Foreign-Trade Zone (FTZ) 176—Rockford, Illinois; Notification of Proposed Production Activity, Tricida Inc. (Pharmaceutical Products), Rockford, Illinois

PCI Pharma Services, an operator within FTZ 176 in Rockford, Illinois, submitted a notification of proposed production activity to the FTZ Board on behalf of Tricida Inc. (Tricida). The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on October 14, 2020.

The proposed production facilities are located within FTZ 176. The facilities are used for the production of pharmaceutical products. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status material/component and specific finished product described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Tricida from customs duty payments on the foreign-status component used in export production. On its domestic sales, for the foreign-status material/component noted below, Tricida would be able to choose the duty rate during customs entry procedures that applies to Veverimer (TRC101)—medicament in measured doses (duty free). Tricida 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 material/component sourced from abroad is a synthetic polymer with an average of at least five monomer units (poly(allylamine-co-N,N′-diallyl-1,3-diaminopropaneco-1,2-diaminoethane) (duty rate 6.5%). The request indicates that the material/component is 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 (19 CFR 146.41).

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 30, 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 Chris Wedderburn at *Chris.Wedderburn@trade.gov* or (202) 482–1963.

Dated: October 16, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–23274 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–39–2020]

Foreign-Trade Zone (FTZ) 82—Mobile, Alabama; Authorization of Production Activity; MH Wirth, Inc. (Offshore Drilling Riser Systems), Theodore, Alabama

On June 16, 2020, the City of Mobile, Alabama, grantee of FTZ 82, submitted a notification of proposed production activity to the FTZ Board on behalf of MH Wirth, Inc., within FTZ 82, in Theodore, Alabama.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 39164, June 30, 2020). On October 14, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to

the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: October 14, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–23271 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–40–2020]

Foreign-Trade Zone (FTZ) 83—Huntsville, Alabama; Authorization of Production Activity; Haier US Appliance Solutions, Inc. (Household Refrigerators), Decatur, Alabama

On June 18, 2020, Haier US Appliance Solutions, Inc., submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 83D in Decatur, Alabama.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 39163, June 30, 2020). On October 16, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: October 16, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–23273 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–873]

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Partial Discontinuation of Review; 2017–2019

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) from India were made at less than normal value during the period of review (POR) November 22, 2017 through May 31, 2019. We are also rescinding this review with respect to 14 companies, and discontinuing this review with respect to one company. We invite interested parties to comment on these preliminary results.

DATES: Applicable October 21, 2020.

FOR FURTHER INFORMATION CONTACT: Nathan James, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5305.

SUPPLEMENTARY INFORMATION:

Background

On June 11, 2018, Commerce published the antidumping duty order on cold-drawn mechanical tubing from India.[1] On July 29, 2019, in accordance with 19 CFR 351.221(c)(i), Commerce initiated an administrative review of the *Order,* covering 16 producers/exporters.[2] As a result of the partial rescission and partial discontinuation of this review, discussed further below, the sole remaining producer/exporter under review is Tube Products of India, Ltd., a unit of Tube Investments of India Limited (collectively, TII). For details regarding the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3]

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce determined that it was not practicable to complete the preliminary results of this review within 245 days and extended the deadline for the preliminary results of this review by 117 days, until June 26, 2020.[4] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[5] On July 21, 2020, Commerce tolled deadlines for all preliminary and final results in administrative reviews by an additional 60 days.[6] The deadline for the preliminary results of this review is now October 14, 2020.

Scope of the Order

The product covered by this order is cold-drawn mechanical tubing from India. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum is available at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margin exists for the period November 22, 2017 through May 31, 2019:

Exporter/producer	Weighted-average dumping margin (percent)
Tube Products of India, Ltd., a unit of Tube Investments of India Limited	7.93

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation. Subsequent to the initiation of this administrative review, the

[1] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China, the Federal Republic of Germany, India, Italy, the Republic of Korea, and Switzerland: Antidumping Duty Orders; and Amended Final Determinations of Sales at Less Than Fair Value for the People's Republic of China and Switzerland,* 83 FR 26962 (June 11, 2018) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 36572 (July 29, 2019).

[3] *See* Memorandum, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India; 2017–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Memorandum, ''Cold-Drawn Mechanical Tubing from India: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated February 24, 2020.

[5] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020.

[6] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

petitioners [7] timely withdrew their request for an administrative review of 14 companies: APL Apollo Tubes Ltd.; Automotive Steel Pipe; Hyundai Steel Pipe India Pvt., Ltd.; ISMT Limited; Jindal (India) Ltd.; Jindal Saw Ltd.; Khanna Industries Pipes Pvt. Ltd.; KLT Automotive Tubular Products Ltd.; Patton International Ltd.; Sandvik Asia Pvt. Ltd.; Surya Global Steel Tubes Ltd.; Surya Roshni Ltd.; Tata Steel Bsl Ltd. (fka Bhushan Steel Ltd.); and Zenith Birla Steels (India) Pvt., Ltd.[8] No other party requested a review of these producers/exporters. As a result, Commerce is rescinding this review with respect to these 14 companies, in accordance with 19 CFR 351.213(d)(1).

Partial Discontinuation of Review

On May 27, 2020, Commerce published a notice of a court decision not in harmony with a final determination in the less-than-fair-value (LTFV) investigation of cold-drawn mechanical tubing from India.[9] At that time, Commerce amended its final determination in the LTFV investigation and revised the antidumping duty margin calculated for Goodluck India Limited (Goodluck).[10] Additionally, in the *Timken Notice,* Commerce stated that it was implementing a partial exclusion from the *Order* for merchandise produced and exported by Goodluck.[11] As a result, we are hereby discontinuing this review with respect to Goodluck because Goodluck only made sales to the United States of merchandise that it produced and exported.[12]

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results.[13] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[14] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[15] Executive summaries should be limited to five pages total, including footnotes. Case and rebuttal briefs should be filed using ACCESS [16] and must be served on interested parties.[17] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[18]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined.

Assessment Rates

Upon completion of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. If TII's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* If TII's weighted-average dumping margin is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[19]

For entries of subject merchandise during the POR produced by TII for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[20] We intend to issue liquidation instructions covering TII's entries to CBP 15 days after publication of the final results of this review.

For the companies for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse for consumption, in accordance with 19 CFR 351.212(c)(l)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice.

For Goodluck, as noted in the *Timken Notice,* the suspension of liquidation of Goodluck's entries must continue during the pendency of the appeal process.[21] The Court of International Trade's ruling has been appealed. If the ruling is upheld by the Court of Appeals

[7] The petitioners are ArcelorMittal Tubular Products LLC, Michigan Seamless Tube, LLC, PTC Alliance Corp., and Webco Industries, Inc.

[8] *See* Petitioners' Letter, ''Cold-Drawn Mechanical Tubing from India—Domestic Industry's Partial Withdrawal of Request for First Administrative Review,'' dated October 8, 2019.

[9] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Notice of Court Decision Not in Harmony With Final Determination of Sales at Less Than Fair Value; Notice of Amended Final Determination Pursuant to Court Decision; and Notice of Revocation of Antidumping Duty Order, in Part,* 85 FR 31742 (May 27, 2020) (*Timken Notice*).

[10] *Id.,* 85 FR at 31743.

[11] *Id.* The partial exclusion covers merchandise produced and exported by Goodluck. However, entries that were produced, but not exported, by Goodluck, and/or entries that were exported, but not produced, by Goodluck are not covered by the exclusion.

[12] *See* Goodluck's Letter, ''Goodluck Sections B, C, and D Questionnaire Response: Antidumping Duty Administrative Review on Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India,'' December 16, 2019, at Section C.

[13] *See* 19 CFR 351.224(b).

[14] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020) (''To provide adequate time for release of case briefs via ACCESS, E&C intends to schedule the due date for all rebuttal briefs to be 7 days after case briefs are filed (while these modifications remain in effect).'').

[15] *See* 19 CFR 351.303 (for general filing requirements).

[16] *See generally* 19 CFR 351.303.

[17] *See* 19 CFR 351.303(f).

[18] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[19] *See* section 751(a)(2)(C) of the Act.

[20] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[21] *Id.*

for the Federal Circuit, Commerce will instruct CBP to terminate the suspension of liquidation and to liquidate entries produced and exported by Goodluck without regard to antidumping duties.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the finals results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for TII in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which they were reviewed; (3) if the exporter is not a firm covered in this review or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 5.87 percent,[22] the all-others rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless otherwise extended, Commerce intends intend to issue the final results of this administrative review, including the results of our analysis of issues raised by the parties in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

[22] *See Order,* 83 FR at 16296.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: October 14, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2020–23270 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–124]

Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof, From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Affirmative Determination of Critical Circumstances, in Part

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines) from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is July 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable October 21, 2020.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Luberda or Whitley Herndon, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2185 or (202) 482–6274, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on April 7, 2020.[1] On August 5, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now October 14, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is small vertical engines from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (scope).[5] Certain interested parties commented on the scope of the

[1] *See Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation,* 85 FR 20670 (April 14, 2020) (*Initiation Notice*).

[2] *See Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation,* 85 FR 47357 (August 5, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from the People's Republic of China'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

investigation as it appeared in the *Initiation Notice,* as well as additional language proposed by Briggs & Stratton Corporation (the petitioner).[6] For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[7] Commerce has preliminarily modified the scope language that appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Commerce has calculated constructed export price in accordance with section 772(b) of the Act. Because China is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value (NV) in accordance with section 773(c) of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon the facts otherwise available, with adverse inferences, in determining the estimated weighted-average dumping margin for the China-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Affirmative Determination of Critical Circumstances, in Part

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily determines that critical circumstances exist with respect to imports of small vertical engines from China for Chongqing Zongshen General Power Machine Co., Ltd./Chongqing Dajiang Power Equipment Co., Ltd./Chongqing Zongshen Power Machinery Co., Ltd (collectively, the Zongshen Companies),[8] and the China-wide entity, but do not exist for Chongqing Kohler Engines Ltd. (Chongqing Kohler) and the separate-rate companies. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[9] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[10]

Separate Rates

In addition to the mandatory respondents Chongqing Kohler and the Zongshen Companies, we have preliminarily granted certain non-individually examined respondents a separate rate. Also, we have preliminarily denied a separate rate to Loncin Motor Co., Ltd., and are treating it as part of the China-wide entity. *See* the Preliminary Decision Memorandum for details.

In calculating the rate for non-individually examined separate rate respondents in a non-market economy antidumping duty (AD) investigation, Commerce normally looks to section 735(c)(5)(A) of the Act, which pertains to the calculation of the all-others rate in a market economy AD investigation. Pursuant to section 735(c)(5)(A) of the Act, normally this rate shall be an amount equal to the weighted average of the estimated AD rates established for those companies individually examined, excluding zero and *de minimis* rates and any rates based entirely under section 776 of the Act. Pursuant to the guidance in section 735(c)(5)(A) of the Act, we based the separate rate respondents' dumping margin on the dumping margins that we calculated for the mandatory respondents Chongqing Kohler and the Zongshen Companies. *See* the table in the ''Preliminary Determination'' section of this notice.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Chongqing Kohler Engines Ltd	Chongqing Kohler Engines Ltd	374.31	363.77
Chongqing Zongshen General Power Machine Co., Ltd./Chongqing Dajiang Power Equipment Co., Ltd./Chongqing Zongshen Power Machinery Co., Ltd.	Chongqing Zongshen General Power Machine Co., Ltd./Chongqing Dajiang Power Equipment Co., Ltd./Chongqing Zongshen Power Machinery Co., Ltd.	316.88	305.12
Producers Supplying the Non-Individually-Examined Exporters Receiving Separate Rates (*see* Appendix III).	Non-Individually-Examined Exporters Receiving Separate Rates (*see* Appendix III).	342.88	331.73
China-Wide Entity		541.75	530.60

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, as discussed below. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted average amount by which NV exceeds U.S. price, as indicated in the chart above as follows: (1) For the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Chinese producers/exporters of merchandise

[6] *See* Petitioner's Letter, ''Small Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from the People's Republic of China: Petitioner's Additional Comments on Scope,'' dated June 18, 2020.

[7] *See* Memorandum, ''Antidumping and Countervailing Duty Investigations of Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determination,'' dated August 17, 2020 (Preliminary Scope Decision Memorandum).

[8] Commerce preliminarily determines that Chongqing Zongshen General Power Machine Co., Ltd./Chongqing Dajiang Power Equipment Co., Ltd./Chongqing Zongshen Power Machinery Co., Ltd. should be treated as a single entity. *See* Memorandum, ''Whether to Collapse Chongqing Zongshen General Power Machine Co., Ltd. and Two Affiliates in the Less-Than-Fair-Value Investigation of Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from the People's Republic of China,'' dated October 14, 2020.

[9] *See Initiation Notice,* 85 FR 20674.

[10] *See* Enforcement and Compliance's Policy Bulletin No. 05.1 regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

under consideration that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the China-wide entity; and (3) for all third-county exporters of merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Chinese producer/exporter combination (or the China-wide entity) that supplied that third-country exporter.

Section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, any suspension of liquidation shall apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the later of (a) the date which is 90 days before the date on which the suspension of liquidation was first ordered, or (b) the date on which notice of initiation of the investigation was published. Commerce preliminarily finds that critical circumstances exist for imports of subject merchandise from the Zongshen Companies and the China-wide entity. In accordance with section 733(e)(2)(A) of the Act, the suspension of liquidation shall apply to all unliquidated entries of merchandise from the Zongshen Companies and the China-wide entity that were entered, or withdrawn from warehouse, for consumption on or after the date that is 90 days before the publication of this notice.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a companion countervailing duty (CVD) proceeding when CVD provisional measures are in effect. Accordingly, where Commerce has made a preliminary affirmative determination for domestic subsidy pass-through or export subsidies, Commerce has offset the calculated estimated weighted-average dumping margin by the appropriate rate(s). Any such adjusted rates may be found in the Preliminary Determination section's chart of estimated weighted-average dumping margins above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting cash deposits at a rate equal to the estimated weighted-average dumping margins calculated in this preliminary determination unadjusted for the passed-through domestic subsidies or for export subsidies at the time the CVD provisional measures expire.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline for case briefs.[11] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Final Determination

Section 735(a)(1) of the Act and 19 CFR 351.210(b)(1) provide that Commerce will issue the final determination within 75 days after the date of its preliminary determination. Accordingly, Commerce will make its final determination no later than 75 days after the signature date of this preliminary determination.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: October 14, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation consists of spark-ignited, non-road, vertical shaft engines, whether finished or unfinished, whether assembled or unassembled, whether mounted or unmounted, primarily for walk-behind lawn mowers. Engines meeting this physical description may also be for other non-hand-held outdoor power equipment, including but not limited to, pressure washers. The subject engines are spark ignition, single-cylinder, air cooled, internal combustion engines with vertical power take off shafts with a minimum displacement of 99 cubic centimeters (cc) and a maximum displacement of up to, but not including, 225cc. Typically, engines with displacements of this size generate gross power of between 1.95 kilowatts (kw) to 4.75 kw.

Engines covered by this scope normally must comply with and be certified under Environmental Protection Agency (EPA) air pollution controls title 40, chapter I, subchapter U, part 1054 of the Code of

[11] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

Federal Regulations standards for small non-road spark-ignition engines and equipment. Engines that otherwise meet the physical description of the scope but are not certified under 40 CFR part 1054 and are not certified under other parts of subchapter U of the EPA air pollution controls are not excluded from the scope of this proceeding. Engines that may be certified under both 40 CFR part 1054 as well as other parts of subchapter U remain subject to the scope of this proceeding.

Certain small vertical shaft engines, whether or not mounted on non-hand-held outdoor power equipment, including but not limited to walk-behind lawn mowers and pressure washers, are included in the scope. However, if a subject engine is imported mounted on such equipment, only the engine is covered by the scope. Subject merchandise includes certain small vertical shaft engines produced in the subject country whether mounted on outdoor power equipment in the subject country or in a third country. Subject engines are covered whether or not they are accompanied by other parts.

For purposes of this investigation, an unfinished engine covers at a minimum a sub-assembly comprised of, but not limited to, the following components: crankcase, crankshaft, camshaft, piston(s), and connecting rod(s). Importation of these components together, whether assembled or unassembled, and whether or not accompanied by additional components such as a sump, carburetor spacer, cylinder head(s), valve train, or valve cover(s), constitutes an unfinished engine for purposes of this investigation. The inclusion of other products such as spark plugs fitted into the cylinder head or electrical devices (*e.g.,* ignition coils) for synchronizing with the engine to supply tension current does not remove the product from the scope. The inclusion of any other components not identified as comprising the unfinished engine subassembly in a third country does not remove the engine from the scope.

Specifically excluded from the scope of the investigation are ''Commercial'' or ''Heavy Commercial'' engines under 40 CFR 1054.107 and 1054.135 that have (1) a displacement of 160 cc or greater, (2) a cast iron cylinder liner, (3) an automatic compression release, and (4) a muffler with at least three chambers and volume greater than 400 cc.

The engines subject to this investigation are predominantly classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 8407.90.1010. The engine subassemblies that are subject to this investigation enter under HTSUS 8409.91.9990. The mounted engines that are subject to this investigation enter under HTSUS 8433.11.0050, 8433.11.0060, and 8424.30.9000. Engines subject to this investigation may also enter under HTSUS 8407.90.1020, 8407.90.9040, and 8407.90.9060. The HTSUS subheadings are provided for convenience and customs purposes only, and the written description of the merchandise under investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Adjustment Under Section 777(A)(f) of the Act
IX. Adjustments to Cash Deposit Rates for Export Subsidies
X. ITC Notification
XI. Recommendation

Appendix III

List of Separate Rate Companies

Exporter	Producer
Non-individually-examined exporters receiving separate rates	Producers supplying the non-individually-examined exporters receiving separate rates
Changzhou Kawasaki and Kwang Yang Engine Co., Ltd	Changzhou Kawasaki and Kwang Yang Engine Co., Ltd.
Chongqing Chen Hui Electric Machinery Co., Ltd	CHONGQING AM PRIDE POWER & MACHINERY CO., LTD.
Chongqing Chen Hui Electric Machinery Co., Ltd	Chongqing Kohler Motors Co., Ltd.
Chongqing HWASDAN Power Technology Co., Ltd	Chongqing HWASDAN Power Technology Co., Ltd.
Chongqing Rato Technology Co., Ltd	Chongqing Rato Technology Co., Ltd.
CHONGQING SENCI IMPORT&EXPORT TRADE CO., LTD	CHONGQING AM PRIDE POWER & MACHINERY CO., LTD.
CHONGQING SENCI IMPORT&EXPORT TRADE CO., LTD	Chongqing Zongshen General Power Machines Co., Ltd.
Jialing-Honda Motors Co., Ltd	Jialing-Honda Motos Co., Ltd.
Wenling Qianjiang Imp. & Exp. Co., Ltd	Chongqing Rato Technology Co., Ltd.
Wenling Qianjiang Imp. & Exp. Co., Ltd	QIANJIANG GROUP WENLING JENNFENG INDUSTRY INC.
Zhejiang Amerisun Technology Co., Ltd	CHONGQING DINKING POWER MACHINERY CO., LTD.
Zhejiang Amerisun Technology Co., Ltd	Chongqing Rato Technology Co., Ltd.
Zhejiang Amerisun Technology Co., Ltd	LONCIN MOTOR CO., LTD.
Zhejiang Amerisun Technology Co., Ltd	Zhejiang Dobest Power Tools Co., Ltd.

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BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 84–31A12]

Export Trade Certificate of Review

ACTION: Notice of Issuance of an amended Export Trade Certificate of Review to Northwest Fruit Exporters (''NFE''), Application No. 84–31A12.

SUMMARY: The Secretary of Commerce, through the Office of Trade and Economic Analysis (''OTEA''), issued an amended Export Trade Certificate of Review (''Certificate'') to NFE on October 6, 2020.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, OTEA, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or email at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001–21) (''the Act'') authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. The regulations implementing Title III are found at 15 CFR part 325. OTEA is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of the certification in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Content

NFE's Certificate was amended as follows:

1. Added the following company as a new Member of the Certificate within the meaning of section 325.2(l) of the Regulations (15 CFR 325.2(l)) for the following Export Product: Fresh sweet cherries:

- Griggs Farms Packing, LLC, Orondo, WA

2. Deleted the following companies as Members of the Certificate:

- Peshastin Hi-Up Growers, Peshastin, WA
- Strand Apples, Inc., Cowiche, WA

3. Changed the Export Product coverage for one Member:

- Stemilt Growers, LLC changed Export Product coverage from fresh sweet cherries, fresh apples, and fresh pears to fresh sweet cherries and fresh apples (dropping fresh pears).

4. Modified the Certificate language under Paragraph 2 of the Export Trade Activities and Methods of Operation to read as follows:

''With respect to fresh sweet cherries only, NFE may on behalf of and with the advice of its Members negotiate export prices and quantities and allocate export quotas among growing regions and its Members, in connection with actual or potential bona fide export opportunities. In allocating export quotas among growing regions and its Members, NFE, through employees or agents of NFE who are not also employees of a Member, may receive, and each Member may supply to such employees or agents of NFE, information as to such Member's actual total export shipments of fresh sweet cherries in any previous growing season or seasons, provided that such information is not disclosed by NFE to any other Member. All communications made on behalf of NFE to its Members relating to the allocation of quotas shall be made by an NFE employee or agent who is not also an employee of a Member, and neither the NFE employee/agent or any employee of a Member shall disclose to any other Member the quota allocation of that Member or any other Member.''

NFE's Amended Certificate Membership Is as Follows

1. Allan Bros., Naches, WA
2. AltaFresh L.L.C. dba Chelan Fresh Marketing, Chelan, WA
3. Apple House Warehouse & Storage, Inc., Brewster, WA
4. Apple King, L.L.C., Yakima, WA
5. Auvil Fruit Co., Inc., Orondo, WA
6. Baker Produce, Inc., Kennewick, WA
7. Blue Bird, Inc., Peshastin, WA
8. Blue Star Growers, Inc., Cashmere, WA
9. Borton & Sons, Inc., Yakima, WA
10. Brewster Heights Packing & Orchards, LP, Brewster, WA
11. Chelan Fruit Cooperative, Chelan, WA
12. Chiawana, Inc. dba Columbia Reach Pack, Yakima, WA
13. CMI Orchards LLC, Wenatchee, WA
14. Columbia Fruit Packers, Inc., Wenatchee, WA
15. Columbia Valley Fruit, L.L.C., Yakima, WA
16. Congdon Packing Co. L.L.C., Yakima, WA
17. Conrad & Adams Fruit L.L.C., Grandview, WA
18. Cowiche Growers, Inc., Cowiche, WA
19. CPC International Apple Company, Tieton, WA
20. Crane & Crane, Inc., Brewster, WA
21. Custom Apple Packers, Inc., Quincy, and Wenatchee, WA
22. Diamond Fruit Growers, Inc., Odell, OR
23. Domex Superfresh Growers LLC, Yakima, WA
24. Douglas Fruit Company, Inc., Pasco, WA
25. Dovex Export Company, Wenatchee, WA
26. Duckwall Fruit, Odell, OR
27. E. Brown & Sons, Inc., Milton-Freewater, OR
28. Evans Fruit Co., Inc., Yakima, WA
29. E.W. Brandt & Sons, Inc., Parker, WA
30. FirstFruits Farms, LLC, Prescott, WA
31. Frosty Packing Co., LLC, Yakima, WA
32. G&G Orchards, Inc., Yakima, WA
33. Gilbert Orchards, Inc., Yakima, WA
34. Griggs Farms Packing, LLC, Orondo, WA
35. Hansen Fruit & Cold Storage Co., Inc., Yakima, WA
36. Henggeler Packing Co., Inc., Fruitland, ID
37. Highland Fruit Growers, Inc., Yakima, WA
38. HoneyBear Growers LLC, Brewster, WA
39. Honey Bear Tree Fruit Co LLC, Wenatchee, WA
40. Hood River Cherry Company, Hood River, OR
41. JackAss Mt. Ranch, Pasco, WA
42. Jenks Bros Cold Storage & Packing, Royal City, WA
43. Kershaw Fruit & Cold Storage, Co., Yakima, WA
44. L & M Companies, Union Gap, WA
45. Legacy Fruit Packers LLC, Wapato, WA
46. Manson Growers Cooperative, Manson, WA
47. Matson Fruit Company, Selah, WA
48. McDougall & Sons, Inc., Wenatchee, WA
49. Monson Fruit Co., Selah, WA
50. Morgan's of Washington dba Double Diamond Fruit, Quincy, WA
51. Naumes, Inc., Medford, OR
52. Northern Fruit Company, Inc., Wenatchee, WA
53. Olympic Fruit Co., Moxee, WA
54. Oneonta Trading Corp., Wenatchee, WA
55. Orchard View Farms, Inc., The Dalles, OR
56. Pacific Coast Cherry Packers, LLC, Yakima, WA
57. Piepel Premium Fruit Packing LLC, East Wenatchee, WA
58. Pine Canyon Growers LLC, Orondo, WA
59. Polehn Farms, Inc., The Dalles, OR
60. Price Cold Storage & Packing Co., Inc., Yakima, WA
61. Pride Packing Company LLC, Wapato, WA
62. Quincy Fresh Fruit Co., Quincy, WA
63. Rainier Fruit Company, Selah, WA
64. Roche Fruit, Ltd., Yakima, WA
65. Sage Fruit Company, L.L.C., Yakima, WA
66. Smith & Nelson, Inc., Tonasket, WA
67. Stadelman Fruit, L.L.C., Milton-Freewater, OR, and Zillah, WA
68. Stemilt Growers, LLC, Wenatchee, WA
69. Symms Fruit Ranch, Inc., Caldwell, ID
70. The Dalles Fruit Company, LLC, Dallesport, WA
71. Underwood Fruit & Warehouse Co., Bingen, WA
72. Valicoff Fruit Company Inc., Wapato, WA
73. Washington Cherry Growers, Peshastin, WA
74. Washington Fruit & Produce Co., Yakima, WA
75. Western Sweet Cherry Group, LLC, Yakima, WA
76. Whitby Farms, Inc. dba: Farm Boy Fruit Snacks LLC, Mesa, WA
77. WP Packing LLC, Wapato, WA
78. Yakima Fresh, Yakima, WA
79. Yakima Fruit & Cold Storage Co., Yakima, WA
80. Zirkle Fruit Company, Selah, WA

The effective date of the amendment is July 8, 2020, the date on which NFE's application to amend was deemed submitted.

Dated: October 16, 2020.

Joseph Flynn,

Director, Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2020–23293 Filed 10–20–20; 8:45 am]

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 200921–0251]

National Cybersecurity Center of Excellence (NCCoE) Zero Trust Cybersecurity: Implementing a Zero Trust Architecture

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) invites organizations to provide products and technical expertise to support and demonstrate security platforms for the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project. This notice is the initial step for the National Cybersecurity Center of Excellence (NCCoE) in collaborating with technology companies to address cybersecurity challenges identified under the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project. Participation in the building

block is open to all interested organizations.

DATES: Collaborative activities will commence as soon as enough completed and signed letters of interest have been returned to address all the necessary components and capabilities, but no earlier than November 20, 2020.

ADDRESSES: The NCCoE is located at 9700 Great Seneca Highway, Rockville, MD 20850. Letters of interest must be submitted to *nccoe-zta-project@list.nist.gov* or via hardcopy to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Organizations whose letters of interest are accepted in accordance with the process set forth in the **SUPPLEMENTARY INFORMATION** section of this notice will be asked to sign a consortium Cooperative Research and Development Agreement (CRADA) with NIST. An NCCoE consortium CRADA template can be found at: *https://nccoe.nist.gov/library/nccoe-consortium-crada-example.*

FOR FURTHER INFORMATION CONTACT: Alper Kerman via email to *nccoe-zta-project@list.nist.gov;* or by telephone at 301–975–0200. Additional details about the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project are available at *https://www.nccoe.nist.gov/zerotrust.*

SUPPLEMENTARY INFORMATION: Interested parties can access the letter of interest template by visiting the project website at *https://www.nccoe.nist.gov/zerotrust* and completing the letter of interest webform. Completed letters of interest should be submitted to NIST and will be accepted on a first come, first served basis. When the building block has been completed, NIST will post a notice on the NCCoE Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project website at *https://www.nccoe.nist.gov/zerotrust* announcing the completion of the building block and informing the public that it will no longer accept letters of interest for this building block.

Background: The NCCoE, part of NIST, is a public-private collaboration for accelerating the widespread adoption of integrated cybersecurity tools and technologies. The NCCoE brings together experts from industry, government, and academia under one roof to develop practical, interoperable cybersecurity approaches that address the real-world needs of complex Information Technology (IT) systems. By accelerating dissemination and use of these integrated tools and technologies for protecting IT assets, the NCCoE will enhance trust in U.S. IT communications, data, and storage systems; reduce risk for companies and individuals using IT systems; and encourage development of innovative, job-creating cybersecurity products and services.

Process: NIST is soliciting responses from all sources of relevant security capabilities (see below) to enter into a Cooperative Research and Development Agreement (CRADA) to provide products and technical expertise to support and demonstrate security platforms for the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project. The full building block can be viewed at: *https://www.nccoe.nist.gov/zerotrust.*

Interested parties can access the letter of interest template by visiting the project website at *https://www.nccoe.nist.gov/zerotrust* and completing the letter of interest webform. On completion of the webform, interested parties will receive access to the letter of interest template, which the party must complete, certify that it is accurate, and submit to NIST. NIST will contact interested parties if there are questions regarding the responsiveness of the letters of interest to the building block objective or requirements identified below. NIST will select participants who have submitted complete letters of interest on a first come, first served basis within each category of product components or capabilities listed below up to the number of participants in each category necessary to carry out this building block. However, there may be continuing opportunity to participate even after initial activity commences. Selected participants will be required to enter into a consortium CRADA with NIST (for reference, see **ADDRESSES** section above). NIST published a notice in the **Federal Register** on October 19, 2012 (77 FR 64314) inviting U.S. companies to enter into National Cybersecurity Excellence Partnerships (NCEPs) in furtherance of the NCCoE. For this demonstration project, NCEP partners will not be given priority for participation.

Building Block Objective: The objective of this building block project is to produce an example implementation(s) of a zero trust architecture that is designed and deployed according to the concepts and tenets documented in the NIST Special Publication (SP) 800–207, *Zero Trust Architecture.* The proposed proof-of-concept solution(s) will integrate commercial and open source products that leverage cybersecurity standards and recommended practices to demonstrate the use case scenarios detailed in the *Implementing a Zero Trust Architecture* project description at *https://www.nccoe.nist.gov/zerotrust.* This project will result in a publicly available NIST Cybersecurity Practice Guide as a Special Publication 1800 series, a detailed implementation guide describing the practical steps needed to implement a cybersecurity reference implementation.

Requirements: Each responding organization's letter of interest should identify which security platform component(s) or capability(ies) it is offering. Letters of interest should not include company proprietary information, and all components and capabilities must be commercially available. Components are listed in section 3 of the *Zero Trust Cybersecurity: Implementing a Zero Trust Architecture* project description (for reference, please see the link in the Process section above) and include, but are not limited to:

Core Components of Zero Trust Architecture

- *Policy Engine:* The policy engine handles the ultimate decision to grant, deny, or revoke access to a resource for a given subject. The policy engine calculates the trust scores/confidence levels and ultimate access decisions.
- *Policy Administrator:* The policy administrator is responsible for establishing and/or terminating the transaction between a subject and a resource. It generates any session-specific authentication and authentication token or credential used by a client to access an enterprise resource. It is closely tied to the Policy Engine and relies on its decision to ultimately allow or deny a session.
- *Policy Enforcement Point:* The policy enforcement point handles enabling, monitoring, and eventually terminating connections between a subject and an enterprise resource.

Functional Components of Zero Trust Architecture

- The data security component includes all the data access policies and rules that an enterprise develops to secure its information, and the means to protect data at rest and in transit.
- The endpoint security component encompasses the strategy, technology, and governance to protect endpoints (*e.g.,* servers, desktops, mobile phones, IoT devices) from threats and attacks, as well as protect the enterprise from threats from managed and unmanaged devices.
- The identity and access management component includes the strategy, technology, and governance for creating, storing, and managing

enterprise user (*i.e.,* subject) accounts and identity records and their access to enterprise resources.

• The security analytics component encompasses all the threat intelligence feeds and traffic/activity monitoring for an IT enterprise. It gathers security and behavior analytics about the current state of enterprise assets and continuously monitors those assets to actively respond to threats or malicious activity. This information could feed the policy engine to help make dynamic access decisions.

Devices and Network Infrastructure Components of a Zero Trust Architecture

• Assets include the devices/endpoints, such as laptops, tablets, and other mobile or IoT devices, that connect to the enterprise.

• Enterprise resources include data and computer resources as well as applications/services that are hosted and managed on-premise, in the cloud, at the edge, or some combination of these.

Each responding organization's letter of interest should identify how their products help address one or more of the following desired security characteristics and properties in section 3 of the *Zero Trust Cybersecurity: Implementing a Zero Trust Architecture* project description (for reference, please see the link in the PROCESS section above):

• All interactions throughout the proposed architecture are achieved in the most secure manner available, with emphasis on protecting confidentiality and integrity through a consistent identification, authentication, and authorization scheme.

• All interactions throughout the proposed architecture are continually reassessed with possible reauthentication and reauthorization as necessary to mitigate unauthorized access to enterprise resources.

• Access to an enterprise resource is assessed on a per-session basis and authorized specifically for that enterprise resource.

• Access requests are evaluated dynamically based on organizational policies and rules for accessing enterprise resources, including the observable state of:

a. Subject identity (*e.g.,* user account or service identity with associated attributes)

b. requesting asset (*e.g.,* laptop, mobile device, server) device characteristics (*e.g.,* software version installed, security posture, network location, time/date of request, previously observed behavior, and installed credentials)

c. requested resource (*e.g.,* server, application, service) characteristics

• Enterprise assets and resources are continuously monitored and reassessed in order to maintain them in the most secure states possible.

• Log and event data generated about the current state of enterprise assets, resources, and interactions throughout the proposed architecture are collected and leveraged for better policy alignment and enforcement to increase the enterprise's overall security posture.

• Secure access to corporate resources, hosted either on-premise or within a cloud environment, as well as to non-corporate resources on the internet are provided without the use of conventional network and network perimeter access and security solutions.

• Integration with various directory protocols and identity management services (*e.g.,* Lightweight Directory Access Protocol [LDAP], OAuth 2.0, Active Directory, OpenLDAP, Security Assertion Markup Language) is demonstrated.

• Integration with security information and event management tools through common application programming interfaces is demonstrated.

• Desired enterprise device security characteristics are demonstrated, including:

a. Maintaining data protection at rest and in transit

b. remediating device vulnerabilities that could result in unauthorized access to data stored on or accessed by the device, and misuse of the device

c. mitigating malware execution on the device that could result in unauthorized access to data stored on or accessed by the device, and misuse of the device

d. mitigating the risk of data loss through accidental, deliberate, or malicious deletion or obfuscation of data stored on the device

e. maintaining awareness of and responding to suspicious or malicious activities within and against the device to prevent or detect a compromise of the device

Responding organizations need to understand and, in their letters of interest, commit to provide:

1. Access for all participants' project teams to component interfaces and the organization's experts necessary to make functional connections among security platform components.

2. Support for development and demonstration of the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture building block will be conducted in a manner consistent with the following standards and guidance: FIPS 200, SP 800–37, SP 800–53, SP 800–63, and SP 800–207. Additional details about the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project are available at *https://www.nccoe.nist.gov/zerotrust.*

NIST cannot guarantee that all of the products proposed by respondents will be used in the demonstration. Each prospective participant will be expected to work collaboratively with NIST staff and other project participants under the terms of the consortium CRADA in the development of the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project. Prospective participants' contribution to the collaborative effort will include assistance in establishing the necessary interface functionality, connection and set-up capabilities and procedures, demonstration harnesses, environmental and safety conditions for use, integrated platform user instructions, and demonstration plans and scripts necessary to demonstrate the desired capabilities. Each participant will train NIST personnel, as necessary, to operate its product in capability demonstrations. Following successful demonstrations, NIST will publish a description of the security platform and its performance characteristics sufficient to permit other organizations to develop and deploy security platforms that meet the security objectives of the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project. These descriptions will be public information.

Under the terms of the consortium CRADA, NIST will support development of interfaces among participants' products by providing IT infrastructure, laboratory facilities, office facilities, collaboration facilities, and staff support to component composition, security platform documentation, and demonstration activities.

The dates of the demonstration of the Zero Trust Cybersecurity: Implementing a Zero Trust Architecture project capability will be announced on the NCCoE website at least two weeks in advance at *https://nccoe.nist.gov/.* The expected outcome will demonstrate how the components of the Zero Trust Architecture can provide security capabilities to mitigate identified risks and meet industry sectors' compliance requirements. Participating organizations will gain from the knowledge that their products are interoperable with other participants' offerings.

For additional information on the NCCoE governance, business processes,

and NCCoE operational structure, visit the NCCoE website *https://nccoe.nist.gov/.*

Kevin A. Kimball,

Chief of Staff.

[FR Doc. 2020–23292 Filed 10–20–20; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA554]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the U.S. Coast Guard's Base Los Angeles/Long Beach Wharf Expansion Project, Los Angeles, California

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the U.S. Coast Guard (Coast Guard) for authorization to take marine mammals incidental to the Base Los Angeles/Long Beach Wharf Expansion Project in Los Angeles, California. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than November 20, 2020.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Comments should be sent to *ITP.Meadows@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On July 2, 2020, NMFS received an application from the Coast Guard requesting an IHA to take small numbers of five species of marine mammals incidental to pile driving associated with the Base Los Angeles Long Beach Wharf Expansion Project in Los Angeles, California. The application was deemed adequate and complete on October 5, 2020. The Coast Guard's request is for take of a small number of five species of marine mammals by Level A and/or Level B harassment. Neither the Coast Guard nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The purpose of the project is to expand the existing wharf and other base infrastructure for hosting two additional offshore patrol cutters. The existing 1255-foot (383 meters (m)) long

by 30-foot (9 m) wide wharf will be extended 265 feet (81 m). The waterfront improvements also include repair of the bank erosion area and placement of small rocks for slope protection near the new onshore electrical substation. Specifically, construction work includes installing up to 102 pier support piles (16 to 30-inch diameter concrete piles) and 126 fender and corner protection piles (16 to 30-inch diameter concrete piles). Pile driving will be by impact hammering.

The pile driving can result in take of marine mammals from sound in the water which results in behavioral harassment or auditory injury.

Dates and Duration

The work described here is scheduled for February 1, 2021 through January 31, 2022. Because of other permitting restrictions, in-water pile driving can only occur between September 1 and April 14, to avoid the nesting season of the California least tern.

Specific Geographic Region

The project site is located in the Port of Los Angeles (Figure 1). The Port of Los Angeles is bounded by hard structure breakwaters and riprap lined, mostly artificial islands. It is a highly industrialized port (the busiest container seaport in the United States) and is located immediately west of the Port of Long Beach, the second-busiest container seaport in the United States. Coast Guard Base Los Angeles/Long Beach is located on 27 acres (0.11 square kilometers (km)) of Federal government-owned land on the southern tip of Terminal Island within the Los Angeles port and harbor at the mouth of the Main Channel. The port geography and breakwaters limit the effects of construction sound to within the port boundaries. Base Los Angeles/Long Beach currently has three wharf piers along its western boundary that serve as the home port for a buoy tender, four fast response cutters, and seven small boats. The extension of the piers will lengthen the existing structure to the south towards the harbor entrance.

The port is heavily used by commercial, recreational, and military vessels. Tetra Tech (2011) reported the underwater ambient noise levels in active shipping areas were approximately 140 decibels (dB) re: 1 micropascal (µPa) root mean square (rms) and noise levels in non-shipping areas were between 120 dB re: 1 µPa (rms) and 132 re: 1 µPa (rms). These underwater ambient noise levels are typical of a large marine bay with heavy commercial boat traffic (Buehler *et al.* 2015). Ship noise in the ports may mask underwater sounds produced by the proposed activities, and project noises will likely become indistinguishable from other background noise as they attenuate to near ambient sound pressure levels moving away from the project site.

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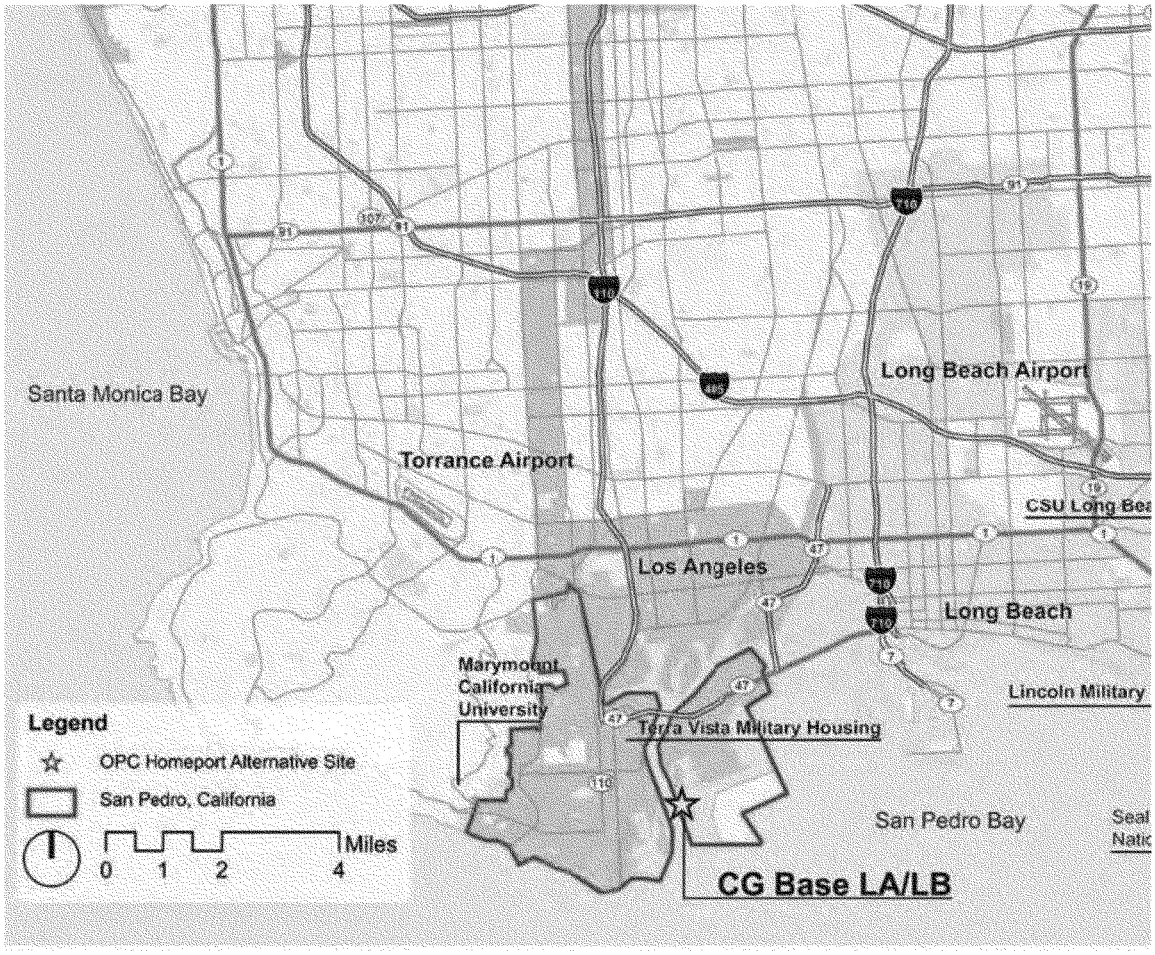

Figure 1-- Map of Proposed Project Area in Los Angeles, CA

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Detailed Description of Specific Activity

The contracting for the project will be a design build contract that has not yet been awarded. Therefore, the Coast Guard does not currently have finalized plans for the project. Consequently the Coast Guard has provided a number of construction scenarios we will use to calculate possible effects of the project and determine potential marine mammal harassment zones, shutdown zones, and take. We will take a conservative worst case approach by analyzing the loudest sounds (from the largest possible diameter piles) and the longest possible duration of sound generation (from installing smaller but more numerous and time-consuming piles) and generally the methods that would most impact marine mammals. Meeting our statutory and regulatory burdens to issue an IHA for this worst case condition assures that whatever project design configuration is ultimately selected will also meet these burdens. It is possible the contract will be awarded by the time this IHA is finalized. Therefore, we consider the Coast Guard's range of construction options herein as we may be able to narrow the range of impacts by the issuance of the final IHA.

The wharf extension will be supported by concrete piles that may vary in diameter from 16 to 30 inches under the different construction options. If 16-inch pies are used the Coast Guard estimates the project will require up to 102 piles to support the wharf. If 30-inch piles are used the Coast Guard estimates up to 54 piles will be required. In addition to the support piles, up to 108 additional concrete piles (up to 30-inch diameter) will be used to construct fenders and a further 18 concrete piles (up to 30-inch diameter) will be installed as corner protection at the end of the wharf.

The pile driving and excavation equipment will most likely be deployed and operated from barges, on water. A temporary construction staging area would be designated on shore in the vicinity, and construction barges would transport materials and crew to the work site from a local pier. The Coast Guard will use a bubble curtain to reduce sounds (*e.g.,* pneumatic barrier typically comprised of hosing or PVC piping that disrupts underwater noise propagation; see Proposed Mitigation section below).

In addition to the in-water work, the project includes onshore work including a new Maintenance and Weapons Division building, modifications to two other buildings, new and refurbished parking, and associated site and utility work. None of this work is expected to affect marine mammals and is not considered further. The waterfront improvements also include repair of the bank erosion area and placement of rock slope protection consisting of small rock near the new onshore electrical substation. None of this waterfront work is expected to affect marine mammals either and is not considered further.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and proposed to be authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Pacific SARs (*e.g.,* Carretta *et al.* 2020).

TABLE 1—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray Whale	*Eschrichtius robustus*	Eastern North Pacific	-, -, N	26,960 (0.05, 25,849, 2016)	801	138
Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose Dolphin	*Tursiops truncatus*	California Coastal	-, -, N	453 (0.06, 346, 2011)	2.7	>2.0
Short-beaked common dolphin.	*Delphinus delphis*	California/Oregon/Washington.	-, -, N	969,861 (0.17, 839,325, 2016)	8,393	≥40
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						

TABLE 1—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
California Sea Lion	*Zalophus californianus*	United States	-, -, N	257,606 (N/A, 233,515, 2014)	14,011	>321
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	California	-, -, N	30,968 (N/A, 27,348, 2012)	1,641	43

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

California sea lion, harbor seal, and bottlenose dolphin spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take of these species. Short-beaked common dolphin and gray whale occurrence and density is such that take is possible, and we have proposed authorizing take of these species also. These are all the species that have been observed in Los Angeles harbor in three surveys over 14 years (MEC, 2002; SAIC, 2010; MBC, 2016).

Blue whale, fin whale, Risso's dolphin, Pacific white-sided dolphin, and northern right whale dolphin occur in the region, but are rare and have not been observed in the project area, so take is not expected to occur and they are not discussed further beyond the explanation provided here. Blue whales have been observed in the Southern California Bight during their fall migration, however the closest live blue whale sighting record is 10 km south of the project site. Fin whales occur in the Southern California Bight year round, although they also seasonally range to central California and Baja California before returning to the Southern California Bight (Falcone and Schorr, 2013). The California, Oregon, and Washington (CA/OR/WA) stock of Risso's dolphins is commonly observed in the Southern California Bight (Carretta *et al.,* 2020), however they are infrequently observed very close to shore. The CA/OR/WA stock of Pacific white-sided dolphin is seasonally present in colder months outside the port breakwater in offshore water. Given that there have been no sightings of Pacific white-sided dolphins in the port and that the noise produced by the proposed project's in-water activities are not anticipated to propagate outside the port, no takes are anticipated for Pacific white-sided dolphins. The CA/OR/WA stock of northern right whale dolphins rarely occurs nearshore in the Southern California Bight (Carretta *et al.,* 2020). The closest northern right whale dolphin sighting record is 26.5 km southwest of the Port of Los Angeles breakwater (OBIS SEAMAP, 2019).

Gray Whale

In the fall, gray whales migrate from their summer feeding grounds, heading south along the coast of North America to spend the winter in their breeding and calving areas off the coast of Baja California, Mexico. From mid-February to May, the Eastern North Pacific stock of gray whales can be seen migrating northward with newborn calves along the west coast of the U.S. During the migration, gray whales will occasionally enter rivers and bays and even harbors along the coast but not in high numbers. They travel alone or in small groups. There is currently a gray whale unusual mortality event that has led to increased strandings along the west coast (*https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2020-gray-whale-unusual-mortality-event-along-west-coast-and*).

Gray whales are periodically, but not regularly sighted within the Los Angeles and Long Beach harbor area. No Gray whales were sighted during the 2013 to 2014 or 2008 biological baseline surveys of the harbors. One small gray whale, and later a dead gray whale, was observed inside the harbor areas during the 2000 survey (MEC, 2002; SAIC, 2010; MBC, 2016).

Bottlenose Dolphin

The California coastal stock of common bottlenose dolphin is found within 0.6 miles (mi) (1 km) of shore (Defran and Weller, 1999) and occurs from northern Baja California, Mexico to Bodega Bay, CA. Their range has extended north over the last several decades with El Niño events and increased ocean temperatures (Hansen and Defran, 1990). Genetic studies have shown that no mixing occurs between the California coastal stock and the offshore common bottlenose dolphin stock (Lowther-Thieleking *et al.,* 2015). Bottlenose dolphins are opportunistic foragers: time of day, tidal state, and oceanographic habitat influence where they pursue prey (Hanson and Defran, 1993). Dive durations up to 15 minutes have been recorded for trained Navy bottlenose dolphins, (Ridgway *et al.,* 1969), but typical dives are shallower and of a much shorter duration (Mate *et al.,* 1995).

Bottlenose dolphins accounted for approximately two percent of all marine mammal observations during the most recent survey of the Los Angeles and Long Beach harbors. The majority of observations involved individuals foraging in the outer harbor area (MBC, 2016).

Short-Beaked Common Dolphin

Common dolphins occur in temperate and tropical waters globally. Short beaked common dolphins from the CA/WA/OR stock are the most common cetacean off the coast of California, occurring year-round and ranging from the coast to at least 300 nautical miles (nm) offshore (Carretta *et al.,* 2019). They travel in large social pods and are generally associated with oceanic and offshore waters, prey-rich ocean upwellings, and underwater landscape features such as seamounts, continental shelves, and oceanic ridges. Though they are present off the coast of California year-round, their abundance varies with seasonal and interannual changes in oceanographic conditions (increasing with higher temperatures) with peak abundance in the summer and fall (Forney and Barlow, 1998; Barlow, 2016). Common dolphins largely forage on schooling fish and squid. Off the California coast, calving takes place in winter months.

Abundance of the CA/OR/WA stock of short-beaked common dolphins has increased since large-scale surveys began in 1991. This stock is known to increase in abundance in California during warm water periods. The most recent survey in 2014 survey was conducted during extremely warm oceanic conditions (Bond *et al.,* 2015) and recorded the highest abundance estimate since large-scale surveys began. This observed increase in abundance of short-beaked common dolphins off California likely reflects a northward movement of this transboundary stock from waters off Mexico (distributional shift), rather than an overall population increase due to growth shift (Anganuzzi *et al.,* 1993; Barlow, 1995; Barlow, 2016; Forney and Barlow, 1998).

Observations during biological surveys in 2013 through 2014 included one pod of 40 individuals in the Los Angeles Main Channel where the project occurs (MBC, 2016).

California Sea Lion

California sea lions occur from Vancouver Island, British Columbia, to the southern tip of Baja California. Sea lions breed on the offshore islands of southern and central California from May through July (Heath and Perrin, 2008). During the non-breeding season, adult and subadult males and juveniles migrate northward along the coast to central and northern California, Oregon, Washington, and Vancouver Island (Jefferson *et al.,* 1993). They return south the following spring (Heath and Perrin 2008, Lowry and Forney 2005). Females and some juveniles tend to remain closer to rookeries (Antonelis *et al.,* 1990; Melin *et al.,* 2008). Pupping occurs primarily on the California Channel Islands from late May until the end of June (Peterson and Bartholomew 1967). Weaning and mating occur in late spring and summer during the peak upwelling period (Bograd *et al.,* 2009). After the mating season, adult males migrate northward to feeding areas as far away as the Gulf of Alaska (Lowry *et al.,* 1992), and they remain away until spring (March–May), when they migrate back to the breeding colonies. Adult females generally remain south of Monterey Bay, California throughout the year, feeding in coastal waters in the summer and offshore waters in the winter, alternating between foraging and nursing their pups on shore until the next pupping/breeding season (Melin and DeLong, 2000; Melin *et al.,* 2008).

California sea lions were the most commonly observed marine mammal during the 2008 and 2013 to 2014 surveys of the Los Angeles and Long Beach harbors. Individuals were observed hauled-out and resting on buoys, docks, riprap shorelines, as well as docked cargo ships. They were frequently documented to be foraging near bait barges and fish markets, as well as in the wakes of fishing boats entering the Port Complex (SAIC, 2010; MBC. 2016).

Harbor Seal

Harbor seals are found from Baja California to the eastern Aleutian Islands of Alaska (Harvey and Goley, 2011). In California there are approximately 500 haulout sites along the mainland and on offshore islands, including intertidal sandbars, rocky shores, and beaches (Hanan, 1996; Lowry *et al.,* 2008). Harbor seals molt from May through June. Peak numbers of harbor seals haul out during late May to July, which coincides with the peak molt. During both pupping and molting seasons, the number of seals and the length of time hauled out per day increase, from an average of 7 hours per day to 10–12 hours (Harvey and Goley, 2011; Huber *et al.,* 2001; Stewart and Yochem, 1994).

Harbor seals tend to forage at night and haul out during the day with a peak in the afternoon between 1 p.m. and 4 p.m. (Grigg *et al.,* 2012; London *et al.,* 2001; Stewart and Yochem, 1994; Yochem *et al.,* 1987). Tide levels affect the maximum number of seals hauled out, with the largest number of seals hauled out at low tide, but time of day and season have the greatest influence on haul out behavior (Manugian *et al.,* 2017; Patterson and Acevedo-Gutiérrez, 2008; Stewart and Yochem, 1994).

Pupping occurs from March through May in central California (Codde and Allen, 2018). Pups are weaned in four weeks, most by mid-June (Codde and Allen, 2018). Harbor seals breed between late March and June (Greig and Allen, 2015). Harbor seals are rarely found more than 10.8 nm from shore (Baird 2001) and are generally non-migratory (Burns, 2002; Jefferson *et al.,* 2008) and solitary at sea.

In the Los Angeles and Long Beach Harbors, Pacific harbor seals were the second most abundant marine mammal, accounting for approximately 26 percent of marine mammal observations. They were more commonly observed in the outer harbor areas, resting or foraging along riprap shorelines, particularly in the vicinity of the outer harbor breakwaters (SAIC, 2010; MBC, 2016).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.

TABLE 2—MARINE MAMMAL HEARING GROUPS—Continued

[NMFS, 2018]

Hearing group	Generalized hearing range *
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Harbor seals are in the phocid group, California sea lions are in the otariid group, the dolphins are mid-frequency cetaceans, and gray whales are classified as low-frequency cetaceans.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Acoustic effects on marine mammals during the specified activity can occur from impact pile driving. The effects of underwater noise from the Coast Guard's proposed activities have the potential to result in Level A and/or Level B harassment of marine mammals in the action area.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (ANSI 1994, 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact pile driving. The sounds produced by these activities fall into one of the two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI, 1986; NIOSH, 1998; ANSI, 2005; NMFS, 2018). Non-impulsive sounds (*e.g.,* machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

An impact pile hammer would be used on this project. Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005).

The likely or possible impacts of the Coast Guard's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel and sedimentation from the work; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile installation.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving is the primary means by which marine mammals may be harassed from the Coast Guard's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). Generally, exposure to pile driving noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional

noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2003; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.,* 1958, 1959; Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals, largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (see Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000, 2002). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SEL_{cum}) in an accelerating fashion: At low exposures with lower SEL_{cum}, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum}, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). The potential for TTS from impact pile driving exists. After exposure to playbacks of impact pile driving sounds (rate 2,760 strikes/hour) in captivity, mean TTS increased from 0 dB after 15 minute exposure to 5 dB after 360 minute exposure; recovery occurred within 60 minutes (Kastelein *et al.,* 2016). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018).

Installing piles for this project requires impact pile driving. There would likely be pauses in activities producing the sound during each day as work moves among piles and to adjust during the course of a single pile. Given these pauses and that many marine mammals are likely moving through the action area and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment—Exposure to noise from pile driving also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or

aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

In 2016, the Alaska Department of Transportation and Public Facilities (ADOT&PF) documented observations of marine mammals during construction activities (*i.e.,* pile driving) at the Kodiak Ferry Dock (see 80 FR 60636, October 7, 2015). In the marine mammal monitoring report for that project (ABR 2016), 1,281 Steller sea lions were observed within the Level B disturbance zone during pile driving or drilling (*i.e.,* documented as Level B harassment take). Of these, 19 individuals demonstrated an alert behavior, 7 were fleeing, and 19 swam away from the project site. All other animals (98 percent) were engaged in activities such as milling, foraging, or fighting and did not change their behavior. In addition, two sea lions approached within 20 meters of active vibratory pile driving activities. Three harbor seals were observed within the disturbance zone during pile driving activities; none of them displayed disturbance behaviors. Fifteen killer whales and three harbor porpoise were also observed within the Level B harassment zone during pile driving. The killer whales were travelling or milling while all harbor porpoises were travelling. No signs of disturbance were noted for either of these species. Given the similarities in activities and habitat and the fact that some of the same species are involved, we expect similar behavioral responses of marine mammals to the Coast Guard's specified activity. That is, disturbance, if any, is likely to be temporary and localized (*e.g.,* small area movements).

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar projects in the area.

Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a

noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. The project area contains active commercial shipping, as well as numerous recreational and other commercial vessels; therefore, background sound levels in the area are already elevated as noted above.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Marine Mammal Habitat Effects

The Coast Guard's construction activities could have localized, temporary impacts on marine mammal habitat and their prey by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During impact pile driving, elevated levels of underwater noise would ensonify the port and harbor where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne sound.

A temporary and localized increase in turbidity near the seafloor would occur in the immediate area surrounding the area where piles are installed. In general, turbidity associated with pile installation is localized to about a 25-foot (7.6-meter) radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Local strong currents are anticipated to disburse any additional suspended sediments produced by project activities at moderate to rapid rates depending on tidal stage. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat

The area likely impacted by the project is relatively small compared to the available habitat (*e.g.,* the impacted area is entirely within the port) and does not include any Biologically Important Areas or other habitat of known importance. The area is highly influenced by anthropogenic activities. The total seafloor area affected by pile installation is a very small area compared to the vast foraging area available to marine mammals in the port and nearby ocean. At best, the impact area provides marginal foraging habitat for marine mammals and fish, while the new pilings installed would provide substrate for invertebrate prey to settle on. Furthermore, pile driving and removal at the project site would not obstruct movements or migration of marine mammals.

Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity.

In-water Construction Effects on Potential Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction

projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012).

Sound Pressure Levels (SPL) of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

Construction activities, in the form of increased turbidity, have the potential to adversely affect fish migratory routes in the project area. These fish form a significant prey base for many marine mammal species that occur in the project area. Increased turbidity is expected to occur in the immediate vicinity of pile driving activities. Most of the turbidity is expected to be within the dredged navigation channel and port. Suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle (Navy, 2018). Given the limited area affected and tidal dilution rates any effects on fish are expected to be minor or negligible. Finally, exposure to turbid waters from construction activities is not expected to be different from the current exposure; fish and marine mammals in the area are routinely exposed to substantial levels of suspended sediment from natural and anthropogenic sources (Tetra Tech, 2011).

In summary, given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through the IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment, as use of the acoustic source (*i.e.,* impact pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result for gray whales and harbor seals because predicted auditory injury zones are larger. The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). NMFS relied on local occurrence data and group size to estimate take. Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 µPa (rms) for continuous (*e.g.,* vibratory pile-driving) and above 160 dB re 1 µPa (rms) for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

The Coast Guard's proposed activity includes the use of impulsive (impact pile-driving) sources, and therefore the

160 dB re 1 μPa (rms) threshold is applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Coast Guard's activity includes the use of impulsive (impact pile-driving) sources.

These thresholds are provided in Table 3. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1 μPa^2s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving).

An impact hammer would be used to place the pile at its intended depth through rock or harder substrates. An impact hammer is a steel device that works like a piston, producing a series of independent strikes to drive the pile. Impact hammering typically generates the loudest noise associated with pile installation. The actual durations of each installation method vary depending on the type and size of the pile.

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for piles of various sizes being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile sizes and methods (see Table 4). Data are provided for 16 and 30-inch concrete piles that are the extremes of the possible range of sizes. As noted above, the Coast Guard will use a bubble curtain to reduce sounds from pile driving. A 5dB reduction is applied to the source levels for calculating distances to the Level A harassment and Level B harassment sound thresholds. This is a conservative reduction based on several studies including CALTRANS (2015) and Austin *et al.* (2016).

TABLE 4—PROJECT SOUND SOURCE LEVELS

Pile driving activity		Estimated sound source level at 10 meters without attenuation			Data source
Hammer type	Pile type	dB RMS	dB SEL	dB peak	
Impact	16-inch concrete	166	155	185	CALTRANS (2015) (Table I.2–1,18-inch concrete).
Impact	30-inch concrete	176	166	200	CALTRANS (2015) (Table I.2–3).

Note: RMS = root mean square, SEL = single strike sound exposure level; dB peak = peak sound level. A 5-db reduction for use of a bubble curtain reduces these source levels when calculating isopleth distances below.

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2), where

TL = transmission loss in dB

B = transmission loss coefficient; for practical spreading equals 15

R1 = the distance of the modeled SPL from the driven pile, and

R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for the Coast Guard's proposed activity.

Using the practical spreading model, the Coast Guard determined underwater noise would fall below the behavioral effects threshold for marine mammals at distances no greater than 55 m with an effective source level of 171 dB rms for the 30-inch piles (Table 5). This distance determines the maximum Level B harassment zone for the project.

TABLE 5—CALCULATED DISTANCES (METERS) TO LEVEL B HARASSMENT ISOPLETHS (m) FOR EACH PILE TYPE

Pile type	Level B isopleth (m)
16-inch concrete	12
30-inch concrete	55

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of take by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as impact pile driving, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS.

Inputs used in the User Spreadsheet (Table 6), and the resulting isopleths are reported below (Table 7) for each of the pile types.

TABLE 6—NMFS TECHNICAL GUIDANCE USER SPREADSHEET INPUT TO CALCULATE LEVEL A ISOPLETHS

Pile type	Piles/day	Strikes per pile *	Days of pile driving **
16-inch concrete	6	1564 strikes	17
30-inch concrete	6	1748 strikes	21 or 30

Note: Propagation loss coefficient is 15LogR and Weighting Factor Adjustment is 2 for all cells.
* Strikes per pile are an estimate from a geotechnical report for the project (TCG, 2019).
** Days depends on size of pile ultimately used for wharf support. Take will be calculated using largest zones (30 inch piles) and longest duration (38 days using 16 inch support piles and 30-inch fender and corner piles).

The above input scenarios lead to PTS isopleth distances (Level A thresholds) of 1 to 194.6 meters (3 to 639 feet), depending on the marine mammal group and scenario (Table 7). Note that the Level A harassment isopleths are larger than the level B harassment isopleths for the low-frequency and high-frequency cetaceans and the phocid pinnipeds because of the large number of piles and strikes per day and use of only an impact hammer.

TABLE 7—CALCULATED DISTANCES (METERS) TO LEVEL A HARASSMENT ISOPLETHS (m) FOR EACH HEARING GROUP AND PILE TYPE

Pile type	Low-frequency cetaceans (meters)	Mid-frequency cetaceans (meters)	High-frequency cetaceans (meters)	Phocid pinnipeds (meters)	Otariid pinnipeds (meters)
16-inch concrete	28.0	1	33.4	15	1.1
30-inch concrete	163.4	5.8	194.6	87.4	6.4

Note: a 10-meter shutdown zone will be implemented for all species and activity types to prevent direct injury of marine mammals.

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, abundance, or group dynamics of marine mammals that will inform the take calculations. Density data in the port and harbor does not exist for any species, but as described above, there are three baseline biological surveys since 2000 (MEC, 2002; SAIC, 2010; MBC, 2016) that provide observations in over 30 defined zones within the harbor, 4 of which are near the ensonified area of the project and are used to estimate take.

Here we describe how the information provided above is brought together to produce a quantitative take estimate. Take by Level A and Level B harassment is proposed for authorization and summarized in Table 8.

Gray Whale

Because live gray whales were not sighted during the baseline surveys (see above), but are periodically known from the harbor, and the Level A harassment and shutdown zone radius is 200 m (656 feet), we propose to authorize two Level A harassment takes (Table 8) for inadvertent takes of animals that could enter the shutdown zone undetected or before shutdown could be implemented. Because the Level A harassment and shutdown zones are larger than the Level B harassment zone, we do not propose to authorize take by Level B harassment, but recognize animals

could also inadvertently enter the smaller Level B harassment zone after already being recorded as Level A harassment within the larger Level A harassment zone.

Bottlenose Dolphin

The highest observation on any given day in the four zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 12. Given the small zone size relative to the study area an expected number of three animals in the project area per day is a reasonable representation of daily occurrence for the species. Given a maximum pile driving period of 38 days, 3 animals per day would equate a take of 114 incidents of Level B harassment. Based on the above, we conservatively propose to authorize 114 Level B harassment takes of bottlenose dolphins (Table 8). Because the Level A harassment and shutdown zones are very small and we believe the protected species observer (PSO) will be able to effectively monitor and implement the shutdown zones, we do not anticipate or propose to authorize take by Level A harassment.

Short-Beaked Common Dolphin

Observations during biological surveys in 2013 through 2014 included one pod of 40 individuals in the Los Angeles Main Channel where the project occurs (MBC, 2016). This number of individuals is highly unlikely to be present in the project area on a daily basis. We conservatively assume one pod of 40 could be present each full week. Given a maximum pile driving period of 38 days, this would equate to 5 full weeks or 200 takes through Level B harassment. Based on the above, we propose to authorize 200 Level B harassment takes of short-beaked common dolphins (Table 8). Because the Level A harassment and shutdown zones are very small and we believe the PSO will be able to effectively monitor and implement the shutdown zones, we do not anticipate or propose to authorize take by Level A harassment.

California Sea Lion

The highest observation on any given day in the four zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 65 sea lions. Given the small zone size relative to the study area an expected number of 10 animals in the project area per day is a reasonable representation of daily occurrence for the species. Given a maximum pile driving period of 38 days, 10 animals per day would equate to 380 incidents of Level B harassment. Based on the above, we propose to authorize 380 Level B harassment takes of California sea lions (Table 8). Because the Level A harassment and shutdown zones are very small and we believe the PSO will be able to effectively monitor and implement the shutdown zones, we do not anticipate or propose to authorize take by Level A harassment.

Harbor Seal

The highest observation on any given day in the four zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 1 seal. The Level A harassment zone for this species is 90 m (295 feet), however the Coast Guard proposed a smaller shutdown zone to minimize work stoppages. We are proposing a shutdown zone of 55 m (180 feet, see Proposed Mitigation section below) that coincides with the size of the Level B harassment zone for ease of implementation. It is conservatively estimated that 0.5 animals per day might enter the shutdown zone or Level A harassment zone between 55 and 90 m (180–295 feet). Given a maximum pile driving period of 38 days, this would equate to a take of 19 individuals through Level A harassment (Table 8). Because the Level A harassment and shutdown zones are larger than the Level B harassment zone, we do not propose to authorize take by Level B harassment, but recognize animals could also enter the smaller Level B harassment zone after already being recorded within the larger Level A harassment zone.

TABLE 8—PROPOSED AUTHORIZED AMOUNT OF TAKING, BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES AND STOCK AND PERCENT OF TAKE BY STOCK

Species	Authorized take		Percent of stock
	Level B	Level A	
Harbor seal (*Phoca vitulina*) California Stock	0	19	<0.1
California sea lion (*Zalophus californianus*) U.S. Stock	380	0	0.2
Gray whale (*Eschrichtius robustus*) Eastern North Pacific Stock	0	2	<0.1
Common bottlenose dolphin (*Tursiops truncatus*) California Coastal Stock	114	0	25.2
Short-beaked common dolphin (*Delphinus delphis*) California/Oregon/Washington Stock	200	0	<0.1

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity,

personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The following mitigation measures are proposed in the IHA:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location; or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile);
- Conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For those marine mammals for which Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level B harassment zone; and
- If take reaches the authorized limit for an authorized species, pile installation will be stopped as these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures would apply to the Coast Guard's in-water construction activities.

- *Establishment of Shutdown Zones*—The Coast Guard will establish shutdown zones for all pile driving activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 9). Shutdown zones are rounded up to the next 10 m from the largest Level A harassment zones in Table 7, except in the case of the phocid group where the shutdown zone is reduced to the same size as the largest Level B harassment zone (55 m) and the applicant has requested the authorization of Level A harassment takes for the area within the Level A harassment one and outside the shutdown zone.
- The placement of PSOs during all pile driving and removal activities (described in detail in the Proposed Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

TABLE 9—SHUTDOWN ZONES

Pile type	Low-frequency cetaceans (meters)	Mid-frequency cetaceans (meters)	High-frequency cetaceans (meters)	Phocid pinnipeds (meters)	Otariid pinnipeds (meters)
16-inch concrete	30	10	40	20	10
30-inch concrete	170	10	200	55	10

- *Monitoring for Level A and B Harassment*—The Coast Guard will monitor the Level A and B harassment zones. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential halt of activity should the animal enter the shutdown zone. Placement of PSOs will allow PSOs to observe marine mammals within the Level B harassment zones.
- *Pre-activity Monitoring*—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will be required.
- *Soft Start*—Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a thirty-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.
- *Bubble Curtain*—The Coast Guard is required to employ a bubble curtain during all impact pile driving and operate it in a manner consistent with the following performance standards: (1) The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column; (2) The lowest bubble ring must be in contact with the mudline for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline contact. No parts of the ring or other objects shall prevent full mudline contact; and (3) Air flow to the bubblers must be balanced around the circumference of the pile.
- *Hydroacoustic monitoring*—The Coast Guard is required to conduct hydroacoustic monitoring of at least two piles of each pile diameter.
- Pile driving or removal is planned to occur during daylight hours.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least

practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Monitoring section of the application and Section 5 of the IHA. Marine mammal monitoring during pile driving must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- Independent PSOs (*i.e.,* not construction personnel) who have no other assigned tasks during monitoring periods must be used;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.
- Other PSOs may substitute education (degree in biological science or related field) or training for experience; and
- The Coast Guard must submit PSO Curriculum Vitae for approval by NMFS prior to the onset of pile driving.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

One PSO will be employed. PSO location will provide an unobstructed view of all water within the shutdown and Level A and Level B harassment zones.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving/removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving or drilling equipment is no more than 30 minutes.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets.

Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring.
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory).
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance).
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.
- Age and sex class, if possible, of all marine mammals observed.
- PSO locations during marine mammal monitoring.
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active.
- Number of marine mammals detected within the harassment zones, by species.
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.
- Description of attempts to distinguish between the number of individual animals taken and the

number of incidences of take, such as ability to track groups or individuals.

• Submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Hydroacoustic Monitoring and Reporting—The Coast Guard will monitor the driving of at least two piles of each diameter. As part of the above-mentioned report, or in a separate report with the same timelines as above, the Coast Guard will provide an acoustic monitoring report for this work. The acoustic monitoring report must, at minimum, include the following:

• Hydrophone equipment and methods: Recording device, sampling rate, distance (m) from the pile where recordings were made; depth of recording device(s).

• Type of pile being driven, substrate type, method of driving during recordings, and if a sound attenuation device is used.

• For impact pile driving: Pulse duration and mean, median, and maximum sound levels (dB re: 1μPa): SELcum, peak sound pressure level (SPLpeak), and single-strike sound exposure level (SELs-s).

• Number of strikes per pile measured, one-third octave band spectrum and power spectral density plot.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Coast Guard shall report the incident to the Office of Protected Resources (OPR), NMFS and to the regional stranding coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Coast Guard must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

• Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

• Species identification (if known) or description of the animal(s) involved;

• Condition of the animal(s) (including carcass condition if the animal is dead);

• Observed behaviors of the animal(s), if alive;

• If available, photographs or video footage of the animal(s); and

• General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in Table 8, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Pile driving activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A harassment and Level B harassment from underwater sounds generated from pile driving. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

The takes from Level A and Level B harassment would be due to potential behavioral disturbance, TTS, and PTS. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

The Level A harassment zones identified in Table 7 are based upon an animal exposed to impact pile driving multiple piles per day. Considering duration of impact driving each pile (up to 45 minutes) and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area. So while the take we are proposing to authorize is expected to occur, if an animal was exposed to accumulated sound energy, the resulting PTS would likely be small (*e.g.,* PTS onset) at lower frequencies where pile driving energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The nature of the pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (Los Angeles port) of any given stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take proposed to be authorized for any given stock is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities (as noted during modification to the Kodiak Ferry Dock; see *Behavioral Harassment* section above) or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day and that pile driving and removal would occur across a few weeks, any harassment would be temporary. There are no other areas or times of known biological

importance for any of the affected species.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized.
- Authorized Level A harassment would be very small amounts and of low degree.
- No biologically important areas have been identified within the project area.
- For all species, the project area is a very small, human-altered and peripheral part of their range.
- The Coast Guard would implement mitigation measures such soft-starts, bubble curtain, and shut downs.
- Monitoring reports from similar work in the ports have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS proposes to authorize of all species or stocks is below one third of the estimated stock abundance. These are all likely conservative estimates of individuals taken because they assume all takes are of different individual animals which is likely not the case. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Coast Guard to conduct the Base Los Angeles/Long Beak Wharf Expansion project in California February 1, 2021 through January 31, 2022, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed Base Los Angeles/Long Beak Wharf Expansion project. We also request at this time comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than

minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: October 16, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–23304 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska American Fisheries Act Reports

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before December 21, 2020.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0401 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, 907–586–7228.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Services (NMFS), Alaska Region, is requesting extension of a currently approved information collection for American Fisheries Act reporting requirements.

NMFS manages the groundfish fisheries of the Bering Sea and Aleutian Islands Management Area in the Exclusive Economic Zone off Alaska. The North Pacific Fishery Management Council (Council) prepared the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* and other applicable laws. Regulations implementing the FMP are at 50 CFR part 679.

The Bering Sea pollock fishery is managed under the American Fisheries Act (AFA). The purpose of the AFA was to tighten U.S. ownership standards for U.S. fishing vessels under the Anti-reflagging Act and to provide the Bering Sea pollock fleet the opportunity to conduct its fishery in a more rational manner while protecting non-AFA participants in the other fisheries. The AFA established sector allocations in the Bering Sea (BS) pollock fishery, determined eligible vessels and processors, allowed the formation of cooperatives, set limits on the participation of AFA vessels in other fisheries, and imposed special catch weighing and monitoring requirements on AFA vessels.

This information collection contains the annual and periodic reporting requirements for AFA cooperatives. These requirements consist of reports about on-going fishing operations of the cooperatives and reports specifically focused on efforts to minimize salmon bycatch in the Bering Sea pollock fishery. These reporting requirements are located at 50 CFR 679.21 and 679.61.

This information collection provides the Council and NMFS with information about the organization and fishing operations of the AFA cooperatives, allocations to the AFA cooperatives, and the effectiveness of the Chinook salmon and chum salmon bycatch management measures. This information is used to manage the BS pollock fishery, to evaluate the salmon bycatch management measures, and to provide the public with information about how the program operates and information about bycatch reduction under this program. This information is necessary to ensure long-term conservation and abundance of salmon and pollock, maintain a healthy marine ecosystem, and provide maximum benefit to fishermen and communities that depend on salmon and pollock.

II. Method of Collection

There are no forms associated with this information collection. Respondents submit the information by mail or fax.

III. Data

OMB Control Number: 0648–0401.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 8.

Estimated Time per Response: AFA Cooperative Contract 8 hours; AFA Annual Cooperative Report 16 hours; Incentive Plan Agreement amendment 50 hours; IPA Annual Report 80 hours; IPA administrative appeals 4 hours.

Estimated Total Annual Burden Hours: 486 hours.

Estimated Total Annual Cost to Public: $557.

Respondent's Obligation: Required to Obtain or Retain Benefits, Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act, American Fisheries Act.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–23228 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA567]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Bering Sea Fishery Ecosystem Plan Local Knowledge, Traditional Knowledge, and Subsistence Taskforce will be held November 9, 2020 through November 10, 2020.

DATES: The meeting will be held on Monday, November 9, 2020, from 8:30 a.m. to 1 p.m. Alaska Time, and from 8:30 a.m. to 1:30 p.m. on Tuesday, November 10, 2020.

ADDRESSES: The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1683.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Kate Haapala Council staff; phone; (907) 271–2809 and email: *kate.haapala@noaa.gov.* For technical support please contact our administrative staff; email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Monday, November 9, 2020 Through Tuesday, November 10, 2020

The agenda will include (a) introduction and updates from Taskforce members; (b) review updates and discussion on search engine; (c) narrative sources of data; (d) review definition of subsistence for Taskforce; (e) review Norton Sound Red King Crab case study; (f) discussion on protocol development; and (g) other business.

The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1683* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/1683.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1683* by 5 p.m. Alaska time on Sunday, November 8, 2020. An opportunity for oral public testimony will also be provided during the meeting.

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

Dated: October 16, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–23324 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA561]

Takes of Marine Mammals Incidental To Specified Activities; Taking Marine Mammals Incidental to Port of Kalama Expansion Project on the Lower Columbia River

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

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization.

SUMMARY: NMFS received a request from the Port of Kalama (POK) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to construction activities associated with an expansion project at the POK on the Lower Columbia River, Washington. These activities are identical to those covered in the current authorization. The project has been delayed and none of the work covered in the initial IHA has been conducted. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than November 5, 2020.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Fowler@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated

to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Description of the Specified Activities and Anticipated Impacts section of this notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of the notice of proposed IHA for the initial IHA, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.* Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA Renewal qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA Renewal request.

History of Request

On September 28, 2015, we received a request from the POK for authorization of the taking, by Level B harassment only, of marine mammals incidental to the construction associated with the Port of Kalama Expansion Project, which involved construction of the Kalama Marine Manufacturing and Export Facility including a new marine terminal for the export of methanol, and installation of engineered log jams, restoration of riparian wetlands, and the removal of existing wood piles in a side channel as mitigation activities. The specified activity is expected to result in the take of three species of marine mammals (harbor seals (*Phoca vitulina*), California sea lions (*Zalophus californianus*), and Steller sea lions (*Eumetopias jubatus*)). A final version of the application, which we deemed adequate and complete, was submitted on December 10, 2015. We published a notice of a proposed IHA and request for comments on March 21, 2016 (81 FR 15064). After the public comment period and before we issued the final IHA, POK requested that we issue the IHA for 2017 instead of the 2016 work season. We subsequently published the final notice of our issuance of the IHA on December 12, 2016 (81 FR 89436), effective from September 1, 2017–August 31, 2018. In-water work associated with the project was expected to be completed within the one-year timeframe of the IHA.

On June 21, 2018, POK informed NMFS that work relevant to the specified activity considered in the MMPA analysis for the 2017–2018 IHA was postponed and would not be completed. POK requested that the IHA

be issued to be effective for the period from 2018–2019. In support of that request, POK submitted an application addendum affirming that no change in the proposed activities is anticipated and that no new information regarding the abundance of marine mammals is available that would change the previous analysis and findings. A notice for the proposed incidental take authorization was published on July 25, 2018 (83 FR 35220), and a corrected notice was published on August 14, 2018 (83 FR 40257). On November 13, 2018, NMFS published final notice of our issuance of an IHA authorizing take of marine mammals incidental to the Port of Kalama Expansion Project (83 FR 56304). The effective dates of that IHA were October 18, 2018 through October 18, 2019.

On August 21, 2019, POK informed NMFS that the project had been delayed by one year. None of the work identified in the IHA (*i.e.*, pile driving and removal) had occurred and no take of any marine mammals had occurred since the effective date of the initial IHA. POK submitted a formal request for an identical IHA, but with modified effective dates, in order to conduct the construction work that was analyzed and authorized through the previously issued IHA. On October 17, 2019, NMFS issued an IHA to POK to take marine mammals incidental to construction activities at the Port of Kalama (84 FR 57013; October 24, 2019), effective from October 19, 2019 through October 18, 2020 (hereafter referred to as the initial IHA).

On August 27, 2020, NMFS received an application for the Renewal of that initial IHA. As described in the request for the Renewal IHA, the activities for which incidental take is requested are identical to those covered in the initial authorization. In order to consider an IHA Renewal, NMFS requires the applicant provide a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. As no construction activities have been conducted, POK has no monitoring results to report. NMFS has preliminarily determined that POK's proposed activities (including mitigation, monitoring, and reporting), estimated incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the initial IHA. However, NMFS is requesting comments or additional information that may further inform our proposal to issue an IHA Renewal to POK. This IHA Renewal would be valid from the date of issuance to October 18, 2021.

Description of the Specified Activities and Anticipated Impacts

POK's planned activities include construction of a marine terminal and dock/pier for the export of methanol, and associated compensatory mitigation activities for the purposes of offsetting habitat effects from the action. Specifically, the location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the original IHA.

Similarly, the anticipated impacts are identical to those described in the initial IHA. NMFS anticipates the take of three species of marine mammals (Pacific harbor seals, California sea lions, and Steller sea lions) by Level A and Level B harassment incidental to underwater noise resulting from construction associated with the proposed activities.

The following documents are referenced in this notice and include important supporting information:

- Initial reissued IHA (84 FR 57013; October 24, 2019);
- Initial final IHA (83 FR 56304; November 13, 2018);
- Initial proposed IHA (83 FR 40257; August 14, 2018);
- 2017 final IHA (81 FR 89436; December 12, 2016);
- 2017 proposed IHA (81 FR 15064; March 21, 2016); and
- 2017 and 2018 IHA applications, references cited, and previous public comments received (available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*).

Detailed Description of the Activity

POK is proposing to construct a marine terminal and dock/pier for the export of methanol, and associated compensatory mitigation activities for the purposes of offsetting habitat effects from the action. The marine terminal will be approximately 45,000 square feet in size, supported by 320 concrete piles (24-inch precast octagonal piles to be driven by impact hammer) and 16 steel piles (12 x 12-inch and 4 x 18-inch anticipated to be driven by vibratory hammer, and impact hammering will only be done to drive/proof if necessary). The compensatory mitigation includes installation of 8 engineered log jams (ELJs), which will be anchored by untreated wooden piles driven by impact hammer at low tides (not in water). The compensatory mitigation also includes removal of approximately 320 untreated wooden piles from an abandoned U.S. Army Corps of Engineers (USACE) dike in a nearby backwater area. The piles will be removed either by direct pull or vibratory extraction. Finally, the compensatory mitigation includes wetland restoration and enhancement by removal of invasive species and replacement with native wetland species.

A detailed description of the construction activities for which take is proposed here may be found in the **Federal Register** notice of proposed IHA for the 2017 authorization (81 FR 15064; March 21, 2016). As stated above, location, timing (*e.g.,* seasonality), and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those analyzed in the initial IHA. The proposed IHA Renewal would be effective from the date of issuance to October 18, 2021 (*i.e.,* one year after the expiration of the initial IHA).

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notices for the proposed IHA for the initial authorization (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. The 2019 Stock Assessment Report notes the estimated abundance of the Eastern U.S. stock of Steller sea lions has decreased slightly. However, NMFS has preliminarily determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** notices for the proposed initial IHA (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events,

and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** notices for the proposed initial IHA (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). Specifically, the source levels, days of operation, and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 1. The estimated abundance of Steller sea lions has decreased from that described in the initial IHA (Muto *et al.,* 2020), therefore the percent of stock proposed to be taken has increased.

TABLE 1—ESTIMATED TAKE PROPOSED FOR AUTHORIZATION AND PROPORTION OF POPULATION POTENTIALLY AFFECTED

	Estimated take by Level B harassment	Estimated take by Level A harassment	Stock	Abundance of stock	Percentage of stock potentially affected
Harbor seal	1,530	10	Oregon/Washington Coast	24,732	6.2
California sea lion	372	0	U.S	153,337	0.2
Steller sea lion	372	0	Eastern U.S	43,201	0.86

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (83 FR 56304; November 13, 2018), and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

Proposed Mitigation Requirements

In summary, mitigation includes implementation of shut down procedures if any marine mammal approaches or enters the Level A harassment zone for pile driving (26 meters (m) (85 feet (ft)) for vibratory pile driving of steel piles; 63 m (207 ft) for impact driving of concrete piles; and 252 m (828 ft) for impact driving of steel piles). For in-water heavy machinery work other than pile driving (*e.g.,* standard barges, barge-mounted cranes, excavators, *etc.*), if a marine mammal comes within 10 m, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions. One trained observer must monitor to implement shutdowns and collect information at each active pile driving location (whether vibratory or impact driving of steel or concrete piles).

Pile driving activities may only be conducted during daylight hours. If the shutdown zone is obscured by fog or poor lighting conditions, pile driving will not be initiated until the entire shutdown zone is visible. Work that has been initiated appropriately in conditions of good visibility may continue during poor visibility. The shutdown zone will be monitored for 30 minutes prior to initiating the start of pile driving, during the activity, and for 30 minutes after activities have ceased. If pinnipeds are present within the shutdown zone prior to pile driving, the start will be delayed until the animals leave the shutdown zone of their own volition, or until 15 minutes elapse without re-sighting the animal(s).

Soft start procedures must be implemented at the start of each day's impact pile driving and at any time following cessation of impact driving for a period of thirty minutes or longer. If steel piles require impact installation or proofing, a bubble curtain must be used for sound attenuation. If water velocity is 1.6 ft per second (1.1 miles per hour (mph)) or less for the entire installation period, the pile being driven must be surrounded by a confined or unconfined bubble curtain that will distribute small air bubbles around 100 percent of the pile perimeter for the full depth of the water column. If water velocity is greater than 1.6 feet per second (1.1 mph) at any point during installation, the pile being driven must be surrounded by a confined bubble curtain (*e.g.,* a bubble ring surrounded by a fabric or non-metallic sleeve) that will distribute air bubbles around 100 percent of the pile perimeter for the full depth of the water column.

Proposed Monitoring Requirements

At least three NMFS-approved observers must be on duty during impact driving at all times. As discussed above, one observer must monitor and implement shutdowns and collect information at each pile driving location at all times. In addition, two shore-based observers are required (one upstream of the project and another downstream of the project), whose primary responsibility shall be to record pinnipeds in the Level B harassment zone and to alert the barge-based observer to the presence of pinnipeds, thus creating a redundant alert system for prevention of injurious interaction as well as increasing the probability of detecting pinnipeds in the disturbance zone.

At least three observers must be on duty during vibratory pile driving activity for the first two days, and thereafter on every third day to allow for estimation of Level B harassment takes. Similar to requirements for impact driving, the first observer must be positioned on a work platform or barge where the entirety of the shutdown zone can be monitored. Shore based observers must be positioned to observe the disturbance zone from the bank of the river. Observers must immediately inform other observers and construction personnel of all marine mammal sightings.

Proposed Reporting Requirements

POK must provide NMFS with a draft monitoring report within 90 calendar days of the expiration of the IHA, or within conclusion of the construction work, whichever comes first. This report must detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. If comments are received from NMFS on the draft report within 30 days, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS within 30 days after receipt of the draft report, the draft report will be considered final.

In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by this Authorization, such as an injury, serious injury, or mortality (Level A take), POK shall immediately

cease all operations and immediately report the incident to the NMFS Office of Protected Resources and the NMFS West Coast Regional Stranding Coordinator. The report must include the following information:

1. Time, date, and location (latitude and longitude) of the incident;
2. Description of the incident;
3. Status of all sound sources used in the 24 hours preceding the incident;
4. Environmental conditions (wind speed, wind direction, sea state, cloud cover, visibility, water depth);
5. Description of the marine mammal observations in the 24 hours preceding the incident;
6. Species identification or description of the animal(s) involved;
7. The fate of the animal(s); and
8. Photographs or video footage of the animal(s), if equipment is available.

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with POK to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. POK may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that POK discovers an injured or dead marine mammal, and the marine mammal observer determines that the cause of injury or death is unknown and the death is relatively recent (less than a moderate state of decomposition), POK will immediately report the incident to the NMFS Office of Protected Resources, and the NMFS West Coast Regional Stranding Coordinator. The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with POK to determine whether modifications in the activities are appropriate.

In the event that POK discovers an injured or dead marine mammal, and the marine mammal observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), POK shall report the incident to the NMFS Office of Protected Resources, and the NMFS West Coast Regional Stranding Coordinator within 24 hours of the discovery. POK shall provide photographs or video footage (if available) or other documentation of the stranded animal(s) to NMFS Office of Protected Resources and the West Coast Regional Stranding Coordinator. POK may continue its operations under such a case.

Public Comments

As noted previously, NMFS published a notice of a proposed IHA (83 FR 40257; August 14, 2018) and solicited public comments on both our proposal to issue the initial IHA for POK's construction activities and on the potential for a Renewal IHA, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (83 FR 56304; November 13, 2018). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the initial IHA.

Comment: The Commission expressed continuing concern with NMFS's notice that one-year IHA Renewals could be issued in certain circumstances without additional public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of Renewals through a more general route, such as abbreviated **Federal Register** notices. The Commission further recommended that if NMFS did not pursue Renewals solely using abbreviated notices, that the agency provide a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

Response: In prior responses to comments about IHA Renewals (*e.g.,* 84 FR 52464; October 02, 2019 and 85 FR 53342; August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

Preliminary Determinations

The construction activities proposed by POK are identical to those analyzed in the initial IHA, as are the planned number of days of activity, the method of taking, and the effects of the action. The potential effects of POK's activities are limited to Level A and Level B harassment in the form of auditory injury and behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMSF determined that POK's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than 7 percent of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of the estimated abundance of the Eastern U.S. stock of Steller sea lions decreasing slightly. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) POK's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species. No incidental take of ESA-listed marine mammal species is expected to result from this activity, and none would be authorized. Therefore, NMFS has determined that consultation under section 7 of the ESA is not required for this action.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to POK for conducting in-water construction activities associated with the POK Expansion Project on the Lower Columbia River, Washington, from the date of issuance through October 18, 2021, provided the previously described mitigation, monitoring, and reporting requirements

are incorporated. A draft of the proposed and final initial IHA can be found at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: October 15, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–23320 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA546]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Groundfish Management Team (GMT) will hold an online meeting to discuss items on the Pacific Council's November 2020 meeting agenda. The meeting is open to the public.

DATES: The webinar will be held Friday, November 6, 2020, from 9 a.m. to 12 p.m. Pacific Standard Time, or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Todd Phillips, Staff Officer; telephone: 503–820–2426; email: *todd.phillips@noaa.gov.*

SUPPLEMENTARY INFORMATION: The primary purpose of the GMT webinar is to prepare for the Pacific Council's November 2020 meeting. The GMT will discuss items related to groundfish and Pacific halibut management and administrative Pacific Council agenda items. A detailed agenda for the webinar will be available on the Pacific Council's website prior to the meeting. The GMT may also address other assignments relating to groundfish management. No management actions will be decided by the GMT.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*; (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: October 16, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–23323 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA535]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting via webinar.

DATES: The Council meeting will be held from 10 a.m. to 4 p.m. on Monday, November 9, 2020.

ADDRESSES: The meeting will be held via webinar. Webinar registration is required. Details are included in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including the webinar link, agenda, and briefing book materials will be posted on the Council's website at: *http://safmc.net/safmc-meetings/council-meetings/.*

Agenda items include:

1. Review of Amendment 46 to the Snapper Grouper Fishery Management Plan (FMP) addressing recreational reporting;

2. Review of Regulatory Amendment 31 to the Snapper Grouper FMP addressing recreational accountability measures;

3. Receive a progress report from the Gulf of Mexico Fishery Management Council and South Atlantic Fishery Management Council Joint Workgroup for Section 102 of the Modernizing Recreational Fisheries Act; and

4. Receive the final report from the MyFishCount recreational reporting project.

Written comments may be directed to John Carmichael, Executive Director, South Atlantic Fishery Management Council (see *Council address*) or electronically via the Council's website at *http://safmc.net/safmc-meetings/council-meetings/.* Comments will automatically be posted to the website and available for Council consideration. Written comments received prior to 9 a.m. on Monday, November 9, 2020 will be part of the administrative record. Public comment will also be allowed as part of the meeting agenda.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 16, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–23322 Filed 10–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0131]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; U.S. Department of Education Green Ribbon Schools Nominee Presentation Form

AGENCY: Office of Communications and Outreach, Department of Education.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension to an existing information collection.

DATES: Interested persons are invited to submit comments on or before November 20, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Andrea Falken, (202) 503–8985.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: U.S. Department of Education Green Ribbon Schools Nominee Presentation Form.

OMB Control Number: 1860–0509.

Type of Review: An extension to an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 90.

Total Estimated Number of Annual Burden Hours: 22.

Abstract: Begun in 2011–2012, U.S. Department of Education Green Ribbon Schools (ED–GRS) is a recognition award that honors schools, districts, and postsecondary institutions that are making great strides in three Pillars: (1) Reducing environmental impact and costs, including waste, water, energy use, and transportation; (2) improving the health and wellness of students and staff, including environmental health of premises, nutrition, and fitness; and (3) providing effective sustainability education, including STEM, civic skills, and green career pathways.

The award is a tool to encourage state education agencies, stakeholders and higher education officials to consider matters of facilities, health and environment comprehensively and in coordination with state health, environment and energy counterparts. In order to be selected for federal recognition, schools, districts and postsecondary institutions must be high achieving in all three of the above Pillars, not just one area. Schools, districts, colleges and universities apply to their state education authorities. State authorities can submit up to six nominees to ED, documenting achievement in all three Pillars. This information is used at the Department to select the awardees. ED collects information on nominees from state nominating authorities regarding their schools, districts, and postsecondary nominees. State agencies are provided sample applications for all three types of nominees for their use and adaptation. Most states adapt the sample to their state competition. There is no one federal application for the award, but rather various applications determined by states. They do use a required two-page Nominee Submission Form as a cover sheet, which ED provides. This document, in school, district, and postsecondary submission formats is attached. The burden varies greatly from state authority to authority and how they chose to approach the award.

The recognition award is part of a U.S. Department of Education (ED) effort to identify and communicate practices that result in improved student engagement, academic achievement, graduation rates, and workforce preparedness, and reinforce federal efforts to increase energy independence and economic security.

Encouraging resource efficient schools, districts, and IHEs allows administrators to dedicate more resources to instruction rather than operational costs. Healthy schools and wellness practices ensure that all students learn in an environment conducive to achieving their full potential, free of the health disparities that can aggravate achievement gaps. Sustainability education helps students engage in hands-on learning, hone critical thinking skills, learn many disciplines and develop a solid foundation in STEM subjects. It motivates postsecondary students in many disciplines, and especially those underserved in STEM subjects, to persist and graduate with sought after degrees and robust civic skills.

So that the Administration can receive states' nominations, ED seeks to provide the Nominee Presentation Form to states—essentially a cover sheet for states' evaluation of their nominees to ED—in three versions; one for school nominees, another for district nominees, and a third form for postsecondary nominees.

Dated: October 15, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–23231 Filed 10–20–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

President's Advisory Commission on Hispanic Prosperity

AGENCY: President's Advisory Commission on Hispanic Prosperity, Office of Communications and

Outreach, U.S. Department of Education.

ACTION: Announcement of an open meeting.

SUMMARY: This notice sets forth the agenda, time, and instructions for public participation in the October 28, 2020 meeting of the President's Advisory Commission on Hispanic Prosperity (Commission) and provides information to members of the public regarding the meeting. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act (FACA). Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act (FACA). This notice is being published less than 15 days from the meeting date due to the exceptional and immediate need to establish a strategic plan for the Commission and to identify items and measures for reaction in light of the declared national emergency related to the COVID–19 pandemic and the significant changes to educational delivery and massive economic dislocation it has caused the Hispanic American community.

DATES: The meeting of the Commission will be held on Wednesday, October 28, 2020, from 1:00 p.m. to 3:00 p.m. Eastern Standard at Alpha and Omega Church Cristiana de Miami, 7800 Miller Dr., Miami, FL 33155. Members of the public can attend virtually.

FOR FURTHER INFORMATION CONTACT: Emmanuel Caudillo, Designated Federal Official, President's Advisory Commission on Hispanic Prosperity, U.S. Department of Education, 400 Maryland Avenue SW, Room 7E324, Washington, DC 20202, telephone: (202) 453–5529, or email: *Emmanuel.Caudillo@ed.gov*.

SUPPLEMENTARY INFORMATION:

The Commission's Statutory Authority and Function: The Commission is established under Executive Order 13935 (July 9, 2020). The Commission's duties are to advise the President and the Secretary on educational and economic opportunities for the Hispanic American community in the following areas: (i) Promoting pathways to in-demand jobs for Hispanic American students, including apprenticeships, internships, fellowships, mentorships, and work-based learning initiatives; (ii) strengthening Hispanic-Serving Institutions (HSIs), as defined by the Higher Education Act of 1965, as amended, and increasing the participation of the Hispanic American community, Hispanic-serving school districts, and HSIs in the programs of the Department and other agencies; (iii) promoting local-based and national private-public partnerships to promote high-quality education, training, and economic opportunities for Hispanic Americans; (iv) promoting awareness of educational opportunities for Hispanic American students, including options to enhance school choice, personalized learning, family engagement, and civics education; (v) promoting public awareness of the educational and training challenges that Hispanic Americans face and the causes of these challenges and; (vi) monitoring changes in Hispanic Americans' access to educational and economic opportunities.

Meeting Agenda: The agenda for the Commission meeting is the continuation of the discussion of the strategic plan to meet its duties under its charter.

Instructions for Accessing the Meeting: Members of the public can access the meeting by registering to obtain dial-in instructions by emailing Emmanuel Caudillo at *Emmanuel.Caudillo@ed.gov*. Due to technical constraints, registration is limited to 200 participants and will be available on a first-come, first-served basis:

Access to Records of the Meeting: The Department will post the official report of the meeting on the Commission's website within 90 days after the meeting. In addition, pursuant to the FACA, the public may request to inspect records of the meeting at 400 Maryland Avenue SW, Washington, DC, by emailing *Emmanuel.Caudillo@ed.gov* or by phoning (202) 453–5529 to schedule an appointment.

Public Comment: Members of the public may submit written statements regarding the work of the Commission via *Emmanuel.Caudillo@ed.gov* (please use the subject line ''October 2020 Advisory Commission Meeting Public Comment''), or by letter to Emmanuel Caudillo, White House Hispanic Prosperity Initiative, 400 Maryland Avenue SW, 7E324, Washington, DC 20202, by Tuesday, October 27, 2020.

Reasonable Accommodations: The meeting platform and access code are accessible to individuals with disabilities. If you will need an auxiliary aid or service for the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice not later than Tuesday, October 27, 2020. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site. You also may access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Executive Order 13935 (July 9, 2020).

Elizabeth Hill,

Communications Director, Delegated Duties of Assistant Secretary, Office of Communications and Outreach.

[FR Doc. 2020–23319 Filed 10–20–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–7–000]

Cricket Valley Energy Center, LLC; Empire Generating Company, LLC v. New York Independent System Operator, Inc.; Notice of Complaint

Take notice that on October 14, 2020, pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824e, 825e and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, Cricket Valley Energy Center LLC and Empire Generating Company, LLC (Complainants) filed a formal complaint against New York Independent System Operator, Inc., (Respondent) requesting that the Commission find the capacity offer floor measures set forth in Respondent's Market Administration and Control Area Services Tariff to be unjust, unreasonable, and unduly discriminatory because they fail to address price suppression in the installed capacity Spot Market Auctions resulting from resources receiving out-of-market payments, all as more fully explained in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondent in the Commission's list of Corporate Officials.

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. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov,* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on November 3, 2020.

Dated: October 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–23295 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–110–000]

Harts Mill TE Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Harts Mill TE Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 4, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23288 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD20–14–000]

Carbon Pricing in Organized Wholesale Electricity Markets

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of proposed policy statement.

SUMMARY: The Commission is proposing to issue a policy statement to encourage efforts to incorporate a state-determined carbon price in organized wholesale electricity markets.

DATES: Comments are due on or before November 16, 2020; reply comments are due on or before December 1, 2020.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

John Miller (Technical Information), Office of Energy Market Regulation, (202) 502–6016, *john.miller@ferc.gov*

Anne Marie Hirschberger (Legal Information), Office of the General Counsel, (202) 502–8387, *annemarie.hirschberger@ferc.gov*

SUPPLEMENTARY INFORMATION: On September 30, 2020, the Commission convened a technical conference on

state-determined carbon pricing in organized wholesale electricity markets operated by regional transmission organizations (RTOs) and independent system operators (ISOs). As discussed further below, the record of that conference identified numerous potential benefits from incorporating a carbon price set by one or more states into RTO/ISO markets. We issue this proposed policy statement to clarify the Commission's jurisdiction over RTO/ISO market rules that incorporate a state-determined carbon price and to encourage RTO/ISO efforts to explore and consider the benefits of potential Federal Power Act (FPA) section 205 [1] filings to establish such rules.[2]

I. Background on State Emissions-Reduction Policies and Commission-Jurisdictional RTO/ISO Markets

1. States are currently taking a leading role in efforts to address climate change by adopting policies to reduce their greenhouse gas (GHG) emissions. The electricity sector is a frequent focus of those policies. Several states have adopted laws or regulations that require the substantial or complete decarbonization of the electricity sector in the coming decades.[3] Many others have adopted goals or targets to the same effect.[4]

2. Carbon pricing has emerged as an important, market-based tool in state efforts to reduce GHG emissions, including efforts to reduce GHG emissions from the electricity sector. In this proposed policy statement, we use the term ''carbon pricing'' to include both ''price-based'' methods adopted by states that directly establish a price on GHG emissions as well as ''quantity-based'' approaches adopted by states that do so indirectly through, for example, a cap-and-trade system.[5] Currently, 11 states impose some version of carbon pricing,[6] with multiple other states considering adopting a carbon pricing regime.[7] Those programs include the ten-state Regional Greenhouse Gas Initiative (RGGI) [8] in the Northeast and the cap-and-trade program administered by the California Air Resources Board.[9] In addition, numerous entities, including RTOs and ISOs, have begun examining approaches to incorporating a state-determined carbon price in wholesale electricity markets.[10]

3. As with any state regulation of electricity generation facilities, state efforts to reduce GHG emissions in the electricity sector may indirectly affect matters subject to Commission jurisdiction.[11] And while the Commission is not an environmental regulator, under FPA section 205 [12] the Commission may be called upon to review proposals that address the rules that incorporate a state-determined carbon price into RTO/ISO markets.

4. RTO/ISO markets already address various matters related to federal and state environmental regulations. For example, the Commission has long permitted generating resources to recover through wholesale rates the costs of complying with environmental regulations, including the costs of emissions pricing regimes.[13] Permitting generating resources to recover through wholesale rates the costs associated with a state-determined carbon price in RTO/ISO markets is consistent with that precedent.[14]

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[1] 16 U.S.C. 824d.

[2] This proposed policy statement addresses only filings pursuant to FPA section 205 and not proceedings initiated pursuant to FPA section 206. 16 U.S.C. 824e.

[3] *E.g.,* Thirteen states—California, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, and Washington—and the District of Columbia have adopted clean energy or renewable portfolio standards of 50% or greater. *See* C2ES, U.S. State Electricity Portfolio Standards, *https://www.c2es.org/document/renewable-and-alternate-energy-portfolio-standards/.*

[4] *E.g.,* Nineteen states—California, Colorado, Connecticut, Hawaii, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington—and the District of Columbia have adopted economy-wide decarbonization goals or targets of 50% or greater. *See* C2ES, U.S. State Greenhouse Gas Emissions Targets, *https://www.c2es.org/document/greenhouse-gas-emissions-targets/.*

[5] ''Price-based'' methods, such as a carbon fee, use an explicit charge on each ton of GHG emitted. ''Quantity-based'' methods, such as a cap-and-trade system, limit the amount of permissible GHG emissions. Cap-and-trade systems establish a total quantity of GHGs that can be emitted collectively by all entities covered by the policy within a fixed period (a cap). ''Allowances'' are created for each ton of GHG emissions that can be emitted. Covered entities must obtain one allowance for each ton of GHG emitted. Covered entities obtain allowances from either: (1) initial allocation or auctioning of allowances; or (2) trading of allowances. Carbon prices thus emerge from the initial allocation of allowances and the trading of allowances on the secondary market. The term ''state-determined carbon price'' can refer to a carbon price set through either a single state or multi-state initiative (*e.g.,* RGGI).

[6] State carbon pricing programs that are currently implemented include: (1) California's cap-and-trade program (*see* California Air Resources Board, Cap-and-Trade Program, *https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/about*); (2) Massachusetts' cap-and-trade program (*see* Mass. Dept. of Env. Protection, Reducing GHG Emissions under Section 3(d) of the Global Warming Solutions Act, *https://www.mass.gov/guides/reducing-ghg-emissions-under-section-3d-of-the-global-warming-solutions-act*); and (3) the ten-state Regional Greenhouse Gas Initiative (RGGI), *infra* n. (*see* RGGI, Inc., Elements of RGGI, *https://www.rggi.org/program-overview-and-design/elements*). *See* C2ES, U.S. State Carbon Pricing Policies, *https://www.c2es.org/document/us-state-carbon-pricing-policies/.*

[7] Two states have pursued carbon pricing through rulemakings: Pennsylvania intends to join RGGI (*see* Penn. Dept. of Env. Protection, RGGI, *https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx*), while Washington adopted a statewide cap-and-trade program, although implementation is delayed due to litigation (*see* State of Washington, Dept. of Ecology, Clean Air Rule, *https://ecology.wa.gov/Air-Climate/Climate-change/Greenhouse-gases/Reducing-greenhouse-gases/Clean-Air-Rule*). In 2019, 16 other states considered carbon pricing legislation: Connecticut, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Texas, Utah, Vermont, and Washington (*see* National Conference of Energy Legislators, Carbon Pricing, State Information, *https://www.ncel.net/carbon-pricing/#stateinfo*).

[8] Those states are: Connecticut; Delaware; Maine; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Rhode Island; and Vermont. RGGI, Inc., *https://www.rggi.org.* Pursuant to state legislation enacted in April 2020 and a subsequent state rule, Virginia will join RGGI in 2021. *See* RGGI, Inc., *RGGI States Welcome Virginia as its CO_2 Regulation is Finalized, https://www.rggi.org/sites/default/files/Uploads/Press-Releases/2020_07_08_VA_Announcement_Release.pdf.*

[9] *See* California Air Resources Board, Cap-and-Trade Program, *https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program.*

[10] For example, ISO–NE's stakeholder discussions regarding carbon pricing (*see* van Welie Opening Comments at 2–3, Tr. 100:1–6 (van Welie); ISO–NE Pre-Technical Conference Statement at 6–7); NYISO's carbon pricing draft proposal (*see* Dewey Opening Remarks at 3–5; Tr. 89:20–90:3 (Dewey); NYISO, Carbon Pricing, *https://www.nyiso.com/carbonpricing*); and PJM's Carbon Pricing Senior Task Force (*see* Giacomoni Comments at 2–3; Tr. 146:13–147:3 (Giacomoni); PJM, Carbon Pricing Senior Task Force, *https://www.pjm.com/committees-and-groups/task-forces/cpstf.aspx*).

[11] *See, e.g., Coal. for Competitive Elec., Dynegy Inc.* v. *Zibelman,* 906 F.3d 41, 57 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass'n* v. *Rhodes,* 139 S. Ct. 1547 (2019) (explaining that the state payments to address environmental externalities at issue in that case had ''(at best) an incidental effect'' on RTO/ISO markets); *see also FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760, 776 (2016), *as revised* (Jan. 28, 2016) (*EPSA*) (noting that the federal and state spheres of jurisdiction under the FPA ''are not hermetically sealed from each other'').

[12] 16 U.S.C. 824d(a) (''All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, *and all rules and regulations affecting or pertaining to such rates or charges* shall be just and reasonable.'') (emphasis added).

[13] *See Policy Statement and Interim Rule Regarding Ratemaking Treatment of the Cost of Emissions Allowances in Coordination Rates,* 59 FR 65,930, at 65,935 (1994) (Policy Statement on Costs of Emissions Allowances) (''We will allow the recovery of incremental costs of emission allowances in coordination rates whenever the coordination rate also provides for recovery of other variable costs on an incremental basis.''); *see also Grand Council of Crees* v. *FERC,* 198 F.3d 950, 957 (D.C. Cir. 2000) (holding that just and reasonable rates may account for a seller's ''need to meet environmental requirements,'' which ''may affect the firm's costs''); *see generally* Peskoe Pre-Conference Filing at 1–2 (discussing these orders in greater detail); Konschnik Opening Statement at 1, Tr. 25:5–18 (Konschnik) (similar).

[14] *See* Peskoe Pre-Conference Filing at 1 (''The Commission has recognized that environmental

5. The Commission has also accepted filings to establish wholesale market rules that address how a state-determined carbon price operates within markets that encompass more than one state. As one example, the California Air Resources Board (CARB) administers a multi-sector cap-and-trade program that includes the electricity sector.[15] As part of its Energy Imbalance Market (EIM), the California Independent System Operator (CAISO) has proposed, and the Commission has accepted, tariff provisions to address how resources located outside California offer into the EIM in light of California's carbon pricing regime.[16] Those rules permit a resource to fashion its offers into the EIM such that they include a carbon price if they are dispatched to serve load in California and not include a carbon price if they are dispatched to serve load in the rest of the EIM.[17] Similarly, CAISO has also proposed, and the Commission has accepted, measures for addressing resource shuffling in the EIM [18] by more accurately assessing which resources are dispatched to serve load in California.[19]

II. Discussion

A. Incorporating a State-Determined Carbon Price in RTO/ISO Markets

6. In this section, we clarify that the Commission has the jurisdiction over RTO/ISO market rules that incorporate a state-determined carbon price in those markets. We also explain that it is the policy of this Commission to encourage efforts to incorporate a state-determined carbon price in RTO/ISO markets.

1. Commission Jurisdiction Regarding Rules That Incorporate a State-Determined Carbon Price Into RTO/ISO Markets

7. We clarify that wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can fall within the Commission's jurisdiction as a practice affecting wholesale rates.[20] Whether the rules proposed in any particular FPA section 205 filing do, in fact, fall under Commission jurisdiction is a determination we will make based on the facts and circumstances in any such proceeding. Accordingly, contrary to the suggestion in the Dissent, we are proposing a framework for applying our jurisdiction, not ''pre-judging'' particular matters or preemptively ''dismiss[ing] . . . potential jurisdictional concerns.'' [21]

8. In *EPSA,* the Supreme Court articulated a two-part test for evaluating whether a Commission action is within its jurisdiction to regulate practices affecting wholesale rates. First, the activity being regulated must ''directly affect'' wholesale rates.[22] Although the Court did not exhaustively define what it means to ''directly affect'' wholesale rates, it noted that the wholesale market rules established in Order No. 745 [23] ''meet that standard with room to spare.'' [24] As the Court explained, those rules address how demand response resources participate in the RTO/ISO markets, including the levels at which they bid and are compensated.[25]

9. The wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can satisfy that ''directly affect'' standard. Like the rules at issue in Order No. 745, the wholesale market rules that incorporate a state-determined carbon price could, depending on the particular circumstances, govern how resources participate in the RTO/ISO market, how market operators dispatch those resources, and how those resources are ultimately compensated.[26] As such, those wholesale market rules can affect wholesale rates in essentially the same way described in *EPSA.*

10. Second, *EPSA* explained that the Commission cannot regulate a matter that FPA section 201(b) reserves for exclusive state jurisdiction, ''no matter how direct, or dramatic, its impact on wholesale rates.'' [27] The Court explained, however, that the effects that wholesale market rules have on retail rates or other matters subject to exclusive state jurisdiction do not, in and of themselves, cause the Commission to exceed its jurisdiction.[28] Instead, those effects are the inevitable result of the fact that the FPA divides jurisdiction over the electricity sector between the Commission and the states.[29] In turning to the specifics of Order No. 745, the Court concluded that the rule did not regulate retail rates because ''every aspect of [the rule] happens exclusively on the wholesale market and governs exclusively that market's rules'' and ''the Commission's justifications for regulating demand response are all about, and only about, improving the wholesale market.'' [30] Under those circumstances, the Court explained, ''section 201(b) imposes no bar'' on Commission authority.[31]

11. The wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can satisfy this standard as well. Wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets would not regulate a matter reserved exclusively to the states under the FPA, or otherwise displace state authority, including state authority over

compliance costs are appropriately included in wholesale rates, and there is no basis for the Commission to treat carbon price costs any differently.'') (citing Policy Statement on Costs of Emissions Allowances, 59 FR 65,930 at 65,935).

[15] *See supra* n.6.

[16] *Cal. Indep. Sys. Operator Corp.,* 153 FERC ¶ 61,087, at PP 9–11, 57 (2015).

[17] *Id.*

[18] In this context, CARB determined that CAISO's initial method for accounting for emissions from EIM resources that serve California load incorrectly assumed that the least-emitting resources served California load, when instead some of those resources would have already been dispatched to serve load outside of California. Therefore, there was a ''backfill'' of higher-emitting resources to serve non-California load, or a ''shuffling'' of resources. CARB concluded that, but for California's demand in the EIM, those higher-emitting resources would not have been dispatched at all and therefore those emissions should be attributed to serving California load. *See, e.g.,* Wolak Comments at 2–3, Hogan Comments at 4–5, Tr. 101:16–24 (Wolak).

[19] *Cal. Indep. Sys. Operator Corp.,* 165 FERC ¶ 61,050, at PP 7, 17 (2018).

[20] 16 U.S.C. 824d(a) (''All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, *and all rules and regulations affecting or pertaining to such rates or charges* shall be just and reasonable.'') (emphasis added).

[21] Dissent at P 5.

[22] *EPSA,* 136 S. Ct. at 774 (*citing Cal. Indep. Sys. Operator Corp.* v. *FERC,* 372 F.3d 395, 403 (2004)).

[23] *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745, 134 FERC ¶ 61,187, *order on reh'g & clarification,* Order No. 745–A, 137 FERC ¶ 61,215 (2011), *reh'g denied,* Order No. 745–B, 138 FERC ¶ 61,148 (2012).

[24] *EPSA,* 136 S. Ct. at 774.

[25] *Id.* at 774–75.

[26] *See, e.g.,* Tr. 23:3–22 (D. Hill); 28:24–29:8, 52:24–53:13 (Peskoe); D. Hill Comments at 5–7; Peskoe Pre-Conference Filing at 2–3; Price Comments at 8–9; Rossi Pre-Conference Filing at 3. *See generally Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,* Order No. 1000, 136 FERC ¶ 61,051, at PP 203–224 (2011), *order on reh'g,* Order No. 1000–A, 139 FERC ¶ 61,132, *order on reh'g and clarification,* Order No. 1000–B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC,* 762 F.3d 41 (D.C. Cir. 2014) (requiring that regional transmission planning processes consider transmission needs driven by public policy requirements (which can include state public policies)).

[27] *EPSA,* 136 S. Ct. at 775.

[28] *Id.* at 776 (''[A] FERC regulation does not run afoul of § 824(b)'s proscription just because it affects—even substantially—the quantity or terms of retail sales.'').

[29] *Id.* (''It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC's regulation of those wholesale matters.'').

[30] *Id.*

[31] *Id.*

generation facilities.[32] Instead, wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can ''govern exclusively'' the wholesale market and do so for the purpose of improving that market.[33] If so, the wholesale market rules that incorporate a state-determined carbon price could affect matters within state jurisdiction, including a state's regulation of generation facilities, without running afoul of section 201(b)'s limitation on Commission jurisdiction.[34] Under that arrangement, and as in the CAISO EIM example discussed above,[35] the state would retain authority over that carbon price as well as other measures for regulating generation facilities. For these reasons, incorporating a state-determined carbon price into RTO/ISO markets would not in any way diminish state authority.

12. Finally, we note that incorporating a state-determined carbon price into RTO/ISO markets could represent another example of the type of ''program of cooperative federalism'' that the Court noted with approval in *EPSA*.[36] RTO/ISO market rules that incorporate a state-determined carbon price could, as discussed above, improve the efficiency and transparency of the organized wholesale markets by providing a market-based method to incorporate state efforts to reduce GHG emissions. Because the decision about the carbon price would be determined by the state—which could select a price of zero, should it choose—state authority would be unaffected, further removing any doubt that rules that incorporate such a state-determined carbon price would comply FPA section 201(b).[37]

2. Commission Encouragement of Efforts To Incorporate a State-Determined Carbon Price Into RTO/ISO Markets

13. As noted, on September 30, 2020, the Commission held a technical conference on the integration of state-determined carbon pricing in RTO/ISO markets. Participants at the conference identified a diverse range of potential benefits that could arise from such a proposal. Those benefits include the development of technology-neutral, transparent price signals within RTO/ISO markets and providing market certainty to support investment.[38] In addition, participants explained that carbon pricing is an example of an efficient market-based tool that incorporates state public policies into RTO/ISO markets, without in any way diminishing state authority.[39]

14. We agree that proposals to incorporate a state-determined carbon price in RTO/ISO markets could, if properly designed and implemented, significantly improve the efficiency of those markets.[40] Accordingly, we propose to make it the policy of this Commission to encourage efforts by RTOs/ISOs and their stakeholders—including States, market participants, and consumers—to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets. Although we will review any specific FPA section 205 filing based on the facts and circumstances presented in each proceeding, we encourage interested parties to explore approaches to propose wholesale market rules to incorporate a state-determined carbon price in RTO/ISO markets.

B. Considerations for Evaluating an FPA Section 205 Proposal To Incorporate a State-Determined Carbon Price in RTO/ISO Markets

15. The Commission will review any FPA section 205 filing that proposes to establish wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets based on the particular facts and circumstances presented in that proceeding. Nevertheless, certain questions and issues are likely to arise in any such filing. Below, we identify certain information and considerations that, based on the record at the Carbon Pricing Technical Conference, we believe may be germane to the Commission's evaluation of a section 205 filing to determine whether an RTO/ISO's market rules that incorporate a state-determined carbon price in RTO/ISO markets are just, reasonable and not unduly discriminatory or preferential. The Commission seeks comment on whether these are the appropriate information and considerations the Commission should take into account or whether different or additional considerations may be or must be taken into account.

a. How, if at all, do the relevant market design considerations change depending on the manner in which the state or states determine the carbon price (*e.g.,* price-based or quantity-based methods)? How will that price be updated?

b. How does the FPA section 205 proposal ensure price transparency and enhance price formation?

c. How will the carbon price or prices be reflected in LMP?

d. How will the incorporation of the state-determined carbon price into the RTO/ISO market affect dispatch? Will the state-determined carbon price affect how the RTO/ISO co-optimizes energy and ancillary services? Are any reforms to the co-optimization rules necessary in light of the state-determined carbon price?

e. Does the proposal result in economic or environmental leakage?[41] How does the proposal address any such leakage?

III. Comment Procedures

16. The Commission invites comments on this Proposed Policy Statement by November 16, 2020 and reply comments by December 1, 2020. Comments must refer to Docket No. AD20–14–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

17. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

18. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

19. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

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[32] *See* 16 U.S.C. 824(b).

[33] *EPSA,* 136 S. Ct. at 776.

[34] *Id.*

[35] *See supra* P 6.

[36] *EPSA,* 136 S. Ct. at 779–80.

[37] *Id.* at 780.

[38] *See* Tr. 24:1–3 (D. Hill), 85:17–21 (Bowring), 95:14–16 (Olson), 171:1–10 (White), 177:1–3 (Mukerji), 219:6–25 (Wadsworth), 261:24–262:5 (''From a pure business perspective, clarity and certainty are so important. And for those of us that are involved in making these long-term capital-intensive investments in energy infrastructure, having this mechanism that can provide long-term price signals for investment would be hugely valuable.'') (Beane), 264:17–19 (Crane), 278:8–10, 279:10–15 (Segal), 283:17–19 (Wiggins), 300:20–301:12 (Beane), 312:22–313:15 (Beane), 314:14–22 (Crane), 317:11–20 (Segal), 326:17–327:7 (Wiggins).

[39] *See, e.g.,* Tr. 27:7–11, 29:9–24 (Peskoe), 31:15–32:12 (Price), 85:9–21 (Bowring), 200:11–23 (Breidenich).

[40] *See, e.g.,* Tr. 31:15–25 (Price), 99:16–22 (van Welie), 150:6–23 (Mukerji), 169:5–12. (Hogan), 170:1–15 (Mukerji), 170:20–171:10 (White), 175:5–20 (Rothleder), 219:1–221:4 (Wadsworth), 265:4–21 (Crane), 271:1–5 (T. Hill), 282:15–22 (Tierney).

[41] *See* Hogan Comments at 4, Wolak Comments at 2, Singh Comments at 2–3. *See also* Tr. 56:12–57:10 (Price) (generally discussing economic and environmental leakage), Tr. 46:2–18 (Peskoe) (discussing the Commission's jurisdiction over proposals from public utilities to address leakage).

IV. Document Availability

20. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

21. The Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020.

22. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

23. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

Issued: October 15, 2020.

Kimberly D. Bose,

Secretary.

United States of America

Federal Energy Regulatory Commission

Carbon Pricing in Organized Wholesale Electricity Markets

Docket No. AD20–14–000

DANLY, Commissioner, *concurring in part and dissenting in part:*

1. The Commission issues a proposed policy statement today in this docket to ''encourage'' Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to develop potential Federal Power Act section 205 [1] filings proposing market rules to accommodate state-determined carbon pricing programs.[2] I dissent in part because I believe that the issuance of a policy statement on this subject—a wholly discretionary act—is unnecessary and unwise. I concur with that part of the policy statement noting that we have jurisdiction to entertain section 205 filings that seek to accommodate state carbon-pricing policies, which is a fundamental principle that cannot be doubted.

2. As to my concern that the Commission should not exercise its discretion to issue a policy statement, I expressed similar concerns in my recent dissent to Order No. 2222 requiring RTOs/ISOs to promulgate rules to accommodate distributed energy resource aggregators.[3] There I questioned the Commission's seizure of authority at the expense of the States and advocated that ''[w]e should allow the RTOs and ISOs . . . to develop their own DER programs in the first instance.'' [4] ''[T]hen the question of the Commission's jurisdiction will be ripe.'' [5]

3. This policy statement does not mandate that RTOs/ISOs adopt carbon-pricing accommodation regimes. I agree that the Commission should not issue such a mandate.

4. Instead, the policy statement ''encourages'' RTO/ISO rule changes. Without seeing a proposal, the Commission predetermines that any such proposal will be within the Commission's jurisdiction and ''would not in any way diminish state authority.'' [6] That may well turn out to be true, but I would have waited until we had an actual 205 filing before us rather than pre-judging the issue based on unstated assumptions about how such programs might work. It is easy to imagine any number of RTO/ISO carbon-pricing proposals that would violate the Federal Power Act by impermissibly invading the authorities reserved to the States. This policy statement is not, as the majority's order characterizes it ''another example of the type of 'program of cooperative federalism' that the Court noted with approval in *EPSA*.'' [7] There is no program. This is instead a non-binding, blanket dismissal of potential jurisdictional concerns.

5. As to the substance of the policy statement, I concur. I cannot do otherwise. The policy statement amounts to little more than a statement of fact: Section 205 of the Federal Power Act has not been repealed and the Commission therefore has jurisdiction to entertain section 205 filings that seek to accommodate state carbon-pricing policies. Surely, that need not be stated. And to the extent the Commission feels the need to ''clarify'' the fact that we have the power to accept just and reasonable tariff revisions that are designed to include mandatory state charges in energy and capacity market offers, I am hard-pressed to identify a more settled area of Commission law.

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly,

Commissioner.

[FR Doc. 2020–23296 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator and Foreign Utility Company Status

Sanford Airport Solar, LLC	EG20–205–000
Sugar Creek Wind One LLC	EG20–207–000
Reloj del Sol Wind Farm LLC	EG20–208–000
Wildcat Creek Wind Farm LLC	EG20–209–000
Copper Mountain Solar 5, LLC	EG20–210–000
Battle Mountain SP, LLC	EG20–211–000

[1] 16 U.S.C. 824d (2018).

[2] *Carbon Pricing in Organized Wholesale Elec. Mkts.,* 172 FERC ¶ 61,062 (2020).

[3] *See Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators,* 172 FERC ¶ 61,247 (2020) (Danly, Comm'r, dissenting).

[4] *Id.* (Danly, Comm'r, dissenting at P 4).

[5] *Id.*

[6] *Carbon Pricing in Organized Wholesale Elec. Mkts.,* 172 FERC ¶ 61,062 at P 12.

[7] *Id.* P 13 (quoting *FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760, 779–80 (2016)).

Millican Solar Energy LLC	EG20–212–000
Prineville Solar Energy LLC	EG20–213–000
Saint Solar, LLC	EG20–214–000
Hunter Solar LLC	EG20–215–000
Tatanka Ridge Wind, LLC	EG20–216–000
American Kings Solar, LLC	EG20–217–000
Rancho Seco Solar II LLC	EG20–218–000
SR Georgia Portfolio I MT, LLC	EG20–219–000
East Line Solar, LLC	EG20–220–000
Kings Point Wind, LLC	EG20–221–000
North Fork Ridge Wind, LLC	EG20–222–000
Diamond Spring, LLC	EG20–223–000
Agua Clara S.A.S	FC20–12–000
Derrysallagh Windfarm Limited	FC20–13–000
Conrad (Melksham) Ltd	FC20–14–000

Take notice that during the month of September 2020, the status of the above-captioned entities as Exempt Wholesale Generators or Foreign Utility Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2020).

Dated: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23286 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–1943–003.
Applicants: North Western Corporation.
Description: Compliance filing: Order Nos. 845 & 845–A Third Compliance Filing to be effective 5/22/2019.
Filed Date: 10/15/20.
Accession Number: 20201015–5100.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER20–2888–001.
Applicants: Townsite Solar, LLC.
Description: Second Supplement to September 16, 2020 Townsite Solar, LLC tariff filing.
Filed Date: 10/14/20.
Accession Number: 20201014–5152.
Comments Due: 5 p.m. ET 10/26/20.

Docket Numbers: ER21–105–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 5794; Queue No. AD2–110 to be effective 9/14/2020.
Filed Date: 10/14/20.
Accession Number: 20201014–5118.
Comments Due: 5 p.m. ET 11/4/20.

Docket Numbers: ER21–106–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO–NE 2021 Capital Budget & Rev. Tariff Sheets for Recovery of 2021 Admin Costs to be effective 1/1/2021.
Filed Date: 10/15/20.
Accession Number: 20201015–5020.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–108–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits Third Quarter 2020 Capital Budget Report.
Filed Date: 10/15/20.
Accession Number: 20201015–5024.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–109–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to WMPA, SA No. 4768; Queue No. AC1–117 to be effective 8/4/2017.
Filed Date: 10/15/20.
Accession Number: 20201015–5040.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–110–000.
Applicants: Harts Mill TE Holdings LLC.
Description: Baseline eTariff Filing: Application For Market Based Rate Authority to be effective 11/14/2020.
Filed Date: 10/15/20.
Accession Number: 20201015–5042.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–111–000.
Applicants: Old Dominion Electric Cooperative.
Description: § 205(d) Rate Filing: ODEC Errata Filing Related to Superseding Cost-of-Service Rate Schedule to be effective 1/1/2021.
Filed Date: 10/15/20.
Accession Number: 20201015–5067.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–112–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2020–10–15 GMC Cost of Service Study to be effective 1/1/2021.
Filed Date: 10/15/20.
Accession Number: 20201015–5077.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–113–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO–NE; Rev. Tariff Sheet for Recovery of Costs for the 2021 Operation NESCOE to be effective 1/1/2021.
Filed Date: 10/15/20.
Accession Number: 20201015–5078.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–114–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA SA No. 5817; Queue No. AF2–085 to be effective 9/15/2020.
Filed Date: 10/15/20.
Accession Number: 20201015–5089.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–115–000.
Applicants: Duke Energy Florida, LLC.
Description: § 205(d) Rate Filing: DEF-Williston Amended and Restated SA No. 146 to be effective 1/1/2021.
Filed Date: 10/15/20.
Accession Number: 20201015–5092.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–116–000.
Applicants: XO Energy CAL, LP.
Description: Baseline eTariff Filing: Baseline new to be effective 10/16/2020.
Filed Date: 10/15/20.
Accession Number: 20201015–5095.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–117–000.
Applicants: System Energy Resources, Inc.
Description: § 205(d) Rate Filing: SERI UPSA Ratebase Credit to be effective 10/16/2020.
Filed Date: 10/15/20.
Accession Number: 20201015–5098.
Comments Due: 5 p.m. ET 11/5/20.

Docket Numbers: ER21–118–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Clean-up to OATT, section 36.1 to add accepted language in Docket No. ER19–2030 to be effective 4/1/2020.
Filed Date: 10/15/20.
Accession Number: 20201015–5115.
Comments Due: 5 p.m. ET 11/5/20.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR21–1–000.

Applicants: North American Electric Reliability Corporation.

Description: Petition for Approval of the Amended And Restated Bylaws of The North American Electric Reliability Corporation.

Filed Date: 10/14/20.

Accession Number: 20201014–5149.

Comments Due: 5 p.m. ET 11/4/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23283 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP19–1353–011.

Applicants: Northern Natural Gas Company.

Description: Compliance filing 20201014 Compliance Filing to be effective 1/1/2020.

Filed Date: 10/14/20.

Accession Number: 20201014–5105.

Comments Due: 5 p.m. ET 10/20/20.

Docket Numbers: RP21–55–000.

Applicants: Gulf South Pipeline Company, LLC.

Description: § 4(d) Rate Filing: Amendment to Neg Rate Agmt (Aethon United 52454) to be effective 10/14/2020.

Filed Date: 10/14/20.

Accession Number: 20201014–5017.

Comments Due: 5 p.m. ET 10/26/20.

Docket Numbers: RP21–56–000.

Applicants: Portland Natural Gas Transmission System.

Description: § 4(d) Rate Filing: Name Change for Eversource to be effective 11/14/2020.

Filed Date: 10/14/20.

Accession Number: 20201014–5050.

Comments Due: 5 p.m. ET 10/26/20.

Docket Numbers: RP21–57–000.

Applicants: Empire Pipeline, Inc.

Description: § 4(d) Rate Filing: Negotiated Rate FT Service Contract—Repsol to be effective 9/15/2020.

Filed Date: 10/14/20.

Accession Number: 20201014–5092.

Comments Due: 5 p.m. ET 10/26/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23284 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–6–000]

NECEC Transmission LLC, Avangrid, Inc. v. NextEra Energy Resources, LLC, NextEra Energy Seabrook, LLC, FPL Energy Wyman LLC, FPL Energy Wyman IV LLC; Notice of Complaint

Take notice that on October 13, 2020, pursuant to sections 206, 210, and 306 of the Federal Power Act, 16 U.S.C. 824e, 824i, 825e, and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, NECEC Transmission LLC and Avangrid, Inc (Complainants) filed a formal complaint against NextEra Energy Resources, LLC, NextEra Energy Seabrook, LLC, FPL Energy Wyman LLC, and FPL Energy Wyman IV LLC (collectively NextEra or Respondents) requesting that the Commission take action to stop NextEra from unlawfully interfering with the interconnection of the New England Clean Energy Connect transmission project (NECEC Project), all as more fully explained in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondent in the Commission's list of Corporate Officials.

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. The Respondents' answer and all interventions, or protests must be filed on or before the comment date. The Respondents' answer, motions to intervene, and protests must be served on the Complainants.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For

assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov,* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on November 2, 2020.

Dated: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23287 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL21–1–000]

Oil Pipeline Affiliate Contracts

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Proposed Policy Statement.

SUMMARY: In this proposed policy statement, the Federal Energy Regulatory Commission proposes guidance for oil pipeline carriers proposing rates and terms pursuant to affiliate contracts.

DATES: Initial Comments are due on or before December 14, 2020, and Reply Comments are due on or before January 28, 2020.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Glenna Riley (Legal Information), Office of the General Counsel, 888 First Street NE, Washington, DC 20426, (202) 502–8620, *Glenna.Riley@ferc.gov*

Adrianne Cook (Technical Information), Office of Energy Markets Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8849, *Adrianne.Cook@ferc.gov*

1. We are proposing guidance for oil pipeline carriers proposing rates and terms pursuant to Affiliate Contracts [1] in tariff filings and petitions for declaratory order. We seek comment on the information outlined in this proposed policy statement that could be used to demonstrate that proposed terms pursuant to Affiliate Contracts are just, reasonable, and not unduly discriminatory under the Interstate Commerce Act (ICA).[2]

I. Introduction

2. The proposed guidance outlines information carriers may provide to demonstrate that proposed rates and terms of service pursuant to Affiliate Contracts comply with the ICA. The proposed guidance is based on the Commission's obligation under the ICA to ensure that oil pipeline rates and terms of service are just, reasonable, and not unduly discriminatory.[3]

3. The Commission has provided little guidance on what information is sufficient to support proposed rates and terms pursuant to Affiliate Contracts, and as a result, the information provided by carriers in their filings varies greatly. In response to this lack of uniformity, we are considering adopting a policy statement outlining information that can support a finding that proposed rates and terms pursuant to Affiliate Contracts are just, reasonable, and not unduly discriminatory under the ICA. We believe that issuing guidance on this topic will help clarify our processes and enable the Commission to gather information relevant to fulfilling our obligations under the ICA. This additional clarity also will promote regulatory certainty through greater transparency with industry on what information is relevant to support proposals related to Affiliate Contracts.

4. We emphasize that the proposed guidance is not designed either to prohibit Affiliate Contracts or to address any specific incidents of undue discrimination by carriers towards nonaffiliated shippers but rather to aid carriers in determining what information to consider including in their filings before the Commission to support a finding. Under the proposed guidance, affiliates may continue to participate in oil pipeline open seasons and become committed shippers on their affiliated pipelines. A lack of nonaffiliated shipper agreements is not, in and of itself, evidence that a carrier afforded an undue preference to its affiliated shipper. While the proposed guidance suggests some means for carriers to support a finding that proposed rates and terms pursuant to an Affiliate Contract are just, reasonable, and not unduly discriminatory, carriers would not be precluded from making this showing in other ways. We will continue to evaluate contract proposals, including those involving Affiliate Contracts, on a case-by-case basis based on all the facts and circumstances presented.

II. Background

A. Oil Pipeline Contracting Arrangements

5. Under the ICA, an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request.[4] A pipeline's rates and practices must be just, reasonable, and not unduly discriminatory.[5] Historically, interstate oil pipelines offered transportation service on a walk-up or month-to-month basis. Beginning in the mid-1990s, the Commission has also approved oil pipeline transportation rates and terms of service pursuant to long-term contracts, which

[1] ''Affiliate Contract'' as used in this proposed policy statement means a contract that is executed by the carrier's affiliate(s) and not by any nonaffiliated entity. For clarification, a contract that is executed by the carrier's affiliate along with one or more nonaffiliated entities is not an ''Affiliate Contract.'' ''Contract'' as used in this proposed policy statement includes transportation service agreements (TSA), throughput and deficiency agreements (T&D Agreement), ship-or-pay agreements, and any contract offered by a carrier under which an entity must make a term commitment associated with interstate oil pipeline transportation service subject to the Commission's jurisdiction. *See, e.g., Saddlehorn Pipeline Co., LLC,* 169 FERC ¶ 61,118 (2019) (TSA); *BridgeTex Pipeline Co., LLC,* 156 FERC ¶ 61,121 (2016) (TSA); *EnLink Del. Crude Pipeline, LLC,* 166 FERC ¶ 61,226 (2019) (*EnLink Del*) (T&D Agreement); *NuStar Crude Oil Pipeline L.P.,* 146 FERC ¶ 61,146 (2014) (T&D Agreement); *Kinder Morgan Pony Express Pipeline LLC,* 141 FERC ¶ 61,180 (2012) (T&D Agreement). The commitment to the pipeline can take various forms such as a commitment to nominate or pay a deficiency for a certain volume or an acreage or plant dedication. *See, e.g., EnLink Del.,* 166 FERC ¶ 61,226 (monthly volume commitments*); Belle Fourche Pipeline Co.,* 162 FERC ¶ 61,091 (2018) (acreage dedication commitment); *Alpha Crude Connector, LLC,* 149 FERC ¶ 61,001 (2014) (acreage dedication and volume commitments); *Panola Pipeline Co.,* 151 FERC ¶ 61,140 (2015) (plant dedication).

[2] 49 U.S.C. app. 1 *et seq.*

[3] 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1); *see also ICC* v. *Baltimore & O. R. Co.,* 145 U.S. 263, 276 (1892) (The principle objects of the ICA include ''to secure just and reasonable charges for transportation'' and ''to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions''); *Texas & P. Ry. Co.* v. *ICC,* 162 U.S. 197, 233 (1896) (The ICA ''make[s] charges for transportation just and reasonable'' and ''forbid[s] undue and unreasonable preferences or discriminations.'').

[4] 49 U.S.C. app. 1(4) (''It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor.''); *Magellan Midstream Partners, L.P.,* 161 FERC ¶ 61,219, at P 12 (2017) (*Magellan*) (''By definition, a pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper.'').

[5] 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1).

has facilitated significant infrastructure development.[6]

6. In general, under Commission policy, an oil pipeline carrier can offer a contract pursuant to which any shipper can make a commitment to the pipeline for a specified term and receive rates and/or service terms different from those available to shippers that do not enter the contract. The same contract must be offered to any interested shippers in a public process, typically an open season.[7] Shippers that enter the contract are commonly referred to as ''committed shippers,'' ''contract shippers,'' or ''term shippers'' because they are making a contractual commitment to the pipeline over the term of the agreement. Shippers that do not enter the contract are typically referred to as ''uncommitted'' or ''walk-up'' shippers because they have no obligation to the pipeline and can decide to ship or not on a month-to-month basis.[8]

B. Ensuring Contract Rates Are Not Unduly Discriminatory

7. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has found that contract rates are not inconsistent with the ICA's common carriage and non-discrimination requirements, provided the same rates and terms are offered to all interested shippers.[9] To comply with these principles, a pipeline may offer a contract in a public open season in which any interested shipper has an equal opportunity to enter the contract.[10] The open season process must be ''open, transparent, and free of the traditional contract nullifiers such as fraud.'' [11]

8. The requirement to offer the contract in a valid public process where all interested shippers have an equal opportunity to obtain the rates and terms is fundamental to meeting the ICA's nondiscrimination requirements.[12] The Commission honors a contract rate that was agreed to in a transparent open season process that involved arm's-length negotiations among sophisticated business entities, finding such rates just and reasonable.[13] In such cases, the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and a finding that the contract terms do not violate the ICA's prohibition against pipelines giving unreasonable preference to one shipper over others. The Commission assumes that nonaffiliated shippers can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive conditions.[14] However, commercial circumstances can lead to situations in which only affiliated shipper(s) agree to the contract. In these cases, the inference of fairness is not immediately apparent, and the Commission must evaluate whether the carrier gave an undue preference to its affiliate.[15]

9. We acknowledge that the Commission previously approved contract rates and terms of service where the only committed shipper was the carrier's affiliate without addressing whether additional informational support would alleviate these concerns.[16] We note that, in other contexts, the Commission has found that affiliate transactions require additional scrutiny.[17] The Commission

[6] *See, e.g., Colonial Pipeline Co.,* 146 FERC ¶ 61,206, at P 35 (2014) (*Colonial*) (''The Commission recognizes that due to increased oil production in the U.S. and Canada, changing market dynamics for crude oil and refined products, and the large financial commitments necessary to increase infrastructure, oil pipelines have proposed and the Commission has approved various types of committed or contract rate structures.''); *see also Express Pipeline P'ship,* 76 FERC ¶ 61,245 (1996) (*Express*).

[7] *See Express,* 76 FERC at 62,254 (''Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms.'') (quoting *Sea-Land Serv., Inc.* v. *I.C.C.,* 738 F.2d 1311, 1317 (D.C. Cir. 1984) (*Sea-Land*)).

[8] *See id.* (''Term shippers are not similarly situated with uncommitted shippers because in any given month, uncommitted shippers may choose to ship on [the pipeline] or not. Uncommitted shippers have the maximum flexibility to react to changes in their own circumstances or in market conditions. Uncommitted shippers do not provide the revenue assurances, planning assurances, and a basis for constructing the pipeline that term shippers provide.'').

[9] *Sea-Land,* 738 F.2d at 1317 (''[C]ontract rates can . . . be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms'').

[10] *See Express Pipeline P'ship,* 77 FERC ¶ 61,188, at 61,756 (1996) (''The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the [ICA] because such term rates were made available to all interested shippers.''); *CenterPoint Energy Bakken Crude Servs., LLC,* 144 FERC ¶ 61,130, at P 19 (2013) (the pipeline ''offered its committed rates through a widely publicized Open Season that gave interested shippers notice and opportunity to sign TSA's accepting the proposed committed rates''); *CCPS Transp., LLC,* 121 FERC ¶ 61,253, at P 19 (2007) (*CCPS*) (the pipeline satisfied the principles of *Sea-Land* because the ''open season afforded all prospective shippers an equal non-discriminatory opportunity to sign a TSA''); *White Cliffs Pipeline, L.L.C.,* 148 FERC ¶ 61,037, at P 47 (2014) (*White Cliffs*) (the open season must ''afford *all* potentially interested shippers . . . a fair and equal opportunity to acquire the surplus Expansion capacity'') (emphasis in original); *Enterprise TE Products Pipeline Co. LLC,* 144 FERC ¶ 61,092, at P 22 (2013) (*Enterprise TE II)* (''All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.'').

[11] *Seaway Crude Pipeline Co. LLC,* 146 FERC ¶ 61,151, at P 37 (2014) (*Seaway*).

[12] *Enterprise Crude Pipeline LLC,* 166 FERC ¶ 61,224, at P 11 (2019) (*Enterprise Crude*) (''The vital element of the contracting arrangements . . . has been an open season that provided all shippers equal opportunity to avail themselves of the offered capacity''); *Enterprise TE II,* 144 FERC ¶ 61,092 at P 22 (''The availability of discount rates to *all* interested shippers is the fundamental requirement upon which rulings approving such rate structures have been based. Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to 'any shipper willing and able to meet the contract's terms.' All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.'') (quoting *Sea-Land,* 738 F.2d at 1317) (emphasis in original)); *see also Nexen Mkt. U.S.A., Inc.* v. *Belle Fourche Pipeline Co.,* 121 FERC ¶ 61,235, at PP 1, 46–49 (2007) (*Nexen*) (''The allocation of expansion capacity during the open season was inconsistent with the principles of common carriage because all shippers were not given an equal opportunity to obtain the expansion capacity.''); *White Cliffs,* 148 FERC ¶ 61,037 at PP 47–51 (pipeline failed to meet ''basic common carrier and anti-discrimination obligations'' when it ''afforded an undue preference to the shippers that contracted for [ ] capacity outside of a valid open season process'').

[13] *Tesoro High Plains Pipeline Co. LLC,* 148 FERC ¶ 61,129, at P 23 (2014) (''The Commission honors the contract terms entered into by sophisticated parties that engage in an arms-length negotiation.''); *Seaway Crude Pipeline Co. LLC,* Opinion No. 546, 154 FERC ¶ 61,070, at PP 40–42 (2016) (a proper review of the committed rates includes investigation of whether the open season involved arm's-length negotiations); *Seaway,* 146 FERC ¶ 61,151 at P 25 (''Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts.'').

[14] *Express,* 76 FERC at 62,254 (''If [contract] terms result in lower costs or respond to unique competitive conditions, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.'') (quoting *Sea-Land,* 738 F.2d at 1316); *Sea-Land,* 738 F.2d at 1316 (''The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.''); *Seaway,* 146 FERC ¶ 61,151 at P 28 (''When reviewing the justness and reasonableness of a contract rate, it is not primarily to relieve one party or another of what they deem an improvident bargain, especially in negotiations involving sophisticated business entities. However, contract negotiations must be held in good faith and not involve fraud or improper conduct.'').

[15] *New York* v. *United States,* 331 U.S. 284, 296 (1947) (''The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations'').

[16] *See, e.g., Medallion Pipeline Co., LLC,* 170 FERC ¶ 61,192 (2020) (*Medallion*); *Medallion Del. Express, LLC,* 163 FERC ¶ 61,170, at P 8 (2018); *Stakeholder Midstream Crude Oil Pipeline, LLC,* 160 FERC ¶ 61,010, at P 4 (2017) (*Stakeholder*); *Medallion Pipeline Co., LLC,* 157 FERC ¶ 61,075, at P 11 (2016); *EnLink Crude Pipeline,* 157 FERC ¶ 61,120, at P 4 (2016).

[17] *E.g., Bidding by Affiliates in Open Season Bids for Pipeline Capacity,* Order No. 894, 137 FERC ¶ 61,126 (2011) (rule to prevent affiliated entities

Continued

has recognized that there is an inherent incentive for a regulated entity to unduly discriminate in favor of an affiliate and that affiliate transactions may not be the result of arm's-length negotiations.[18] The Commission has adopted policies in these other contexts to mitigate concerns that affiliates may coordinate in ways that involve self-dealing and anti-competitive behavior to the detriment of other customers.[19] In contrast, arm's-length transactions between nonaffiliated entities do not raise these concerns.[20]

10. A similar potential exists for an oil pipeline carrier to afford its affiliate an undue preference.[21] An affiliated shipper may be indifferent to any rate paid to its affiliated pipeline because the expenditures and earnings of the affiliates are combined at the parent company level under integrated company economics.[22] Thus, one way for a carrier to provide its affiliate unduly preferential access to capacity is to offer a contract rate in the open season that is excessively burdensome or uneconomic for any nonaffiliated market participant. Similarly, an affiliate may not be meaningfully bound to any onerous terms in the contract such as deficiency or shortfall penalties because deficiency payments and penalties may be transfer payments within an integrated economic entity.

11. In light of the above, we are concerned that our practice of evaluating proposed rates and terms pursuant to Affiliate Contracts under the same framework as contracts supported by commitments from nonaffiliated shippers may not be sufficient to ensure such terms are not unduly discriminatory under the ICA.[23] To ensure that the Commission has the information it needs in its decision making, we are considering adopting a policy statement explaining how we will evaluate proposed rates and terms that are pursuant to Affiliate Contracts consistent with our obligations under the ICA and seek comment on the proposed guidance. In proposing the guidance below, we emphasize that affiliates may continue to participate in oil pipeline open seasons and become committed shippers on their affiliated pipelines. Where one or more nonaffiliated shippers execute a contract offered in an open season along with any affiliates of the carrier, the concern that the carrier unduly discriminated in favor of its affiliate is not present. Further, as stated above, the proposed guidance would not preclude oil

from coordinating their open season bids to obtain a disproportionate share of natural gas pipeline capacity at the expense of single bidders); *Mkt.-Based Rates for Wholesale Sales of Electric Energy, Capacity & Ancillary Servs. by Pub. Utils.,* Order No. 697, 119 FERC ¶ 61,295, at PP 540–543 (2007) (rule adopting guidelines and restrictions for power sale transactions of utilities with market-based rates to mitigate affiliate abuse concerns); *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects,* Final Policy Statement, 142 FERC ¶ 61,038, at P 34 (2013) (developer allocating capacity for new merchant transmission project has a ''high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of non-affiliated potential customers is just, reasonable, and not unduly preferential or discriminatory''); *Ne. Utils. Serv. Co.,* 66 FERC ¶ 61,332, at 62,089 (1994) (*Ne. Util. Serv.*) (''The Commission long has recognized, and the courts have agreed, that transactions between affiliated companies require close scrutiny.''); *Iowa S. Utils. Co.,* 58 FERC ¶ 61,317, at 62,014 (1992) (*Iowa S. Utils*) (''[I]n looking at dealings between affiliates, the Commission is presented with a different set of concerns . . . because affiliates share common corporate goals profits for stockholders that own both entities—and therefore have an incentive to engage in preferential transactions.''), *reh'g denied,* 59 FERC ¶ 61,193 (1992); *Ind. Mun. Power Agency* v. *FERC,* 56 F.3d 247, 254 (D.C. Cir. 1995) (''[T]he Commission gives 'special scrutiny' to fuel supply contracts between a utility and its subsidiary or an affiliated company'').

[18] *Tapstone Midstream, LLC,* 150 FERC ¶ 61,016, at P 15 (2015) (''Because the shipper is an affiliate, there is no assurance that there was an arms-length negotiation between the entities agreeing to the rate.''); *Sw. Power Pool,* 149 FERC ¶ 61,048 at P 100 (2014) (finding that a contract between affiliates ''cannot be characterized as one in which each party has sought to promote its individual economic interest, a central feature of arm's-length bargaining''); Opinion No. 546, 154 FERC ¶ 61,070 at PP 92–96 (sales between affiliates are not arm's-length because ''arm's length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests''); *Ne. Utils. Serv.,* 66 FERC at 62,090 (''In arm's-length transactions, assuming relatively equal bargaining strength between the parties, the buyer will be able to protect itself against excessive charges or unreasonable contract provisions. . . . In the case of affiliate transactions, however, the buyer has less incentive to bargain for the lowest possible rates and most reasonable contract provisions, because ultimately all provisions will benefit the common parent.''); *Iowa S. Utils.,* 58 FERC at 62,014 n.10 (''Self-dealing may arise in transactions between affiliates because such affiliates may have incentives to offer terms to one another which are more favorable than those available to other market participants.''); *see also Ass'n Gas Distributors* v. *FERC,* 824 F.2d 981, 1009 (D.C. Cir. 1987) (discounts in favor of a pipeline's gas trading affiliate ''may carry more than the usual risk of undue discrimination''); *Copperweld Corp.* v. *Indep. Tube Corp.,* 467 U.S. 752, 771 (1984) (''A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.''); Black's Law Dictionary (11th ed. 2019) (arm's-length is defined as ''involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power'').

[19] *See, e.g., Bos. Edison Co. Re: Edgar Electric Co.,* 55 FERC ¶ 61,382, at 62, 167–68 n.56 (1991) (*Edgar Electric*) (''The Commission's concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings.''); Order No. 894, 137 FERC ¶ 61,126 at P 11 (multiple affiliate bidding in natural gas pipeline open seasons harms other entities and their customers and has a ''chilling effect on competition''); *Chinook Power Transmission, LLC,* 126 FERC ¶ 61,134, at P 49 (2009) (heightened scrutiny applies where a merchant transmission developer's affiliates are anchor customers due to ''concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate and subsidize the merchant project inappropriately'').

[20] *See, e.g., Edgar Electric,* 55 FERC at 62,168 (''In an arm's-length (unaffiliated) transaction, the buyer has no economic incentive to favor anyone but the least-cost supplier (considering price and nonprice factors).'').

[21] *See Revisions to Oil Pipeline Regs. Pursuant to the Energy Policy Act of 1992,* Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,960 (1993) (cross-referenced at 65 FERC ¶ 61,109) (recognizing ''a concern . . . with allowing a pipeline that may possess market power to control prices in a market to establish an initial rate through negotiations'' and requiring at least one nonaffiliated shipper to agree to a rate to ''provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge''), *order on reh'g,* Order No. 561–A, FERC Stats. & Regs. ¶ 31,090, at 31,106 (1994) cross-referenced at 68 FERC ¶ 61,138) (''The purpose of requiring the one shipper who must agree to the initial rate to be unaffiliated with the pipeline is to ensure that the agreement is based upon arms-length negotiations.''), *aff'd sub nom. AOPL* v. *FERC,* 83 F.3d 1424 (D.C. Cir. 1996); *Seaway,* 146 FERC ¶ 61,151 at P 30 (oil pipelines must show that a nonaffiliated entity agrees to a negotiated rate due to the ''concern that potential market power could be exercised against shippers who did not agree to the negotiated rate''); *Magellan,* 161 FERC ¶ 61,219 at P 21 (finding an oil pipeline's proposed affiliate transactions would ''violate the ICA's anti-discrimination provisions by offering pipeline transportation pursuant to customized terms, conditions, and rates unavailable to shippers who utilize [the] pipeline directly through nominating volumes under the pipeline's published tariff'').

[22] *See Magellan,* 161 FERC ¶ 61,219 at P 14 (while the marketing affiliate ''would facially pay its pipeline's filed tariff rate, and the [m]arketing [a]ffiliate would sell that capacity for less than that rate, the entire transaction could nevertheless yield a net profit to the integrated company''); *see also Williams Pipe Line Co.,* Opinion No. 154, 21 FERC ¶ 61,260, at 61,660 (1982) (''If the X Oil Company charges itself a lot of money for shipping its own oil over its own line, that is just bookkeeping. But suppose that X also charges Y, an unaffiliated shipper, that same high rate for the use of its line. For Y, that high rate is very real. So we now have something that some will undoubtedly view as undue discrimination of a perniciously anticompetitive type.'').

[23] We note that Congress brought oil pipelines under the ICA to address concerns regarding affiliate collusion and competitive imbalances caused by integrated ownership of transportation facilities. *See United States* v. *Champlin Refining Co.,* 341 U.S. 290, 297–298 (1951) (''There is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated companies might possess from exclusive ownership of a pipe line.''); *The Pipeline Cases (United States* v. *Ohio Oil Co.),* 234 U.S. 548, 559 (1914) (''Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself.''); Opinion No. 154, 21 FERC at 61,582 (Standard Oil ''kept its crude pipeline rates high, thus enabling the railroads to hold on to business that they would have lost had Standard [Oil] passed the lower costs of pipeline transit on to unaffiliated shippers'' in exchange for preferential rates from the railroads).

pipeline carriers from implementing contract rates and terms of service pursuant to Affiliate Contracts. The fact that no nonaffiliated shipper agrees to a contract does not, in and of itself, provide a basis for finding that the carrier unduly discriminated in favor of an affiliate.[24] There are many reasons that nonaffiliated shippers may choose not to make a term commitment under a contract offered by a carrier. As stated above, the proposed guidance is not intended to reflect any view of the Commission that pipelines are currently engaging in practices that afford their affiliates an undue preference and unduly discriminating against nonaffiliated shippers in open seasons,[25] or that Affiliate Contracts are inherently discriminatory. Instead, the proposed guidance is intended to provide clarity regarding the type of information that is relevant to the Commission's evaluation of a carrier's filing to encourage the submission of a complete record on which the Commission can conclude that the proposed terms are just, reasonable and not unduly discriminatory under the ICA.

12. In proposing this guidance, we emphasize that an oil pipeline carrier has a burden to support its proposed rates and terms of service.[26] Further, ''the fact that contract rates are not inherently discriminatory does not mean they must always be approved or that such rates are appropriate under all circumstances.'' [27] In seeking approval of any rates or terms pursuant to a contract solely with an affiliate, the carrier must demonstrate that its affiliate did not receive an undue preference contrary to the ICA.[28]

III. Discussion

13. In this proposed policy statement, we provide guidance for a carrier seeking approval in a petition for declaratory order or tariff filing for contract rates or terms pursuant to an Affiliate Contract. We note that a carrier is not required to file a petition for declaratory order before proposing to implement contract rates and terms in a tariff filing.[29] The purpose of a declaratory order is ''to terminate controversy or remove uncertainty.'' [30] In evaluating the first proposal by an oil pipeline for long-term contract rates in 1996, the Commission found that the ratemaking issues raised by the pipeline were appropriately addressed in a declaratory order proceeding.[31] Since then, certain proposed rate structures and terms have repeatedly been found to be consistent with the ICA and Commission policy in numerous declaratory orders and have become industry standards. Therefore, for some proposals there is no controversy or uncertainty for the Commission to resolve, and it may not be beneficial for the carrier to file a petition for declaratory order in advance of a tariff filing to implement the proposed contract rates and terms. We expect that in such instances, a carrier will fully explain and support the proposed rates and terms in its tariff filing.[32]

14. The proposed guidance suggests some means for a carrier to support a finding that its proposed terms are not unduly discriminatory, and carriers would not be precluded from making this showing in other ways. The Commission will continue its practice of evaluating contract proposals on a case-by-case basis based on all the facts and circumstances presented.[33]

15. The proposed guidance falls into four categories: (1) Proposed guidance that oil pipeline carriers identify Affiliate Contracts when making filings with the Commission, (2) proposed information that could demonstrate that an open season process was not unduly discriminatory, (3) methods for showing that rates and terms pursuant to an Affiliate Contract are just, reasonable, and not unduly discriminatory, and (4) ensuring that sufficient access to pipeline capacity is reserved for uncommitted shippers. We seek comment on these and any other methods for a carrier to demonstrate that proposed terms pursuant to an Affiliate Contract are just, reasonable, and not unduly discriminatory.

A. Identifying Affiliate Contracts in Commission Filings

16. When a carrier seeks approval for contract rates or terms in a petition for declaratory order or tariff filing, we propose that the carrier disclose whether or not those terms are pursuant to an Affiliate Contract. Given that Affiliate Contracts require additional safeguards to ensure compliance with the ICA, this information is necessary for the Commission to evaluate the carrier's proposal.

17. We propose to define an ''affiliate'' of a specified carrier for purposes of this proposed policy statement as any entity that, directly or indirectly, controls, is controlled by or is under common control with, the carrier.[34] We seek comment on how to define control and any standards or thresholds for establishing a rebuttable presumption of control or lack of control.[35] As explained above, if one or

[24] *See Magellan,* 161 FERC ¶ 61,219 at P 19 (The ICA does not impose ''a blanket restriction on integrated company financing,'' but ''[t]he issue of integrated company finances is instead a ratemaking and accounting matter concerning the justness and reasonableness of a carrier's rates and rate structures'').

[25] We recognize that in many circumstances, a carrier has an incentive to obtain commitments from nonaffiliated shippers. Securing term commitments from nonaffiliated shippers can mitigate a pipeline's financial risk and provide the pipeline with a stable assured revenue stream supporting the pipeline. *E.g., TransCan. Keystone Pipeline, LP,* 125 FERC ¶ 61,025, at P 21 (2008) (committed rates ''support pipelines' efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities.''); *Enbridge Pipelines (S. Lights) LLC,* 141 FERC ¶ 61,244, at P 4 (2012) (*Enbridge Pipelines* (*S. Lights*)) (''[I]t was necessary to obtain financial support through long-term volume commitments without which the project could not move forward.''); *Express,* 76 FERC at 62,254 (''longer term commitments provide greater assurances . . . and hence more long-term revenue stability'').

[26] *E.g., Laurel Pipe Line Co.,* 167 FERC ¶ 61,210, at P 24 n. 37 (2019) (''Oil pipelines have the burden to demonstrate that proposed rates are just and reasonable.''); *ONEOK Elk Creek Pipeline, L.L.C.,* 167 FERC ¶ 61,277, at P 4 (2019) (''An oil pipeline bears the burden of demonstrating that proposed rates and changes to its tariff are just and reasonable'').

[27] *Colonial,* 146 FERC ¶ 61,206 at P 34.

[28] *See* 49 U.S.C. app. 1, 2, 3(1), 6, 10, 15(1), 15(7).

[29] *Seaway Crude Pipeline Co., LLC,* 139 FERC ¶ 61,109, at P 25 (2012) (''The Commission, of course, cannot require the filing of a petition for declaratory order nor prevent the filing of a tariff proposing to implement service under section 15(7) of the ICA.'').

[30] 5 U.S.C. 554(e) (2018).

[31] *Express Pipeline P'ship,* 75 FERC ¶ 61,303, at 61,967 (1996), *aff'd,* 76 FERC at 62,253.

[32] *See, e.g., Laure Pipe Line Co., L.P.,* 167 FERC ¶ 61,210, at P 24 n.37 (2019) (*Laurel*) (Oil pipelines ''must provide sufficient explanatory information to meet [their] burden of proof in their transmittal letters rather than their answers.''); *Chaparral Pipeline Co., LLC,* 152 FERC ¶ 61,068, at P 7 (2015) (failure to provide sufficient explanation and support for tariff changes in the transmittal letter ''may result in the Commission rejecting such filings as patently deficient''); *Mars Oil Pipeline Co.,* 150 FERC ¶ 61,148, at P 7 n.7 (2015) (oil pipelines must provide ''adequate explanation in their transmittal letters as opposed to waiting to justify a filing in an answer''); *Plains Pipeline, L.P.,* 168 FERC ¶ 61,201, at P 10 (2019) (''[P]ipelines must explain their tariff changes in their transmittal letters, not subsequent responses.''); *see also, Seaway,* 146 FERC ¶ 61,151 at P 15 (''By not first seeking a declaratory order approving its general rate structure prior to filing its tariff, [the pipeline] left the question of rate structure issues, including the open season process for committed shippers, open to litigation.'').

[33] *See Colonial,* 146 FERC ¶ 61,206 at P 34.

[34] This definition is based upon the Commission's Standards of Conduct regulations for electric utilities and natural gas pipelines. *See* 18 CFR 358.3 (2020). However, we welcome comments proposing an alternative definition of ''affiliate'' for the limited purpose contemplated by this proposed policy statement.

[35] Although commenters should address whether a different standard may be appropriate here, the Commission's Standards of Conduct define ''control'' as ''the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity'' and specify that ''[a] voting interest of

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more nonaffiliated entities execute the contract to become committed shippers along with any affiliates of the carrier, the contract is not an Affiliate Contract. This proposed guidance only applies to rates and terms pursuant to contracts exclusively executed by the carrier's affiliate(s) and not by any nonaffiliated entity.

18. We recognize that a carrier may choose to file a petition for declaratory order requesting that the Commission approve proposed contract rates and terms before the open season has closed and where it is not definitively known whether an unaffiliated entity will execute the proposed contract. In such circumstances, we propose that a carrier could request the Commission's approval of the proposed rates and terms conditioned on at least one nonaffiliated shipper executing the contract.[36] If a nonaffiliate eventually executes a proposed contract, the carrier could confirm in its transmittal letter when it files its tariff implementing the proposed rates and terms that a nonaffiliated entity has agreed to such rates and terms. In the event that only an affiliated entity executes the contract, the carrier could file an amended petition to support the proposed rates and terms as an Affiliate Contract consistent with the below proposed guidance.

B. Information Regarding an Open Season Process

19. We propose that by providing information regarding an open season process that resulted in the execution of only an Affiliate Contract, a carrier can demonstrate that its affiliate(s) emerged as the only committed shipper(s) via a fair, transparent, and non-discriminatory process. Below, we suggest some ways that carriers can help support such a finding by providing information regarding (1) open season advertising and participation, (2) open season timing, (3) open season negotiations and changes, and (4) additional facts. We seek comment on the items proposed below and whether such information could support a showing that a carrier did not unduly discriminate in favor of an affiliate, as well as any other information that could support such a finding.

20. We emphasize that the proposed items below are neither prescriptive nor exhaustive. The items proposed below merely illustrate some potential ways that a carrier could demonstrate that an open season process was not unduly discriminatory. In proposing the suggested items below, we also do not intend to preclude carriers from providing any other information that could demonstrate the integrity of the open season process. Furthermore, a carrier would not necessarily need to provide all the information discussed below to support its proposed rates and terms pursuant to the Affiliate Contract. We recognize that some of the items below would not be applicable to every situation and there may be considerations that enable a carrier to support its filing without including all the information discussed below.

1. Open Season Advertising and Participation

21. Information regarding a carrier's efforts to publicize its open season and nonaffiliated shipper participation in the open season may support a finding that a carrier did not afford an affiliate an undue preference. This could include:

- Describing the steps the carrier undertook to advertise the open season;
- Identifying how many (if any) nonaffiliated entities participated in the open season process;
- Describing any facts that could be relevant to explaining the lack of participation by nonaffiliated shippers, if no such nonaffiliated shippers expressed interest or participated in the open season;
- Showing that any confidentiality agreement that shippers were required to sign as a prerequisite for obtaining the proposed contract was narrowly tailored.

22. The Commission's well-established policy considers whether a contract was offered in a widely publicized open season, regardless of whether nonaffiliated shippers enter the contract.[37] However, the level of supporting information provided by carriers to support a finding that an open season was widely publicized varies. We propose that carriers proposing rates and terms pursuant to Affiliate Contracts provide detailed information showing compliance with this policy to alleviate concerns regarding affiliate favoritism. Evidence showing an open season was widely publicized may include copies of press releases and web-postings, data on how widely the open season notice was distributed, and descriptions of the carrier's marketing efforts and efforts to contact market participants that could have a potential interest in the offered service.[38]

23. Information regarding the level of participation from nonaffiliated entities during an open season may also indicate that the process was truly open and inclusive, rather than designed to unduly favor a carrier's affiliate. Such information could include identifying how many, if any, nonaffiliated entities (1) responded to the open season notice, (2) received the open season materials, or (3) actively participated in the open season process by engaging in discussions or negotiations with the carrier. Where no nonaffiliated entity either expressed any interest or participated in the open season, a carrier could describe any pertinent facts that could explain why the carrier's affiliate was the only participant. For example, information regarding the market context, such as product liquidity, connectivity, and business operations of entities active in the region served by the pipeline, may help to explain the level of interest by nonaffiliated entities.[39] Where a carrier can identify specific circumstances that

10 percent or more creates a rebuttable presumption of control.'' 18 CFR 358.3.

[36] Of course, where a carrier believes it unlikely that any nonaffiliated entity will be interested in its proposal, a carrier could provide support for the proposed rates and terms as an Affiliate Contract in a petition for declaratory order, notwithstanding the possibility that a nonaffiliated entity could agree to the contract prior to the close of the open season.

[37] *E.g., Enterprise Crude,* 166 FERC ¶ 61,224 at P 11 (''[A] carrier's open season must be widely publicized and structured in manner that provides all shippers access to the offered capacity''); *Navigator BSG Transp. & Storage, LLC,* 152 FERC ¶ 61,026, at P 18 (2015); *ETP Crude LLC,* 153 FERC ¶ 61,261, at P 17 (2015); *Wolverine Pipe Line Co.,* 153 FERC ¶ 61,109, at P 22 (2015); *ONEOK Arbuckle II Pipeline, L.L.C.,* 170 FERC ¶ 61,010, at P 12 (2020) (*ONEOK Arbuckle II*); *White Cliffs,* 148 FERC ¶ 61,037 at P 52; *Monarch Oil Pipeline, LLC,* 151 FERC ¶ 61,150, at P 30 (2015) (*Monarch*).

[38] *E.g., ONEOK Arbuckle II,* 170 FERC ¶ 61,010 at P 4 (notice of the open season was provided ''on the company website, in S&P Global Platts Daily, and in the Oil Price Information Service Newsletter''); *Palmetto Products Pipe Line LLC,* 151 FERC ¶ 61,090, at P 6 (2015) (pipeline represented that ''[t]he open season was widely publicized through a press release reported through the trade press and extensive marketing efforts''); *Monarch,* 151 FERC ¶ 61,150 at P 14 (pipeline represented that the open season was ''widely-publicized through a press release that was distributed via Business Wire, posted on [the pipeline's] website, and through in-person meetings with potential shippers''); *Sunoco Pipeline L.P.,* 141 FERC ¶ 61,212, at P 5 (2012) (notice of the open season was ''distributed in press releases to more than 200 trade and general circulation print and online publications''); *Saddlehorn Pipeline Co., LLC,* 153 FERC ¶ 61,067, at P 7 (2015) (''Notice of the open season was published on [the pipeline's] website, reported in the trade press, and [the pipeline] launched its own marketing efforts, which included direct contact to potential shippers.'').

[39] *See, e.g., ONEOK Arbuckle II,* 170 FERC ¶ 61,010 at P 3 (noting that ''the Petition includes a description of the production, processing, and market for Demethanized Mix'' and ''explains that the Pipeline is likely to be used by only one or a very small number of shippers, not because of the terms of service or open season, but as a result of the nature of the market for Demethanized Mix in which the Pipeline operates'').

shed light on the lack of nonaffiliated shipper interest, such information could assist the Commission in its evaluation.

24. The Commission's policy is that confidentiality agreements used in open seasons must be narrowly tailored, regardless of whether nonaffiliated shippers make commitments.[40] However, the level of information provided by carriers in their filings regarding confidentiality agreements varies. We propose that carriers proposing rates and terms pursuant to Affiliate Contracts provide a showing that any confidentiality agreement that was a prerequisite to obtaining open season materials was narrowly tailored consistent with Commission policy. This information is particularly important in the context of Affiliate Contracts to ensure that any nonaffiliated shippers that participated in the open season were not prevented from raising concerns about the process or proposed terms with the Commission.

2. Open Season Timing

25. Information regarding the timing of the open season may support a finding that a carrier did not afford an affiliate an undue preference, such as:

- Showing that the open season process permitted any potential nonaffiliated committed shippers adequate time to meaningfully participate in the open season;
- Identifying whether a carrier conducted its open season before beginning construction of any pipeline facilities or infrastructure that would enable the service offerings, such that the scope could potentially be modified to accommodate requests from potential nonaffiliated committed shippers during the open season;
- Identifying whether discussions were ongoing with potential nonaffiliated committed shippers prior to the close of the open season, and whether the open season was extended to allow additional time for discussions with potential nonaffiliated committed shippers.

26. The above information regarding open season timing may support a finding that an open season was not designed to afford an undue preference to a carrier's affiliate. In general, a carrier's open season process should allow for meaningful participation by interested shippers. Where no nonaffiliated shippers make a commitment, information regarding an open season's timing could be particularly useful to illustrate that the carrier made a good faith effort to allow participation by any interested nonaffiliated entities. The length of the open season should allow sufficient time for a potential shipper to evaluate the proposed rates and terms of service, engage in back-and-forth discussions and negotiations with the carrier, and formulate a proposed commitment. While the amount of time permitted for potential shippers to submit commitments in carriers' initial open season notices varies, industry standards appear to allow at least 30 days (not including any extensions). We propose that filings regarding Affiliate Contracts include a representation that the initial open season notice permitted potential shippers 30 days or longer to submit commitments consistent with industry standards or explain why a shorter deadline was used.

27. The relationship between the open season timing and the timing of any construction activities that will enable the new service offerings may also support a finding that the open season process allowed for meaningful participation from nonaffiliated shippers. Where a carrier conducts its open season before beginning construction on a project, the carrier may have the opportunity to modify the project's scope to respond to the business needs of potential nonaffiliated committed shippers. For example, a carrier may consider upsizing the design capacity of a planned new pipeline or expansion project in response to the level of shipper commitments received during the open season.[41] Conversely, where a project's in-service date is coincident with the close of the open season, there may be less opportunity for the project's scope to be modified based on the interest shown in the open season. Information regarding the relationship between when the carrier conducted the open season process in relation to the timing of any construction activities may be useful in some cases to support a finding that a carrier did not unduly discriminate in favor of an affiliate. However, we emphasize that a carrier is not precluded from conducting an open season after construction on the project has commenced.[42] We recognize that the circumstances may vary.[43]

28. If the open season was extended to allow for continued negotiations with potential nonaffiliated committed shippers, such information suggests that the carrier made genuine efforts to accommodate the participation of nonaffiliated potential shippers in the open season process. Accordingly, we believe it would be useful for carriers proposing terms pursuant to Affiliate Contracts to state whether discussions were ongoing with any nonaffiliated entities prior to the close of the open season and whether the open season was extended.[44] Where discussions were ongoing, but the carrier declined to extend the open season, we propose that carriers include an explanation of why the open season was not extended.

29. As explained above, we recognize that these suggestions may not be feasible for every carrier seeking to implement contract rates and terms. We do not seek to inhibit a carrier's discretion to decide the optimal timing or length of an open season process but instead seek to illustrate what type of information regarding the open season timing could be useful to support proposed terms pursuant to Affiliate Contracts where such information is available.

3. Open Season Negotiations and Changes

30. Information regarding the discussions and modifications that took place during the open season may support a finding that a carrier did not afford an affiliate an undue preference. This information could include:

- Providing the open season materials, including any *pro forma*

[40] The Commission has explained that while we ''recognize[] a pipeline's need for confidentiality agreements during an open season to protect the pipeline from competitive harm due to the release of potential rates, discounts, contract terms etc.,'' such ''confidentiality agreements should be narrowly tailored and should not prevent potential shippers from bringing to the Commission's attention issues arising from the open season or proposed contract provisions that may conflict with applicable law, precedent or policy.'' *Colonial,* 146 FERC ¶ 61,206 at P 31.

[41] *See, e.g., Enbridge Pipeline (Ill.) LLC,* 144 FERC ¶ 61,085, at P 3 (2013) (explaining that the pipeline may increase the size of the pipeline depending on the results of the open season); *Sunoco Pipeline L.P.,* 149 FERC ¶ 61,191, at P 7, n.5 (2014) (explaining that the TSA required shippers to make specific volume commitments for propane and/or butane so the pipeline could properly size the project and the receipt points). We recognize that this example would not be relevant in all circumstances, such as where a carrier undertakes an expansion and has only a finite amount of additional capacity it is able to create on its system.

[42] *See SFPP, L.P.,* 169 FERC ¶ 61,001, at P 42 (2019) (dismissing challenge to the validity of an open season based on the fact that the pipeline conducted the open season when development of the expansion project was near completion); *SFPP, L.P.,* 168 FERC ¶ 61,058, at P 15 n.31 (2019).

[43] For example, market demand for a new service may be so strong that market participants request that the carrier begin the construction activities necessary to enable the new service offerings as early as possible.

[44] *E.g., Monarch,* 151 FERC ¶ 61,150 at P 14 (open season was extended to respond to shipper interest); *Shell Pipeline Co. LP,* 141 FERC ¶ 61,017, at P 4 (2012) (carrier clarified terms based on shipper feedback and extended the open season); *ONEOK Arbuckle II,* 170 FERC ¶ 61,010 at PP 4, 12 (carrier was willing to extend the open season if shipper interest warranted).

contracts, the carrier offered in the open season;

- Describing any open season negotiations and any changes proposed or made to the offered terms;
- Explaining the carrier's basis for not accepting commitments submitted by any nonaffiliated entities during the open season or providing any facts relevant to why such nonaffiliated entities did not ultimately become committed shippers;
- Describing steps taken to ensure that any relevant information or data provided or communicated to an affiliate related to the proposed contract terms was also provided to all open season participants;
- Providing all offers and commitments submitted by the carrier's affiliates;
- Showing that a neutral, independent third-party monitored or administered the open season process.

31. While some of the above information may be confidential, carriers have filed contracts and other sensitive information with a request for privileged treatment in the past.[45] Information regarding the open season negotiations between the carrier and potential shippers could support a finding that the open season was not unduly discriminatory. For example, such information could demonstrate that the carrier was willing to consider potential modifications to a contract in response to requests or counter-proposals from nonaffiliated shippers. We emphasize that carriers have discretion to determine what services to offer.[46] We are not suggesting that a carrier is obligated to accept any suggested modifications to contract rates and terms of service, but to the extent a carrier considered counter-proposals from nonaffiliated shippers and engaged in a back-and-forth communication with nonaffiliated shippers, such information may support a finding that the carrier did not afford an undue preference to its affiliate.

32. Similarly, information regarding any commitments, offers, or bids submitted by affiliated or nonaffiliated entities could be relevant to the Commission's evaluation of proposed rates and terms pursuant to an Affiliate Contract. If a nonaffiliated entity submitted a commitment that was not accepted by the carrier, we propose that the carrier explain its basis for rejecting the nonaffiliate's submission, including describing any method that was used to allocate requests, such as net present value.[47]

33. Finally, although we are not aware of any oil pipeline open season that was monitored or administered by a neutral, independent third party, in other contexts the Commission has recognized that ''[a]n independent third party can ensure meaningful participation by non-affiliates and eliminate characteristics that improperly give an advantage to the affiliate.'' [48] We seek comment on whether independent, third-party monitors could play a role in ensuring that oil pipeline open seasons afford meaningful participation by nonaffiliates and prevent undue discrimination in favor of pipeline affiliates.

4. Additional Facts

34. Under this proposal, a carrier could provide any other information to support a finding that the open season provided an equal opportunity for nonaffiliated shippers to enter a contract and did not unduly discriminate in favor of the carrier's affiliates. The above list is neither exclusive nor exhaustive, and we invite comments on any information pertinent to demonstrating the integrity of an open season that does not result in commitments from nonaffiliated shippers.

C. Information Regarding the Committed Terms

35. We also seek comment on the below proposed guidance for a carrier seeking to implement rates and terms pursuant to an Affiliate Contract to demonstrate that it did not unduly discriminate in favor of an affiliate by offering excessively burdensome or uneconomic contract terms designed to prevent nonaffiliated shippers from becoming committed shippers. A contract rate or term that appears to impose excessive burdens and departs from industry standards could be an indication that the carrier was seeking to exclude any nonaffiliated shippers from entering the contract and unduly discriminating in favor of its affiliate.

36. The following proposed guidance highlights key areas where carriers proposing rates and terms pursuant to Affiliate Contracts could demonstrate they closely adhered to industry standards and Commission policy: (1) Minimum commitment requirements, (2) rate requirements, (3) penalty and deficiency provisions, and (4) duty to support clauses. Some of the below guidance is based on Commission policies that are generally applicable, including to carriers implementing contracts supported by nonaffiliated shipper commitments. However, the level of information and support provided by carriers in their filings before the Commission varies. For the reasons discussed above, we propose that carriers seeking to implement rates and terms pursuant to Affiliate Contracts expressly address the below items and demonstrate in their filings that such terms are consistent with the Commission's policies and industry standards. We seek comment on the guidance as well as on any other information that could support a finding that a carrier did not unduly discriminate in favor of its affiliate.

1. Minimum Commitment Requirements

37. The Commission has explained that a contract that requires an excessively high minimum commitment for a shipper to become a committed shipper may violate the anti-discrimination provisions of the ICA.[49] In *Enterprise Crude,* the Commission found that a contract offered in an open season that included a large minimum volume requirement that was not justified by operational requirements and only allowed the carrier to accept one committed shipper ''had the effect of conferring an undue or unreasonable preference or advantage to large shippers.'' [50]

38. Where a carrier's affiliate is the only committed shipper, a high minimum volume commitment that is not operationally justified may be an indication that the carrier intended to unduly discriminate in favor of its affiliate. Likewise, a long minimum term commitment that departs from industry standards without any explanation raises similar concerns. For example, an affiliated shipper may incur no additional risk when agreeing to a 20-year contract with its affiliated pipeline, but a 20-year term could impose significant risk on a nonaffiliated shipper that would be required to pay the contract rate for its committed volumes (or incur significant

[45] 18 CFR 388.112 (2020); *see also Enbridge (S. Lights),* 121 FERC ¶ 61,244 at P 9, n.4 (pro forma TSA was attached to the petition); *Enbridge Pipelines (N.D.) LLC,* 133 FERC ¶ 61,167, at P 19, n.30 (2010) (same); *ONEOK Elk Creek Pipeline, L.L.C.,* 169 FERC ¶ 61,105, at P 4, n.3 (2019) (same).

[46] *Enterprise TE Products Pipeline Co. LLC,* 143 FERC ¶ 61,191, at P 23 (2013) (*Enterprise TE I*) (''[I]t is the oil pipeline's choice what services it will offer.''); *SFPP, L.P.,* 169 FERC ¶ 61,001, at P 45 (''[A] pipeline possesses discretion to decide whether or not to offer a particular service.'').

[47] *See, e.g., Shell Pipeline Co. LP,* 139 FERC ¶ 61,228, at P 22 (2012).

[48] *Allegheny Energy Supply Co., LLC,* 108 FERC ¶ 61,082, at P 25 (2004).

[49] *Enterprise Crude,* 166 FERC ¶ 61,224.

[50] *Id.* P 8.

shortfall penalties) throughout the term.[51]

39. Accordingly, we propose that carrier filings proposing terms pursuant to an Affiliate Contract (1) describe the minimum commitment (volume and term length) required to enter the contract in their filings, (2) state the maximum number of committed shippers the minimum requirements would allow the carrier to accept (*e.g.,* if multiple interested shippers submitted a minimum bid), and (3) explain whether the minimum commitment requirements are consistent with Commission policy and industry standards or, where not consistent with industry standards, any operational or other considerations or circumstances that would justify the requirements.[52] We seek comment on whether this proposal will provide sufficient assurance that minimum commitment requirements in Affiliate Contracts do not unduly discriminate against potential nonaffiliated shippers.

2. Rates

a. Standards Applicable To Affiliate Contract Rate Terms

40. To fulfill its obligations under the ICA, the Commission must look at (1) the rate information provided by the carrier during the open season and (2) the burden the contract imposes over the life of the contract, not just on the first day of service. Potential committed shippers must decide whether to agree to the contract rate based on the information provided during the open season process, not when the tariff is ultimately filed with the Commission.[53] During the open season process, a shipper is faced with the decision whether to commit to pay the contract rate, including any rate increases permitted by the contract over the entire term of the agreement, not merely on the first day of service. Therefore, to ensure that a contract rate is just, reasonable, and not unduly discriminatory under the ICA, the Commission must evaluate the full obligation that a potential contracting shipper would incur by agreeing to the rate terms offered by the carrier in the open season over the life of the agreement, including the burden imposed by any rate escalation provisions.

41. As discussed above, where a nonaffiliated shipper agrees to a contract, the Commission can generally presume that the open season process afforded shippers sufficient information to evaluate the contract rate and that the agreed-to rate terms, including any escalation provisions, respond to competitive conditions because the contract reflects arm's-length bargaining.[54] In contrast, an affiliated shipper may evaluate any rate paid to its affiliated pipeline differently than an arm's-length third party because the expenditures and earnings of the affiliates are combined at the parent company level. Thus, where a carrier seeks to provide an affiliated shipper preferential access to capacity, the carrier may offer a contract rate, including escalation terms over the life of the contract, that do not reflect market factors and would be excessively burdensome or uneconomic for any nonaffiliated market participants.[55] This is one means for the carrier to provide an undue preference to an affiliate over a non-affiliate through its open season rate offerings.

42. Thus, in the absence of an arm's-length transaction, the Commission must have some means for evaluating the Affiliate Contract rate and rate escalation provisions that will apply over the term of the agreement as offered by the carrier in the open season to ensure that they are just and reasonable under the ICA and were not structured to unduly discriminate against nonaffiliates.

b. Proposed Method for Demonstrating Affiliate Contract Rate Terms are Consistent With ICA Principles

43. We propose that offering a cost-of-service rate over the term of the agreement to any interested shippers in an open season would support a finding that such rate offering is just, reasonable, and not unduly discriminatory under the ICA. The Commission has long recognized that cost-of-service ratemaking provides one mechanism for protecting against an exercise of market power.[56] A cost-of-service rate can serve as a substitute for a competitive market rate where the indicia of fair dealing that accompanies arm's-length, non-affiliate transactions is absent.[57] Therefore, where a carrier chooses to offer a cost-of-service rate over the term of the agreement to any interested shippers in an open season, such rate offering is entitled to a presumption that it is just, reasonable, and not unduly discriminatory under the ICA.[58] Although we are proposing that offering a cost-of-service rate over the term of the contract as described further below provides a safe harbor method of supporting an Affiliate Contract rate for purposes of applying a presumption that the rate complies with the ICA, we recognize that there can be other ways to justify Affiliate Contract rates where the Commission cannot rely on the presence of arm's-length bargaining. The proposed guidance is

[51] We estimate that less than five percent of oil pipeline contract terms filed with the Commission include initial term lengths of 20 years or more.

[52] *See ONEOK Arbuckle II,* 170 FERC ¶ 61,010 at P 6 n.7 (pipeline represented that ''the minimum volume commitment is a small percentage of the initial capacity of the Pipeline and roughly corresponds to the average output of a typical natural gas processing plant in Oklahoma'').

[53] As discussed above, the process of offering the contract rates to all interested shippers is essential to meeting the common carrier duty of nondiscrimination. *Sea-Land,* 738 F.2d at 1317 (''Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms.'').

[54] *See, e.g., Seaway,* 146 FERC ¶ 61,151 at PP 13, 25, 28; *Tesoro,* 148 FERC ¶ 61,129 at P 23.

[55] *See Magellan,* 161 FERC ¶ 61,219 at P 14 (while the marketing affiliate ''would facially pay its pipeline's filed tariff rate, and the [m]arketing [a]ffiliate would sell that capacity for less than that rate, the entire transaction could nevertheless yield a net profit to the integrated company''); Opinion No. 154, 21 FERC at 61,660.

[56] *See ExxonMobil Oil Corp.* v. *FERC,* 487 F.3d 945, 961 (D.C. Cir. 2007) (''[T]he purpose of a cost-of-service rate . . . is to simulate what a pipeline's economic behavior would be in a competitive market.''); *SFPP, L.P.,* 121 FERC ¶ 61,240, at P 14 (2007) (''cost-of-service rate making seeks to replicate a competitive rate'').

[57] *See Phila. Elec. Co.,* 58 FERC ¶ 61,060, at 61,134 (1992) (The concern ''for the potential for self-dealing or other forms of abuse arising from an affiliated relationship between the buyer and seller of electric power . . . is particularly acute where the seller seeks to charge rates for service that are based on negotiation in the marketplace rather than the traditional measure of the seller's costs of providing service.'').

[58] We note that a carrier must provide cost-of-service support to justify an Affiliate Contract rate in order to comply with section 342.2(a) when it files its tariff implementing the new service. 18 CFR 342.2(a) (2020); *see also Targa NGL Pipeline Co. LLC,* 166 FERC ¶ 61,179, at P 21 (2019) (explaining that because the pipeline's ''only committed shipper is an affiliate,'' the pipeline would be ''required to file its initial rates as cost-of-service rates''); *Medallion Midland Gathering, LLC,* 170 FERC ¶ 61,048, at P 33 n.58 (2020) (Because ''the only committed shipper is an affiliate of [the pipeline],'' the pipeline is ''required to file the data required under section 342.2(a).''); *Medallion Del. Express, LLC,* 170 FERC ¶ 61,047, at P 30 n.57 (2020); *Medallion,* 170 FERC ¶ 61,192 at P 15 n.25. In adopting these regulations, the Commission recognized ''a concern . . . with allowing a pipeline that may possess market power to control prices in a market to establish an initial rate through negotiations'' and required at least one nonaffiliated shipper to agree to a rate to ''provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge.'' *See* Order No. 561, FERC Stats. & Regs. at 30,960, *order on reh'g,* Order No. 561–A, FERC Stats. & Regs. ¶ 31,090, at 31,106 (''The purpose of requiring the one shipper who must agree to the initial rate to be unaffiliated with the pipeline is to ensure that the agreement is based upon arms-length negotiations.''), *aff'd sub nom. AOPL* v. *FERC,* 83 F.3d 1424 (D.C. Cir. 1996); *see also Seaway,* 146 FERC ¶ 61,151 at P 30 (oil pipelines must show that a nonaffiliated entity agrees to a negotiated rate due to the ''concern that potential market power could be exercised against shippers who did not agree to the negotiated rate'').

not intended to require a carrier to offer a cost-of-service rate as outlined below in order to demonstrate the rate is just, reasonable and not unduly discriminatory or to preclude a carrier from supporting an Affiliate Contract rate on different grounds consistent with Commission precedent and regulations.

44. We propose that a carrier can demonstrate that it offered a cost-of-service rate over the term of the contract as follows: (1) Provide cost-of-service support for the contract rate in the materials provided to potential shippers during the open season, (2) stipulate in the contract that adjustments to the rate over the term of the contract by the carrier would be pursuant to the Commission's cost-of-service and indexing regulations,[59] (3) stipulate in the contract that the committed shipper has the right to directly challenge the committed rate on a cost-of-service basis under 18 CFR 343.2, and (4) provide that whenever the rate is changed during the contract term on a cost-of-service basis, the new cost-of-service rate will be set at a 100% load factor (or some other reasonable limit) so the committed shipper is not at risk for future reductions in the pipeline's throughput.[60] We seek comment on the above proposed criteria for offering a cost-of-service rate over the life of the contract for purposes of applying a presumption of compliance with the ICA. In particular, regarding the first criteria (providing cost-of-service support for the rate in the open season), we recognize that a carrier may not be able to precisely calculate its cost of service for pipeline projects that are not yet constructed. We seek comment on how, in such instances, the open season documents could contain sufficient cost-of-service information for a potential shipper to evaluate the proposed rate. For example, a carrier could potentially include a reasonable estimated rate range based on construction cost projections determined using methods consistent with Commission policy. The contract could also provide a committed shipper an option to terminate the contract if the actual cost-of-service committed rate determined when construction is completed was not within the estimated range. The Commission could also consider evidence that the carrier's proposed rate is reasonably in line with the estimates provided in the open season, or whether the carrier provided adequate explanation where the proposed rate materially diverges from the open season estimates.

45. Although we propose a safe harbor method for supporting Affiliate Contract rates on a cost-of-service basis, we invite comments on any other methods that would warrant a presumption of compliance with the ICA in the absence of arm's-length negotiations. Comments proposing alternative methods should address (1) the criteria for justifying Affiliate Contract rate terms using the proposed method, (2) the information a carrier would need to provide in order to support the proposed rate terms under the proposed method, (3) how such a showing would support a finding that the rate terms offered in the open season mitigate the potential for undue discrimination towards potential nonaffiliated shippers, (4) why the proposed method is necessary given the availability of the cost-of-service safe harbor, and (5) whether such method is consistent with the Commission's regulations or, if not, changes that would be necessary to permit such method.

3. Penalties and Deficiency Provisions

46. Surcharges, additional fees, deficiency provisions, or other penalties could potentially be designed to impose unreasonable financial burden or risk on the contracting shipper, thus ensuring that a carrier's affiliate (who may not be affected by such provisions in the same manner as unaffiliated entities) emerges from the open season process as the only committed shipper. We propose that carrier filings regarding Affiliate Contracts include a showing that any such terms are consistent with Commission policy and industry standards, and are reasonably tailored to meet legitimate objectives, so as to demonstrate that they do not impose an excessive or disproportionate burden on potential nonaffiliate-committed shippers. For example, the Commission has explained that penalties must be reasonably tailored to deter conduct that is detrimental to shippers or pipeline operations.[61] Similarly, the Commission's prior precedents describe when costs can be appropriately recovered through a surcharge.[62] We seek comment on this proposal.

4. Duty To Support

47. The Commission has explained that it ''will . . . look with disfavor upon duty to support clauses that require too broad a waiver of a shipper's statutory rights to seek redress before the Commission.'' [63] In particular, ''[w]hile it appears to be reasonable for contract shippers to support the specific rates to which they agreed, requiring those shippers to also waive their statutory rights as to past rates or other rates of the pipeline to which they have not specifically agreed is likely too broad.'' [64] Although this policy applies to all contract proposals as a general matter, the level of information carriers provide to the Commission regarding duty to support clauses varies.

48. We propose that carrier filings proposing terms pursuant to an Affiliate Contract provide a showing that any duty to support clause included in the contract was narrowly tailored consistent with Commission policy. In the context of Affiliate Contracts, such showing could be particularly useful to the Commission to support a finding that no nonaffiliated entities were unreasonably deterred from entering the contract on the basis that the contract required an overbroad waiver of a shipper's statutory rights to seek redress before the Commission. We seek comment on this proposal.

D. Prorationing Rules

49. When the only committed shipper is the carrier's affiliate, we are concerned about prorationing rules that may unduly hinder an uncommitted shipper's (*i.e.,* unaffiliated shipper's) access to pipeline capacity. When a carrier proposes rates and terms pursuant to an Affiliate Contract, the only way for nonaffiliates to access the pipeline is through the capacity reserved for uncommitted shippers. Accordingly, when a carrier proposes rates and terms pursuant to an Affiliate Contract, the carrier should ensure that it has included a full explanation for how the Affiliate Contract is integrated into the pipeline's prorationing rules.

50. The Commission has approved various proposals to provide committed shippers preferential prorationing terms,

[59] 18 CFR 342.3, 342.4(a).

[60] Without setting the rate at a 100% load factor or something similar, a cost-of-service contract rate would place all of the risk for reductions in the pipeline's throughout on the committed shipper, which could deter participation by nonaffiliated entities.

[61] *See Bridger Pipeline LLC,* 135 FERC ¶ 61,188, at P 16 (2011); *Enbridge Pipelines (North Dakota) LLC,* 118 FERC ¶ 61,162, at PP 15–16 (2007); *Platte Pipe Line Co.,* 80 FERC ¶ 61,036, at 61,082 (1997); *Colonial Pipeline Co.,* 92 FERC ¶ 61,289, at 62,022 (2000); *Mars Oil Pipeline Co.,* 150 FERC ¶ 61,148, at P 8 (2015); *Williams Pipe Line Co.,* 76 FERC ¶ 61,023, at 61,160 (1996).

[62] *See, e.g., Chevron Pipe Line Co.,* 163 FERC ¶ 61,238 (2018), *reh'g denied,* 165 FERC ¶ 61,069 (2018); *Tesoro Logistics Nw. Pipelines LLC,* 153 FERC ¶ 61,118 (2015); *Magellan Pipeline Co., L.P.,* 115 FERC ¶ 61,276 (2006); *Chevron Pipe Line Co.,* 115 FERC ¶ 61,117, at P 31 (2006); *SFPP, L.P.,* 121 FERC ¶ 61,162 (2007).

[63] *See Colonial,* 146 FERC ¶ 61,206 at P 32; *Nexen,* 121 FERC ¶ 61,235 at PP 51–52.

[64] *Colonial,* 146 FERC ¶ 61,206 at P 32.

such as firm or priority service,[65] or deemed regular shipper status.[66] The Commission's policies require that sufficient capacity be reserved for uncommitted shippers. This addresses the concern that the carrier is exercising market power by ensuring that shippers have an alternative to the terms the carrier is offering in a committed contract. Although each proposal is addressed based on the facts and circumstances presented,[67] Commission precedent and industry standards generally support a carrier reserving at least 10% of capacity for uncommitted shippers.[68] In particular, the Commission rejected a proposed prorationing policy where committed shippers would have access to 95% of the capacity as of the in-service date of the project, finding that such proposal ''undermines the Commission's committed rate policy, which allocates a minimum 10 percent reservation of the pipeline's total capacity to uncommitted shippers to ensure reasonable access to the pipeline consistent with its common carrier obligation.'' [69] As with several of the other proposals discussed herein, these policies apply to all committed shipper contracts, not just Affiliate Contracts. However, carriers seeking to implement contract rates and terms do not always discuss the prorationing policy in detail in their filings, such as where there is already a prorationing policy in the pipeline's tariff that applies to committed shipper contracts.

51. Accordingly, we propose that carriers proposing rates and terms pursuant to Affiliate Contracts fully explain any prorationing terms applicable to committed shippers and the committed volume levels to which these terms apply. We also propose that carriers explain how the prorationing terms are consistent with Commission policy and the pipeline's common carrier obligations and will ensure that any unaffiliated shippers that request transportation will have reasonable access to the pipeline as uncommitted shippers.

IV. Conclusion

52. We seek input on the above proposals or any other approaches for oil pipeline carriers to demonstrate that Affiliate Contracts are not the result of undue discrimination to exclude potential nonaffiliated committed shippers. We welcome comments on any other issues or factors related to these issues that the Commission should consider for inclusion in the policy statement.

V. Comment Procedures

53. The Commission invites comments on this proposed policy statement by December 14, 2020 and Reply Comments by January 28, 2020. Comments must refer to Docket No. PL21–1–000 and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

54. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

55. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

56. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VI. Document Availability

57. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

58. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

59. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By the Commission.

Issued: October 15, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–23289 Filed 10–20–20; 8:45 am]

BILLING CODE 6717–01–P

[65] *E.g., CCPS,* 121 FERC ¶ 61,253 at P 19; *EnLink NGL Pipeline, LP,* 167 FERC ¶ 61,024, at PP 19, 22 (2019); *Sunoco Pipeline L.P.,* 169 FERC ¶ 61,088, at P 13 (2019); *Plantation Pipe Line Co.,* 167 FERC ¶ 61,025, at P 17 (2019).

[66] *E.g., Kinder Morgan Pony Express,* 141 FERC ¶ 61,180 at PP 33–41; *Bayou Bridge Pipeline, LLC,* 153 FERC ¶ 61,322, at P 30 (2015); *Permian Express Terminal LLC,* 162 FERC ¶ 61,112, at P 17 (2018).

[67] *CCPS Transp., LLC,* 122 FERC ¶ 61,123, at PP 14–15 (2008) (''Each proposal presented to the Commission is appraised on its own merits regarding the amount of set-aside capacity planned to be reserved for spot volumes.'').

[68] *See, e.g., CenterPoint,* 144 FERC ¶ 61,130 at P 24 (''The Commission previously found that a reservation of at least 10 percent of the pipeline's capacity for uncommitted shippers is sufficient to provide reasonable access to the pipeline.''); *CCPS,* 121 FERC ¶ 61,253 at P 17 n.33 (requiring 10% of the expansion volumes to be reserved for uncommitted shippers in order ''to preserve the common carrier obligation''); *EnLink,* 157 FERC ¶61,120 at P 15 (approving ''proposal to allow committed shippers priority access for up to 90 percent of the Project's capacity, with at least 10 percent of the capacity reserved for uncommitted shippers''); *Stakeholder,* 160 FERC ¶ 61,010 at P 16 (same); *Enterprise Liquids Pipeline LLC,* 142 FERC ¶ 61,087, at P 27 (2013) (approving a rate structure guaranteeing a reservation of 10% of capacity for uncommitted shippers); *Kinder Morgan Cochin LLC,* 141 FERC ¶ 61,056, at P 18 (2012) (stating that ''Cochin provides an appropriate amount of capacity for Uncommitted Shippers, at least [10%], while affording benefits to Committed Shippers who enter into long-term TSAs.''); *EnLink NGL Pipeline, LP,* 167 FERC ¶ 61,024, at P 22 (2019) (finding ''[t]he policy is consistent with Commission precedent and ensures that uncommitted shippers moving crude oil in interstate commerce will continue to have access to at least 10 percent of the Expansion Project's capacity during times of prorationing'').

[69] *White Cliffs Pipeline, L.L.C.,* 168 FERC ¶ 61,087, at P 36 (2019).

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 20, 2020.

A. Federal Reserve Bank of Minneapolis (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *PB Bancshares, Inc., Maplewood, Minnesota;* to become a bank holding company by acquiring Premier Bank, also of Maplewood, Minnesota.

Board of Governors of the Federal Reserve System, October 16, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–23312 Filed 10–20–20; 8:45 am]

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FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 20, 2020.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Beal Financial Corporation, Plano, Texas;* to become a bank holding company through the conversion of the charter of its existing wholly owned subsidiary bank, Beal Bank SSB, Plano, Texas, and to continue the operation as a bank of a Nevada thrift company, Beal Bank USA, Las Vegas, Nevada.

Board of Governors of the Federal Reserve System, October 16, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–23313 Filed 10–20–20; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0291; Docket No. 2020–0001; Sequence No. 10]

Information Collection; FSRS Registration Requirements for Prime Grant Awardees

AGENCY: Office of the Integrated Award Environment, General Services Administration (GSA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of the currently approved information collection requirement regarding FSRS Registration Requirements for Prime Grant Awardees.

DATES: Submit comments on or before December 21, 2020.

ADDRESSES: Submit comments identified by Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees to *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching OMB control number 3090–0291. Select the link ''Comment Now'' that corresponds with ''Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees on your attached document. If your comment cannot be submitted using *regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees, in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: John Corro, Procurement Analyst, Office of the Integrated Award Environment, GSA, at telephone number 703–605–2733; or via email at *john.corro@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Federal Funding Accountability and Transparency Act (Pub. L. 109–282, as amended by section 6202(a) of Pub. L. 110–252), known as FFATA or the Transparency Act, requires information disclosure of entities receiving Federal financial assistance through Federal awards such as Federal contracts, sub-contracts, grants and sub-grants, FFATA 2(a), (2), (i), (ii). The system that collects this information is called the FFATA Sub-award Reporting System (FSRS, *www.fsrs.gov*). This information collection requires information necessary for prime awardee registration in FSRS to create a user log-in and enable sub-award reporting for their entity. To register in FSRS for a user log-in, an entity is required to provide their Data Universal Numbering System (DUNS) number. FSRS then pulls core data about the entity from their System for Award Management (SAM) registration to include the legal business name, physical address, mailing address

and Commercial and Government Entity (CAGE) code. The entity completes the FSRS registration by providing contact information within the entity for approval.

If a prime awardee has already registered in FSRS to report contracts-related Transparency Act financial data, a new log-in will not be required. In addition, if a prime awardee had a user account in the Electronic Subcontract Reporting System (eSRS), a new log-in will not be required.

B. Annual Reporting Burden

Respondents: 2,662.

Responses per Respondent: 1.

Total annual responses: 2,662.

Hours per Response: .5.

Total Burden Hours: 1,331.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary, whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 3090–0291, FSRS Registration Requirements for Prime Grant Awardees, in all correspondence.

Beth Ann Killoran,

Chief Information Officer, General Services Administration.

[FR Doc. 2020–23294 Filed 10–20–20; 8:45 am]

BILLING CODE 6820–XY–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0157; Docket No. 2020–0053; Sequence No. 12]

Information Collection; Architect-Engineer Qualifications (SF–330)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision and renewal concerning architect-engineer qualifications (Standard Form (SF) 330). DoD, GSA, and NASA invite comments on: Whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through December 31, 2020. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by December 21, 2020.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite Information Collection 9000–0157, Architect-Engineer Qualifications (SF–330). Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0157, Architect-Engineer Qualifications (SF–330).

B. Need and Uses

This clearance covers the information that offerors must submit to comply with the following Federal Acquisition Regulation (FAR) requirement:

Standard Form (SF) 330, Architect-Engineer Qualifications. As specified in FAR 36.702(b), an architect-engineer firm must provide information about its qualifications for a specific contract when the contract amount is expected to exceed the simplified acquisition threshold. Part I of the SF 330 may be used when the contract amount is expected to be at or below the simplified acquisition threshold, if the contracting officer determines that its use is appropriate. Part II of the SF 330 is used to obtain information from an architect-engineer firm about its general professional qualifications.

The SF 330 accomplishes the following:

- Expands essential information about qualifications and experience data including:
  - An organizational chart of all participating firms and key personnel.
  - For all key personnel, a description of their experience in 5 relevant projects.
  - A description of each example project performed by the project team (or some elements of the project team) and its relevance to the agency's proposed contract.
  - A matrix of key personnel who participated in the example projects. This matrix graphically illustrates the degree to which the proposed key personnel have worked together before on similar projects.
- Reflects current architect-engineer disciplines, experience types and technology.
- Permits limited submission length thereby reducing costs for both the

architect-engineer industry and the Government. Lengthy submissions do not necessarily lead to a better decision on the best-qualified firm. The proposed SF 330 indicates that agencies may limit the length of firm's submissions, either certain sections or the entire package. The Government's right to impose such limitations was established in case law (*Coffman Specialties, Inc.,* B–284546. N–284546/2, 2000 U.S.Comp.Gen.LEXIS 58, May 10, 2000).

The contracting officer uses the information provided on the SF 330 to evaluate firms to select an architect-engineer firm for a contract.

C. Annual Burden

Respondents: 411.
Total Annual Responses: 1,644.
Total Burden Hours: 47,676.
Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0157, Architect-Engineer Qualifications (SF–330).

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2020–23317 Filed 10–20–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–21–0214]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled National Health Interview Survey (NHIS) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on April 16, 2020 to obtain comments from the public and affected agencies. CDC received five comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

National Health Interview Survey (NHIS) (OMB Control No. 0920–0214, Exp. 12/31/2020)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C.), as amended, authorizes that the Secretary of Health and Human Services (HHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States.

The annual National Health Interview Survey (NHIS) is a major source of general statistics on the health of the U.S. population and has been in the field continuously since 1957. This voluntary and confidential household-based survey collects demographic and health-related information from a nationally representative sample of households and noninstitutionalized, civilian persons throughout the country. NHIS data have long been used by government, academic, and private researchers to evaluate both general health and specific issues, such as smoking, diabetes, health care coverage, and access to health care. The survey is also a leading source of data for the Congressionally mandated ''Health US'' and related publications, as well as the single most important source of statistics to track progress toward HHS health objectives.

The NHIS sample adult and sample child questionnaires include annual core content that is scheduled to be fielded in the survey every year, rotating content that is fielded periodically, emerging content to address new topics of growing interest, and sponsored content that is fielded when external funding is available. In July 2020, content related to the COVID–19 pandemic and for which emergency OMB clearance was obtained on June 22, 2020 was added to both the sample adult and sample child questionnaires. Items on positive COVID–19 cases, and access to non-pandemic care were added to both the sample child and sample adult questionnaires. Items on underlying health conditions, immunosuppression, access to cancer care, access to skilled and informal caregiving, social support, impact of chronic pain, and social distancing at current or most recent job were added to the sample adult questionnaire only. All of these items will be fielded as part of the 2021 NHIS.

Sample adult content fielded in the 2020 NHIS that will be removed from the 2021 NHIS includes dental services and other provider services, physical activity, walking for transportation and leisure, sleep, fatigue, smoking history and cessation and alcohol use. Sponsored content that will be removed include content on asthma, diabetes prevention, diabetes family history, opioid use, pain management and cancer control items on lung cancer screening, environment for walking and sun care protection. Sample child content fielded in the 2020 NHIS that will be removed from the 2021 NHIS include items on dental services, mental health services, other provider services, height and weight, physical activity, neighborhood characteristics, sleep, and screen time will rotate off the sample child core. Sponsored content on asthma will be also be removed.

The 2021 rotating sample adult core will include questions that were previously fielded in the 2019 NHIS including items on chronic pain, preventive screening tests and aspirin use. New rotating core include items on allergies and psychological distress, both of which were fielded in the pre-redesigned NHIS. New sponsored content includes items on epilepsy, myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS), insulin affordability, diabetes distress, A1C testing, colorectal cancer, prostate cancer, cervical cancer and breast cancer screening, occupational health, life satisfaction, hepatitis A and B vaccination coverage, COVID–19 vaccination coverage, and loss of the sense of taste and smell. New sponsored cancer control content that focuses on cancer screenings uses questions similar to those used in the 2019 NHIS.

The 2021 rotating sample child core will include items on stressful life events previously fielded in 2019 and on allergies, fielded in the pre-redesigned NHIS. New content included for analyses in conjunction with the adolescent follow-back study (see below) includes items on social and emotional support, bullying, health care utilization and life satisfaction.

Beginning around July 1, interviewers will ask the respondents for sample children aged 12–17 (usually the parent or guardian) for permission to contact the adolescent by web, phone, or mail and to ask follow-up questions about topics (1) already included in the sample child NHIS and (2) topics added to the sample child specifically related this follow-back. The adolescent questionnaire will be conducted web phone, or mail and include items on general health and well-being, height and weight, health care utilization, content of care in past year (or at last wellness visit), health care access, use of complementary and alternative health, physical activity, sleep, screen time, cognition, concussions, behavior, depression and anxiety, sexual orientation and gender identity, mental health care use and unmet need, social support, stressful life events, bullying, everyday discrimination, and demographics. Items on the survey environment and experience with the survey will also be asked.

Like in past years, and in accordance with the 1995 initiative to increase the integration of surveys within the DHHS, respondents to the 2021 NHIS will serve as the sampling frame for the Medical Expenditure Panel Survey conducted by the Agency for Healthcare Research and Quality. In addition, a subsample of NHIS respondents and/or members of commercial survey panels may be identified to participate in short, web-based methodological and cognitive testing activities to evaluate the questionnaire and/or inform the development of new rotating and sponsored content using web and/or mail survey tools. In the future, a subsample of NHIS respondents may also be re-contacted for a brief health exam.

There is no cost to the respondents other than their time. Clearance is sought for three years, to collect data for 2021–2023. The total annualized burden is estimated to be 42,845 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Adult Household Member	Household Roster	36,000	1	4/60
Sample Adult	Adult Questionnaire	30,000	1	48/60
Adult Family Member	Child Questionnaire	10,000	1	19/60
Adult Family Member	Methodological Projects	15,000	1	20/60
Sample Child	Adolescent follow-back Survey	1,200	1	16/60
Sample Adult	Health Exam	10,000	1	45/60
Adult Family Member	Reinterview Survey	5,500	1	5/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–23265 Filed 10–20–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–21–1071; Docket No. CDC–2020–0108]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. This Generic Information Collection enables the CDC to garner customer and stakeholder feedback on service delivery through routine surveys, focus groups, usability testing, and customer comment cards.

DATES: CDC must receive written comments on or before December 21, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0108 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and

instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7118; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 submissions of responses.

5. Assess information collection costs.

Proposed Project

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery (OMB Control No. 0920–1071, Exp. 02/28/2021)—Extension—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC/NCEZID is seeking a three-year extension of OMB control No. 0920–1071 to continue collecting routine customer feedback on agency service delivery. Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, the National Center for Emerging and Zoonotic Infectious Diseases, Centers for Disease Control and Prevention (CDC) (hereafter the ''Agency'') seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Since the previous renewal in 2018, NCEZID has utilized 0920–1071 on 10 different occasions. The total number of responses was 15,585. The total number of burden hours was 2,525.

Improving agency programs requires ongoing assessment of service delivery, by which we mean systematic review of the operation of a program compared to a set of explicit or implicit standards, as a means of contributing to the continuous improvement of the program. The Agency will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of current services and make improvements in service delivery based on feedback. The solicitation of feedback will target areas such as timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and 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 the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, procedures outlined in Question 16 will be followed);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; [1]
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study;
- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, 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; and
- With the exception of information needed to provide renumeration for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained.

If these conditions are not met, the Agency will submit an information collection request to OMB for approval through the normal PRA process.

To obtain approval for a collection that meets the conditions of this generic clearance, a standardized form (Attachment C) will be submitted to OMB along with supporting documentation.

The types of collections that this generic clearance covers include, but are not limited to:

- Customer comment cards/complaint forms
- Small discussion groups
- Focus Groups of customers, potential customers, delivery partners, or other stakeholders

- Cognitive laboratory studies, such as those used to refine questions or assess usability of a website;
- Qualitative customer satisfaction surveys (*e.g.,* post-transaction surveys; opt-out web surveys)
- In-person observation testing (*e.g.,* website or software usability tests)

The Agency has established a manager/managing entity to serve for this generic clearance and will conduct an independent review of each information collection to ensure compliance with the terms of this clearance prior to submitting each collection to OMB. CDC requests approval for an estimated 3,850 annual burden hours. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
General public	Online surveys	1,500	1	30/60	750
	Focus groups	800	1	2	1,600
	In-person surveys	1,000	1	30/60	500
	Usability testing	1,500	1	30/60	750
	Customer comment cards	1,000	1	15/60	250
Total					3,850

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–23247 Filed 10–20–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-21–0199; Docket No. CDC–2020–0107]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Application for Permit to Import Biological Agents and Vectors of Human Disease into the United States, Application for Permit to Import or Transport Live Bats, and Application for Permit to Import Infectious Human Remains into the United States (OMB Control No. 0920–0199). The purpose of this data collection is to support Section 361 of the Public Health Service (PHS) Act and to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

DATES: CDC must receive written comments on or before December 21, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0199 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7118; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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 submissions of responses.
5. Assess information collection costs.

Proposed Project

Import regulations for infectious biological agents, infectious substances, and vectors (42 CFR 71.54) (OMB Control No. 0920–0199, Exp. 4/30/

2021)—Revision—Center for Preparedness and Response (CPR), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 361 of the Public Health Service Act (42 U.S.C. 264), as amended, authorizes the Secretary of Health and Human Services to make and enforce such regulations as are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. Part 71 of Title 42, Code of Federal Regulations (Foreign Quarantine) sets forth provisions to prevent the introduction, transmission, and spread of communicable disease from foreign countries into the United States. Subpart F—Importations—contains provisions for the importation of infectious biological agents, infectious substances, and vectors (42 CFR 71.54); requiring persons that import these materials to obtain a permit issued by the CDC.

The Application for Permit to Import Biological Agents, Infectious Substances and Vectors of Human Disease into the United States form is used by laboratory facilities, such as those operated by government agencies, universities, and research institutions to request a permit for the importation of biological agents, infectious substances, or vectors of human disease. This form currently requests applicant and sender contact information; description of material for importation; facility isolation and containment information; and personnel qualifications. CDC plans to revise this application to:

(1) Remove question 10 ''Will the permittee be the courier of the imported biological agent?'' from Section A since it is the same question found in section C, question 1.

(2) Add example to section F, question 2 for clarity to read, ''Protective Clothing (*e.g.,* laboratory coat).''

These revisions will not affect the burden hours.

The Application for Permit to Import or Transport Live Bats form is used by laboratory facilities such as those operated by government agencies, universities, research institutions, and for educational, exhibition, or scientific purposes to request a permit for the importation, and any subsequent distribution after importation, of live bats. This form currently requests the applicant and sender contact information; a description and intended use of bats to be imported; and facility isolation and containment information. CDC does not plan to revise this application.

The Application for Permit to Import Infectious Human Remains into the United States is used by facilities that will bury/cremate the imported cadaver and educational facilities to request a permit for the importation and subsequent transfers throughout the U.S. of human remains or body parts that contains biological agents, infectious substances, or vectors of human disease. This form will request applicant and sender contact information; facility processing human remains; cause of death; biosafety and containment information; and final destination(s) of imported infectious human remains. CDC does not plan to revise this application.

Annualized burden hours were calculated based on data obtained from CDC import permit database on the number of permits issued on annual basis since 2015, which is 2,000 respondents. The total estimated burden for the data collection is 1,098. There is a decrease in burden from 1,355 hours to 1,098 hours to reflect the implementation of the Electronic Import Permit Program portal (eIPP) which has decreased the time required to enter information.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Applicants Requesting to Import Biological Agents, Infectious Substances and Vectors.	Application for Permit to Import Biological Agents, Infectious Substances and Vectors of Human Disease into the United States.	2,000	1	30/60	1,000
Applicants Requesting to Import Biological Agents, Infectious Substances and Vectors.	Application for Permit to Import Biological Agents, Infectious Substances and Vectors of Human Disease into the United States-Subsequent Transfer.	380	1	10/60	63
Applicants Requesting to Import Live Bats.	Application for a Permit to Import Live Bats.	3	1	20/60	1
Applicants Requesting to Import Infectious Human Remains into the United States.	Application for Permit to Import Infectious Human Remains into the United States.	100	1	20/60	33
Total					1,098

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–23248 Filed 10–20–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3397–FN]

Medicare and Medicaid Programs; Application From The Joint Commission for Continued Approval of Its Ambulatory Surgical Center (ASC) Accreditation Program

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

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve The Joint Commission for continued recognition as a national accrediting organization for Ambulatory Surgical Centers that wish to participate in the Medicare or Medicaid programs.

DATES: The decision announced in this notice is effective on December 20, 2020 through December 20, 2024.

Joy Webb (410) 786–1667.

Erin Imhoff (410) 786–2337.

I. Background

Ambulatory Surgical Centers (ASCs) are distinct entities that operate exclusively for the purpose of furnishing outpatient surgical services to patients. Under the Medicare program, eligible beneficiaries may receive covered services from an ASC provided certain requirements are met. Section 1832(a)(2)(F)(i) of the Social Security Act (the Act) establishes distinct criteria for a facility seeking designation as an ASC. 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 42 CFR part 416 specify the conditions that an ASC must meet in order to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for ASCs.

Generally, to enter into an agreement, an ASC must first be certified by a State survey agency (SA) as complying with the conditions or requirements set forth in part 416 of our Medicare regulations. Thereafter, the ASC is subject to regular surveys by an SA to determine whether it continues to meet these requirements.

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 conditions are met or exceeded, we may deem that provider entity as having met the 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 as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program may be deemed to meet the Medicare conditions. The 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 conditions. Our regulations concerning the approval of AOs are set forth at § 488.5.

The Joint Commission's (TJC's) current term of approval for its ASC program expires December 20, 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 26, 2020 we published a proposed notice in the **Federal Register** (85 FR 31511), announcing TJC's request for continued approval of its Medicare ASC accreditation program. In the May 26, 2020 proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act and in our regulations at § 488.5, we conducted a review of TJC's Medicare ASC accreditation application in accordance with the criteria specified by our regulations, which include, but are not limited to the following:

- An administrative review of TJC's: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its ASC surveyors; (4) ability to investigate and respond appropriately to complaints against accredited ASCs; and (5) survey review and decision-making process for accreditation.

- The comparison of TJC's Medicare ASC accreditation program standards to our current Medicare ASC conditions for coverage (CfCs).

- A documentation review of TJC's survey process to do the following:

++ Determine the composition of the survey team, surveyor qualifications, and TJC's ability to provide continuing surveyor training.

++ Compare TJC's processes to those we require of state survey agencies, including periodic resurvey and the ability to investigate and respond appropriately to complaints against TJC-accredited ASCs.

++ Evaluate TJC's procedures for monitoring accredited ASCs it has found to be out of compliance with TJC's program requirements. (This pertains only to monitoring procedures when TJC identifies non-compliance. If noncompliance is identified by a SA through a validation survey, the SA monitors corrections as specified at § 488.9(c)).

++ Assess TJC's ability to report deficiencies to the surveyed ASCs and respond to the ASCs' plans of correction in a timely manner.

++ Establish TJC'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 TJC's staff and other resources.

++ Confirm TJC's ability to provide adequate funding for performing required surveys.

++ Confirm TJC's policies with respect to surveys being unannounced.

++ Confirm TJC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

++ Obtain TJC'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 26, 2020 proposed notice also solicited public comments regarding whether TJC's requirements met or exceeded the Medicare CfCs for ASCs. No comments were received in response to our proposed notice.

V. Provisions of the Final Notice

A. Differences Between TJC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements

We compared TJC's ASC accreditation requirements and survey process with the Medicare CfCs of parts 416, and the survey and certification process requirements of parts 488 and 489. Our review and evaluation of TJC's ASC application, which were conducted as described in section III of this final notice, yielded the following areas where, as of the date of this notice, TJC has completed revising its standards and certification processes in order to do all of the following:

• Meet the standard's requirements of all of the following regulations:

++ Section 416.2, to include the regulatory definition of an ASC as a comparable TJC standard instead of a glossary definition.

++ Section 416.43(c)(2), to address the broad requirement under the quality improvement program to track adverse patient events.

++ Section 416.44(c), to include reference to the Health Care Facilities Code (HCFC) of the National Fire Protection Association (NFPA) 99 (2012 edition).

++ Section 416.45(a), to include adequate review of credential and personnel files during survey activity.

++ Section 416.48(a), to include policies regarding the administration of drugs be in accordance with acceptable standards of practice.

++ Section 416.50(a), to provide the correct regulatory citation reference to the CMS standard, ''Condition for Coverage—Patient Rights; Notice of Rights.''

++ Section 488.5(a)(4)(iv), to include the requirement that all comparable Medicare CfC citations be included in the findings sections of TJC's survey reports.

CMS also reviewed TJC'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, TJC has completed revising its survey processes in order to demonstrate that it uses survey processes that are comparable to state survey agency processes by:

++ Modifying TJC's accreditation award letter to facilities to remove the term ''lengthen'' to eliminate potential conflict as it relates to survey cycle length not to exceed 36 months, as survey cycles for deeming purposes do not exceed this timeframe.

++ Adding references to the HCFC of the NFPA 99 (2012 edition). (NFPA 99) within its Accreditation Process and Surveyor Activity Guide.

++ Providing clarification to its Surveyor Activity Guide indicating that the 2012 edition of the NFPA Life Safety Code and NFPA 99 applies to ASCs, regardless of the number of patients served.

++ Clarifying the process for TJC's performance of on-site Evidence of Standard Compliance (ESC) processes, including what it means to provide coaching and guidance as part of TJC's ESC survey activities.

B. Term of Approval

Based on our review described in section III. and section V. of this final notice, we approve TJC as a national accreditation organization for ASCs that request participation in the Medicare program. The decision announced in this final notice is effective December 20, 2020 through December 20, 2024. 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 an ASC survey completed by TJC surveyors as part of the application review process, which is one component of the comparability evaluation. Therefore, we are providing TJC with a shorter period of approval. Based on our discussions with TJC and the information provided in its application, we are confident that TJC will continue to ensure that its accredited ASCs will continue to meet or exceed Medicare standards. While TJC has taken actions based on the findings annotated in section V.A., of this final notice, (Differences Between TJC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements) as authorized under § 488.8, we will continue ongoing review of TJC's ASC survey processes and will conduct a survey observation once the COVID–19 PHE has expired. In keeping with CMS's initiative to increase AO oversight broadly, and ensure that our requested revisions by TJC are completed, CMS expects more frequent review of TJC's activities in the future.

VI. Collection of Information and Regulatory Impact Statement

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. 3501 *et seq.*).

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. 2020–23230 Filed 10–20–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10752, CMS–10137, CMS–R–262 and CMS–10549]

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 21, 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 *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–10752 Submissions of 1135 Waiver Request Automated Process

CMS–10137 Solicitation for Applications for Medicare Prescription Drug Plan 2022 Contracts

CMS–R–262 CMS Plan Benefit Package (PBP) and Formulary CY 2022

CMS–10549 Generic Clearance: Questionnaire Testing and Methodological Research for the Medicare Current Beneficiary Survey (MCBS)

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Submissions of 1135 Waiver Request Automated Process; *Use:* Waivers under Section 1135 of the Social Security Act (the Act) and certain flexibilities allow the CMS to relax certain requirements, known as the Conditions of Participation (CoPs) or Conditions of Coverage to promote the health and safety of beneficiaries. Under Section 1135 of the Act, the Secretary may temporarily waive or modify certain Medicare, Medicaid, and Children's Health Insurance Program (CHIP) requirements to ensure that sufficient health care services are available to meet the needs of individuals enrolled in Social Security Act programs in the emergency area and time periods. These waivers ensure that providers who provide such services in good faith can be reimbursed and exempted from sanctions.

During emergencies, such as the current COVID–19 public health emergency (PHE), CMS must be able to apply program waivers and flexibilities under section 1135 of the Social Security Act, in a timely manner to respond quickly to unfolding events. In a disaster or emergency, waivers and flexibilities assist health care providers/suppliers in providing timely healthcare and services to people who have been affected and enables states, Federal districts, and U.S. territories to ensure Medicare and/or Medicaid beneficiaries have continued access to care. During disasters and emergencies, it is not uncommon to evacuate Medicare-participating facilities and relocate patients/residents to other provider settings or across state lines, especially, during hurricane and tornado events. CMS must collect relevant information for which a provider is requesting a waiver or flexibility to make proper decisions about approving or denying such requests. Collection of this data aids in the prevention of gaps in access to care and services before, during, and after an emergency. CMS must also respond to inquiries related to a PHE from providers and beneficiaries. CMS is not collecting information from these inquiries; we are merely responding to them.

Prior to this request, CMS did not have a standard process or OMB approval for providers/suppliers impacted to submit 1135 waiver/flexibility requests or inquiries, as these were generally seen on a smaller scale (natural disasters) prior to the COVID–19 public health emergency. CMS has provided general guidance to Medicare-participating facilities which can be viewed at *https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/1135-Waivers.* The requests and inquiries would be sent directly, via email, to the Survey Operations Group in each CMS Location (previously known as CMS Regional Offices) and the entity would provide a brief summary to CMS for a waiver/flexibility request or an answer to an inquiry. We are now developing a streamlined, automated process to standardize the 1135 waiver requests and inquiries submitted based on lessons learned during COVID–19 PHE, primarily based on the volume of requests to ensure timely response to facility needs. The waiver request form was approved under an Emergency information collection request on October 15, 2020.

Furthermore, the normal operations of a healthcare provider are disrupted by emergencies or disasters occasionally. When this occurs, State Survey Agencies (SA) deliver a provider/beneficiary tracking report regarding the current status of all affected healthcare providers and their beneficiaries. This report includes demographic information about the provider, their operational status, beneficiary status, and planned resumption of normal operations. This information is provided whether or not a PHE has been declared. We are now developing a streamlined, automated process to standardize submission of this information directly by the provider during emergencies and eliminating the need for SA to provide it. It will consist of a public facing web form.

This information will be used by CMS to receive, triage, respond to and report on requests and/or inquiries for Medicare, Medicaid, and CHIP beneficiaries. This information will be

used to make decisions about approving or denying waiver and flexibility requests and may be used to identify trends that inform CMS Conditions for Coverage or Conditions for Participation policies during public health emergencies, when declared by the President and the HHS Secretary.

Subsequent to the Emergency information collection request, we are revising the package to include a second form, Healthcare Facility Status Workflow, which is for operational status information which will be used to assist providers in delivering critical care to beneficiaries during emergencies. *Form Number:* CMS–10752 (OMB control number: 0938–1384); *Frequency:* Occasionally; *Affected Public:* Private Sector: Business or other for-profits and Not-for-profit institutions and State, Local or Tribal Governments; *Number of Respondents:* 3,730; *Total Annual Responses:* 3,730; *Total Annual Hours:* 3,730. (For policy questions regarding this collection, contact Adriane Saunders at 404–562–7484.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Solicitation for Applications for Medicare Prescription Drug Plan 2022 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423 entitled ''Application Procedures and Contracts with PDP Sponsors.''

The information will be collected under the solicitation of proposals from PDP, MA–PD, Cost Plan, Program of All Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) Ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS–10137 (OMB control number: 0938–0936); *Frequency:* Yearly; *Affected Public:* Private Sector: Business or other for-profits and Not-for-profit institutions and State, Local or Tribal Governments; *Number of Respondents:* 658; *Total Annual Responses:* 331; *Total Annual Hours:* 1,550. (For policy questions regarding this collection, contact Arianne Spaccarelli at 410–786–5715.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* CMS Plan Benefit Package (PBP) and Formulary CY 2022; *Use:* Under the Medicare Modernization Act (MMA), Medicare Advantage (MA) and Prescription Drug Plan (PDP) organizations are required to submit plan benefit packages for all Medicare beneficiaries residing in their service area. The plan benefit package submission consists of the Plan Benefit Package (PBP) software, formulary file, and supporting documentation, as necessary. MA and PDP organizations use the PBP software to describe their organization's plan benefit packages, including information on premiums, cost sharing, authorization rules, and supplemental benefits. They also generate a formulary to describe their list of drugs, including information on prior authorization, step therapy, tiering, and quantity limits.

CMS requires that MA and PDP organizations submit a completed PBP and formulary as part of the annual bidding process. During this process, organizations prepare their proposed plan benefit packages for the upcoming contract year and submit them to CMS for review and approval. CMS uses this data to review and approve the benefit packages that the plans will offer to Medicare beneficiaries. This allows CMS to review the benefit packages in a consistent way across all submitted bids during with incredibly tight timeframes. This data is also used to populate data on Medicare Plan Finder, which allows beneficiaries to access and compare Medicare Advantage and Prescription Drug plans. *Form Number:* CMS–R–262 (OMB control number: 0938–0763); *Frequency:* Yearly; *Affected Public:* Private Sector: Business or other for-profits and Not-for-profit institutions and State, Local or Tribal Governments; *Number of Respondents:* 753; *Total Annual Responses:* 8,090; *Total Annual Hours:* 74,038. (For policy questions regarding this collection, contact Kristy Holtje at 410–786–2209.)

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Generic Clearance: Questionnaire Testing and Methodological Research for the Medicare Current Beneficiary Survey (MCBS); *Use:* The current generic clearance for MCBS Questionnaire Testing and Methodological Research encompasses development and testing of MCBS questionnaires, instrumentation, and data collection protocols, as well as a mechanism for conducting methodological experiments. The current clearance includes conducting field tests and experiments, including split ballot experiments, within the MCBS production environment, and conducting usability tests. The purpose of this OMB clearance package is to revise the current clearance to expand the methods to allow for field tests outside of MCBS production Field tests conducted within production do not incur any additional burden on respondents whereas tests conducted outside production must account for additional respondent burden. The MCBS is a continuous, multipurpose survey of a nationally representative sample of aged, disabled, and institutionalized Medicare beneficiaries. The MCBS, which is sponsored by the Centers for Medicare & Medicaid Services (CMS), is the only comprehensive source of information on the health status, health care use and expenditures, health insurance coverage, and socioeconomic and demographic characteristics of the entire spectrum of Medicare beneficiaries. The core of the MCBS is a series of interviews with a stratified random sample of the Medicare population, including aged and disabled enrollees, residing in the community or in institutions. Questions are asked about enrollees' patterns of health care use, charges, insurance coverage, and payments over time. Respondents are asked about their sources of health care coverage and payment, their demographic characteristics, their health and work history, and their family living circumstances. In addition to collecting information through the core questionnaire, the MCBS collects information on special topics. *Form Number:* CMS–10549 (OMB control number: 0938–1275); *Frequency:* Occasionally; *Affected Public:* Individuals or Households; *Number of Respondents:* 11,655; *Total Annual Responses:* 11,655; *Total Annual Hours:*

3,947. (For policy questions regarding this collection, contact William Long at 410–786–7927.)

Dated: October 16, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–23335 Filed 10–20–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–116 and CMS–317]

Agency Information Collection Activities: Submission for OMB Review; 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 (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 a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate 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 on the collection(s) of information must be received by the OMB desk officer by November 20, 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.

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 Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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 (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-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 that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Clinical Laboratory Improvement Amendments (CLIA) Application Form and Supporting Regulations; *Use:* Section 353 (b) of the Public Health Service Act specifies that the laboratory must submit an application in such form and manner as the Secretary shall prescribe that describes the characteristics of the laboratory and examinations and procedures performed by the laboratory. The application must be completed by entities performing laboratory's testing specimens for diagnostic or treatment purposes. This information is vital to the certification process. In this revision, the majority of changes were minor changes to the form and accompanying instructions to facilitate the completion and data entry of the form. We anticipate that the changes will not increase the time to complete the form. *Form Number:* CMS–116 (OMB control number: 0938–0581); *Frequency:* Biennially and Occasionally; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 52,140; *Total Annual Responses:* 52,140; *Total Annual Hours:* 52,140. (For policy questions regarding this collection contact Kathleen Todd at 410–786–3385.)

2. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection of information; *Title of Information Collection:* State Medicaid Eligibility Quality Control Sampling Plan; *Use:* The Medicaid Eligibility Quality Control (MEQC) program provides states and the District of Columbia a unique opportunity to improve the quality and accuracy of their Medicaid and Children's Health Insurance Program (CHIP) eligibility determinations. The MEQC program is intended to complement the Payment Error Rate Measurement (PERM) program by ensuring state operations make accurate and timely eligibility determinations so that Medicaid and CHIP services are appropriately provided to eligible individuals. Current regulations require that states review equal numbers of active cases and negative case actions (*i.e.,* denials and terminations) through random sampling. Active case reviews are conducted to determine whether or not the sampled cases meet all current criteria and requirements for Medicaid or CHIP eligibility. Negative case reviews are conducted to determine if Medicaid and CHIP denials and terminations were appropriate and undertaken in accordance with due process. *Form Number:* CMS–317 (OMB control number: 0938–0146); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 10; *Total Annual Responses:* 20; *Total Annual Hours:* 520. (For policy questions regarding this collection contact Camiel Rowe at 410–786–0069.)

Dated: October 15, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–23219 Filed 10–20–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2032]

Determination That BUTISOL SODIUM (Butabarbital Sodium) Oral Tablets, 15 Milligrams, 50 Milligrams, and 100 Milligrams, and Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs that refer to the products if they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Stacy Kane, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6236, Silver Spring, MD 20993–0002, 301–796–8363, *Stacy.Kane@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, a drug is removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved, (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved, and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for safety or effectiveness reasons, the Agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in the table are no longer being marketed.

Application No.	Drug name	Active ingredient(s)	Strength(s)	Dosage form/route	Applicant
NDA 000793	BUTISOL SODIUM	Butabarbital Sodium	15 mg; 50 mg; 100 mg	Tablet; Oral	Mylan Specialty, L.P.
NDA 007392	SECONAL SODIUM	Secobarbital Sodium	50 mg/Milliliter (mL)	Injectable; Injection	Eli Lilly and Co.
NDA 012665	VELBAN	Vinblastine Sulfate	10 mg/Vial	Injectable; Injection	Eli Lilly and Co.
NDA 017015	PAVULON	Pancuronium Bromide.	1 mg/mL; 2 mg/mL	Injectable; Injection	Schering-Plough Corp.
NDA 017919	ORTHO–NOVUM 1/35–28.	Ethinyl Estradiol; Norethindrone.	0.035 mg;1 mg	Tablet; Oral-28	Janssen Pharmaceuticals, Inc.
NDA 018554	EULEXIN	Flutamide	125 mg	Capsule; Oral	Schering-Plough Corp.
NDA 019151	RYTHMOL	Propafenone Hydrochloride.	150 mg, 225 mg, 300 mg	Tablet; Oral	GlaxoSmithKline.
NDA 019579	TERAZOL 7	Terconazole	0.4%	Cream; Vaginal	Janssen Pharmaceuticals, Inc.
NDA 019599	NAFTIN	Naftifine Hydrochloride.	1%	Cream; Topical	Sebela Ireland Limited.
NDA 019653	ORTHO CYCLEN–28	Ethinyl Estradiol; Norgestimate.	0.035 mg; 0.25 mg	Tablet; Oral-28	Janssen Pharmaceuticals, Inc.
NDA 019716	DIPROLENE	Betamethasone Dipropionate.	EQ 0.05% Base	Lotion, Augmented; Topical.	Merck Sharp & Dohme Corp.
NDA 019964	TERAZOL 3	Terconazole	0.8%	Cream; Vaginal	Janssen Pharmaceuticals, Inc.
NDA 020313	MIACALCIN	Calcitonin Salmon	200 International Units/Spray.	Metered Spray; Nasal	Mylan Ireland Limited.
NDA 020388	NAVELBINE	Vinorelbine Tartrate	EQ 10 mg Base/mL	Injectable; Injection	Pierre Fabre Medicament.
NDA 020413	ZERIT	Stavudine	1 mg/mL	For Solution; Oral	Bristol-Myers Squibb.
NDA 020741	PRANDIN	Repaglinide	0.5 mg; 1 mg; 2 mg	Tablet; Oral	Gemini Laboratories, LLC.
NDA 020872	CHILDREN'S ALLEGRA ALLERGY.	Fexofenadine Hydrochloride.	30 mg	Tablet; Oral	Sanofi-Aventis U.S., LLC.
NDA 021071	AVANDIA	Rosiglitazone Maleate.	EQ 8 mg Base	Tablets; Oral	SB Pharmco Puerto Rico, Inc.
NDA 021235	PROZAC WEEKLY	Fluoxetine Hydrochloride.	EQ 90 mg/Base	Delayed-Release Capsules; Oral.	Eli Lilly and Co.

Application No.	Drug name	Active ingredient(s)	Strength(s)	Dosage form/route	Applicant
NDA 021909	CHILDREN'S ALLEGRA HIVES.	Fexofenadine Hydrochloride.	30 mg	Tablet, Orally Disintegrating; Oral.	Sanofi-Aventis U.S., LLC.
NDA 022246	METOZOLV ODT	Metoclopramide Hydrochloride.	EQ 5 mg Base	Tablet, Orally Disintegrating; Oral.	Bausch Health US, LLC.
NDA 022291	PROMACTA	Eltrombopag Olamine	EQ 100 mg Acid	Tablet; Oral	Novartis.
NDA 022362	WELCHOL	Colesevelam Hydrochloride.	1.875 g/Packet	For Suspension; Oral	Daiichi Sankyo.
NDA 022396	DYLOJECT	Diclofenac Sodium	37.5 mg/mL (37.5 mg/mL)	Solution; Intravenous	Javelin Pharmaceuticals, Inc.
NDA 050368	ILOTYCIN	Erythromycin	0.5%	Ointment; Ophthalmic	Eli Lilly and Co.
NDA 050587	PRIMAXIN	Cilastatin Sodium; Imipenem.	EQ 250 mg Base/Vial; 250 mg/Vial.	Powder; Intravenous	Merck & Co., Inc.
NDA 201373	CHILDREN'S ALLEGRA HIVES.	Fexofenadine Hydrochloride.	30 mg/5 mL	Suspension; Oral	Sanofi-Aventis U.S., LLC.
NDA 208411	NARCAN	Naloxone Hydrochloride.	2 mg/Spray	Spray, Metered; Nasal.	Adapt Pharma.

FDA has reviewed its records and, under § 314.161, has determined that the drug products listed were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the Agency will continue to list the drug products in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the NDAs and ANDAs listed are unaffected by the discontinued marketing of the products subject to those NDAs and ANDAs. Additional ANDAs that refer to these products may also be approved by the Agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: October 16, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–23300 Filed 10–20–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3771]

Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989; Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989.'' Forms FDA 3988, Transmittal of PMR/PMC Submissions for Drugs and Biologics, and FDA 3989, PMR/PMC Annual Status Report for Drugs and Biologics, are intended to facilitate submissions by drug and biological product application holders of complete and accurate information on postmarketing requirements (PMRs) and postmarketing commitments (PMCs) in a consistent format. Forms FDA 3988 and 3989 are published in draft form in Appendix A and B of the draft guidance for comment and are not intended to be used until the forms are finalized. The forms were developed, in part, in response to the recommendations from the Government Accountability Office (GAO) and the Department of Health and Human Services (HHS) Office of the Inspector General (OIG) regarding the need for comparable information across annual status reports (ASRs) on PMRs and PMCs, to eliminate manual data entry, and to enhance FDA's ability to track PMRs and PMCs. These forms are expected to result in improved accuracy and timeliness of FDA's identification and review of those submissions containing information on PMRs and PMCs. This draft guidance covers the purpose of each form, when to use these forms, and how to submit these forms. The draft guidance also explains where applicants will be able to find the forms and instructions for their completion once the forms and instructions are finalized.

DATES: Submit either electronic or written comments on the draft guidance by December 21, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance. Submit either electronic or written comments on the collection of information set forth in this document by December 21, 2020.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that

identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked, and identified as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received should include the Docket No. FDA–2018–N–3771 for ''Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Kathy Weil, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5367, Silver Spring, MD 20993–0002, 301–796–6054; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

With regard to the proposed collection of information: 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*, PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989.'' This draft guidance is intended for applicants that are required to report annually on the status of postmarketing studies and clinical trials for human drug and biological products under section 506B of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 356b) and its implementing regulations at §§ 314.81(b)(2)(vii) and 601.70 (21 CFR 314.81(b)(2)(vii) and 601.70). These forms are expected to result in improved accuracy and timeliness of FDA's identification and review of those submissions containing information on PMRs and PMCs. The purpose of the draft guidance is to explain why Forms FDA 3988 and FDA 3989 were created, describe the contents of the forms, and explain how to submit the forms electronically. The draft guidance also explains where applicants will be able to find the forms and instructions for their completion once the forms and instructions are finalized. Forms FDA 3988 and 3989 are published in draft form in Appendix A and B of the draft guidance for comment and are not intended to be used until the forms are finalized.

PMRs and PMCs are studies or clinical trials conducted by the applicant after FDA has approved a drug or biological product for marketing or licensing. These studies or clinical trials can be required under statute or regulation (PMRs) or agreed upon in writing by FDA and the applicant (PMCs). Section 130(a) of the Food and Drug Administration Modernization Act of 1997 amended the FD&C Act by adding section 506B of the FD&C Act (21 U.S.C. 356b). Under section 506B of the FD&C Act and its implementing regulations at §§ 314.81(b)(2)(vii) and 601.70, applicants must submit an ASR on PMRs and PMCs.[1] This report must address the progress of the PMR/PMC or the reasons for failing to conduct the requirement or commitment (section 506B(a) of the FD&C Act).

This draft guidance does not apply to postmarketing studies or clinical trials

[1] The FDA defines postmarketing studies or clinical trials for which annual status reports (ASRs) must be submitted under section 506B of the FD&C Act as those concerning a human drug or biological product's clinical safety, clinical efficacy, clinical pharmacology, or nonclinical toxicology that are either required by FDA (PMRs) or that are committed to, in writing, (PMCs) either at the time of approval of an application or a supplement or after approval of an application or supplement. See §§ 314.81(b)(2)(vii) and 601.70. FDA interprets section 506B of the FD&C Act to apply to postmarketing studies and clinical trials that are required under the Pediatric Research Equity Act (section 505B of the FD&C Act (21 U.S.C. 355c); §§ 314.55(b) and 601.27(b)), the animal efficacy rule (§§ 314.610(b)(1) and 601.91(b)(1)), accelerated approval (section 506(c)(2)(A) of the FD&C Act; §§ 314.510 and 601.41), and the Food and Drug Administration Amendments Act of 2007 (section 505(*o*)(3) of the FD&C Act (21 U.S.C. 355(*o*)(3)).

that are not subject to the reporting requirements of section 506B of the FD&C Act.[2] For example, the draft guidance does not apply to voluntary studies or clinical trials performed by an applicant or on an applicant's behalf that are neither required nor agreed upon in writing. This draft guidance also does not apply to PMCs related to chemistry, manufacturing, and controls or stability studies.

In a December 2015 report from the GAO entitled ''Drug Safety: FDA Expedites Many Applications, but Data for Postapproval Oversight Need Improvement,'' [3] the GAO recommended that FDA improve its data tracking to ensure the completeness, timeliness, and accuracy of information in its database on PMRs/PMCs. Additionally, in a July 2016 HHS OIG study entitled ''FDA is Issuing More Postmarketing Requirements, but Challenges with Oversight Persist,'' [4] the HHS OIG noted that FDA continued to have problems with its data management system and work processes, thereby hindering its ability to track PMRs. OIG recommended that FDA provide standardized forms for ASRs, ensure that the forms are complete, and require applicants to submit the forms electronically.

Based in part on the recommendations from GAO and HHS OIG, FDA created Forms FDA 3988 and FDA 3989 to improve its collection, identification, and use of information regarding PMRs and PMCs. Form FDA 3988 was developed to accompany an applicant's PMR/PMC-related submissions (*e.g.,* draft protocols, final protocols, interim reports, final reports, and PMR/PMC-related correspondence), except the ASR on PMRs and PMCs. Form FDA 3988 allows applicants to identify, in a standardized format, the type of PMR/PMC-related submission the applicant is making (*e.g.,* draft protocol) and the PMR or PMC to which the submission applies. Form FDA 3989 was developed so that applicants may provide ASR information on their PMRs and PMCs in a standardized format. The purpose of these forms is to assist applicants in providing clearly identified PMR/PMC-related submissions and in meeting their annual reporting requirements under section 506B of the FD&C Act and §§ 314.81(b)(2)(vii) and 601.70.

Use of Form FDA 3988 and 3989 is optional, but FDA encourages their use because the forms should facilitate FDA management and review of the applicant's submissions, as well as enhance the accuracy of data within FDA's electronic document archiving systems. FDA uses these archiving systems as a source from which to obtain data published annually in the **Federal Register** as required under section 506B(c) of the FD&C Act and to provide quarterly status updates of the PMR and PMC data on FDA's Postmarket Requirements and Commitments public web page (available at *https://www.accessdata.fda.gov/scripts/cder/pmc/index.cfm).*

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989.'' 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

Under the Paperwork Reduction Act of 1995 (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 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.

Annual Status Report Information and Other Submissions for Postmarketing Requirements and Commitments: Using Forms FDA 3988 and FDA 3989

The draft guidance describes the purpose and content of Form FDA 3988, Transmittal of PMR/PMC Submissions for Drugs and Biologics, and Form FDA 3989, PMR/PMC Annual Status Report for Drugs and Biologics. These forms are intended for applicants that are required by statute or regulation, or that have agreed in writing, to conduct postmarketing studies or clinical trials concerning the clinical safety, clinical efficacy, clinical pharmacology, or nonclinical toxicology of a human drug or biological product as PMRs or PMCs. Applicants are required to submit ASRs on PMCs and PMRs under section 506B of the FD&C Act and its implementing regulations at §§ 314.81(b)(2)(vii) and 601.70, and this information collection is approved under OMB control numbers 0910–0001 and 0910–0338, respectively. For this reason, these existing control numbers will be updated to account for Forms FDA 3988 and FDA 3989.

Form FDA 3988 would include the following information:

- Applicant's name, Center that approved or licensed the application (Center for Drug Evaluation and Research or Center for Biologics Evaluation and Research), application type (new drug application (NDA), biologics license application (BLA), abbreviated new drug application (ANDA), or investigational new drug application (IND)), and submission date.
- Six-digit application number and supplement number(s) as applicable.
- Drug or biologic product's established name (*e.g.,* proper name, U.S. Pharmacopeia/U.S. Adopted Name) and proprietary (trade) name(s), if any.
- Information for all PMRs and PMCs addressed in the submission, including type (PMR or PMC), PMR or PMC number, establishment date, and National Clinical Trial (NCT) number (if applicable).
- PMR/PMC submission type, including draft protocol, final protocol, interim report, final report, general correspondence, Pediatric Research

[2] Under § 314.81(b)(2)(viii), applicants submitting an annual report for human drug products must include a status report of postmarketing studies and clinical trials not included under § 314.81(b)(2)(vii) that are being performed by, or on behalf of, the applicant.

[3] Available at *https://www.gao.gov/products/GAO-16-192.*

[4] Available at *https://oig.hhs.gov/oei/reports/oei-01-14-00390.asp.*

Equity Act PMR deferral extension request, response to information request, request for revised milestones, and ''other,'' and a brief description of the submission's content or rationale.

- Name and title of the applicant's Responsible Official, and (as applicable) telephone and facsimile numbers, and email and mailing addresses.
- Signature of the applicant's Responsible Official or other Authorized Official, countersignature of the Authorized U.S. Agent, and date that the form is signed.

Form FDA 3989 would include the following information:

- Applicant's name, Center that approved or licensed the application, application type, and submission date.
- Six-digit application number and date of U.S. approval.
- Drug or biologic product's established name (*e.g.,* proper name, U.S. Pharmacopeia/U.S. Adopted Name) and proprietary (trade) name(s), if any.
- Alternate annual status report due date (*i.e.,* a date other than the approval date that FDA has allowed the applicant to use for annual reporting).
- Period covered by the report.
- PMR/PMC update for each ''Open'' PMR/PMC. Information includes PMR/PMC number, establishment date, supplement number as applicable, description, study or clinical trial title as applicable, current and expected enrollment of studies and clinical trials as applicable, study or clinical trial status, explanation of status, and milestone information (*e.g.,* milestone type, original date, revised date as applicable, the reason for the revision).
- Name and title of the applicant's Responsible Official, and (as applicable) telephone and facsimile numbers, and email and mailing addresses.
- Signature of the applicant's Responsible Official or other Authorized Official, countersignature of the Authorized U.S. Agent, and date that the form is signed.

Forms FDA 3988 and FDA 3989 are fillable forms supporting electronic signatures. Based on the number of applicants required by statute or regulation, or that have agreed in writing, to conduct postmarketing studies or clinical trials as PMRs or PMCs, and based on the number of PMR/PMC-related submissions that we currently receive annually, we estimate receiving approximately 1,908 Forms FDA 3988 and 636 Forms FDA 3989, annually, in accordance with the description in the draft guidance. We estimate that approximately 318 [5] applicants will submit these forms, and that each form, as described in the draft guidance, will take approximately 1 hour to prepare and electronically submit to FDA.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED REPORTING BURDEN [1] [2] [3]

§ 314.81	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Form FDA 3988	226	6	1,356	1	1,356
Form FDA 3989	226	2	452	1	452
Total					1,808

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Total hours for Form FDA 3989 in this table includes and replaces the burden that applicants currently incur to complete the ASR on PMRs and PMCs that is currently submitted as part of the annual report under § 314.81(b)(2).
[3] Burden associated with OMB Control No. 0910–0001: *Applications for FDA Approval to Market a New Drug.*

TABLE 2—ESTIMATED REPORTING BURDEN [1] [2] [3]

§ 601.70	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Form FDA 3988	92	6	552	1	552
Form FDA 3989	92	2	184	1	184
Total					736

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Total hours for Form FDA 3989 in this table includes and replaces the burden that applicants currently incur to complete the ASR on PMRs and PMCs that is currently submitted pursuant to § 601.70.
[3] Burden associated with OMB Control No. 0910–0338: *General Licensing Provisions: Biologics License Application, Changes to an Approved Application, Labeling, Revocation and Suspension, Postmarketing Studies Status Reports, and Form FDA 356h (21 CFR part 601).*

[5] This number is based on information from ''The Food and Drug Administration Report on the Performance of Drugs and Biologics Firms in Conducting Postmarketing Requirements and Commitments. Fiscal Year 2018'' available at *https://www.fda.gov/media/129657/download.*

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics,* or *https://www.regulations.gov.*

Dated: October 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–23290 Filed 10–20–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0781]

Agency Information Collection Activities; Proposed Collection; Comment Request; Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim

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 record retention requirement of the soy protein/coronary heart disease health claim.

DATES: Submit either electronic or written comments on the collection of information by December 21, 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 21, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 21, 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–2011–N–0781 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim.'' 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, 240–420–7500.

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, *PRAStaff@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.

Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim—21 CFR 101.82

OMB Control Number 0910–0428—Extension

Section 403(r)(3)(A) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(r)(3)(A)) provides for the use of food label statements characterizing a relationship of any nutrient of the type required to be in the label or labeling of the food to a disease or a health related condition only where that statement meets the requirements of the regulations issued by the Secretary of Health and Human Services to authorize the use of such a health claim. Section 101.82 (21 CFR 101.82) of our regulations authorizes a health claim for food labels about soy protein and the risk of coronary heart disease. Accordingly, we established the previously referenced information collection in support of the regulation. In the **Federal Register** of October 31, 2017 (82 FR 50324), we published a proposed rule to revoke the underlying regulation found at § 101.82. We are taking this action based on our review of the totality of publicly available scientific evidence currently available and our tentative conclusion that such evidence does not support our previous determination that there is significant scientific agreement among qualified experts for a health claim regarding the relationship between soy protein and reduced risk of coronary heart disease. Upon finalization of the proposed rule, the associated information collection requirements under this OMB control number will be revoked. Until such time and in accordance with the PRA, we retain our currently approved burden estimate for this information collection.

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 recordkeeping	Total annual records	Average burden per recordkeeping	Total hours
101.82(c)(2)(ii)(B)	25	1	25	1	25

[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.

The records currently required to be retained under § 101.82(c)(2)(ii)(B) are the records, *e.g.,* the formulation or recipe, that a manufacturer has and maintains as a normal course of its doing business. Thus, the burden to the food manufacturer is limited to assembling and retaining the records.

Dated: October 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–23285 Filed 10–20–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Diversity Education Program.

Date: November 18, 2020.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20814 (Virtual Meeting).

Contact Person: Shelley S. Sehnert, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Suite 208–T, Bethesda, MD 20892–7924, (301) 827–7984, *ssehnert@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: October 15, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23216 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning

individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Antimicrobial Drugs and Resistance.
Date: November 13, 2020.
Time: 9:00 a.m. to 11:00 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Susan Daum, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Room 3202, Bethesda, MD 20892, 301–827–7233, *susan.boyle-vavra@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Non-Viral Anti-Infective Therapeutics.
Date: November 17–18, 2020.
Time: 9:00 a.m. to 7:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Bidyottam Mittra, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–4057, *bidyottam.mittra@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; AIDS and AIDS Related Research.
Date: November 17, 2020.
Time: 1:00 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Shiv A. Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301–443–5779, *prasads@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Cardiovascular and Respiratory Sciences.
Date: November 18–19, 2020.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kimm Hamann, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118A, MSC 7814, Bethesda, MD 20892, (301) 435–5575, *hamannkj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; BRAIN Initiative: Targeted BRAIN Circuits Projects R01/R34.
Date: November 18–19, 2020.
Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Healthcare Delivery and Methodologies.
Date: November 18, 2020.
Time: 9:00 a.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Pia Kristina Peltola, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–435–1266, *pia.peltola@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Microbial (non-HIV) Diagnostics and Detection of Infectious Agents, Food and Waterborne Pathogens, and Methods in Microbial Sterilization, Disinfection and Bioremediation.
Date: November 18–20, 2020.
Time: 9:00 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Gagan Pandya, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, RM 3200, MSC 7808, Bethesda, MD 20892, 301–435–1167, *pandyaga@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Non-HIV Microbial Vaccine Development.
Date: November 18–20, 2020.
Time: 9:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Barna Dey, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, Bethesda, MD 20892, 301–451–2796, *bdey@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Bioengineering, Surgery, Anesthesiology, and Trauma.
Date: November 18, 2020.
Time: 10:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Donald Scott Wright, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7854, Bethesda, MD 20892, (301) 435–8363, *wrightds@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Motivated Behavior, Alcohol and Heavy Metals.
Date: November 18, 2020.
Time: 1:00 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Endocrinology, Metabolism, Nutrition and Reproductive Science.
Date: November 18, 2020.
Time: 1:00 p.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Gregory S. Shelness, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6156, Bethesda, MD 20892–7892, 301–755–4335, *greg.shelness@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23221 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose

confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19).

Date: November 13, 2020.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Annie Walker-Abbey, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Bethesda, MD 20892–9834, (240) 627–3390, *aabbey@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 15, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23218 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee.

Date: November 6, 2020.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3185, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara J. Thomas, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3185, Bethesda, MD 20892, 301–402–0838, *barbara.thomas@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: October 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23217 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel Early Phase Clinical Trials—Pharma/Device and K Awards.

Date: November 13, 2020.

Time: 12:00 p.m. to 4:30 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: Rebecca Steiner Garcia, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel Clinical Trials to Test the Effectiveness of Treatment, Prevention, and Services Interventions.

Date: November 16, 2020.

Time: 1:30 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: 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.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: October 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23212 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; Emergency Awards: Automatic Detection and Tracing of SARS–CoV–2 (RFA OD 20–014).

Date: October 29–30, 2020.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ranga V. Srinivas, Ph.D., Chief, Extramural Project Review Branch,

National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: October 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23211 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Limited Competition: National Biocontainment Laboratories (NBLs) Operations Support (UC7 Clinical Trial Not Allowed).

Date: November 13, 2020.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G20, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Zhuqing (Charlie) Li, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G20, Bethesda, MD 20892–9823, (240) 669–5068, *zhuqing.li@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 15, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–23213 Filed 10–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0004]

Agency Information Collection Activities: Application for Exportation of Articles Under Special Bond

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 20, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 47975) on August 7, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application for Exportation of Articles under Special Bond.

OMB Number: 1651–0004.

Form number: CBP Form 3495.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3495, *Application for Exportation of Articles Under Special Bond,* is an application for exportation of articles entered under

temporary bond pursuant to 19 U.S.C. 1202, Chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States, and 19 CFR 10.38. CBP Form 3495 is used by importers to notify CBP that the importer intends to export goods that were subject to a duty exemption based on a temporary stay in this country. It also serves as a permit to export in order to satisfy the importer's obligation to export the same goods and thereby get a duty exemption. This form is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=3495&=Apply.*

Estimated Number of Respondents: 500.

Estimated Number of Annual Responses per Respondent: 30.

Estimated Number of Total Annual Responses: 15,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 2,000.

Dated: October 16, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–23308 Filed 10–20–20; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0051]

Agency Information Collection Activities: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 20, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 47974) on August 7, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement.

OMB Number: 1651–0051.

Form Number: None.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours, the information collection, or to the record keeping requirements.

Type of Review: Extension (without change).

Affected Public: Businesses or other for-profit institutions.

Abstract: In accordance with 19 CFR 146.25 and 146.4, foreign trade zone (FTZ) operators are required to account for zone merchandise admitted, stored, manipulated and removed from FTZs. FTZ operators must prepare a reconciliation report within 90 days after the end of the zone year for a spot check or audit by CBP. In addition, within 10 working days after the annual reconciliation, FTZ operators must submit to the CBP port director a letter signed by the operator certifying that the annual reconciliation has been prepared, is available for CBP review, and is accurate. Foreign Trade Zones Act, as amended (Title 19 U.S.C. 81a–81u), authorizes these requirements.

Record Keeping Requirements Under 19 CFR 146.4

Estimated Number of Respondents: 276.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 207.

Certification Letter Under 19 CFR 146.25

Estimated Number of Respondents: 276.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 92.

Dated: October 16, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–23277 Filed 10–20–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0037]

Agency Information Collection Activities: Entry of Articles for Exhibition

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA).

DATES: The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 20, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 47976) on August 7, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Entry of Articles for Exhibition.

OMB Number: 1651–0037.

Form Number: None.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Goods entered for the purpose of exhibit at fairs, or for use in constructing, installing, or maintaining foreign exhibits at a fair, may be free of duty under 19 U.S.C. 1752. In order to substantiate that goods qualify for duty-free treatment, the consignee of the merchandise must provide information to CBP about the imported goods, which is specified in 19 CFR 147.11(c).

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 50.

Estimated Number of Total Annual Responses: 2,500.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 832.

Dated: October 16, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–23276 Filed 10–20–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0028]

Agency Information Collection Activities: Cost Submission

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 20, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other

Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 47978) on August 7, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Cost Submission.

OMB Number: 1651–0028.

Form Number: CBP Form 247.

Current Actions: CBP proposes to extend the expiration date of this information collection. There is no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The information collected on CBP Form 247, Cost Submission, is used by CBP to assist in correctly calculating the duty on imported merchandise. This form includes details on actual costs and helps CBP determine which costs are dutiable and which are not.

This collection of information is provided for by subheadings 9801.00.10, 9802.00.40, 9802.00.50, 9802.00.60 and 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS), and by 19 U.S.C. 1508 through 1509, 19 CFR 10.11–10.24, 19 CFR 141.88 and 19 CFR 152.106.

CBP Form 247 can be found at *http://www.cbp.gov/xp/cgov/toolbox/forms/.*

Estimated Number of Respondents: 1,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,000.

Estimated Time per Response: 50 hours.

Estimated Total Annual Burden Hours: 50,000.

Dated: October 16, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–23275 Filed 10–20–20; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0020]

Agency Information Collection Activities: Crew's Effects Declaration

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than November 20, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 85 FR Page 47975) on August 7, 2020 allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Crew's Effects Declaration.

OMB Number: 1651–0020.

Form Number: CBP Form 1304.

Current Actions: CBP proposes to extend the expiration date of this information collection. There is a reduction in burden hours due to a reduction in the number of respondents and responses. There is no change to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 1304, *Crew's Effects Declaration,* was developed through an agreement by the United Nations' Intergovernmental Maritime Consultative Organization (IMCO) in conjunction with the United States and various other countries. The form is used as part of the entrance and clearance of vessels pursuant to the provisions of 19 CFR 4.7 and 4.7a, 19 U.S.C. 1431, and 19 U.S.C. 1434. CBP Form 1304 is completed by the master of the arriving carrier to record and list the crew's effects that are onboard the vessel. This form is accessible at *https://www.cbp.gov/newsroom/publications/forms?title=1304.*

Estimated Number of Respondents: 2,624.

Estimated Number of Annual Responses per Respondent: 72.

Estimated Number of Total Annual Responses: 188,928.

Estimated Time per Response: 60 minutes.

Estimated Total Annual Burden Hours: 188,928.

Dated: October 16, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–23307 Filed 10–20–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2020–0118; FXES11140400000–201–FF04EF2000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink and Blue-Tailed Mole Skink, Polk County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments and information.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from the Polk County Board of County Commissioners (applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the ITP to take the federally listed sand skink and blue-tailed mole skink incidental to the construction of the Nalcrest Fire Station in Polk County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded under the National Environmental Policy Act. To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

DATES: We must receive your written comments on or before November 20, 2020.

ADDRESSES:

Obtaining Documents: You may obtain copies of the documents online in Docket No. FWS–R4–ES–2020–0118 at *http://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by any one of the following methods:

- *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2020–0118.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS–R4–ES–2020–0118; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Dennis Hamlin, by telephone at 772–469–4225 or via email at *dennis_hamlin@fws.gov.* Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the Fish and Wildlife Service, announce receipt of an application from the Polk County Board of County Commissioners (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 applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) and blue-tailed mole skink (*Eumeces egregious lividus*) (skinks) incidental to the construction of the Nalcrest Fire Station in Polk County, Florida. We request public comment on the application, which includes the applicant's HCP, and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded, under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

Project

The applicant requests a 5-year ITP to take skinks through the conversion of approximately 0.64 acre (ac) of occupied skink foraging and sheltering habitat incidental to the construction of the Nalcrest Fire Station on a 5.44-ac parcel in Section 8, Township 30, South, Range 29 East in Polk County, Florida. The applicant proposes to mitigate for take of the skinks by purchasing credits equivalent to 1.28 ac of skink-occupied habitat from a Service-approved conservation bank in Polk County. The Service would require the applicant to purchase the credits prior to engaging in any phase of the project.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment, including your personal identifying information, may be made available to the public. While you may request that we withhold your personal identifying information, we cannot guarantee that we will be able to do so.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including land clearing, construction of the Nalcrest Fire Station, and the proposed mitigation measures, would individually and cumulatively have a minor or negligible effect on the skinks and the environment. Therefore, we have preliminarily concluded that the ITP for this project would qualify for categorical exclusion and the HCP would be low effect under our NEPA regulations at 43 CFR 46.205 and 46.210. A low-effect HCP is one that would result in (1) minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) minor or negligible effects on other environmental values or resources; and (3) impacts that, when considered together with the impacts of other past, present, and reasonable foreseeable similarly situated projects, would not result in significant cumulative effects to environmental values or resources over time.

Next Steps

The Service will evaluate the application and the comments to determine whether to issue the requested permit. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the preceding matters, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue ITP number TE80687D–0 to the Polk County Board of County Commissioners.

Authority

The Service provides this notice under section 10(c) of the ESA (16 U.S.C. 1539(c)) and NEPA regulation 40 CFR 1506.6.

Roxanna Hinzman,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. 2020–23329 Filed 10–20–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2020–0117; FXES11140400000–201–FF04EF2000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink and Blue-Tailed Mole Skink, Polk County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments and information.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from the Polk County Board of County Commissioners (applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the ITP to take the federally listed sand skink and blue-tailed mole skink incidental to the construction of the Loughman Fire Station in Polk County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded under the National Environmental Policy Act. To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

DATES: We must receive your written comments on or before November 20, 2020.

ADDRESSES: *Obtaining Documents:* You may obtain copies of the documents online in Docket No. FWS–R4–ES–2020–0117 at *http://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by any of the following methods:

- *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2020–0117.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS–R4–ES–2020–0117; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Dennis Hamlin, by telephone at 772–469–4225 or via email at *dennis_hamlin@fws.gov.* Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the Fish and Wildlife Service, announce receipt of an application from the Polk County Board of County Commissioners (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 applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) and blue-tailed mole skink (*Eumeces egregious lividus*) (skinks) incidental to the construction of the Loughman Fire Station in Polk County, Florida. We request public comment on the application, which includes the applicant's HCP, and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded, under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

Project

The applicant requests a 10-year ITP to take skinks through the conversion of approximately 1.54 acres (ac) of occupied skink foraging and sheltering habitat incidental to the construction of the Loughman Fire Station on a 5.01-ac parcel in Section 13, Township 26, South, Range 27 East in Polk County, Florida. The applicant proposes to mitigate for take of the skinks by purchasing credits equivalent to 3.08 ac of skink-occupied habitat from a Service-approved conservation bank in Polk County. The Service would require the applicant to purchase the credits prior to engaging in any phase of the project.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment, including your personal identifying information, may be made available to the public. While you may request that we withhold your personal identifying information, we cannot guarantee that we will be able to do so.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including land clearing, construction of the Loughman Fire Station, and the proposed mitigation measures, would individually and cumulatively have a minor or negligible effect on the skinks and the environment. Therefore, we have preliminarily concluded that the ITP for this project would qualify for categorical exclusion, and the HCP would be low effect under our NEPA regulations at 43 CFR 46.205 and 46.210. A low-effect HCP is one that would result in (1) minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) minor or negligible effects on other environmental values or resources; and (3) impacts that, when considered together with the impacts of other past, present, and reasonable foreseeable similarly situated projects, would not result in significant cumulative effects to environmental values or resources over time.

Next Steps

The Service will evaluate the application and the comments to determine whether to issue the requested permit. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the preceding matters, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue ITP number TE79912D–0 to the Polk County Board of County Commissioners.

Authority

The Service provides this notice under section 10(c) of the ESA (16 U.S.C. 1539(c)) and NEPA regulation 40 CFR 1506.6.

Roxanna Hinzman,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. 2020–23330 Filed 10–20–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999253G; OMB Control Number 1076–0135]

Agency Information Collection Activities; Reporting Systems for Indian Employment, Training and Related Services Consolidation Act of 2017

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Affairs (BIA), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 21, 2020.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Bureau of Indian Affairs—Office of Indian Services, Division of Workforce Development, 1001 Indian School Rd. NW, Unit 225D, Albuquerque, New Mexico 87104; or by email to *BIA_477Program@bia.gov.* Please reference OMB Control Number 1076–0135 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Anthony Riley by email at *anthony.riley@bia.gov,* or by telephone at (505) 563–3745.

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.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the BIA; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BIA enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BIA 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. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BIA—Indian Services is seeking revisions for the information collection Reporting System for Public Law 102–477 Indian Employment & Related Services Consolidation Act. This information allows the Division of Workforce Development (DWD), which reports to the BIA—Indian Services, to document satisfactory compliance with statutory, regulatory, and other requirements of the various integrated programs. Public Law 102–477 Indian Employment & Related Services Consolidation Act authorized Tribal governments to integrate Federally funded employment, training, and related services and programs into a single, coordinated, comprehensive service delivery plan. Funding agencies include the Department of the Interior, the Department of Labor, the Department of Health and Human Services, the Department of Education, the Department of Agriculture, the Department of Commerce, the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of Transportation, the Department of Veterans Affairs and the Department of Justice. BIA is statutorily required to serve as the lead agency and provides a single, universal report format for use by Tribal governments to report on integrated activities and expenditures. The DWD shares the information collected from these reports with the Department of the Interior, Department of Labor, the Department of Health and Human Services, the Department of Education, the Department of Agriculture, Department of Commerce, the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of Transportation, the Department of Veterans Affairs and the Department of Justice.

This renewal will be revised to include information collected under 25 CFR part 26 to administer the job placement and training program, through Tribes, which provides vocational/technical training, related counseling, guidance, and job placement services, and limited financial assistance to Indian individuals who are not less than 18 years old and who reside within the Department of the Interior (DOI) approved service areas. Public Law 102–477 Indian Employment & Related Services Consolidation Act allows Tribes to consolidate into a single plan, single budget and single report to one office programs they currently have under contract or grant. The job placement and training program has been included in these 477 plans. Since Tribes determine which programs will be included, the plans vary from Tribe to Tribe. Submission of this information allows DOI, through Tribes, to administer the job placement and training program, which provides vocational/technical training, related counseling, guidance, job placement services, and limited financial assistance to individual Indians who are not less than 18 years old and who reside within DOI approved service areas.

Title of Collection: Reporting System for Public Law 102–477 Indian Employment & Related Services Consolidation Act.

OMB Control Number: 1076–0135.

Form Number: BIA–8205.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Native American & Alaska Native Tribes participating in Public Law 102–477 Indian Employment & Related Services Consolidation Act and individuals.

Total Estimated Number of Annual Respondents: 255.

Total Estimated Number of Annual Responses: 255.

Estimated Completion Time per Response: Varies from half an hour to six hours.

Total Estimated Number of Annual Burden Hours: 1,003.

Respondent's Obligation: Required to Obtain a Benefit.

Frequency of Collection: Once annually for the reporting, and once annually for the job placement and training application.

Total Estimated Annual Nonhour Burden Cost: $350.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Elizabeth K. Appel,

Director, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2020–23325 Filed 10–20–20; 8:45 am]

BILLING CODE 4337–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1183]

Certain Foldable Reusable Drinking Straws and Components and Accessories Thereof; Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge (''ALJ'') has issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public only.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone 202–205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States:

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: A general exclusion order directed to infringing articles imported, sold for importation, and/or sold after importation.

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on September 22, 2020. Comments should address whether issuance of the recommended remedial order in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the recommended remedial order are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended order;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended order within a commercially reasonable time; and

(v) explain how the recommended order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on November 16, 2020.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1183'') in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*) Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: October 16, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–23314 Filed 10–20–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1223]

Certain Shingled Solar Modules, Components Thereof, and Methods for Manufacturing the Same; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on

September 15, 2020, under section 337 of the Tariff Act of 1930, as amended, on behalf of The Solaria Corporation of Fremont, California. A supplement to the Complaint was filed on September 25, 2020. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain shingled solar modules, components thereof, and methods for manufacturing the same by reason of infringement of certain claims of U.S. Patent No. 10,522,707 (''the '707 Patent''); U.S. Patent No. 10,651,333 (''the '333 Patent''); and U.S. Patent No. 10,763,388 (''the '388 Patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on October 15, 2020, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 8, 9, and 12–20 of the '707 patent; claims 1, 8, 9, and 12–20 of the '333 patent; and claims 1–11, 15–17, 19, and 20 of the '388 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''tiled solar modules, shingled solar modules, and components thereof specifically solar cells, strips of solar cells, strings of solar cells, and strings of solar cell strips, whereby such modules and components, either are covered by, or are manufactured or produced under, or by means of, a process covered by, one or more claims of the Asserted Patents'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant: The Solaria Corporation, 45700 Northport Loop East, Fremont, CA 94538.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Canadian Solar Inc., 545 Speedvale Avenue West, Guelph, Ontario N1K 1E6, Canada

Canadian Solar (USA) Inc., 3000 Oak Road, Ste. 400, Walnut Creek, CA 94597

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: October 15, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–23243 Filed 10–20–20; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Civil Rules; Hearing of the Judicial Conference

AGENCY: Advisory Committee on the Federal Rules of Civil Procedure, Judicial Conference of the United States.

ACTION: Notice of cancellation of open hearing.

SUMMARY: The following remote public hearing on proposed amendments to the Federal Rules of Civil Procedure has been canceled: Civil Rules Hearing on November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

SUPPLEMENTARY INFORMATION: Announcements for this hearing were previously published in 85 FR 48562.

Authority: 28 U.S.C. 2073.

Dated: October 15, 2020.

Rebecca A. Womeldorf,

Chief Counsel, Rules Committee Staff.

[FR Doc. 2020–23226 Filed 10–20–20; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number–1100–0049]

Agency Information Collection Activities; Proposed eCollection eComments Requested—Revision of Current Collection

AGENCY: Federal Bureau of Investigation—Directorate of Intelligence, Office of Private Sector, Department of Justice.

ACTION: 60 Day notice.

SUMMARY: The Department of Justice, Office of Private Sector, is 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: The Department of Justice encourages public comment and will accept input until December 21, 2020.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tiffany Locklear, Unit Chief, Office of Private Sector, FBI, 935 Pennsylvania Ave., Washington, DC 20535, *tllocklear@fbi.gov,* 202–436–7627.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

➢ Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Department of Justice, Office of Private Sector 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 Current Collection.

2. *The Title of the Form/Collection:* InfraGard Membership Application and Profile Questionnaire The agency form number, if any, and the applicable component of the Department sponsoring the collection: There is no agency form number for this collection. The applicable component within the Department of Justice is the Office of Private Sector.

3. *Affected public who will be asked or required to respond, as well as a brief abstract:* The public affected is an individual or household. This collection is used by FBI's Office of Private Sector to vet applicant's for InfraGard membership. InfraGard is a Public/Private Alliance with the purpose of sharing intelligence and criminal information between the FBI and the private sector about threats and infrastructure vulnerabilities.

4. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 11,000 complete the application annually, taking approximately 30 minutes to complete.

5. *An estimate of the total public burden (in hours) associated with the collection:* This collection takes approximately 5,500 hours.

6. *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 16, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–23334 Filed 10–20–20; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On October 15, 2020, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Wisconsin in the lawsuit entitled *United States* v. *Hydrite Chemical Co.,* Case No. 3:20–cv–00950.

The United States filed a Complaint in this lawsuit seeking civil penalties and injunctive relief from Defendant Hydrite Chemical Co. (''Hydrite'') for alleged violations of the Clean Air Act, 42 U.S.C. 7401–7671q, at Hydrite's chemical blending and manufacturing facility in Cottage Grove, Wisconsin (the ''Facility''). The United States' Complaint alleges that Hydrite has violated statutory and regulatory requirements limiting hazardous air pollutant emissions from the Facility, as well as corresponding requirements in Hydrite's Clean Air Act permits for the Facility.

When the Complaint was filed, the United States also lodged a proposed Consent Decree that would settle the claims asserted in the Complaint. Among other things, the proposed Consent Decree would require that Hydrite implement appropriate injunctive relief to control air pollutant emissions from the Facility, including improving its practices for the detection and control of fugitive emissions from tanks and equipment that contain chemicals classified as hazardous air pollutants. The Consent Decree also would require Hydrite to pay a $480,503 civil penalty to the United States.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Hydrite Chemical Co.,* D.J. Ref. No. 90–5–2–1–12229. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.*

We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $17.25 (25 cents per page

reproduction cost) payable to the United States Treasury.

Patricia A. McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2020–23251 Filed 10–20–20; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Process for Expedited Approval of an Exemption for Prohibited Transaction, Prohibited Transaction Class Exemption 1996–62

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-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 20, 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: On April 28, 1975, the Department published ERISA Procedure 75–1 in the **Federal Register**, which provided the public with information regarding the procedure to follow when requesting an exemption. On August 10, 1990, the Department issued a regulation which replaced ERISA Procedure 75–1 for applications for prohibited transaction exemptions filed on or after September 10, 1990 (29 CFR 2570.30 *et seq.*).

On July 31, 1996, the Department published in the **Federal Register**, Prohibited Transaction Class Exemption 96–62 that provides for accelerated approval of an exemption permitting a plan to engage in a transaction which might otherwise be prohibited following a demonstration to the Department that the transaction: (1) Is substantially similar in all material respects to at least two other transactions for which the Department recently granted administrative relief from the same restriction; and (2) presents little, if any, opportunity for abuse or risk of loss to a plan's participants and beneficiaries. Under the class exemption, a party may proceed with a transaction in as little as 78 days from the acknowledgment of receipt by the Department of a written submission filed in accordance with the terms of the class exemption.

In 2002, the DOL amended the exemption to clarify that it covers ''plans'' as described in Code Section 4975(e)(1), such as IRAs and Keogh Plans, and that the scope of the exemption is not limited to Title I ERISA covered plans. Additionally, in 2003 the DOL amended the exemption to permit parties to base their submissions on substantially similar transactions described either in two individual exemptions granted within the past 60 months, or in one individual exemption granted within the last 120 months and one transaction that received final authorization under the exemption within the past 60 months. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on April 29, 2020 (85 FR 23856).

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–EBSA.

Title of Collection: Process for Expedited Approval of an Exemption for Prohibited Transaction, Prohibited Transaction Class Exemption 1996–62.

OMB Control Number: 1210–0098.

Affected Public: Private Sector—Businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 7.

Total Estimated Number of Responses: 3,507.

Total Estimated Annual Time Burden: 88 hours.

Total Estimated Annual Other Costs Burden: $30,156.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: October 15, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020–23267 Filed 10–20–20; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0057]

Excavations (Design of Cave-in Protection Systems); 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 collection of information contained in the Standard on Excavations (Design of Cave-in Protection Systems).

DATES: Comments must be submitted (postmarked, sent, or received) by December 21, 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–2011–0057, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Please note: While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2011–0057) 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 above address. 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 through 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 (202) 693–2222 to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Seleda Perryman, 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 collection of information in accordance with the Paperwork Reduction Act (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 (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 to 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).

Paragraphs (b) and (c) of § 1926.652 (''Requirements for Protective Systems''; the ''Standard'') contain paperwork requirements that impose burden hours or costs on employers. These paragraphs require employers to use protective systems to prevent cave-ins during excavation work; these systems include sloping the side of the trench, benching the soil away from the excavation, or using a trench shielding system (such as a trench box). The Standard specifies allowable configurations and slopes for excavations, and provides appendices to assist employers in designing protective systems. However, paragraphs (b)(3) and (b)(4) of the Standard permit employers to design sloping or benching systems based on tabulated data (Option 3), or to use a design approved by a registered professional engineer (Option 4).

Under Option 3, employers must provide the tabulated data in a written form that also identifies the registered professional engineer who approved the data and the parameters used to select the sloping or benching system drawn from the data, as well as the limitations of the data (including the magnitude and configuration of slopes determined to be safe). The document must also provide any explanatory information necessary to select the correct benching system based on the data. Option 2 requires employers to develop a written design approved by a registered professional engineer. The design information must include the magnitude and configuration of the slopes determined to be safe, and the identity of the registered professional engineer who approved the design.

Paragraph (c)(2)(iii) allows employers to use manufacturer's tabulated data or to deviate from the data provided. The manufacturer's specification, recommendations and limitations as well as the manufacturer's approval to deviate from these items shall be in writing. Paragraphs (c)(3) and (c)(4) allow employers to design support systems, shield systems, and other protective systems based on tabulated data provided by a system manufacturer (Option 3) or obtained from other sources including a registered professional engineer and approved by a registered professional engineer (Option 4).

Each of these provisions requires employers to maintain a copy of the documents described in these options at the jobsite during construction. After construction is completed, employers may store the documents off-site provided they make them available to an OSHA compliance officer on request. These documents provide both the employer and the compliance officer with information needed to determine if the selection and design of a protective system are appropriate to the excavation work, thereby assuring workers of maximum protection against cave-ins.

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

The agency is requesting that OMB extend the approval of the information collection requirements contained in the Standard on Excavations (Design of Cave-in Protection Systems). An increase in the number of construction projects/sites from 768,278 in 2013 to 1,010,188 in 2019 has resulted in an adjustment increase in burden hours from 17,262 to 19,402, a total increase

of 2,140 burden hours. OSHA reduced the number of apartment and non-residential construction sites that would use outside contractor engineering services for the required protective system design from 2,466 to 2,038. There was also a decrease in overall cost from $311,505 to $269,138, a difference of $42,367.

The agency will summarize any comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of a currently approved collection.

Title: Excavations (Design of Cave-in Protection Systems) (29 CFR part 1926, subpart P).

OMB Control Number: 1218–0137.

Affected Public: Business or other for-profits.

Number of Respondents: 8,152.

Number of Responses: 19,402.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 19,402 hours.

Estimated Cost (Operation and Maintenance): $269,138.

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 material must identify the agency name and the OSHA docket number (Docket No. OSHA–2011–0057) for the ICR. 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 the agency can attach them to your comments.

Due to 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 dates 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 through 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 through 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 15, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020–23266 Filed 10–20–20; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (20–086)]

NASA Advisory Council; Aeronautics Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Aeronautics Committee of the NASA Advisory Council (NAC). This meeting will be held for soliciting, from the aeronautics community and other persons, research and technical information relevant to program planning.

DATES: Tuesday, November 10, 2020, 10:00 a.m.–6:00 p.m., Eastern Time.

ADDRESSES: Virtual Meeting via WebEx and Toll-Free telephone only.

FOR FURTHER INFORMATION CONTACT: Ms. Irma Rodriguez, Designated Federal Officer, Aeronautics Research Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 527–4826, or *irma.c.rodriguez@nasa.gov.*

SUPPLEMENTARY INFORMATION: As noted above, this meeting will be available telephonically and by WebEx only. The WebEx link is *https://nasaenterprise.webex.com,* the meeting number is 199 494 0997, and the password is mX47WJPMW8$ (case sensitive). You can also dial in by phone toll-free: 888–769–8716 passcode: 6813159. The agenda for the meeting includes the following topics:

—Capability and workforce strategic planning

—COVID Impacts activities and NASA Return to site plans

—Autonomy Plans

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Carol Hamilton,

Acting Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2020–23291 Filed 10–20–20; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meetings:

Name and Committee Code: Proposal Review Panel for Division of Physics (1208)—Institute for Quantum Information and Matter (IQIM).

Date and Time: November 18, 2020 10:00 a.m.–6:00 p.m., November 19, 2020 10:00 a.m.–5:00 p.m., November 20, 2020 10:00 a.m.–2:00 p.m.

Place: NSF, 2415 Eisenhower Avenue, Alexandria, VA 22314 (Virtual).

Type of Meeting: Part-open.

Contact Persons: James Shank, Program Director for Physics Frontier Centers, Division of Physics, National Science Foundation, 2415 Eisenhower Avenue, Room W9214, Alexandria, VA 22314; Telephone: (703) 292–4516.

Purpose of Meeting: Virtual site visit to provide an evaluation of the progress of the projects at the host site for the Division of Physics at the National Science Foundation.

Agenda

November 18, 2020; 10:00 a.m.–06:00 p.m.

10:00 a.m.–12:00 p.m.
Directors Overview & Science Talks—Session 1
12:00 p.m.–01:00 p.m.
Lunch
01:00 p.m.–04:00 p.m.
Science Talks—Session 2
04:00 p.m.–05:00 p.m.
Executive Session—CLOSED
05:00 p.m.–06:00 p.m.
Poster Session

November 19, 2020; 10:00 a.m.–05:00 p.m.

10:00 a.m.–12:00 p.m.
Education/Outreach/Diversity (need more than 1 hour)
12:00 p.m.–01:00 p.m.
Lunch
01:00 p.m.–02:00 p.m.
University Administrators
02:00 p.m.–03:00 p.m.
Directors Conclusion and Plans for Coming Year
03:00 p.m.–04:30 p.m.
Executive Session—CLOSED
04:30 p.m.–05:00 p.m.
Questions delivered to PIs

November 20, 2020; 10:00 a.m.–2:00 p.m.

10:00 a.m.–11:00 a.m.
Responses to Questions
11:00 a.m.–02:00 p.m.
Panel Discussion of Report

Reason for Closing: Topics to be discussed and evaluated during closed portions of the site review will include information of a proprietary or confidential nature, including technical information and information on personnel. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: October 16, 2020.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2020–23281 Filed 10–20–20; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Awardee Reporting Requirements for the Established Program To Stimulate Competitive Research (EPSCoR) Research Infrastructure Improvement Programs

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the *second notice* for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAmain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays). Copies of the submission may be obtained by calling 703–292–7556.

SUPPLEMENTARY INFORMATION: NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Title of Collection: Awardee Reporting Requirements for the Established Program to Stimulate Competitive Research (EPSCoR) Research Infrastructure Improvement Programs.

OMB Number: 3145–0243.

Type of Request: Reinstatement with change of an established information collection.

Proposed Project: The mission of the National Science Foundation (NSF) is to promote the progress of science; to advance the national health, welfare, and prosperity; and to secure the national defense, while avoiding the undue concentration of research and education. In 1977, in response to congressional concern that NSF funding was overly concentrated geographically, a National Science Board task force analyzed the geographic distribution of NSF funds, which resulted in the creation of an NSF Experimental Program to Stimulate Competitive Research (EPSCoR). The American Innovation and Competitiveness Act (Pub. L. 114–329, Sec 103 D) effectively changed the program's name from ''Experimental'' to ''Established'' in FY 2016. Congress specified two objectives for the EPSCoR program in the National Science Foundation Authorization Act of 1988: (1) To assist States that historically have received relatively little Federal research and development funding; and (2) to assist States that have demonstrated a commitment to develop their research bases and improve science and engineering research and education programs at their universities and colleges

The EPSCoR Research Infrastructure Improvement (RII) Investment Strategies advance science and engineering capabilities in EPSCoR jurisdictions for discovery, innovation and overall knowledge-based prosperity. These projects build human, cyber, and physical infrastructure in EPSCoR jurisdictions, stimulating sustainable improvements in their Research & Development (R&D) capacity and competitiveness.

EPSCoR projects are unique in their scope and complexity; in their integration of individual researchers, institutions, and organizations; and in their role in developing the diverse, well-prepared, STEM-enabled workforce necessary to sustain research competitiveness and catalyze economic development. In addition, these projects are generally inter- or multi-disciplinary and involve effective jurisdictional and regional collaborations among academic, government, and private sector stakeholders that advance scientific research, promote innovation, and provide multiple societal benefits. They also broaden participation in science and engineering by engaging multiple institutions and organizations at all levels of research and education, and people within and among EPSCoR jurisdictions. These projects usually involve between 100 to 300 participants per year over the performance period, and the projects reach thousands more through their extensive STEM outreach activities. The American Innovation and Competitiveness Act of 2016, Section 103 (Pub. L. 114–329) requires NSF EPSCoR to submit annual reports to both Congress and OSTP that contain data detailing project progress and success (new investigators, broadening participation, dissemination of results, new workshops, outreach activities,

proposals submitted and awarded, mentoring activities among faculty members, collaborations, researcher participating on the review process, etc.).

EPSCoR RII Track-1, Track-2, and Track-4 projects are required to submit annual reports on progress and plans, which are used as a basis for performance review and determining the level of continued funding. To support this review and the management of EPSCoR RII projects, teams are required to develop a set of performance indicators for building sustainable infrastructure and capacity in terms of a strategic plan for the project; measure performance and revise strategies as appropriate; report on the progress relative to the project's goals and milestones; and describe changes in strategies, if any, for submission annually to NSF. These indicators are both quantitative and descriptive and may include, for example, the characteristics of project personnel and students; aggregate demographics of participants; sources of financial support and in-kind support; expenditures by operational component; characteristics of industrial and/or other sector participation; research activities; workforce development activities; external engagement activities; patents and patent licenses; publications; degrees granted to students involved in project activities; and descriptions of significant advances and other outcomes of the EPSCoR project's efforts. Part of this reporting takes the form of several spreadsheets to capture specific information to demonstrate progress towards achieving the goals of the program. Such reporting requirements are included in the cooperative agreement which is binding between the awardee institution and NSF.

Each project's annual report addresses the following categories of activities: (1) Research, (2) education, (3) workforce development, (4) partnerships and collaborations, (5) communication and dissemination, (6) sustainability, (7) diversity, (8) management, and (9) evaluation and assessment.

For each of the categories the report is required to describe overall objectives for the year; specific accomplishments, impacts, outputs and outcomes; problems or challenges the project has encountered in making progress towards goals; and anticipated problems in performance during the following year.

Use of the Information: NSF will use the information to continue its oversight of funded EPSCoR RII projects, and to evaluate the progress of the program.

The change would facilitate reporting better aligned with program goals and provides data as legislatively required for NSF EPSCoR.

Estimate of Burden: Approximately 59 hours per project for 173 projects for a total of 7,555 hours.

Respondents: Non-profit institutions; federal government.

Estimated Number of Responses per Report: One.

Dated: October 16, 2020.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2020–23332 Filed 10–20–20; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 3 and 4; Inspections, Tests, Analyses, and Acceptance Criteria

AGENCY: Nuclear Regulatory Commission.

ACTION: Determination of the successful completion of inspections, tests, and analyses.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) staff has determined that specified inspections, tests, and analyses have been successfully completed, and that specified acceptance criteria are met for the Vogtle Electric Generating Plant (VEGP), Units 3 and 4.

DATES: Determinations of the successful completion of inspections, tests, and analyses for VEGP Units 3 and 4 are effective on the dates indicated in the NRC staff's verification evaluation forms for the inspections, tests, analyses, and acceptance criteria (ITAAC).

ADDRESSES: Please refer to Docket ID NRC–2008–0252 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–2008–0252. Address questions about Docket IDs 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 (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *Attention:* The 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: Cayetano Santos, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7270, email: *Cayetano.Santos@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Licensee Notification of Completion of ITAAC

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC., MEAG Power SPVJ, LLC., MEAG Power SPVP, LLC., and the City of Dalton, Georgia, (hereafter called the licensee) has submitted ITAAC closure notifications (ICNs) under § 52.99(c)(1) of title 10 of the *Code of Federal Regulations* (10 CFR), informing the NRC that the licensee has successfully performed the required inspections, tests, and analyses, and that the acceptance criteria are met for:

VEGP Unit 3 ITAAC

2.1.02.08d.i (32), 2.1.02.08e (40), 2.1.02.09b.ii (43), 2.2.03.08c.i.01 (177), 2.2.03.08c.i.03 (179), 2.2.03.08c.i.04 (180), 2.2.03.08c.ii (181), 2.2.03.09a.i (201), 2.3.05.03c.ii (350), 2.3.05.03d.ii (352), 2.3.15.03 (483), 2.5.05.03b (570), C.2.6.09.02 (659), 2.7.06.02.ii (725), 3.3.00.05a (784), C.3.8.02.01 (843), and E.3.9.08.01.03 (872).

VEGP Unit 4 ITAAC

2.3.05.03a.ii (344), 2.5.05.03b (570), 3.3.00.02g (775), 3.3.00.05a (784), and C.3.8.02.01 (843).

The ITAAC for VEGP Unit 3 are in Appendix C of the VEGP Unit 3 combined license (ADAMS Accession No. ML14100A106). The ITAAC for VEGP Unit 4 are in Appendix C of VEGP

Unit 4 combined license (ADAMS Accession No. ML14100A135).

II. Licensee ITAAC Post-Closure Notifications (IPCNs)

Since the last **Federal Register** notice of the NRC staff's determinations of successful completion of inspections, tests, and analyses for VEGP Units 3 and 4, the NRC staff has not made additional determinations of the successful completion of inspections, tests, and analyses based on licensee IPCNs submitted under 10 CFR 52.99(c)(2).

III. NRC Staff Determination of Completion of ITAAC

The NRC staff has determined that the specified inspections, tests, and analyses have been successfully completed, and that the specified acceptance criteria are met. The documentation of the NRC staff's determination is in the ITAAC Closure Verification Evaluation Form (VEF) for each ITAAC. The VEF is a form that represents the NRC staff's structured process for reviewing ICNs and IPCNs.

Each ICN presents a narrative description of how the ITAAC was completed. The NRC's ICN review process involves a determination on whether, among other things: (1) Each ICN provides sufficient information, including a summary of the methodology used to perform the ITAAC, to demonstrate that the inspections, tests, and analyses have been successfully completed; (2) each ICN provides sufficient information to demonstrate that the acceptance criteria of the ITAAC are met; and (3) any NRC inspections for the ITAAC have been completed and any ITAAC findings associated with that ITAAC have been closed. The NRC's review process for IPCNs is similar to that for ICNs but focuses on how the licensee addressed the new, material information giving rise to the IPCN.

The NRC staff's determination of the successful completion of these ITAAC is based on information available at this time and is subject to the licensee's ability to maintain the condition that the acceptance criteria are met. If the NRC staff receives new information that suggests the NRC staff's determination on any of these ITAAC is incorrect, then the NRC staff will determine whether to reopen that ITAAC (including withdrawing the NRC staff's determination on that ITAAC). The NRC staff's determination will be used to support a subsequent finding, pursuant to 10 CFR 52.103(g), at the end of construction that all acceptance criteria in the combined license are met. The ITAAC closure process is not finalized for these ITAAC until the NRC makes an affirmative finding under 10 CFR 52.103(g). Any future updates to the status of these ITAAC will be reflected on the NRC's website at *https://www.nrc.gov/reactors/new-reactors/oversight/itaac.html.*

This notice fulfills the NRC staff's obligations under 10 CFR 52.99(e)(1) to publish a notice in the **Federal Register** of the NRC staff's determination of the successful completion of inspections, tests, and analyses.

Vogtle Electric Generating Plant Unit 3, Docket No. 5200025

A complete list of the review status for VEGP Unit 3 ITAAC, including the submission date and ADAMS accession number for each ICN received, the ADAMS accession number for each VEF, and the ADAMS accession numbers for the inspection reports associated with these specific ITAAC, can be found on the NRC's website at *https://www.nrc.gov/reactors/new-reactors/new-licensing-files/vog3-icnsr.pdf.*

Vogtle Electric Generating Plant Unit 4, Docket No. 5200026

A complete list of the review status for VEGP Unit 4 ITAAC, including the submission date and ADAMS accession number for each ICN and IPCN received, the ADAMS accession number for each VEF, and the ADAMS accession numbers for the inspection reports associated with these specific ITAAC, can be found on the NRC's website at *https://www.nrc.gov/reactors/new-reactors/new-licensing-files/vog4-icnsr.pdf.*

Dated: October 16, 2020.

For the Nuclear Regulatory Commission.

Omar R. Lopez-Santiago,

Chief, Vogtle Project Office, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–23316 Filed 10–20–20; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90203; File No. SR–DTC–2020–012]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Adopt a New Service Guide To Establish the ClaimConnect™ Service and Update the Settlement Service Guide

October 15, 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 8, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. 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

The proposed rule change[3] consists of amendments to (i) adopt a new DTC service guide to establish the ClaimConnect service at DTC (''ClaimConnect Service Guide''),[4] and (ii) update the existing DTC Settlement Service Guide[5] (''Settlement Guide'') to (A) account for a new ClaimConnect process that would bypass DTC's existing Receiver Authorized Delivery function (''RAD''), (B) make related clarifying changes regarding RAD, and (C) update certain address and contact information in the Copyright section of the Settlement Guide, as described in greater detail below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (''Rules'') *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf,* or in the hereby proposed ClaimConnect Service Guide, included as Exhibit 5 to this proposed rule change filing.

[4] The hereby proposed ClaimConnect Service Guide sets forth Procedures for the proposed DTC ClaimConnect service. Procedures, in this context, pursuant to Section 1 of Rule 1, means ''the Procedures, service guides, and regulations of [DTC] adopted pursuant to Rule 27, as amended from time to time.'' Rule 1, Section 1, *supra* note 3. The proposed ClaimConnect Service Guide would constitute a Procedure of DTC, as defined in the Rules.

[5] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf.*

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to (i) adopt the ClaimConnect Service Guide, and (ii) update the Settlement Guide to (A) account for a new ClaimConnect process that would bypass RAD, (B) make related clarifying changes regarding RAD, and (C) update certain address and contact information in the Copyright section of the Settlement Guide.

About ClaimConnect

The proposed ClaimConnect service will be an optional service available to all Participants.[6] The service will enable Participants to bilaterally match and settle cash claim transactions at DTC.

With respect to ClaimConnect, a cash claim or cash claim transaction is a cash entitlement (*i.e.,* a request for cash) from one Participant to another Participant. Typically, cash claims arise as a result of trading exceptions from a Corporate Action event,[7] where a cash entitlement needs to be delivered from one holder to another. Today, such claims are settled away from DTC, except for some stock loan and repurchase (''repo'') substitution payments, which can be settled via Adjustment Payment Orders (''APOs'').[8] However, based on discussions with Participants, DTC has developed ClaimConnect so Participants can settle cash claims in one centralized location, using the DTC system.[9]

As described below, ClaimConnect will be a validation and matching engine that continually monitors claims throughout their lifecycle in order to settle and close claims through DTC's settlement process. This continuous processing will allow for both the manual matching of claims (*i.e.,* to Affirm or Affirmation) by ClaimConnect users (''Users'') and systematic matching of two like claims by ClaimConnect based on the alignment of certain data elements (*i.e.,* Auto-matching).

ClaimConnect will offer various claim processing functions, including end-of-day settlement of cash claims through systematic Securities Payment Orders (''SPOs'') generated and submitted by ClaimConnect at set times intraday (''settlement time'') on a settlement date.

Preparing To Use ClaimConnect

To use ClaimConnect, a Participant need only request to be a ''Claim Participant'' by contacting its Relationship Manager. The Participant's account information at DTC will then be updated to indicate that the Participant is now a member of the service (*i.e.,* a User).

Once permissioned, a Participant (now a User) will be able to engage ClaimConnect in two ways: (i) The ClaimConnect application via the MyDTCC portal, and (ii) the ClaimConnect Application Programming Interfaces (''APIs'').[10]

If using ClaimConnect through the web application on the MyDTCC portal, Users will have access to all ClaimConnect functionality, including:

- Submitting new claims;
- modifying claims submitted by the User;
- attaching documents to claims;
- Canceling claims submitted by the User;
- DKing and Un-DKing claims;[11]
- Affirming claims;
- utilizing the ClaimConnect Auto-match feature;
- establishing Approvals; and
- searching all claims submitted or received by the User.

Additionally, the ClaimConnect dashboard, which would be available via the MyDTCC portal, will offer a comprehensive overview of a User's claim activity, as well as provide daily and weekly email alerts on the status of claims, and the ability to pull reports and export data for manipulation and analysis.

Meanwhile, the ClaimConnect family of APIs will enable Users to automate the claim process. The APIs could be used separately for machine-to-machine processing of claims or in combination with the ClaimConnect web application through the MyDTCC portal. Although ClaimConnect functionality is more limited through the APIs (*i.e.,* APIs cannot Affirm claims, attach documents to claims, access the ClaimConnect dashboard or establish an Approval), Users will still be able to:

- Submit new claims;
- modify their own claims;
- Cancel their own claims;
- utilize the ClaimConnect Auto-match feature;
- DK and Un-DK claims; and
- search all claims submitted or received by the User.

Each ClaimConnect function is described in greater detail below. Unless otherwise noted, the functions apply to both the ClaimConnect service via the web application and the APIs.

Submitting Claims

If overpaid or underpaid a cash entitlement due to a trading exception, a User will be able to create a claim against a claim counterparty through ClaimConnect. To create a claim, the ClaimConnect system will require certain data elements to be included, while other data elements will be optional.[12] Optional data elements will help Users differentiate similar claims.

To help expedite the claim process, Users will be able to attach a document to a claim, through the ClaimConnect web application in the MyDTCC portal, which can provide further details about the claim. Similarly, to more easily identify claims and expedite the settlement process, claim submitters should work with claim counterparties during the claim submission process.

Once all required data elements are entered and the claim is submitted, the claim is assigned a Claim ID.[13] If both parties to a claim submit their respective sides to the claim (*i.e.,* a debit claim and a credit claim), and the two sides of the claim are Auto-matched, then the claim will be identified by the Claim ID associated with the debit side of the claim. The Claim ID of the credit side of the claim will be viewable in the claim's audit history.

Claim States

Once submitted, claims can exist in several different ''states'' depending upon the actions taken by the parties to the claim. Claims will be able to exist

[6] A fee associated with Participants' use of the ClaimConnect service will be the subject of a separate, subsequent rule filing with the Commission.

[7] Trading exceptions include, but are not limited to, trades outside of the market's agreed upon settlement cycle, lack of due bill fail tracking, stock loan or repo transaction discrepancy, or tax treaty differences.

[8] In light of the proposed ClaimConnect service, DTC is considering retiring the APO process. If such a decision is made, then any corresponding changes would be the subject of a separate, subsequent rule filing with the Commission, as applicable. Until such time, Participants would have the option to settle stock loan and repo substitution payments via APOs or ClaimConnect.

[9] Based on discussions with Participants, DTC estimates that ClaimConnect may process approximately 212,000 claims its first year, increasing to approximately 425,000 claims by its fifth year.

[10] ClaimConnect APIs will provide Users with callable endpoints for creating and deleting data resources, as well as reading and updating data resource values. Information including specifications related to ClaimConnect APIs will be available to Participants at *https://developer.dtcc.com* or by navigating through the Portals menu on *www.dtcc.com.*

[11] DK is shorthand for ''Don't Know.''

[12] A sample list of required and optional data elements will be available in the proposed ClaimConnect Service Guide. A complete list of data elements and whether the data elements are required or optional will be available on the ClaimConnect DTCC Learning Center page.

[13] A Claim ID is a unique claim identification number that is assigned to a claim after all required data elements are entered and the claim is submitted.

as Matched, Uncompared, DK-uncompared, Cancelled, or Closed.

Matched. A claim will be in a Matched state when it has been Auto-matched by the ClaimConnect system, or it has been Affirmed by the counterparty to the claim.

Uncompared. A claim will be in an Uncompared state, and will remain in such a state indefinitely, until an action is taken on it. This will occur when (i) a claim is initially submitted, without any further action taken on the claim; (ii) a claim is modified by the submitting party before the counterparty has acted on it; (iii) a claim is modified by the submitting party after it has been DK'd by the counterparty; or (iv) a claim is Un-DK'd, without any further action taken on the claim.

DK-uncompared. A claim will be in a DK-uncompared state when it has been DK'd by the receiving counterparty, and the submitting party has not yet acted on the counterparty's DK.[14]

Cancelled. A claim will be in a Cancelled state when the submitting party determines that the claim is no longer needed. This will occur when the submitting party Cancels the claim before it has been acted on by the counterparty, or the submitting party Cancels a claim that has been DK'd by the counterparty.

Closed. A claim will be in a Closed state when a Matched claim settles or fails to settle, as part of DTC's end-of-day settlement process, by the close of the scheduled settlement day, as described below. Once a claim is either Matched or Closed, then it can no longer be modified, DK'd, or moved into an Uncompared state. If a correction needs to be made to a Matched or Closed claim, then a new claim will need to be submitted.

Validating Claims

Validation, the process of confirming claim data elements, will happen in two ways: (i) When a claim is Affirmed (*i.e.,* by Affirming a claim, the receiving counterparty is confirming the claim's data elements), or (ii) when ClaimConnect Auto-matches two claims.

Once Validated, a claim will switch from an Uncompared to a Matched state. However, if certain data elements of the two sides of a claim do not agree, the claims cannot be Validated and, thus, cannot be Matched.[15] Such claims will remain in an Uncompared state until action is taken upon one or both claims.

Modifying and Canceling Claims

Users will be able to modify or Cancel claims. However, not all data elements can be modified after submission,[16] and a claim can be modified if and only if:

- The modifying User is the User that submitted the claim; and
- the claim is Uncompared;
- the claim has not been Cancelled;
- the claim has not been Matched; or
- the claim has not been Closed.

A claim can be Cancelled if and only if:

- The Canceling User is the User that submitted the claim; and
- the claim is Uncompared;
- the claim has not been Matched; or
- the claim has not been Closed.

Once a claim is Cancelled, no further action can be made on the claim.

Affirming Claims

If a counterparty receives a claim and agrees with its details (*i.e.,* the data elements), then the counterparty could Affirm the claim. Affirming a claim will be a confirmation of the claim's data elements and would move the claim into a Matched state. Once Affirmed, the claim will be settled on the Claim Settlement Date[17] or Settle After Match,[18] whichever the parties agree to.

Affirmation will usually occur only when one side of a claim is submitted because it affords the counterparty enough time to Affirm the claim. If both sides of a claim are submitted, and the applicable data elements align, then Auto-match will likely Match the claims before either party has time to make an Affirmation.

Claims can be Affirmed only:

- ''Manually'' via the MyDTCC portal, not through an API;
- by the counterparty that received the claim; and
- when the claim is Uncompared; or
- when the claim is not Cancelled or Closed.

Once Affirmed, the claim will move to a Matched state and no further action will be permitted on the claim.

DKing Claims

If a counterparty receives a claim that it does not know or does not agree with, then it can DK the claim. Claims can be DK'd only by the User that received the claim and when the claim is Uncompared or when the claim is not Cancelled or Closed. Users that DK a claim must provide a reason for the DK.[19] DKing a claim will return it to the submitting party and change the state of the claim to DK-uncompared. The submitting party will then have the option to modify the claim or Cancel it.

A claim DK'd in error can be Un-DK'd (*i.e.,* reversed) by the party, and only that party, that DK'd the claim. Once Un-DK'd, the claim will be in an Uncompared state. Uncompared claims can be modified or Cancelled by the submitting party, or they can be Affirmed or DK'd by the receiving party.

Searching and Reporting on Claims

ClaimConnect also will have both search and report functions. There will be two types of searches: (i) Quick Search, to look up a specific claim using either the unique Claim ID or Xref that the User assigned to the claim, and (ii) Advanced Search, to search for a range of claim activity, including claims submitted by the User or by a counterparty.

From the search results, Users will be able to select a claim to view more detailed information. ClaimConnect also will enable Users to view all of their claims as of a given date (either on a current or historic day), which can then be downloaded into a CSV (Comma-Separated Value) file format report.

Approving Claims

To assist Users with the management of their claims, ClaimConnect will offer an Approval feature. The Approval feature will require certain actions on a claim to be approved by a separate User employee, if the claim amount meets or exceeds a predetermined dollar threshold set by the User, before that action can be completed. This feature is designed to enable Users to better monitor and manage certain cash debits that are leaving their account to satisfy claims.

Users will be able to activate the Approval feature by updating their ClaimConnect client profile. When doing so, the User must then set the dollar threshold that will trigger the Approval process. For example, if a User wants all debit claims equaling $100.00 or greater to be Approved, the User would set the Approval threshold

[14] The DK-uncompared state is synonymous with an Uncompared status but will be distinguished in the proposed ClaimConnect Service Guide to better depict the workflow.

[15] A complete list of data elements that require matching will be available in the training materials found on the ClaimConnect DTCC Learning Center page.

[16] Users will be able to refer to the ClaimConnect user guides and other training materials to determine which fields can be modified.

[17] The Claim Settlement Date is the date on which a claim will settle, as agreed upon by the claim parties.

[18] Settle After Match is a settlement option where a Matched claim will settle at the next scheduled settlement time, as compared to a future settlement date. Both parties to the claim would need to select the Settle After Match option to be effective.

[19] Reasons for a DK include, but are not limited to, bad quantity, bad trade date, bad settlement date, bad amount, bad counterparty, duplicate record, invalid security identifier, need paperwork, need medallion stamp, settlement date difference, other bad data, or wrong event type.

to $100.00. Unfortunately, because of the manual aspects of the Approval feature, this feature will not be available via APIs.[20]

Once the Approval process is activated and a dollar threshold set, Approval by another User employee is required when the dollar threshold is met for claims that are new, being Affirmed, being modified, or being Cancelled after being previously Approved.

If a claim would be modified so that the dollar amount of the claim would no longer meet or exceed a previously established approval threshold, then the modification will not need to be Approved. Conversely, if a claim would be modified so that the dollar amount of the claim would now meet or exceed a previously established Approval threshold, then the claim will need to be Approved. If a previously Approved claim is modified but the claim amount remains unchanged (*i.e.,* it still meets or exceeds the Approval threshold), then the claim will need to be re-Approved. Approval is not required to DK or Un-DK a claim.

New claims that are pending Approval will not have a claim state, and the counterparty to the claim will not see the claim until it is Approved. Once Approved, the claim will be moved to an Uncompared state.

In order to modify a new claim that is still pending Approval, the submitting User should reject the claim, make the modification, and resubmit it for Approval. If the claim has already been Approved, a modification may require re-Approval, if the Approval threshold is met.

Claim Approvers must be different than the User employee that created the claim. Approvers can view the details of the claim prior to Approving. If an Approver rejects a claim, the claim will need to be resubmitted for Approval or Cancelled.

Settling Claims

Matched claims will generate a ClaimConnect SPO for settlement on either the Claim Settlement Date, the next applicable daily settlement time if the Settle After Match indicator has been agreed to by both parties,[21] or the first settlement time on the next settlement day if the current day is a holiday or non-settlement date. The SPO will credit the payee Participant and debit the payor Participant the claim amount and will then be incorporated into DTC's end-of-day settlement process.

Although a ClaimConnect SPO will be similar to other DTC SPOs, it will be unique to ClaimConnect and its settlement process in several ways:

- The reason code for ClaimConnect SPOs will be used only for ClaimConnect cash movements;
- ClaimConnect SPOs will not be able to be instructed manually, as the instructions will be an automated process through the ClaimConnect service; and
- ClaimConnect SPOs will bypass RAD, meaning there will be no additional approval or rejection process for ClaimConnect SPOs.

ClaimConnect will Close the claim once it settles or fails to settle by the close of the settlement day. Closed claims cannot be reopened, modified, or processed again. If an adjustment is needed, a new claim will need to be submitted and processed.

ClaimConnect SPOs will be subject to DTC's Risk Controls (*i.e.,* Collateral Monitor and Net Debit Cap) and will ''recycle'' (*i.e.,* pend) if the SPO cannot satisfy those controls.[22] If a ClaimConnect SPO does not ''make'' (*i.e.,* settle) by the end of the settlement day, the SPO will be ''dropped'' (*i.e.,* Closed). Details on failed claims will be available using the Settlement Web activity inquiry function.

Changes to the Rules

To effectuate the establishment of the ClaimConnect service, DTC hereby proposes to adopt a new service guide—the ClaimConnect Service Guide—to explain the ClaimConnect service as described above. In addition, the existing Settlement Guide will be updated to (A) indicate that not all SPOs are subject to RAD prior to settlement, as ClaimConnect SPOs will not be subject to RAD, (B) make related clarifying changes regarding RAD, and (C) update certain address and contact information in the Copyright section of the Settlement Guide.

Implementation Timeframe

The ClaimConnect service, and associated guide, will become effective and available to Participants within 10 business days following Commission approval. DTC will announce the effective date of the proposed changes by Important Notice posted to its website. A fee associated with Participants' use of ClaimConnect will be the subject of a separate, subsequent rule filing with the Commission. If that fee filing has not been completed by the time the ClaimConnect service becomes effective and available to Participants, then Participants will not be charged a fee for their use of ClaimConnect until that filing is completed. The proposed changes the Settlement Service Guide will become effective upon Commission approval.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency be designed to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[23] DTC believes this proposed rule change is consistent with that provision of the Act, and the rules and regulations thereunder applicable to a registered clearing agency.

As described above, the ClaimConnect service will be an optional service that was developed based on discussions with Participants. ClaimConnect would enable Participants to bilaterally match and settle cash claim transactions at DTC. While settlement of cash claims occurs today, it does so away from DTC, in a dispersed fashion. ClaimConnect would establish a centralized and coordinated location for Participants to settle such claims and, as described above, include various functionality, such as a web application, APIs, an Auto-match feature, an Approval function, and final settlement via SPOs.

Although a cash claim transaction itself is not a securities transaction, it is the biproduct of a securities transaction and a Corporate Action event on the securities. By offering a centralized and coordinated location for Participants to settle cash claims, with various functionality, the ClaimConnect service is designed to help Participants more easily settle cash claim activity associated with a securities transaction. Similarly, by updating the existing Settlement Service Guide to indicate that not all SPOs will be subject to RAD (since ClaimConnect SPOs will not be subject to RAD, as explained above), the guide will help Participants better understand the clearance and settlement processes.

Finally, by updating the Settlement Guide with more current information about where Participants and others may direct inquiries about the DTC

[20] Because APIs are a form of machine-to-machine or system-to-system communication, all necessary actions, such as the manual process of Approving a claim, must be completed prior to that communication.

[21] The intraday settlement times for processing ClaimConnect SPOs will be available on the ClaimConnect DTCC Learning Center page.

[22] Because ClaimConnect SPOs will not be submitted for night cycle processing, they will not be subject to DTC's settlement optimization process. *See* Securities Exchange Act Release No. 87022 (September 19, 2019), 84 FR 50541 (September 25, 2019) (SR–DTC–2019–005).

[23] 15 U.S.C. 78q–1(b)(3)(F).

service guides, the Settlement Guide will provide the most up-to-date information to help Participants submit questions or comments about the service guides.

Therefore, for the above reasons, DTC believes that the proposed rule change will help foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[24]

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the adoption of the proposed service guide to establish the ClaimConnect service or the proposed modifications to the existing Settlement Guide will have any impact on competition.

As described above, the ClaimConnect service will be an optional service (*i.e.,* Participants will have the option to either use ClaimConnect or continue to settle cash claims away from DTC). Although DTC believes settling a cash claim via ClaimConnect will offer benefits over settling such claims away from DTC, those benefits would be available to all Participants that choose to use the service, including both the credit and debit sides of any single claim. Meanwhile, the proposed changes to the Settlement Guide would simply (A) account for the processing of ClaimConnect SPOs, with respect to RAD, (B) make related clarifying changes regarding RAD, and (C) update certain address and contact information in the Copyright section of the Settlement Guide.

For these reasons, DTC does not believe that the proposed rule change will have any impact on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change, 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 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–DTC–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.

All submissions should refer to File Number SR–DTC–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 the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2020–012 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23260 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90205; File No. SR–Phlx–2020–47]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Phlx Rule 3312

October 15, 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 13, 2020, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 3312, Clearly Erroneous Transactions, to the close of business on April 20, 2021. The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 purpose of the proposed rule change is to extend the current pilot program related to Rule 3312, Clearly Erroneous Transactions, to the close of business on April 20, 2021. The pilot program is currently due to expire on October 20, 2020.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 3312 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] Following this, on September 30, 2010, the Exchange adopted changes to conform its Rule 3312 to Nasdaq's and BX's rules 11890.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[7] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[8] In light of that change, the Exchange amended Rule 3312 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[9] The Exchange later amended Rule 3312 to extend the pilot's effectiveness to the close of business on April 20, 2020,[10] and subsequently, to the close of business on October 20, 2020.[11]

The Exchange now proposes to amend Rule 3312 to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2021. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[12] In such an event, the remaining sections of Rule 3312 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 3312.

The Exchange does not propose any additional changes to Rule 3312. Extending the effectiveness of Rule 3312 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[13] in general, and Section 6(b)(5) of the Act,[14] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 3312 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 63023 (September 30, 2010), 75 FR 61802 (October 6, 2010) (SR–Phlx–2010–125).

[5] *See* Securities Exchange Act Release No. 68820 (February 1, 2013), 78 FR 9436 (February 8, 2013) (SR–Phlx–2013–12).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–Phlx–2014–27).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[8] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[9] *See* Securities Exchange Act Release No. 85632 (April 11, 2019), 84 FR 16057 (April 17, 2019) (SR–Phlx–2019–14).

[10] *See* Securities Exchange Act Release No. 87356 (October 18, 2019), 84 FR 57133 (October 24, 2019) (SR–Phlx–2019–44).

[11] *See* Securities Exchange Act Release No. 88503 (March 27, 2020), 85 FR 18606 (April 2, 2020) (SR–Phlx–2020–13).

[12] *See* notes 3—6, *supra*. The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) [17] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2020–47 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–Phlx–2020–47. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2020–47 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

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[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90201; File No. SR–NASDAQ–2020–002]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change To Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel

October 15, 2020.

I. Introduction

On July 2, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the procedures governing proceedings before a Hearings Panel, including the introduction of legal arguments and material information by companies during such proceedings. The proposed rule change was published for comment in the **Federal Register** on July 20, 2020.[3] On September 2, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89309 (Jul. 14, 2020), 85 FR 43900 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nasdaq-2020-002/srnasdaq2020002.htm.*

[4] 15 U.S.C. 78s(b)(2).

institute proceedings to determine whether to disapprove the proposed rule change.[5] This order approves the proposed rule change.

II. Description of the Proposal

Under Nasdaq's current rules, a Company [6] may, within seven calendar days of the date of a Staff Delisting Determination [7] notification, Public Reprimand Letter,[8] or written denial of a listing application, request a written or oral hearing before a Hearings Panel [9] to review the Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application.[10] The Hearings Department [11] will schedule hearings to take place, to the extent practicable, within 45 days of the request for a hearing.[12] The Hearings Department will send written acknowledgment of the Company's hearing request and inform the Company of the date, time, and location of the hearing, and deadlines for written submissions to the Hearings Panel.[13] The Company will be provided at least ten calendar days' notice of the hearing unless the Company waives such notice.[14]

Under the current hearings process, set forth in Nasdaq Rule 5815(a)(5), the Company may, but is not required to, submit to the Hearings Department a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, as permitted by Nasdaq Rule 5815(c)(1)(A), or may set forth specific grounds for the Company's contention that the issuance of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. The Hearings Panel will review the written record before the hearing.[15] Pursuant to Nasdaq Rule 5815(a)(6), at an oral hearing, the Company may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons, and the Hearings Panel may question any representative appearing at the hearing.[16] A Company may waive its right to an oral hearing and seek a decision by the Hearings Panel based solely on its written submissions.[17]

The Exchange now proposes to revise Nasdaq Rules 5815(a)(5) and (6) to amend the procedures governing the introduction of legal arguments and material information by Companies in a written or oral hearing before a Hearings Panel as well as require Companies to provide a written submission in such proceedings. The Exchange is also proposing some other changes to the Hearings Panel proceedings as discussed in more detail below. The Exchange stated that the proposed amendments are designed to improve the efficient and effective functioning of the hearings process in connection with the Company's appeal of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application.[18]

Specifically, the Exchange is proposing to amend Nasdaq Rule 5815(a)(5) to require a Company to provide a written submission to the Hearings Department, to which Staff may respond in writing, stating with specificity the grounds on which the Company is seeking review of the Staff Delisting Determination notification, Public Reprimand Letter, or written denial of a listing application (''Written Submission'').[19] The Company would be required to include in the Written Submission all legal arguments on which it intends to rely.[20] In addition, the Exchange proposes to specify that the Company may supplement the Written Submission by providing a written update to the Hearings Department (''Written Update'') no later than two business days in advance of the hearing. The Written Update may not include any legal argument not raised by the Company with specificity in the Written Submission.[21]

The Exchange is proposing to amend Nasdaq Rule 5815(a)(6) to provide that during an oral hearing, a Company would be prohibited from introducing any legal argument not raised by the Company with specificity in the Written Submission. The Exchange also proposes to amend Nasdaq Rule 5815(a)(6) to provide that during an oral hearing, a Company would be prohibited from introducing any material information that was not raised by the Company with specificity in the Written Submission or Written Update, unless such information was solicited

[5] *See* Securities Exchange Act Release No. 89745, 85 FR 55728 (Sep. 9, 2020). The Commission designated October 18, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] Nasdaq Rule 5005(a)(6) defines ''Company'' as the issuer of a security listed or applying to list on Nasdaq.

[7] Nasdaq Rule 5805(h) defines a ''Staff Delisting Determination'' as a written determination by the Listing Qualifications Department to delist a listed Company's securities for failure to meet a continued listing standard. Nasdaq Rule 5805(f) defines the ''Listing Qualifications Department'' as the department of Nasdaq responsible for evaluating Company compliance with quantitative and qualitative listing standards and determining eligibility for initial and continued listing of a Company's securities.

[8] Nasdaq Rule 5805(j) defines a ''Public Reprimand Letter'' as a letter issued by Staff or a Decision of an Adjudicatory Body in cases where the Company has violated a Nasdaq corporate governance or notification listing standard (other than one required by Rule 10A–3 of the Act) and Staff or the Adjudicatory Body determines that delisting is an inappropriate sanction. Rule 5805(g) defines ''Staff'' as employees of the Listing Qualifications Department; Rule 5805(i) defines ''Decision'' as a written decision of an Adjudicatory Body; and Rule 5805(a) defines ''Adjudicatory Body'' as the Hearings Panel, the Listing Council, or the Nasdaq Board, or a member thereof.

[9] Nasdaq Rule 5805(d) defines ''Hearings Panel'' as an independent panel made up of at least two persons who are not employees or otherwise affiliated with Nasdaq or its affiliates, and who have been authorized by the Nasdaq Board of Directors.

[10] *See* Nasdaq Rule 5815(a)(1)(A). If a Company fails to request in writing a hearing within seven calendar days, it waives its right to request review of a Staff Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application and the Hearings Department will take action to suspend trading of the securities and follow procedures to delist the securities. *See* Nasdaq Rule 5815(a)(2).

[11] Nasdaq Rule 5805(c) defines ''Hearings Department'' as the Hearings Department of the Nasdaq Office of General Counsel.

[12] *See* Nasdaq Rule 5815(a)(4).

[13] *See id.*

[14] *See id.*

[15] *See* Nasdaq Rule 5815(a)(5).

[16] Hearings are generally scheduled to last one hour, but the Hearings Panel may extend the time. The Hearings Department will arrange for and keep on file a transcript of oral hearings. *See* Nasdaq Rule 5815(a)(6).

[17] *See* Notice, *supra* note 3, 85 FR at 43901.

[18] *See id.*

[19] The Hearings Department generally calendars a hearing within 45 days of the request for a hearing and will establish deadlines for written submissions to the Hearings Panel. *See* Nasdaq Rule 5815(a)(4). As determined by the Hearings Department, both oral and written hearing matters are generally considered on Thursdays, and the Company's written submission is typically due on the third Friday before the hearing. The Hearings Department will generally establish the Thursday before the hearing as the deadline for Nasdaq Staff to respond in writing. *See* Notice, *supra* note 3, 85 FR at 43901, n.6.

[20] The proposal would amend the current rule to allow the Company's Written Submission, as appropriate, to include a written plan of compliance and request that the Hearings Panel grant an exception to the listing standards for a limited time period, as permitted by Nasdaq Rule 5815(c)(1)(A), or may set forth specific grounds for the Company's contention that the issuance of a Staff Delisting Determination, Public Reprimand Letter, or denial of a listing application was in error, and may also submit public documents or other written material in support of its position, including any information not available at the time of the staff determination. *See* proposed Nasdaq Rule 5815(a)(5).

[21] *See* proposed Nasdaq Rule 5815(a)(5). The Hearings Panel will determine that a company has raised a legal argument with specificity if the legal argument includes sufficient detail to be useful in the Hearings Panel's review of the record before the hearing. *See* Notice, *supra* note 3, 85 FR at 43901.

by the Hearings Panel or the Company shows either that the material information did not exist at the time the Company was permitted to submit a Written Update [22] or that exceptional or unusual circumstances exist that warrant consideration of the newly raised material information. The proposal provides that exceptional or unusual circumstances would include, but are not necessarily limited to, material information that was not earlier discoverable by the Company despite all reasonable measures having been taken.[23] If the Hearings Panel determines either that the Company has shown that the material information did not exist at the time the Company was permitted to submit a Written Update or that the Company has shown exceptional or unusual circumstances exist that warrant consideration of the newly raised material information, then the Company would be permitted to introduce such information at the oral hearing.[24] Nasdaq Staff would have up to three business days, or such shorter time as the Hearings Panel requests, following the oral hearing to respond in writing to the Company's newly raised material information, and the Company would be permitted to respond to the Staff's submission only upon request by the Hearings Panel.[25]

The Exchange stated that Companies that have requested a written or oral hearing before a Hearings Panel to review a Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application prior to the date of Commission approval of the proposed rule change will be subject to the rule text in Nasdaq Rule 5815(a)(5) and (6) that was effective prior to the date of such Commission approval.[26]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[27] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[28] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,[29] which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.

Nasdaq proposes to amend the procedures that govern a written or oral hearing before a Hearings Panel to review a Staff Delisting Determination, Public Reprimand Letter, or written denial of a listing application. Specifically, where a company has requested either a written or an oral hearing, Nasdaq proposes to require the company to provide a Written Submission in advance of the hearing, in which the company must state in writing with specificity the grounds upon which it is seeking review and all legal arguments on which it intends to rely. In addition, Nasdaq proposes to clarify that Nasdaq Staff may respond in writing to a company's Written Submission. Nasdaq also proposes that a company may supplement its Written Submission by providing a Written Update to the Hearings Department no later than two business days in advance of the hearing, thereby briefing the Hearings Panel on any new material information that has transpired since its Written Submission. Nasdaq proposes to allow a company only to introduce legal arguments in the Written Submission, and to not allow a company to introduce any legal arguments in the Written Update or during the oral hearing that were not raised with specificity in the Written Submission. Finally, Nasdaq proposes to set forth limited circumstances in which the Hearings Panel will permit a company to introduce material information at the oral hearing.[30] The Exchange stated that the proposed amendments will enhance the hearings process by providing the Hearings Panel with the most developed record in as timely a manner as possible.[31]

As the Commission has previously noted, the development and enforcement of meaningful listing standards [32] for an exchange is of substantial importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies that have or will have sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets.[33] Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.[34] Therefore it is important for exchanges to prevent companies that are deficient in their listing standards or that do not meet initial listing standards

[22] The Exchange provides the following example. Where a key component of a Company's compliance plan is a merger, and the Company obtains a fully executed version of the merger agreement the day before the hearing, the executed merger agreement would constitute information that did not exist at the time the Company was permitted to submit a Written Update. However, the fact that the Company was pursuing a merger, the potential merger parties, and the material terms of the contemplated merger should have been previously disclosed by the Company, as some or all of such information likely existed at the time the Company was permitted to submit a Written Update. *See* Notice, *supra* note 3, 85 FR at 43902.

[23] *See* proposed Nasdaq Rule 5815(a)(6).

[24] *See id.*

[25] *See id.*

[26] *See* Notice, *supra* note 3, 85 FR at 43902, n.11.

[27] 15 U.S.C. 78f(b). In approving this proposed rule change the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[28] 15 U.S.C. 78f(b)(5).

[29] 15 U.S.C. 78f(b)(7).

[30] *See supra* notes 22–24 and accompanying text.

[31] *See* Notice, *supra* note 3, 85 FR at 43902.

[32] The Commission notes that this is referring to both initial and continued listing standards.

[33] In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. *See, e.g.,* Securities Exchange Act Release Nos. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR–NYSE–2017–30); 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR–NYSE–2017–31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR–NYSE–2017–11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. *See, e.g.,* Securities Exchange Act Release Nos. 82627 (Feb. 2, 2018), 3 FR 5650, 5653, n.53 (Feb. 8, 2018) (SR–NYSE–2017–30); 87648 (Dec. 3, 2019), 84 FR 67308, 67314, n.42 (Dec. 9, 2019) (SR–NASDAQ–2019–059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395, n.22 (Apr. 27, 2020) (SR–NASDAQ–2020–001).

[34] *See, e.g.,* Securities Exchange Act Release Nos. 65708 (Nov. 8, 2011), 76 FR 70799 (Nov. 15, 2011) (SR–NASDAQ–2011–073) (order approving a proposal to adopt additional listing requirements for companies applying to list after consummation of a ''reverse merger'' with a shell company), and 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR–NYSE–2018–17) (order approving a proposal to adopt new initial and continued listing standards to list securities of special purpose acquisition companies).

from remaining or becoming listed on an exchange.

The Commission believes that the proposed revisions to the hearings process are appropriate and consistent with Section 6(b)(5) of the Act in that the proposed rules are designed to protect investors and the public interest. The Commission further believes the proposed rule change is consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. The Commission believes that the proposed procedures will require companies that have received a Staff Delisting Determination, Public Reprimand Letter, or have been denied initial listing to provide all relevant legal arguments and material information to the Hearings Panel in a timely manner within reasonable deadlines, so that the Hearings Panel may make an informed decision regarding the company's initial or continued listing on the Exchange. The proposed procedures should prevent companies that have received a Staff Delisting Determination, Public Reprimand Letter, or have been denied initial listing from withholding material information or legal arguments in an effort to extend the time before the Hearings Panel makes a decision or otherwise unduly lengthen the hearings process. The Commission notes that this is particularly important given that under Nasdaq rules a timely request for a hearing will ordinarily stay the suspension and delisting action until the issuance of a written panel decision. Therefore, as discussed in more detail below, most companies will have their stock continue to trade during the appeal of a Staff Delisting Determination or Public Reprimand Letter.[35] The Commission believes that the proposed procedures are reasonable and appropriate to allow companies to present all relevant legal arguments and material information before the Hearings Panel, and for Nasdaq Staff to have a reasonable opportunity to respond in advance of the hearing. The Commission further believes that the proposed procedures are also reasonable to allow the Hearings Panel time and opportunity to review all relevant material information and legal arguments and should strengthen the integrity, efficiency, and transparency of the hearings process while also providing for a fair procedure for companies to present their case before the Hearings Panel.[36]

The Commission believes the proposed amendments governing the submission of a Written Submission and Written Update are appropriate and consistent with the Act. The Exchange has stated that Nasdaq Staff has observed instances where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance or regarding their appeal of a Public Reprimand Letter or denial of an initial listing application, and instead present such information for the first time during the hearing.[37] Under current rules, as noted above, companies are not required to make a written submission upon an appeal to the Hearings Panel, but rather companies have the option to submit a written submission. The new procedures will require all companies to submit a Written Submission upon an appeal to the Hearings Panel. The Exchange has stated in support of the new requirements that when companies belatedly provide information to the Hearings Panel, it does not provide the Hearings Panel with adequate time to consider the information or to adequately prepare or formulate questions in advance of the hearing.[38] The Exchange stated that in such circumstances, the Hearings Panel may need more time or information to fully consider the matter following the hearing, and that a company that withholds information is effectively rewarded by extending the time it remains listed pending a Hearings Panel decision.[39] The Exchange also stated that the Written Update will provide the company an additional opportunity to update any new material information since the submission of its Written Submission as well as provide an opportunity to reply to any Nasdaq written Staff response.[40] The Commission believes that requiring a company to provide a Written Submission early on in the hearings process and allowing a company to supplement this information up to two business days prior to the hearing should enable the Hearings Panel to prepare for the hearing with the most up-to-date information regarding the company and its ability to achieve or maintain compliance with listing standards when appealing a Staff Delisting Determination, Public Reprimand Letter, or a denial of initial listing.

In addition, the Commission believes that the proposed restrictions on a company's ability to present material information during the oral hearing are appropriate and consistent with the Act. As discussed above, such restrictions should improve the Hearings Panel's access to relevant information in a timely manner and allow the Hearings Panel to prepare for the hearings process in order to make an informed decision. Under the proposal, a company would be permitted to introduce new material information that is solicited by the Hearings Panel to ensure the Hearings Panel is not unnecessarily restricted and that the company can appropriately respond to any such inquiry by the Hearings Panel at the oral hearing. Further, a company would be permitted to introduce new material information if the company shows that such information did not exist at the time the company was permitted to submit a Written Update or that exceptional or unusual circumstances exist that warrant consideration of the new material information. Such exceptions are fair to allow a company to raise new information if the Hearings Panel finds that the company has shown that it was truly unable to present such information prior to the oral hearing or exceptional circumstances existed. The Commission also has previously found a similar provision of a national securities exchange that limited a company's ability to introduce new material information that was not identified in its initial request for review of a delisting as consistent with Sections 6(b)(5) and 6(b)(7) of the Act, stating, among other things, that the new procedures may contribute to a more efficient appeals process and reduce unnecessary delays.[41]

Further, the Commission believes that the proposed requirement for a company to present all legal arguments on which it intends to rely in its Written Submission, and the related restrictions

[35] *See infra* notes 65–67 and accompanying text.

[36] *See* below at notes 43–60 and accompanying text for discussion of comments received.

[37] *See* Notice, *supra* note 3, 85 FR at 43902.

[38] *See id.*

[39] *See* Notice, *supra* note 3, 85 FR at 43903. Pursuant to Nasdaq Rule 5815(a)(1)(B), a timely request for a hearing generally stays the suspension and delisting action pending the issuance of a written panel decision.

[40] The Commission notes that the information the company may provide in the Written Update may not include any legal argument not raised by the company with specificity in the Written Submission but is otherwise not limited. The proposed language will specifically state that the Nasdaq Staff may respond in writing to the Written Submission. Nasdaq stated this is a clarification of current procedures. *See* Notice, *supra* note 3, 85 FR at 43901.

[41] *See* Securities Exchange Act Release No. 47161 (Jan. 10, 2003), 68 FR 2603, 2604 (Jan. 17, 2003) (SR–NYSE–2001–46) (approving proposed rule change to modify, among other things, the exchange's procedures for issuer appeals of delisting determinations) (''NYSE 2003 Order'').

on presenting any legal arguments later in the Written Update or oral hearings process, are also appropriate and consistent with the Act. The Exchange has stated that where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq Staff may be unable to fully develop legal arguments or advise the Hearings Panel effectively regarding a company's request for relief. As a result, the Hearings Panel may not have all the relevant information before it and may not be able to properly adjudicate the issue during the hearing.[42] Requiring a company to raise legal arguments in the Written Submission should allow Nasdaq Staff the opportunity to provide a thorough response to the legal argument and provide the Hearings Panel the benefit of Nasdaq Staff's views and perspective, thus improving the integrity and transparency of the hearings process while at the same time providing a fair procedure for the company to set forth its legal arguments in the hearings process.

One commenter opposed Nasdaq's proposed revisions to the hearings process, stating its belief that the proposal is highly prejudicial to issuers and will impede the Hearings Panel's ability to make fully informed listing decisions.[43] This commenter stated that issuers are often still in the process of assembling their legal team for the hearing in the days leading up to the deadline for making the prehearing submission, which ''limits the issuer's ability to provide any and all comprehensive legal arguments or other detailed information regarding its compliance plan.'' [44] The commenter stated that requiring ''the issuer to submit the totality of its compliance plan and any legal arguments in connection therewith several weeks ahead of the hearing would place the issuer at a significant disadvantage before the Panel'' and that the proposal ''fails to take into consideration the fact that companies that are subject to delisting . . . are typically dealing with a very fluid set of circumstances in their efforts to regain compliance with the applicable listing criteria; circumstances that are rapidly evolving, sometimes right up to the time of the hearing.'' [45] The commenter stated that the Nasdaq's current procedures, which require the hearing to be held within 45 days of the hearing request and do not require the Hearings Panel to issue its decision within any particular time period following the hearing,[46] allow for sufficient time for the Hearings Panel to seek a response from Nasdaq Staff on any new information provided at the hearing.[47] The commenter stated that it is ''not uncommon for the Panel to afford the Staff an opportunity to make a responsive submission post-hearing and then to give the company the opportunity to respond to such post-hearing submission'' and that ''[s]uch an exchange can easily be completed within two weeks, allowing the Panel to make a decision within 30 days.'' [48] The commenter argued that the current hearings process has served Nasdaq, investors, and issuers well for many years and provides the Hearings Panel with the necessary tools to ensure that Nasdaq Staff has an adequate opportunity to respond to an issuer's compliance plan and any legal arguments in connection therewith without arbitrarily limiting the issuer's ability to present information it deems relevant to the Hearings Panel's decision.[49]

In response to this commenter, Nasdaq stated that, rather than impeding the Hearings Panel's ability to make fully informed listing decisions, the proposal will ''increase the information available to the Hearings Panel in advance of a hearing, which will allow the Panelists adequate time to review the information and ask questions of the company during the hearing and, thereby, make a fully informed decision.'' [50] Nasdaq stated that the proposal does not in any way limit the nature and amount of information, whether legal arguments or factual statements, that a company may submit to the Hearings Panel for consideration, but rather requires a company to submit the relevant legal arguments and material information by a reasonable deadline and prevents the belated submission of such information.[51] In addition, Nasdaq stated that the proposed rules will provide a company with ample opportunity to present the material information necessary to allow for a full and complete consideration of the issues by the Hearings Panel.[52]

Nasdaq further stated that, as recognized by the opposing commenter,[53] most hearings relate to deficiencies where the company receives a cure period or is allowed to submit to Nasdaq Staff a plan to regain compliance before receiving a delisting letter.[54] Therefore, the company should be on notice long before the hearings process of both the nature of the deficiency and the timing of when the company will receive a delisting, and the company should have adequate time before receiving a delisting letter to assemble its legal team, consider its legal arguments, and develop its plan to regain compliance.[55] Nasdaq stated that, as noted by the commenter,[56] in most

[42] *See* Notice, *supra* note 3, 85 FR at 43903.

[43] *See* Letter from David A. Donohoe, Jr., Donohoe Advisory Associates LLC, to Secretary, Commission, dated August 10, 2020 (''Donohoe Letter''), at 3.

[44] *Id.* at 2.

[45] *Id.*

[46] The commenter noted, however, that Nasdaq advises all issuers in advance of the hearing that it is their intention to issue the panel decision within 30 calendar days of the hearing date. *See id.* at 3.

[47] *See id.*

[48] *Id.*

[49] *See id.*

[50] Letter from Arnold Golub, Vice President and Deputy General Counsel, Nasdaq, to Secretary, Commission, dated September 1, 2020 (''Response Letter''), at 1.

[51] *See id.* at 2.

[52] *See id.* at 3. Nasdaq stated, for example, that the proposal allows a company appealing a staff determination to submit additional information two business days prior to the hearing. Nasdaq also stated that the proposal permits the company an opportunity to present new material information under certain conditions at the oral hearing as discussed above. *See* Response Letter, at 2. *See also supra* notes 21–24 and accompanying text.

[53] *See* Donohoe Leter, at 2 (stating that ''market-based deficiencies (*e.g.,* bid price, market value of listed securities, and market value of publicly held shares) and stockholders' equity deficiencies . . . represent the lion's share of compliance issues resulting in hearings.'').

[54] Nasdaq stated that from January 1, 2020 through August 31, 2020, 28 of the 45 hearings held, or 62%, related only to bid price, market value of listed securities, market value of publicly held shares, and stockholders' equity deficiencies. *See* Response Letter, at 2, n.4. Deficiencies relating to all such listing standards allow a company to submit a plan of compliance. *See* Nasdaq Rule 5810(c)(2) and (c)(3) (setting forth deficiencies for which a company may submit a plan of compliance). Generally, deficiencies relating to bid price, market value of listed securities, and market value of publicly held shares allow for a cure period of 180 days. *See* Nasdaq Rule 5810(c)(3). In addition, under certain circumstances, companies that fail to meet the continued listing requirement for minimum bid price may be allowed a cure period of 360 days. *See* Nasdaq Rule 5810(c)(3)(A).

[55] *See* Response Letter, at 2–3. Pursuant to Nasdaq Rules, there are only a limited set of deficiencies for which Nasdaq's initial notice to the company is a delisting determination and the company's securities are immediately subject to suspension and delisting, including where a company fails to timely solicit proxies and where, under its discretionary authority in the Nasdaq Rule 5100 Series, Nasdaq Staff has determined that a company's continued listing raises a public interest concern. *See* Nasdaq Rule 5810(c)(1); Response Letter, at 2, n.6. Moreover, Nasdaq stated that it would be concerned if a company ignored its prior communications with Staff about the deficiency and only began to act upon receiving the delisting letter, as suggested by the commenter. *See* Response Letter, at 2–3.

[56] *See* Donohoe Letter, at 2 (stating that ''in the majority of cases, the Panel is not rendering a determination as to whether the Staff erred in its determination to delist an issuer, but rather is seeking to determine whether, at the time of the Panel's decision, the issuer has adequately addressed the Staff's concerns and presented a definitive plan to regain compliance within a reasonable period of time and, certainly within the

cases, the Hearings Panel does not render a decision regarding the legal merits of Nasdaq Staff's determination in the matter. Given that most matters do not require the Hearings Panel to consider legal arguments put forth by the company, Nasdaq stated that it is more important that such arguments be raised early in the process to allow Nasdaq Staff adequate time to consider the claims raised and respond in advance of the hearing.[57] Nasdaq stated that requiring the Hearings Panel to solicit subsequent submissions, as proposed by the commenter,[58] would only serve to delay the adjudication of the matter, potentially to the detriment of prospective future investors.[59] One commenter also expressed unqualified support for the Nasdaq proposal and Nasdaq's efforts to improve the effectiveness of Hearings Panel proceedings.[60]

As discussed above, the Commission believes, as noted by Nasdaq, that the proposed procedures will require companies to submit relevant legal arguments and material information by a reasonable deadline and prevent the belated submission of such information.[61] The proposal permits the addition of any new information up to two business days prior to the hearing to be submitted in the Written Update, except for any legal argument not raised by the Company with specificity in the Written Submission. Thus, the company should be able to provide any new information that has evolved since the submission of the Written Submission, including updates on its compliance plan, in its Written Update. Further, the Hearings Panel can allow the admission of additional material information at an oral hearing if certain conditions are met.[62] The Commission notes that the New York Stock Exchange (''NYSE'') provides for similar procedures regarding the submission of information where an issuer requests a review of a delisting determination by the Committee of the Board of Directors of the NYSE and the Commission found such procedures to be consistent with both Section 6(b)(5) and 6(b)(7) under the Exchange Act.[63] The Commission further notes that the requirement for all legal arguments upon which the company will rely to be presented in the company's opening submission is not novel and is analogous to provisions in the Commission's Rules of Practice and Federal Rules of Appellate Procedure, routinely enforced by the Commission and the federal courts of appeals.[64]

Finally, the Commission notes that when a company requests a Hearings Panel review, the suspension and delisting of the company's securities is generally stayed pending the issuance of the Hearing Panel's decision.[65] The Commission believes that where a company has received a delisting determination, it is important to have an efficient, fair, and effective process for reviewing such determination, given that the company's shares will likely continue to trade during the duration of the Hearings Panel's review.[66] If such company is not in compliance with listing standards and will not be able to regain compliance in accordance with Nasdaq rules, the continued trading of such securities could be misleading to investors. Allowing a company that will not be able to demonstrate compliance with the Exchange's listing standards to delay providing material information and legal arguments and thereby extend the delisting review process and thus the trading of the security on the Exchange during the pendency of the Hearings Panel's review would raise issues under the Exchange Act, including investor protection concerns.[67]

Based on the above, the Commission believes the proposed procedures provide companies with ample opportunity for a fair procedure and efficient process for reviewing appeals before the Hearings Panel. The Commission therefore believes that Nasdaq's proposal is consistent with Section 6(b)(7) of the Act in setting forth a fair procedure for the Hearings Panel's review of a Staff Delisting Determination, Public Reprimand

discretionary period available to the Panel under the Nasdaq Listing Rules.'').

[57] *See* Response Letter, at 3.

[58] *See supra* note 48 and accompanying text.

[59] *See* Response Letter, at 3.

[60] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Commission, dated August 4, 2020 (''CII Letter'').

[61] The Commission notes that the one commenter agreed with Nasdaq that ''when companies belatedly provide information to the Hearings Panel . . . it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing'' and that ''where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue.'' *See* CII Letter.

[62] Indeed, in its filing, Nasdaq stated that it has observed that companies primarily seek to introduce material information, such as a new equity offering or merger, as opposed to legal arguments at the hearing. *See* Notice, *supra* note 3, 85 FR at 43902, n.9.

[63] *See* Section 804.00 of the NYSE Listed Company Manual (''The Committee's review and final decision will be based on oral argument (if any) and the written briefs and accompanying materials submitted by the parties. The company will not be permitted to argue grounds for reversing the staff's decision that are not identified in its request for review, however, the company may ask the Committee for leave to adduce additional evidence or raise arguments not identified in its request for review, if it can demonstrate that the proposed additional evidence or new arguments are material to its request for review and that there was reasonable ground for not adducing such evidence or identifying such issues earlier. This section will not, however, (i) authorize a company to seek to file a reply brief in support of its request for review or (ii) be deemed to limit the staff's response to a request for review to the issues raised in the request for review. Upon review of a properly supported request, the Committee may in its sole discretion permit new arguments or additional evidence to be raised before the Committee.''). *See also supra* note 41 and accompanying text.

[64] *See* 17 CFR 201.420(c) (stating, in reference to Commission review of a determination by a self-regulatory organization, that ''[a]ny exception to a determination not supported in an opening brief . . . may, at the discretion of the Commission, be deemed to have been waived by the applicant''). *See also* 17 CFR 201.222(a) (providing that a hearing officer may require a party, in its prehearing submission, to include ''[a]n outline or narrative summary of its case or defense'' and ''[t]he legal theories upon which it will rely''); *Island Creek Coal Co.* v. *Wilkerson,* 910 F.3d 254, 256 (6th Cir. 2018) (''Time, time, and time again, we have reminded litigants that we will treat an 'argument' as 'forfeited when it was not raised in the opening brief.' . . . . The obligation to identify the issues on appeal in the opening brief applies to arguments premised on the loftiest charter of government as well as the most down to earth ordinance.''); *United States* v. *Van Smith,* 530 F.3d 967, 973 (D.C. Cir. 2008) (''We require petitioners and appellants to raise all of their arguments in the opening brief, and have repeatedly held that an argument first made in a reply brief ordinarily comes too late for our consideration.''); *Barna* v. *Bd. Of Sch. Dirs. of the Panther Valley Sch. Dist.,* 877 F.3d 136, 145–46 (3d Cir. 2017) (''We have long recognized, consistent with Federal Rule of Appellate Procedure 28(a) . . . that an appellant's opening brief must set forth and address each argument the appellant wishes to pursue in an appeal.'' . . . . and the court will not ''reach arguments raised for the first time in a reply brief or at oral argument.'').

[65] *See* Nasdaq Rule 5815(a)(1)(B). There are some exceptions to this rule for companies subject to late filing delinquencies, companies involved in a change of control as described in Nasdaq Rule 5110(a), or companies involved in a bankruptcy or liquidation as described in Nasdaq Rule 5110(b). *See* Nasdaq Rule 5815(a)(1)(B)(i) and (ii).

[66] *See* NYSE 2003 Order, *supra* note 41, 68 FR at 2604 (stating that ensuring appeals are considered in a timely manner and resolved promptly is particularly important because the NYSE may permit an issuer to continue to trade during the appeal process).

[67] *See In re Tassaway,* Securities Exchange Act Release No. 11291, 45 S.E.C. 706, 709, 1975 SEC LEXIS 2057, at *6 (Mar. 13, 1975) (''[P]rimary emphasis must be placed on the interests of prospective future investors . . . [who are] entitled to assume that the securities in [Nasdaq] meet [Nasdaq's] standards. Hence the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect.''). *See also In re Biorelease Corporation,* Securities Exchange Act Release No. 35575, 1995 SEC LEXIS 818, at *13 (Apr. 6, 1995) (''[T]hough exclusion from the system may hurt existing investors, primary emphasis must be placed on the interests of prospective future investors. Prospective investors are entitled to assume that the securities listed [on Nasdaq] meet the system's listing standards.'').

Letter, or denial of a listing application. The Commission also believes that Nasdaq's proposal will further the purposes of Section 6(b)(5) of the Act by, among other things, protecting investors and the public interest by setting forth reasonable deadlines and a fair and efficient process for the Hearings Panel to review a delisting determination and make an informed determination regarding whether a company should remain listed on the Exchange. Where the Hearings Panel ultimately determines that the continued listing of a company on Nasdaq is not appropriate, the proposal would help to prevent such a company from unnecessarily delaying the review process and thereby extending the time period that the company's securities are traded on Nasdaq, while at the same time ensuring that companies have a fair procedure and reasonable process to provide relevant information to the Hearings Panel in a timely manner. The Commission believes the proposal furthers these goals consistent with Sections 6(b)(5) and 6(b)(7) of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[68] that the proposed rule change (SR–NASDAQ–2020–002), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[69]

J. Matthew DeLesDernier,

Assistant Secretary.

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[68] 15 U.S.C. 78s(b)(2).

[69] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90202; File No. SR–NASDAQ–2020–070]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11890 (Clearly Erroneous Transactions)

October 15, 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 13, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Nasdaq Rule 11890 (Clearly Erroneous Transactions) to the close of business on April 20, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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 purpose of the proposed rule change is to extend the current pilot program related to Rule 11890, Clearly Erroneous Transactions, to the close of business on April 20, 2021. The pilot program is currently due to expire on October 20, 2020.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[6] In April 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 that change, the Exchange amended Rule 11890 to untie the pilot program'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] The Exchange later amended Rule 11890 to extend the pilot's effectiveness to the close of business on April 20, 2020,[9] and subsequently, to the close of business on October 20, 2020.[10]

The Exchange now proposes to amend Rule 11890 to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2021. If the pilot period is not either

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 68819 (February 1, 2013), 78 FR 9438 (February 8, 2013) (SR–NASDAQ–2013–022).

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NASDAQ–2014–044).

[6] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[7] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[8] *See* Securities Exchange Act Release No. 85603 (April 11, 2019), 84 FR 16064 (April 17, 2019) (SR–NASDAQ–2019–028).

[9] *See* Securities Exchange Act Release No. 87358 (October 18, 2019), 84 FR 57129 (October 24, 2019) (SR–NASDAQ–2019–085).

[10] *See* Securities Exchange Act Release No. 88504 (March 27, 2020), 85 FR 18598 (April 2, 2020) (SR–NASDAQ–2020–013).

extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[11] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Rule 11890. Extending the effectiveness of Rule 11890 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[12] in general, and Section 6(b)(5) of the Act,[13] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[17] 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 effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–070. This file number should be included on the

[11] *See* notes 3–5, *supra*. The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] 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).

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–070 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23259 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90191; File No. SR–NYSEArca–2020–90]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Arca Options Fee

October 15, 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 8, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') to extend the waiver of certain Floor-based fixed fees. The Exchange proposes to implement the fee change effective October 8, 2020.[4] The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to extend the waiver of certain Floor-based fixed fees for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective October 8, 2020.

On March 18, 2020, the Exchange announced that it would temporarily close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID–19. Following the temporary closure of the Trading Floor, the Exchange waived certain Floor-based fixed fees for April and May 2020.[5] Although the Trading Floor partially reopened on May 4, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through June, July, August and September 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or ''unmanned'' Podia for the entire month due to COVID–19 related considerations (the ''Qualifying Firms'').[6] Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the fee waiver for Qualifying Firms through the earlier of the first full month of a full reopening of the Trading Floor facilities to Floor personnel or December 2020.[7] The Exchange also proposes to clarify that Qualifying Firms would include firms that began Floor operations after March 2020 that are unable to operate at more than 50% of their Exchange-approved on-Floor staffing levels.[8]

Specifically, as with the prior fee waivers, the proposed fee waiver covers the following fixed fees for Qualifying Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Booths;
- Market Maker Podia;
- Options Floor Access;
- Wire Services; and
- ISP Connection.[9]

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on September 24, 2020. (SR–NYSEArca–2020–86) and withdrew such filing on October 8, 2020.

[5] *See* Securities Exchange Act Release Nos. 88596 (April 8, 2020), 85 FR 20796 (April 14, 2020) (SR–NYSEArca–2020–29); 88812 (May 5, 2020), 85 FR 27787 (May 11, 2020) (SR–NYSEArca–2020–38).

[6] *See* Securities Exchange Act Release Nos. 89038 (June 10, 2020), 85 FR 36447 (June 16, 2020) (SR–NYSEArca–2020–52); 89242 (June 7, 2020), 85 FR 42037 (July 13, 2020) (SR–NYSEArca–2020–60); 89480 (August 5, 2020), 85 FR 48591 (August 11, 2020) (SR–NYSEArca–2020–69); 89694 (August 27, 2020), 85 FR 54608 (September 2, 2020) (SR–NYSEArca–2020–76). *See also* Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO-LOCATION FEES.

[7] *See* proposed Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO-LOCATION FEES.

[8] *See id.* The Exchange originally filed in September 2020 (*see supra* note 4) to make explicit the treatment of firms that began Floor operations after March 2020 and this change applies to firms that joined the Exchange on September 1st or thereafter.

[9] *See id.* Given the proposed changes to the preamble of this section to update the potential duration of the fee waiver, which includes a delineation of each fee waived, the Exchange proposes to delete (the now repetitive) references that appear (again) next to each fee waived for

The proposed fee change is designed to reduce monthly costs for all Qualifying Firms whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening. Absent this change, all Qualifying Firms may experience an unexpected increase in the cost of doing business on the Exchange.[10] The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[12] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity & ETF options trades.[15]

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for all Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. Absent this change, all Qualifying Firms may experience an unexpected increase in the cost of doing business on the Exchange. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the previous fee waiver for Qualifying Firms, which affects fees charged only to Floor participants and does not apply to participants that conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend the fee waiver for Qualifying Firms because such firms have either no more than half of their Floor staff (as measured by either the March 2020 or Exchange-approved) levels or have vacant podia—and this reduction in staffing levels on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their financial detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

The Exchange believes that it is reasonable to clarify that firms that began Floor operations on the Exchange after March 2020 would be included as ''Qualifying Firms'' if such firms are unable to operate at more than 50% of their Exchange-approved on-Floor staffing levels as such treatment places all firms on a level playing field and avoids placing ''newer'' Qualifying Firms at a financial disadvantage. The Exchange believes that this proposed change would add clarity and transparency and reduce the potential for confusion in the Fee Schedule as relates to the treatment new Floor participants.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and would enhance order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [16]

Intramarket Competition. The proposed change, which continues the fee waiver for all Qualifying Firms, is designed to reduce monthly costs for those Floor participants whose operations continue to be impacted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. Absent this change, all Qualifying Firms may experience an unintended increase in the cost of doing business on

Qualifying Firms as well as to delete references to prior months (now concluded) regarding when the fee waivers were in place. *See id.*

[10] The Exchange will refund participants of the Floor Broker Prepayment Program for any prepaid 2020 fees that are waived. *See* proposed Fee Schedule, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program'') (providing that ''the Exchange will refund certain of the prepaid Eligible Fixed costs that were waived for Qualifying Firms as defined, and set forth in, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO-LOCATION FEES'').

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5).

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[14] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp*.

[15] Based on OCC data, *see id.,* the Exchange's market share in equity-based options increased from 9.59% for the month of August 2019 to 10.20% for the month of August 2020.

[16] *See* Reg NMS Adopting Release, *supra* note 13, at 37499.

the Exchange, given that the Floor has only reopened in a limited capacity. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees. In addition, Floor-based firms that are not subject to the extent of staffing shortfalls as are Qualifying Firms, *i.e.,* such firms have more than 50% of their March 2020—or Exchange-approved—staffing levels on the Floor and/or have no vacant Podia during the month, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[17] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity & ETF options trades.[18]

The Exchange believes that the proposed rule change reflects this competitive environment because it waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully staffed on-Floor operations to off-Floor. Absent this change, Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, which would make the Exchange a less competitive venue on which to trade as compared to other options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[19] of the Act and subparagraph (f)(2) of Rule 19b–4[20] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–90 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–90. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–90, and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23253 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[17] *See supra* note 14.

[18] Based on OCC data, *supra* note 15, the Exchange's market share in equity-based options was the Exchange's market share in equity-based options increased from 9.59% for the month of August 2019 to 10.20% for the month of August 2020.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34051; 812–15104]

361 Social Infrastructure Fund and 361 Infrastructure Partners, LLC

October 15, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 18(a)(2), 18(c) and 18(i) of the Act, under sections 6(c) and 23(c) of the Act for an exemption from rule 23c–3 under the Act, and for an order pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares and to impose asset-based distribution and/or service fees, and early withdrawal charges (''EWCs'').

APPLICANTS: 361 Social Infrastructure Fund (the ''Initial Fund''), 361 Infrastructure Partners, LLC (the ''Adviser'').

FILING DATES: The application was filed on March 2, 2020 and amended on July 14, 2020, September 1, 2020, and October 2, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on November 9, 2020 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov. Applicants:* by email to *deades@vedderprice.com; wclouse@361capital.com; rita.dam@mfac-ca.com.*

FOR FURTHER INFORMATION CONTACT: Samuel Thomas, Senior Counsel, at (202) 551–7952, or Daniele Marchesani, Assistant Chief Counsel, at (202) 551–6747 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Initial Fund is a Delaware statutory trust that is registered under the Act as a non-diversified, closed-end management investment company. The Initial Fund's investment objective is to seek to provide alternative income uncorrelated to public markets.

2. The Adviser, a Delaware limited liability company, is registered as an investment adviser under the Investment Advisers Act of 1940, as amended. The Adviser will serve as investment adviser to the Initial Fund.

3. The applicants seek an order to permit the Initial Fund to issue multiple classes of shares and to impose EWCs, asset-based distribution and/or service fees with respect to certain classes.

4. Applicants request that the order also apply to any continuously-offered registered closed-end management investment company that has been previously organized or that may be organized in the future for which the Adviser, or any entity controlling, controlled by, or under common control with the Adviser, or any successor in interest to any such entity,[1] acts as investment adviser and that operates as an interval fund pursuant to rule 23c–3 under the Act or provides periodic liquidity with respect to its shares pursuant to rule 13e–4 under the Securities Exchange Act of 1934 (''Exchange Act'') (each, a ''Future Fund'' and together with the Initial Fund, the ''Funds'').[2]

5. The Initial Fund anticipates making a continuous public offering of its shares following the effectiveness of its registration statement. Applicants state that additional offerings by any Fund relying on the order may be on a private placement or public offering basis. Shares of the Funds will not be listed on any securities exchange nor quoted on any quotation medium. The Funds do not expect there to be a secondary trading market for their shares.

6. If the requested relief is granted, the Initial Fund anticipates offering Class I shares that are not subject to sales, charges, EWCs or asset-based distribution or service fees. However, the Initial Fund may in the future offer additional classes of shares and/or another sales charge structure. Because of the different distribution fees, service fees and any other class expenses that may be attributable to each class of shares, the net income attributable to, and the dividends payable on, each class of shares may differ from each other.

7. Applicants state that, from time to time, the Fund may create additional classes of shares, the terms of which may differ from the initial classes pursuant to and in compliance with rule 18f–3 under the Act.

8. Applicants state that shares of a Fund may be subject to an early repurchase fee (''Early Repurchase Fee'') at a rate of no greater than 2% of the shareholder's repurchase proceeds if the interval between the date of purchase of the shares and the valuation date with respect to the repurchase of those shares is less than one year. Any Early Repurchase Fees will apply to all classes of shares of a Fund, consistent with section 18 of the Act and rule 18f–3 thereunder. To the extent a Fund determines to waive, impose scheduled variations of, or eliminate any Early Repurchase Fee, it will do so in compliance with the requirements of rule 22d–1 under the Act as if the Early Repurchase Fee were a CDSL (defined below) and as if the Fund were an open-end investment company and the Fund's waiver of, scheduled variation in, or elimination of, any such Early Repurchase Fee will apply uniformly to all shareholders of the Fund regardless of class.

9. Applicants state that the Initial Fund has adopted a fundamental policy to repurchase a specified percentage of its shares at net asset value on a quarterly basis. Such repurchase offers will be conducted pursuant to rule 23c–3 under the Act. Any Future Fund will likewise adopt fundamental investment policies in compliance with rule 23c–3 and make periodic repurchase offers to its shareholders or will provide periodic liquidity with respect to its shares pursuant to rule 13e–4 under the Exchange Act. Any repurchase offers made by the Funds will be made to all holders of shares of each such Fund.

10. Applicants represent that any asset-based service and/or distribution fees for each class of shares of the Funds will comply with the provisions of the FINRA Rule 2341(d) (''FINRA Sales Charge Rule''). Applicants also represent that each Fund will disclose in its prospectus the fees, expenses and other characteristics of each class of shares offered for sale by the prospectus, as is required for open-end multiple class funds under Form N–1A. As is required for open-end funds, each Fund will disclose its expenses in shareholder reports, and describe any arrangements that result in breakpoints in or elimination of sales loads in its prospectus.[3] In addition, applicants will

[1] A successor in interest is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] Any Fund relying on this relief in the future will do so in compliance with the terms and conditions of the application. Applicants represent that each entity presently intending to rely on the requested relief is listed as an applicant.

[3] *See* Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Investment Company Act Release No. 26372 (Feb. 27, 2004) (adopting release) (requiring open-end investment companies to disclose fund

Continued

comply with applicable enhanced fee disclosure requirements for fund of funds, including registered funds of hedge funds.[4]

11. Each of the Funds will comply with any requirements that the Commission or FINRA may adopt regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements, as if those requirements applied to the Fund. In addition, each Fund will contractually require that any distributor of the Fund's shares comply with such requirements in connection with the distribution of such Fund's shares.

12. Each Fund will allocate all expenses incurred by it among the various classes of shares based on the net assets of that Fund attributable to each class, except that the net asset value and expenses of each class will reflect the expenses associated with the distribution plan of that class (if any), service fees attributable to that class (if any), including transfer agency fees, and any other incremental expenses of that class. Expenses of a Fund allocated to a particular class of shares will be borne on a pro rata basis by each outstanding share of that class.

13. Applicants state that each Fund may impose an EWC on shares submitted for repurchase that have been held for less than a specified period and may waive the EWC for certain categories of shareholders or transactions to be established from time to time. Applicants state that each Fund will apply the EWC (and any waivers, scheduled variations, or eliminations of the EWC) uniformly to all shareholders in a given class and consistently with the requirements of rule 22d–1 under the Act as if the Funds were open-end investment companies.

14. Each Fund operating as an interval fund pursuant to rule 23c–3 under the Act may offer its shareholders an exchange feature under which the shareholders of the Fund may, in connection with such Fund's periodic repurchase offers, exchange their shares of the Fund for shares of the same class of (i) registered open-end investment companies or (ii) other registered closed-end investment companies that comply with rule 23c–3 under the Act and continuously offer their shares at net asset value, that are in the Fund's group of investment companies (collectively, ''Other Funds''). Shares of a Fund operating pursuant to rule 23c–3 that are exchanged for shares of Other Funds will be included as part of the amount of the repurchase offer amount for such Fund as specified in rule 23c–3 under the Act. Any exchange option will comply with rule 11a–3 under the Act, as if the Fund were an open-end investment company subject to rule 11a–3. In complying with rule 11a–3, each Fund will treat an EWC as if it were a contingent deferred sales load (''CDSL'').

Applicants' Legal Analysis

Multiple Classes of Shares

1. Section 18(a)(2) of the Act provides that a closed-end investment company may not issue or sell a senior security that is a stock unless certain requirements are met. Applicants state that the creation of multiple classes of shares of the Funds may violate section 18(a)(2) because the Funds may not meet such requirements with respect to a class of shares that may be a senior security.

2. Section 18(c) of the Act provides, in relevant part, that a closed-end investment company may not issue or sell any senior security if, immediately thereafter, the company has outstanding more than one class of senior security. Applicants state that the creation of multiple classes of shares of the Funds may be prohibited by section 18(c), as a class may have priority over another class as to payment of dividends because shareholders of different classes would pay different fees and expenses.

3. Section 18(i) of the Act provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that multiple classes of shares of the Funds may violate section 18(i) of the Act because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule or regulation under the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) from sections 18(a)(2), 18(c) and 18(i) to permit the Funds to issue multiple classes of shares.

5. Applicants submit that the proposed allocation of expenses relating to distribution and voting rights among multiple classes is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit a Fund to facilitate the distribution of its securities and provide investors with a broader choice of shareholder services. Applicants assert that the proposed closed-end investment company multiple class structure does not raise the concerns underlying section 18 of the Act to any greater degree than open-end investment companies' multiple class structures that are permitted by rule 18f–3 under the Act. Applicants state that each Fund will comply with the provisions of rule 18f–3 as if it were an open-end investment company.

Early Withdrawal Charges

1. Section 23(c) of the Act provides, in relevant part, that no registered closed-end investment company shall purchase securities of which it is the issuer, except: (a) On a securities exchange or other open market; (b) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of securities of the class to be purchased; or (c) under other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors.

2. Rule 23c–3 under the Act permits an ''interval fund'' to make repurchase offers of between five and twenty-five percent of its outstanding shares at net asset value at periodic intervals pursuant to a fundamental policy of the interval fund. Rule 23c–3(b)(1) under the Act permits an interval fund to deduct from repurchase proceeds only a repurchase fee, not to exceed two percent of the proceeds, that is paid to the interval fund and is reasonably intended to compensate the fund for expenses directly related to the repurchase.

3. Section 23(c)(3) provides that the Commission may issue an order that would permit a closed-end investment company to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

expenses in shareholder reports); and Disclosure of Breakpoint Discounts by Mutual Funds, Investment Company Act Release No. 26464 (June 7, 2004) (adopting release) (requiring open-end investment companies to provide prospectus disclosure of certain sales load information).

[4] Fund of Funds Investments, Investment Company Act Rel. Nos. 26198 (Oct. 1, 2003) (proposing release) and 27399 (Jun. 20, 2006) (adopting release). *See* also Rules 12d1–1, *et seq.* of the Act.

4. Applicants request relief under section 6(c), discussed above, and section 23(c)(3) from rule 23c–3 to the extent necessary for the Funds to impose EWCs on shares of the Funds submitted for repurchase that have been held for less than a specified period.

5. Applicants state that the EWCs they intend to impose are functionally similar to CDSLs imposed by open-end investment companies under rule 6c–10 under the Act. Rule 6c–10 permits open-end investment companies to impose CDSLs, subject to certain conditions. Applicants note that rule 6c–10 is grounded in policy considerations supporting the employment of CDSLs where there are adequate safeguards for the investor and state that the same policy considerations support imposition of EWCs in the interval fund context. In addition, applicants state that EWCs may be necessary for the distributor to recover distribution costs. Applicants represent that any EWC imposed by the Funds will comply with rule 6c–10 under the Act as if the rule were applicable to closed-end investment companies. The Funds will disclose EWCs in accordance with the requirements of Form N–1A concerning CDSLs.

Asset-Based Distribution and/or Service Fees

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates unless the Commission issues an order permitting the transaction. In reviewing applications submitted under section 17(d) and rule 17d–1, the Commission considers whether the participation of the investment company in a joint enterprise or joint arrangement is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

2. Rule 17d–3 under the Act provides an exemption from section 17(d) and rule 17d–1 to permit open–end investment companies to enter into distribution arrangements pursuant to rule 12b–1 under the Act. Applicants request an order under section 17(d) and rule 17d–1 under the Act to the extent necessary to permit the Fund to impose asset–based distribution and/or service fees. Applicants have agreed to comply with rules 12b–1 and 17d–3 as if those rules applied to closed-end investment companies, which they believe will resolve any concerns that might arise in connection with a Fund financing the distribution of its shares through asset-based distribution fees.

3. For the reasons stated above, applicants submit that the exemptions requested under section 6(c) are necessary and appropriate in the public interest and are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants further submit that the relief requested pursuant to section 23(c)(3) will be consistent with the protection of investors and will insure that applicants do not unfairly discriminate against any holders of the class of securities to be purchased. Finally, applicants state that the Funds' imposition of asset-based distribution and/or service fees is consistent with the provisions, policies and purposes of the Act and does not involve participation on a basis different from or less advantageous than that of other participants.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Each Fund relying on the order will comply with the provisions of rules 6c–10, 12b–1, 17d–3, 18f–3, 22d–1, and, where applicable, 11a–3 under the Act, as amended from time to time, as if those rules applied to closed-end management investment companies, and will comply with the FINRA Sales Charge Rule, as amended from time to time, as if that rule applied to all closed–end management investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23242 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90204; File No. SR–CBOE–2020–034]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Authorize for Trading Flexible Exchange Options on Full-Value Indexes With a Contract Multiplier of One

October 15, 2020.

On June 30, 2020, Cboe Exchange, Inc. (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to authorize for trading flexible exchange options (''FLEX Options'') on full-value indexes with a contract multiplier of one. The proposed rule change was published for comment in the **Federal Register** on July 20, 2020.[3] On September 2, 2020, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.

I. Description of the Proposal and Comment Received [7]

The Exchange has proposed to amend its rules to authorize for trading on the Exchange FLEX Options on full-value indexes (''FLEX Index Options'') with a contract multiplier of one. Currently, CBOE Rule 4.21(b)(1) states that the index multiplier for FLEX Index Options is 100. The Exchange proposes to provide that, in addition to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89308 (July 14, 2020), 85 FR 43923 (''Notice''). Comments received on the proposed rule change are available on the Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-034/srcboe2020034.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89743, 85 FR 55717 (September 9, 2020). The Commission designated October 18, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] For a complete description of the Exchange's proposal, *see* the Notice, *supra* note 3.

current index multiplier of 100, the index multiplier for FLEX Index Options on full-value indexes may also be one.

The Exchange's rules provide that, when submitting a FLEX Order, the submitting FLEX Trader [8] must include all required terms of a FLEX Option series,[9] including the underlying equity security or index (*i.e.,* the FLEX Option class) on the FLEX Order. The proposed rule change would amend Rule 4.21(b)(1) to state that if a FLEX Trader specifies a full-value index on a FLEX Order, the FLEX Trader must also include whether the index option has an index multiplier of 100 or 1 when identifying the class of FLEX Order. In the proposal, the Exchange stated that each FLEX Index Option series in a FLEX Index Option class with a multiplier of one will include the same flexible terms as any other FLEX Option series, including strike price, settlement, expiration date, and exercise style as required by Rule 4.21(b).[10]

The Exchange's rules permit trading in a put or call FLEX Option series only if it does not have the same exercise style, same expiration date, and same exercise price as a non-FLEX option series on the same underlying security or index that is already available for trading.[11] Rule 1.1 defines the term ''series'' as all option contracts of the same class that are the same type of option and have the same exercise price and expiration date. The Exchange stated that it therefore believes that a FLEX Option series in one class may have the same exercise style, expiration date, settlement, and exercise price as a non-FLEX option series in a different class, even if they are on the same underlying security or index. The Exchange stated that it believes, for example, pursuant to the proposed rule change, a FLEX Option series overlying the S&P 500 with a multiplier of one may have the same exercise style, expiration date, settlement, and exercise price as a non-FLEX option series overlying the S&P 500 with a multiplier of 100, as they are series in different classes.

The Exchange represented that FLEX Index Options with a multiplier of one will be traded in the same manner as all other FLEX Options pursuant to Chapter 5, Section F of the Exchange's rules. The proposed rule change would amend Rule 4.21(b)(6) to state that the exercise price for a FLEX Index Option series in a class with a multiplier of one is set at the same level as the exercise price for a FLEX Index Option series in a class with a multiplier of 100. The proposed rule change also would add to Rule 5.3(e)(3) that FLEX Index Options with a multiplier of one must be expressed in (a) U.S. dollars and decimals if the exercise price for the FLEX Option series is a fixed price, or (b) a percentage, if the exercise price for the FLEX Option series is a percentage of the closing value of the underlying equity security or index on the trade date, per 1/100th unit. In addition, the proposed rule change would state that the Exchange's system rounds bids and offers of FLEX Options to the nearest minimum increment following application of the designated percentage to the closing value of the underlying security or index. The Exchange stated that it believes that this is consistent with current functionality and is merely a clarification in the Exchange's rules.

The Exchange stated that it believes a FLEX Option position with a multiplier of one would not be fungible with any non-FLEX index option. Pursuant to Rule 4.22(a), a FLEX Option position becomes fungible with a non-FLEX option that becomes listed with identical terms. The Exchange stated that it does not list for trading any non-FLEX index option class with a multiplier of one, and that, therefore, in its view, no FLEX Index Option series with a multiplier of 100 could be identical to, and fungible with, any non-FLEX option pursuant to Rule 4.22(a) despite the fact that all the other terms of the FLEX Index Option could be identical to a non-FLEX index option. The Exchange stated that if it determines to list non-FLEX index options with a one multiplier in the future, then a FLEX Index Option with a multiplier of one would become fungible with any non-FLEX index option with a multiplier of one with the same terms pursuant to Rule 4.22(a).

The proposed rule change would amend Rule 8.35(a) regarding position limits for FLEX Options to describe how FLEX Index Options with a multiplier of one will be counted for purposes of determining compliance with position limits. Because 100 FLEX Index Options with a multiplier of one are equivalent to one FLEX Index Option with a multiplier of 100 overlying the same index due to the difference in contract multipliers, proposed Rule 8.35(a)(7) states that for purposes of determining compliance with the position limits under Rule 8.35, 100 FLEX Index Option contracts with a multiplier of one equal one FLEX Index Option contract with a multiplier of 100 with the same underlying index.[12] The Exchange stated that it believes that this is consistent with the current treatment of other reduced-value FLEX Index Options with respect to position limits. The proposed rule change also would amend Rule 8.42 to make a corresponding statement regarding the application of exercise limits to FLEX Index Options with a multiplier of one. The Exchange stated that the margin requirements set forth in Chapter 10 of the Exchange's rules would apply to FLEX Index Options with a multiplier of one (as they currently do to all FLEX Options).[13]

The Exchange stated that it believes that permitting investors to trade FLEX Index Option contracts on full-value indexes with an index multiplier of one will provide investors with additional granularity in the prices at which they may execute and exercise their FLEX Options on the Exchange, and thus provide investors with an additional tool to manage the positions and associated risk in their portfolios based on notional value, which currently may equal a fraction of a standard contract.

The Exchange represented that, with regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems

[8] A ''FLEX Trader'' is a Trading Permit Holder the Exchange has approved to trade FLEX Options on the Exchange.

[9] These terms include, in addition to the underlying equity security or index, the type of options (put or call), exercise style, expiration date, settlement type, and exercise price. *See* Rule 4.21(b). A ''FLEX Order'' is an order submitted in FLEX Options. The submission of a FLEX Order makes the FLEX Option series in that order eligible for trading. *See* Rule 5.72(b).

[10] The Exchange stated that because these are the terms designated by the Commission as those that constitute standardized options, therefore, the Exchange believes the proposed rule change is consistent with Section 9(b) of the Exchange Act. *See* Securities Exchange Act Release No. 31910 (February 23, 1993), 58 FR 12056 (March 2, 1993) (Order Designating FLEX Options as Standardized Options under Rule 9b–1 of the Exchange Act) (''FLEX Rule 9b–1 Order'').

[11] *See* Rule 4.21(a)(1). Non-FLEX options are standardized options traded on CBOE's non-FLEX options market. All terms of non-FLEX options such as strike prices, exercise types, expiration dates, and settlement types are the same and standardized for all market participants trading non-FLEX options. This is in contrast to the Exchange's FLEX Options market where such terms can be ''flexed'' by market participants.

[12] According to the Exchange, the proposed rule change would make a corresponding change to Rule 8.35(b) to clarify that, like reduced-value FLEX contracts, FLEX Index Option contracts with a multiplier of one will be aggregated with full-value contracts and counted by the amount by which they equal a full-value contract for purposes of the reporting obligation in that provision (*i.e.,* 100 FLEX Index Options with a multiplier of one will equal one FLEX Index Option contract with a multiplier of 100 overlying the same index).

[13] The Exchange stated that, pursuant to Rule 8.43(j), FLEX Index Options with a multiplier of one will be aggregated with non-FLEX index options on the same underlying index in the same manner as all other FLEX Index Options.

capacity to handle the potential additional traffic associated with the listing and trading of FLEX Index Options with a multiplier of one. The Exchange also stated that it understands that the Options Clearing Corporation will be able to accommodate the listing and trading of FLEX Index Options with a multiplier of one. The Exchange stated that, to reduce any potential confusion, FLEX Index Options with a multiplier of one would be listed with different trading symbols than FLEX Index Options with a multiplier of 100.

To date the Commission has received one comment letter, which supports the proposed rule change.[14] The commenter stated that, as a customer of CBOE, the proposal would ''dramatically increase the ease of use FLEX options'' in its hedging process.[15]

II. Proceedings To Determine Whether To Approve or Disapprove SR–CBOE–2020–034 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[16] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as stated below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[17] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with the Exchange Act, and, in particular, with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[18]

The proposal would permit the trading of FLEX Index Options with a contract multiplier of one, which could have the exact same, or similar, terms as non-FLEX options[19] on the same index with a multiplier of 100.[20] The trading of FLEX Index Options with a contract multiplier of one under the proposal presents issues related to price protection in currently-existing non-FLEX index options on the same underlying index. Specifically, permitting two options with different contract multipliers on the same underlying interest could have the effect of allowing FLEX Options with a multiplier of one to gain priority over customer orders on the book for the similar non-FLEX index options overlying the same index and also allow bypassing or trading through the national best bid or offer (''NBBO'') in non-FLEX index options. Furthermore, the proposal could lead to market fragmentation by allowing FLEX Index Options to trade with a multiplier of one and index options on the same index to trade in the non-FLEX market with a multiplier of 100. Accordingly, the Commission believes there are questions as to whether the proposal is consistent with Section 6(b)(5) of the Exchange Act and the requirements that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and in general, to protect investors and the public interest, and whether the proposal is consistent with the maintenance of fair and orderly markets under the Exchange Act.

The FLEX Rule 9b–1 Order deemed FLEX Options to be standardized options for purposes of the options disclosure framework established under Exchange Act Rule 9b–1, which applies solely to standardized options.[21] The FLEX Rule 9b–1 Order specifically discussed the ability to flex strike prices, settlement, expiration dates, and exercise style, and states that all of the other terms of FLEX Options are standardized.[22] In addition, the Original FLEX Order specifically stated that the index multiplier, among other terms, is the same for FLEX as for non-FLEX index options.[23] Accordingly, the Commission believes there are questions as to whether the Exchange's proposal is consistent with the FLEX Rule 9b–1 Order and Original FLEX Order and the policies underlying those orders, and whether the proposal is consistent with Section 6(b)(5) of the Exchange Act.

The Commission notes that, under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder . . . is on the self-regulatory organization [''SRO''] that proposed the rule change.[24] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[25] and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rule and regulations.[26]

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[27] to determine whether the proposal should be approved or disapproved.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would

[14] *See* letter from Joyana Pilquist, CFA, dated August 24, 2020.

[15] *See id.*

[16] 15 U.S.C. 78s(b)(2)(B).

[17] *Id.*

[18] 15 U.S.C. 78f(b)(5).

[19] *See supra* note 11.

[20] Under the proposal, 100 FLEX Index Options with a multiplier of one would be economically equivalent to one non-FLEX index option with the same exact terms.

[21] *See* FLEX Rule 9b–1 Order, *supra* note 10.

[22] *See id.*

[23] *See* Securities Exchange Act Release No. 31920 (February 24, 1993), 58 FR 12280 at 12282 (March 3, 1993) (original order approving a CBOE proposal to list and trade FLEX Options on the S&P 100 and 500 Index options (''Original FLEX Order'')). The Original FLEX Order stated, among other things, that except for flexing certain terms different from a standardized option (*i.e.,* (1) strike prices; (2) exercise types; (3) expiration date; and (4) form of settlement), ''[o]ther terms, such as the level of the index multiplier and the nature of the rights and obligations FLEX Option purchasers and sellers, are the same for FLEX as for non-FLEX index options.'' The Commission notes that the Exchange does not currently allow trading of options with a multiplier of one on either FLEX or non-FLEX index options.

[24] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[25] *See id.*

[26] *See id.*

[27] 15 U.S.C. 78s(b)(2)(B).

be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[28]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by November 12, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 25, 2020.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[29] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–034 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–034. 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–CBOE–2020–034 and should be submitted on or before November 12, 2020. Rebuttal comments should be submitted by November 25, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23261 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[28] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[29] *See supra* note 3.

[30] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90211; File No. 265–33]

Asset Management Advisory Committee; Meeting

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting.

SUMMARY: Notice is being provided that the Securities and Exchange Commission Asset Management Advisory Committee (''AMAC'') will hold a public meeting on November 5, 2020, by remote means. The meeting will begin at 9:00 a.m. (ET) and will be open to the public via webcast on the Commission's website at *www.sec.gov.* Persons needing special accommodations to take part because of a disability should notify the contact person listed below. The public is invited to submit written statements to the Committee. The meeting will include potential recommendations concerning COVID–19 related operational issues.

DATES: The public meeting will be held on November 5, 2020. Written statements should be received on or before October 29, 2020.

ADDRESSES: The meeting will be held by remote means and webcast on *www.sec.gov.* Written statements may be submitted by any of the following methods. To help us process and review your statement more efficiently, please use only one method. At this time, electronic statements are preferred.

Electronic Statements

- Use the Commission's internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number 265–33 on the subject line; or

Paper Statements

- Send paper statements to Vanessa Countryman, Federal Advisory Committee Management Officer, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–33. This file number should be included on the subject line if email is used. The Commission will post all statements on the Commission's website at (*http://www.sec.gov/comments/265-33/265-33.htm*).

Statements also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. For up-to-date information on the availability of the Public Reference Room, please refer to *https://www.sec.gov/fast-answers/answerspublicdocshtm.html* or call (202) 551–5450.

All statements received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christian Broadbent, Senior Special Counsel, Angela Mokodean, Branch Chief, or Jay Williamson, Branch Chief, at (202) 551–6720, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549–3628.

SUPPLEMENTARY INFORMATION: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 1, and the regulations thereunder, Dalia Blass, Designated Federal Officer of the Committee, has ordered publication of this notice.

Dated: October 16, 2020.

Vanessa A. Countryman,

Committee Management Officer.

[FR Doc. 2020–23302 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90195; File No. SR–CBOE–2020–090]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend the Definition of ''Current Market Value'' With Respect to Certain Index Options for Purposes of Calculating Margin Requirements

October 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend the definition of ''current market value'' with respect to certain index options for purposes of calculating margin requirements. The text of the proposed rule change is provided below.

(additions are italicized; deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 10.3. Margin Requirements

(a) *Definitions.* For purposes of this Rule, the following terms shall have the meanings specified below.

(1) No change.

(2) The term ''current market value'' is as defined in Section 220.3 of Regulation T of the Board of Governors of the Federal Reserve System. At any other time, in the case of options, stock index warrants, currency index warrants and currency warrants, it shall mean the closing price of that series of options or warrants on the Exchange on any day with respect to which a determination of current market value is made*, except in the case of certain index options determined by the Exchange, it shall be based on quotes for that series of options on the Exchange 15 minutes prior to the close of trading on any day with respect to which a determination of current market value is made.* In the case of other securities, it shall mean the preceding business day's closing price as shown by any regularly published reporting or quotation service. If there is no closing price *or quotes, as applicable,* on the option or on another security, a TPH organization may use a reasonable estimate of the current market value of the security as of the close of business *or as of 15 minutes prior to the closing of trading, respectively,* on the preceding business day.

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), 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 the definition of ''current market value'' with respect to certain index options for purposes of calculating margin requirements. Rule 10.3(a)(2) currently defines the term ''current market value'' as follows:

The term ''current market value'' is as defined in Section 220.3 of Regulation T of the Board of Governors of the Federal Reserve System. At any other time, in the case of options, stock index warrants, currency index warrants and currency warrants, it shall mean the closing price of that series of options or warrants on the Exchange on any day with respect to which a determination of current market value is made. In the case of other securities, it shall mean the preceding business day's closing price as shown by any regularly published reporting or quotation service. If there is no closing price on the option or on another security, a TPH organization may use a reasonable estimate of the current market value of the security as of the close of business on the preceding business day.[5]

Rule 10.3 and other Rules in Chapter 10 of the Exchange's Rulebook describe how margin requirements are calculated for market participants' positions in options (and certain other securities), including strategy-based margin and customer portfolio margin requirements, which requirements are generally based on the current market value of the option series. For example, the minimum margin required in customer margin accounts for broad-based index options is 100% of the current market value of the option plus 10% of the current underlying index value (for calls) or the aggregate exercise price (for puts).[6] These requirements are determined on a daily basis for market participants' securities accounts that hold options positions.[7] Most index options that are listed for trading on the Exchange close for trading at 4:15 p.m. Eastern time.[8] Therefore, daily margin requirements for those index options are currently based on the closing trade prices of those options series at that time.[9]

Index options and futures are complementary investment tools available to market participants. The Exchange understands that market participants often incorporate prices of related futures products when pricing options. Additionally, market participants' investment and hedging strategies often involve index options

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] Section 220.3 [*sic*] of Regulation T of the Board of Governors of the Federal Reserve System defines ''current market value'' of a security as (1) throughout the day of the purchase or sale of a security, the security's total cost of purchase or the net proceeds of its sale including any commissions charged; or (2) at any other time, the closing sale price of the security on the preceding business day, as shown by any regularly published reporting or quotation service. If there is no closing sale price, the creditor may use any reasonable estimate of the market value of the security as of the close of business on the preceding business day.'' *See* 12 CFR 220.2. The term ''marking'' value is often used to refer to the current market value for capital and margin purposes.

[6] *See* Rule 10.3(c)(5).

[7] The Exchange notes the Options Clearing Corporation (''OCC'') calculates the daily margin requirements for Clearing Members' options positions at OCC. The Exchange understands OCC intends to incorporate a corresponding change regarding the time at which the value of a series is determined into its procedures for calculating margin requirements.

[8] *See* Rule 5.1(b)(2).

[9] The Exchange notes the daily margin requirements for index options that close at 4:00 p.m. Eastern time are based on the closing trade at that time.

and related futures products. For example, market participants often engage in hedging strategies that involve options on the S&P 500 Index (''SPX options''), which trade exclusively on the Exchange, and e-mini S&P 500 Index futures (''S&P futures''), which trade on the Chicago Mercantile Exchange (''CME'').[10] Additionally, market participants regularly price SPX options based on then-current prices of the S&P futures. Several futures products—S&P futures, Russell futures, and Dow futures—related to certain index options that are listed for trading on the Exchange (SPX options, XSP options, OEX options, XEO options, RUT options, DJX options, and VIX options) are listed on CME.

Currently, CME determines the daily settlement price for those futures at 4:15 p.m. Eastern time,[11] which is the same time at which the current market value for margin requirements purposes is determined for the above-referenced index options. The Exchange understands that CME intends to change this time to 4:00 p.m. Eastern time on October 26, 2020.[12] Therefore, to maintain alignment between the times at which the current market value of index options is determined and the daily settlement price of related futures is determined for purposes of calculating daily margin requirements, the Exchange proposes to amend the definition of current market value with respect to certain Exchange-designated index options [13] to be based on quotes of that series of options on the Exchange 15 minutes prior to the close of trading on any day with respect to which a determination of current market value is made (and to make conforming changes throughout the definition).[14] The Exchange intends to apply an indicator to the quotes disseminated to OPRA that will be the daily mark for a series on the applicable trading day. The Exchange anticipates initially applying this proposed definition to the following options: SPX, XSP, OEX, XEO, VIX, RUT, and DJX. The proposed flexibility will permit the Exchange to respond in a timely manner to any changes going forward to daily settlement times of futures by other trading venues related to options that trade on the Exchange and maintain alignment between those times as appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [16] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3) of the Act,[18] which authorizes the Exchange to, among other things, prescribe standards of financial responsibility or operational capability and standards of training, experience and competence for its Trading Permit Holders and person associated with Trading Permit Holders.

In particular, the Exchange believes maintaining alignment between the times at which related options and futures prices are used to calculate daily margin requirements will protect investors. Among other things, the Exchange believes retaining this alignment will prevent increased risk to market participants that hold positions across related options and futures products due to potential disparities that could occur in relation to factors such as margin requirements, pay-collect obligations, the synchronization of existing hedges, and the level of end-of-day risk. If the daily valuation times for these products were different, offset relationships between options and futures positions may be lost, which may distort the true status of risk within a market participant's portfolio. Use of the same determination time for margin calculations reduces risk of a disconnect between the values used in a market participant's securities account and the market participant's futures account. For example, if the Exchange continued to use the closing prices of index options as the current market value of those options while the daily settlement of related futures used prices 15 minutes prior to the close, there could be a significant misalignment between these values, particularly if there were to be a large price move in the equity markets during that 15-minute time period.

The Exchange believes the proposed rule change will also promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by permitting continued alignment of daily marks for related products that market participants often use in a complementary manner as part of their investment and hedging strategies. The Act authorizes the Exchange to prescribe standards of financial responsibility for Trading Permit Holders, and the proposed rule change regarding the daily value to be used for calculation of daily margin requirements for options positions is consistent with that authority.

[10] Similar pricing and strategy relationships exist between Mini-S&P 500 Index options (''XSP options'') and American- and European-style S&P 100 Index options (''OEX options'' and ''XEO options'', respectively) and S&P futures; Russell 2000 Index options (''RUT options'') and e-mini Russell 2000 Index futures (''Russell futures''); and Dow Jones Industrial Average Index options (''DJX options'') and e-mini Dow Index futures (''Dow futures''). In addition, given the relationship between options on the Cboe Volatility Index (''VIX options'') and the S&P 500 Index, investment and hedging strategies that involve both VIX options and VIX futures (which trade on the Cboe Futures Exchange, which is making a corresponding rule change). It is common for market participants to hedge VIX futures with SPX options and to hedge VIX options with VIX futures.

[11] Similar to the index options that trade on the Exchange, these future products close for trading at 4:15 p.m. Eastern time.

[12] *See* CME Notice SER–8591, issued September 22, 2020, *available at https://www.cmegroup.com/notices/ser/2020/09/SER-8591.html.*

[13] Pursuant to Rule 1.5, the Exchange announces to Trading Permit Holders all determinations it makes pursuant to the Rules (which would include the determination of indexes subject to the proposed rule change) via specifications, notices, or regulatory circulars with appropriate advanced notice, which are posted on the Exchange's website, or as otherwise provided in the Rules (among other methods).

[14] *See* Cboe Exchange Notice C2020092202, issued September 22, 2020, *available at https://cdn.cboe.com/resources/release_notes/2020/Adjustment-of-Daily-Settlement-Time-for-Proprietary-Index-Products-Notice.pdf.* Fifteen minutes prior to the close of trading will generally equate to 4:00 p.m. Eastern time. The Exchange notes the proposed rule change does not change the time at which trading in the applicable index options will close. In other words, on a regular trading day, while the current market value for these index options will be determined at 4:00 p.m. Eastern time, those index options will continue to trade until 4:15 p.m. Eastern time (any options trades that occur between 4:00 and 4:15 on that trading day would use the 4:00 current market value for margin calculation purposes).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *Id.*

[18] 15 U.S.C. 78f(c)(3).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The primary purpose of the proposed rule change is to maintain alignment of margin calculations for related products in the securities and futures industries. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change related to margin requirements for the designated options will apply in the same manner to all market participants that hold positions in those options. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it relates solely to margin requirements for options that trade exclusively on the Exchange. Additionally, as noted above, the proposed rule change is intended to maintain alignment of the daily valuation time of index options with the daily valuation time of related future products that trade on another exchange.

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

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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[19] and Rule 19b–4(f)(6)[20] thereunder.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, as required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that waiver of the 30-day operative delay will permit the Exchange to maintain continuous alignment of the times at which the current market value of index options in securities accounts and the daily settlement value of related futures in futures accounts are determined. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Exchange to maintain the continuous alignment of the times at which the current market value of index options and related futures are determined, thereby avoiding confusion that could result from potential price distortions for investors holding positions in both index options and related futures. For this reason, the Commission 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 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:

[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).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov. Please include File Number SR–CBOE–2020–090 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–090. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2020–090 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23255 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90209; File Nos. SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08]

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Notice of Filings of Partial Amendment No. 3 and Order Granting Accelerated Approval to Proposed Rule Changes, Each as Modified by Partial Amendment No. 3, To Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections

October 15, 2020.

I. Introduction

On January 30, 2020, New York Stock Exchange LLC (''NYSE''), NYSE American LLC (''NYSE American''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Chicago, Inc. (''NYSE Chicago''), and NYSE National, Inc. (''NYSE National'') (collectively, the ''Exchanges'') each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a schedule of Wireless Connectivity Fees and Charges (''Wireless Fee Schedule'') listing available wireless connections between the Mahwah, New Jersey data center (''Mahwah Data Center'') and other data centers. The proposed rule changes (collectively, ''Wireless I'') were published for comment in the **Federal Register** on February 18, 2020.[3] On April 1, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either approve the Wireless I proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.[5]

On February 11, 2020, NYSE, NYSE Arca, NYSE Chicago, and NYSE National each filed with the Commission, pursuant to Section 19(b)(1) of the Act [6] and Rule 19b–4 thereunder,[7] a proposed rule change to amend the proposed Wireless Fee Schedule to add wireless connections for the transport of certain market data of the Exchanges. NYSE American filed with the Commission a substantively identical filing on February 12, 2020. The proposed rule changes (collectively, ''Wireless II'') were published for comment in the **Federal Register** on February 25, 2020.[8] On April 1, 2020, pursuant to Section 19(b)(2) of the Act,[9] the Commission designated a longer period within which to either approve the Wireless II proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.[10]

On May 18, 2020, the Division of Trading and Markets, for the Commission pursuant to delegated authority, instituted proceedings to determine whether to approve or disapprove the Wireless I and Wireless II proposed rule changes.[11] On July 27, 2020, the Exchanges each filed Partial Amendment No. 1 to the Wireless I and Wireless II proposed rule changes, notices of which were published for comment in the **Federal Register** on August 7, 2020.[12] On August 12, 2020, pursuant to Section 19(b)(2) of the Act,[13] the Commission designated a longer period for Commission action on proceedings to determine whether to approve or disapprove the Wireless I and Wireless II proposed rule changes, as amended.[14]

On September 10, 2020, the Exchanges each filed Partial Amendment No. 2 to the proposed rule changes.[15] On September 29, 2020, the Exchanges each filed Partial Amendment No. 3 to the proposed rule changes.[16]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 88168 (February 11, 2020), 85 FR 8938 (February 18, 2020) (SR–NYSE–2020–05) (''Wireless I Notice''); 88169 (February 11, 2020), 85 FR 8946 (February 18, 2020) (SR–NYSEAMER–2020–05); 88170 (February 11, 2020), 85 FR 8956 (February 18, 2020) (SR–NYSEArca–2020–08); 88172 (February 11, 2020), 85 FR 8923 (February 18, 2020) (SR–NYSECHX–2020–02); and 88171 (February 11, 2020), 85 FR 8930 (February 18, 2020) (SR–NYSENAT–2020–03) (collectively, the ''Wireless I Notices''). Comments received on the Wireless I Notices, including Exchange responses, are available on the Commission's website at: *https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005.htm*. For ease of reference, citations to the Wireless I Notice(s) are to the Notice for SR–NYSE–2020–05.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 88539 (April 1, 2020), 85 FR 19553 (April 7, 2020). The Commission designated May 18, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

[6] 15 U.S.C. 78s(b)(1).

[7] 17 CFR 240.19b–4.

[8] *See* Securities Exchange Act Release Nos. 88237 (February 19, 2020), 85 FR 10752 (February 25, 2020) (SR–NYSE–2020–11) (''Wireless II Notice''); 88238 (February 19, 2020), 85 FR 10776 (February 25, 2020) (SR–NYSEAMER–2020–10); 88239 (February 19, 2020), 85 FR 10786 (February 25, 2020) (SR–NYSEArca–2020–15); 88240 (February 19, 2020), 85 FR 10795 (February 25, 2020) (SR–NYSECHX–2020–05); and 88241 (February 19, 2020), 85 FR 10738 (February 25, 2020) (SR–NYSENAT–2020–08) (collectively, the ''Wireless II Notices''). Comments received on the Wireless II Notices, including Exchange responses, are available on the Commission's website at: *https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011.htm*. For ease of reference, citations to the Wireless II Notice(s) are to the Notice for SR–NYSE–2020–11.

[9] 15 U.S.C. 78s(b)(2).

[10] *See* Securities Exchange Act Release No. 88540 (April 1, 2020), 85 FR 19562 (April 7, 2020). The Commission designated May 25, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

[11] *See* Securities Exchange Act Release No. 88901, 85 FR 31273 (May 22, 2020).

[12] *See* Securities Exchange Act Release Nos. 88168 (August 3, 2020), 85 FR 47992 (August 7, 2020) (SR–NYSE–2020–05); 89454 (August 3, 2020), 85 FR 48002 (August 7, 2020) (SR–NYSEAMER–2020–05); 89455 (August 3, 2020), 85 FR 48035 (August 7, 2020) (SR–NYSEArca–2020–08); 89456 (August 3, 2020), 85 FR 48024 (August 7, 2020) (SR–NYSECHX–2020–02); and 89457 (August 3, 2020), 85 FR 47997 (August 7, 2020) (SR–NYSENAT–2020–03) (amending Wireless I). *See* Securities Exchange Act Release Nos. 89458 (August 3, 2020), 85 FR 48045 (August 7, 2020) (SR–NYSE–2020–11); 89459 (August 3, 2020), 85 FR 48052 (August 7, 2020) (SR–NYSEAMER–2020–10); 89460 (August 3, 2020), 85 FR 48017 (August 7, 2020) (SR–NYSEArca–2020–15); 89461 (August 3, 2020), 85 FR 48039 (August 7, 2020) (SR–NYSECHX–2020–05); and 89462 (August 3, 2020), 85 FR 48008 (August 7, 2020) (SR–NYSENAT–2020–08) (amending Wireless II).

[13] 15 U.S.C. 78s(b)(2).

[14] *See* Securities Exchange Act Release Nos. 89532 (August 12, 2020), 85 FR 50849 (August 18, 2020) (regarding Wireless I); Securities Exchange Act Release No. 89531 (August 12, 2020), 85 FR 50861 (August 18, 2020) (regarding Wireless II).

[15] In filing Partial Amendment No. 2, the Exchanges withdrew Partial Amendment No. 1, replacing it in its entirety with Partial Amendment No. 2. Partial Amendment No. 2 to the Wireless I proposed rule changes (''Wireless I Partial Amendment No. 2'') is available on the Commission's website at *https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-7757518-223248.pdf*. For ease of reference, citations to Wireless I Partial Amendment No. 2 are to that for SR–NYSE–2020–05. Partial Amendment No. 2 to the Wireless II proposed rule changes (''Wireless II Partial Amendment No. 2'') is available on the Commission's website at *https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011-7757532-223232.pdf*. For ease of reference, citations to Wireless II Partial Amendment No. 2 are to that for SR–NYSE–2020–11.

[16] In filing Partial Amendment No. 3, the Exchanges withdrew Partial Amendment No. 2, replacing it in its entirety with Partial Amendment No. 3. In Partial Amendment No. 3 to the Wireless I proposed rule changes (''Wireless I Partial Amendment No. 3''), the Exchanges propose new rules to place restrictions on the use of a pole or other structure on the grounds of the Mahwah, New Jersey data center that is used for wireless connections. Wireless I Partial Amendment No. 3 is available on the Commission's website at *https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-7860147-223930.pdf*. For ease of reference, citations to Wireless I Partial Amendment No. 3 are to that for SR–NYSE–2020–05. In Partial Amendment No. 3 to the Wireless II proposed rule changes (''Wireless II Partial Amendment No. 3''), the Exchanges propose new rules to place restrictions on the use of a pole or other structure

This order provides notice of the filing of Partial Amendment No. 3 to each of the proposed rule changes, and grants approval to the proposed rule changes, each as modified by Partial Amendment No. 3, on an accelerated basis.

II. Description of the Proposed Rule Changes, as Modified by Partial Amendment No. 3

A. Proposed Wireless Connectivity Services and Fees

The Exchanges propose wireless connectivity services (''Wireless Connections'') for specified fees that enable market participants purchasing one or more of the proposed services to establish low-latency connectivity between their equipment in the Mahwah Data Center (where the Exchanges house their electronic trading and execution systems and co-location facility),[17] and data centers in Carteret, NJ, Secaucus, NJ, and Markham, Canada (''Third Party Data Centers'').[18] As stated in the Wireless I and Wireless II Notices, Wireless Connections involve beaming signals through the air between antennas that are within sight of one another.[19] Because the signals travel a straight, unimpeded line, and because light waves travel faster through air than through glass (fiber optics), wireless messages have lower latency than messages traveling through fiber optics.[20]

The Exchanges are each an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE'').[21] The Exchanges state that the Wireless Connections are provided and maintained not by them, but by ICE Data Services (''IDS''), which operates through several affiliates of ICE, including an indirect subsidiary of NYSE.[22]

The proposed Wireless Connections are of two types: (i) Bandwidth connections (''Wireless Bandwidth Connections'') that enable market participants to send trading orders and relay market data between their equipment in the Mahwah Data Center and the Third Party Data Centers; [23] and (ii) market data connections (''Wireless Market Data Connections'') that enable market participants in a Third Party Data Center to receive connectivity to certain NYSE, NYSE Arca and NYSE National market data feeds (collectively, the ''Selected Market Data'').[24]

For each Wireless Bandwidth Connection, the Exchanges propose a non-recurring initial charge of $10,000 or $15,000, and a monthly recurring charge that varies depending on bandwidth size and location of the connection.[25] For each Wireless Market Data Connection, the Exchanges likewise propose a non-recurring initial charge of $5,000 and a monthly recurring charge that varies depending on the type of feed and location of the connection.[26] In addition, the Exchanges propose to waive the first month's monthly recurring charge,[27] and specify (as they currently do regarding co-location fees) that a market participant obtaining and maintaining a Wireless Connection would not be charged more than once, irrespective of whether it is a member of one, some or none of the Exchanges.[28]

Describing how the Wireless Connections are provided, the Exchanges state that IDS uses its own wireless network to provide Wireless Connections between the Markham Third Party Data Center and the Mahwah Data Center.[29] For Wireless Connections with the Carteret and Secaucus Third Party Data Centers, however, IDS contracts with a non-ICE entity (Anova Technologies, LLC, or ''Anova'' [30]) to facilitate provision of the Wireless Connections, via a network traversing a series of towers with wireless equipment, including a pole on the grounds of the Mahwah Data Center property (the ''Data Center Pole''), to which third parties do not have access.[31]

The Data Center Pole is where the Wireless Connections to the Carteret and Secaucus Third Party Data Centers begin and end, and convert to a fiber connection into the Mahwah Data Center co-location facility where market participants' servers then connect to the Exchanges' trading and execution systems.[32] In response to comments

on the grounds of the Mahwah, New Jersey data center that is used for wireless connectivity services that transport the market data of certain of the Exchanges. Wireless II Partial Amendment No. 3 is available on the Commission's website at *https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011-7860139-223920.pdf*. For ease of reference, citations to Wireless II Partial Amendment No. 3 are to that for SR–NYSE–2020–11. The substance of Wireless I Partial Amendment No. 3 and Wireless II Partial Amendment No. 3 (collectively, ''Partial Amendment No. 3'') is discussed further in Sections II.A and III.B below.

[17] *See* Wireless I Notice, *supra* note 3, at 8939–40; Wireless II Notice, *supra* note 8, at 10753–54. The Exchanges state that a portion of the Mahwah Data Center houses their ''SRO Systems,'' which they define as Exchange trading and execution systems, as well as systems of communication from customer servers in co-location to the trading and execution systems of each Exchange or affiliate self-regulatory organizations. According to the Exchanges, the Mahwah Data Center ''is not owned or operated by any of the . . . Exchanges.'' *See* Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated May 8, 2020, responding to comments on Wireless I and Wireless II (''First NYSE Response'') at 9 n.37. The Exchanges describe the Mahwah Data Center as ''grounds that ICE already leased and over which it had control for security purposes.'' *See id.* at 10.

[18] *See* Wireless I Notice, *supra* note 3, at 8939; Wireless II Notice, *supra* note 8, at 10753. The Exchanges state that the Third Party Data Centers are owned and operated by third parties unaffiliated with the Exchanges. *See id.*

[19] *See* Wireless I Notice, *supra* note 3, at 8942–43; Wireless II Notice, *supra* note 8, at 10757.

[20] *See id.*

[21] *See* Wireless I Notice, *supra* note 3, at 8939.

[22] *See* Wireless I Notice, *supra* note 3, at 8939 n.11; Wireless II Notice, *supra* note 8, at 10753 n.12 (''The IDS business operates through several different ICE Affiliates, including NYSE Technologies Connectivity, Inc. an indirect subsidiary of the NYSE.''). The Exchanges further state all of the ICE affiliates are ultimately controlled by ICE. *See* Wireless I Notice, *supra* note 3, at 8939; Wireless II Notice, *supra* note 8, at 10753.

[23] *See* Wireless I Notice, *supra* note 3, at 8939. At either end of a Wireless Bandwidth Connection, a market participant uses a cross connect or other cable to connect its equipment to the wireless equipment in the Mahwah Data Center and Third Party Data Center. Cross connects in the Mahwah Data Center lead to the market participant's server in co-location. *See id.* at 8939 n.12.

[24] *See* Wireless II Notice, *supra* note 8, at 10753, 10757. Selected Market Data to Carteret and Secaucus includes the NYSE Integrated Feed, NYSE Arca Integrated Feed, and the NYSE National Integrated Feed. Selected Market Data to Markham includes the NYSE BBO and Trades data feeds and the NYSE Arca BBO and Trades data feeds.

[25] These fees range as follows: To and from Secaucus, from $9,000 per month for a 10 Mb connection to $44,000 per month for a 200 Mb connection; to and from Carteret, from $10,000 per month for a 10 Mb connection to $45,000 for a 200 Mb connection; to and from Secaucus and Carteret, $22,000 per month for 50 Mb connection; and to and from Markham, from $6,000 for a 1 Mb connection to $23,000 for a 10 Mb connection. For additional detail on the proposed fees, see Wireless I Notice, *supra* note 3, at 8942.

[26] These fees range from $5,250 to $21,000 per month to transport Selected Market Data to Carteret and Secaucus, and are $6,500 per month to transport Selected Market Data to Markham. For additional detail on the proposed fees, see Wireless II Notice, *supra* note 8, at 10756.

[27] *See* Wireless I Notice, *supra* note 3, at 8941–42; Wireless II Notice, *supra* note 8, at 10756.

[28] *See* Wireless I Notice, *supra* note 3, at 8942.

[29] *See id.* at 8939. According to the Exchanges, ''[t]here is no commercial competitor'' for the route connecting Mahwah with Markham. *See* First NYSE Response at 17. *See also* Wireless I Notice, *supra* note 3, at 8942; Wireless II Notice, *supra* note 8, at 10757.

[30] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 4.

[31] *See* Wireless I Notice, *supra* note 3, at 8945; Wireless II Notice *supra* note 8, at 10759. Specifically, the Exchanges state, ''[w]ith the exception of the non-ICE entity that owns the wireless network used for the Wireless Connections to Secaucus and Carteret, third parties do not have access to such pole, as the IDS wireless network has exclusive rights to operate wireless equipment on the Mahwah data center pole. IDS does not sell rights to third parties to operate wireless equipment on the pole, due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together.'' *Id.*

[32] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 4; Wireless II Partial Amendment No. 3, *supra* note 16, at 4. The Wireless Connections between the Markham Third Party Data Center and

Continued

(discussed below) that restricted access to the Data Center Pole gives a geographical and latency advantage to IDS arising from the Data Center Pole's proximity to the Exchanges' trading and execution systems that competitors cannot replicate, the Exchanges amended the proposals, initially filing Partial Amendment No. 1 and then replacing it with Partial Amendment No. 2, and then replacing Partial Amendment No. 2 with Partial Amendment No. 3.

In Partial Amendment No. 3, the Exchanges each propose to add rules placing restrictions on use of the Data Center Pole designed to address any advantage that the Wireless Connections have by virtue of a Data Center Pole, and thereby level the playing field for competitors offering similar wireless connectivity services between the Mahwah Data Center and Secaucus and Carteret Third Party Data Centers. Specifically, they propose fiber-length equalization measures so that the Wireless Connections, and future wireless connections that use a Data Center Pole (as defined below), would ''operat[e] in the same manner as competitors do today without a latency subsidy or other advantage provided by the Exchanges . . . .'' [33] In addition, the Exchanges represent that if the rule is approved, once the required changes are implemented, they ''commit to have the latency of the relevant fiber route measured.'' [34]

For the Wireless Bandwidth Connections, the Exchanges each propose rules requiring that, with respect to each Third Party Data Center,[35] the length of the fiber path between (a) the base of any Data Center Pole and (b) the Patch Panel Point [36] shall be no less than the sum of (x) the length of the fiber path between the base of the Closest Commercial Pole [37] and the Patch Panel Point, plus (y) the difference in length, if any, between (i) the geodesic distance [38] between the Closest Commercial Pole and the Third Party Data Center and (ii) the geodesic distance between the Data Center Pole and the Third Party Data Center. The proposed rules also require that the length of the fiber from the Patch Panel Point to each customer cabinet in the space used for co-location in the Data Center is the same.[39]

Similarly, for the Wireless Market Data Connections, the Exchanges each propose rules requiring that, with respect to each Third Party Data Center, the length of the fiber path between (a) the base of any Data Center Pole and (b) the Production Point [40] shall be no less than the sum of (x) the length of the fiber path between the base of the Closest Commercial Pole and the Production Point, plus (y) the difference in length, if any, between (i) the geodesic distance between the Closest Commercial Pole and the Third Party Data Center and (ii) the geodesic distance between the Data Center Pole and the Third Party Data Center.[41] The proposed rules also require that Exchange market data will be handed off in the Data Center in the same manner and method, including by using the same network path from the Production Point, to (a) any third party that utilizes a Commercial Pole to offer wireless connectivity to such market data to other third parties, and (b) any wireless network that utilizes the Data Center Pole.[42]

The Exchanges state that these proposed rules are designed to provide that market participants using the Wireless Connections would not benefit from wireless equipment being on an ICE-controlled Data Center Pole that is closer to the Patch Panel Point or the Production Point than the Closest Commercial Pole.[43]

B. Filing Requirement for Facilities of an Exchange

Although the Exchanges filed the Wireless I and Wireless II proposals for approval, they maintain that filing is not required because the Wireless Connections are not ''facilities of an exchange,'' within the meaning of Section 3(a)(1) of the Act (defining ''exchange'') and Section 3(a)(2) of the Act (defining the term ''facility'' of an exchange).[44] They thus take the position that the proposed Wireless Connections and associated fees are not proposed rules of an exchange, and are not subject to review for determination of consistency with Exchange Act standards.[45]

In support of this argument, the Exchanges state that the definition of exchange ''focuses on the exchange entity and what it does,'' whereas the Wireless Connections are separately offered by IDS, a group of ''non-exchange ICE Affiliates.'' [46] They acknowledge that the Exchanges squarely fall within the Exchange Act's

the Mahwah Data Center do not use the Data Center Pole. *See* Wireless I Partial Amendment No. 3, *supra* note 15, at 7; Wireless II Partial Amendment No. 3, *supra* note 16, at 6.

[33] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 9 (internal citation and quotations omitted); Wireless II Partial Amendment No. 3, *supra* note 16, at 9 (internal citation and quotations omitted). *See also* Wireless I Partial Amendment No. 3, *supra* note 16, at 12 (stating that the proposed rule also would apply to the fiber path used for the previously filed wireless services that allow co-located users to receive market data feeds from third party markets through a wireless connection).

[34] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 11. *See also* Wireless II Partial Amendment No. 3, *supra* note 16, at 11. The Exchanges state that because no known commercial provider (including ICE affiliates) has a network that follows the geodesic route, and because the routes they do follow are both changeable and not publicly available, the Exchanges cannot ensure that they would have access to the information required to measure what differences exist in the path followed between the Closest Commercial Pole and any Third Party Data Center. *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6; Wireless II Partial Amendment No. 3, *supra* note 16, at 6. *See also infra* notes 121–145, and accompanying text (discussing the evolution of Wireless I and Wireless II Partial Amendment No. 3).

[35] ''Third Party Data Center'' means a service access point from which wireless connections to the Data Center using a Data Center Pole are made available. ''Data Center'' means the Mahwah, New Jersey data center where each Exchange's matching engine is located, or its successor. ''Data Center Pole'' means a pole or other structure that (a) holds wireless equipment, and (b) is located within the grounds of the Data Center. *See id.* at 5.

[36] ''Patch Panel Point'' means the patch panel where fiber connections for wireless services connect to the network row in the space used for co-location in the Data Center. *See id.* at 5. The Exchanges represent that every provider of wireless connectivity to co-location customers, including IDS and each of its competitors, is connected to the Patch Panel Point, and the length of the fiber path from the Patch Panel Point to each customer cabinet in the space used for co-location in the data center (''Customer Cabinet'') is the same. *See id.* at 6.

[37] ''Closest Commercial Pole'' means the Commercial Pole that has the shortest fiber path between (a) the Patch Panel Point and (b) the base of the Commercial Pole. ''Commercial Pole'' means a pole or other structure (a) on which one or more third parties locate wireless equipment used to offer wireless connectivity to other third parties, and (b) from which a fiber connection extends between the Data Center and third party equipment located on the pole or other structure. *See id.* at 5.

[38] According to the Exchanges, ''[g]eodesic measurements use above ground line measurements,'' and ''geodesic distances'' are sometimes referred to as ''over-the-air distances.'' *See id.* at 6.

[39] *See id.* at 5.

[40] ''Production Point'' means the point inside the Data Center where Exchange market data is made available to the space used for co-location in the Data Center. *See* Wireless II Partial Amendment No. 3, *supra* note 16, at 5.

[41] *See id.*

[42] *See id.*

[43] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 11; Wireless II Partial Amendment No. 3, *supra* note 16, at 10–11.

[44] *See* Wireless I Notice, *supra* note 3 at 8939–41; Wireless II Notice, *supra* note 8, at 10754–56.

[45] *See* Wireless I Notice, *supra* note 3 at 8938–39; Wireless II Notice, *supra* note 8, at 10753. The Exchanges state that they seek approval of the proposed rule changes ''solely because the Staff of the Commission'' advised that filing is required. *See id.* In Partial Amendment No. 3, the Exchanges do not depart from this position and state, ''All other representations in the Filing remain as stated therein and no other changes are being made.'' *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 17; Wireless II Partial Amendment No. 3, *supra* note 16, at 18.

[46] *See* Wireless I Notice, *supra* note 3 at 8939–40; Wireless II Notice, *supra* note 8, at 10754.

definition of exchange, but argue that IDS and the ICE Affiliates do not, and that the Exchange Act does not ''automatically collapse the ICE Affiliates into the Exchange[s].'' [47]

Turning to whether the Wireless Connections are facilities of the Exchanges within the meaning of the definition of ''facility'' of an exchange in Section 3(a)(2) of the Act,[48] the Exchanges state that the Wireless Connections are not the ''premises'' of the Exchanges, reasoning that the network that runs between IDS's equipment in the Mahwah Data Center and IDS's equipment in Third Party Data Centers, much of which is actually owned, operated, and maintained by a non-ICE entity, do not constitute ''premises.'' [49] They also state that the Wireless Connections are not the ''property'' of the Exchanges because they are ''services,'' and something owned by a non-exchange ''ICE Affiliate'' is not owned by the Exchanges.[50] They further maintain that the Exchanges have no right to the use of such premises, property, or services for the purpose of effecting or reporting a transaction on an exchange, and note that the Wireless Bandwidth Connections do not connect directly to the Exchanges' trading and execution systems.[51]

III. Discussion and Commission Findings

A. The Wireless Connections Are Facilities of the Exchanges and Thus the Proposed Rule Changes, as Modified by Partial Amendment No. 3, Are Subject To Review for a Determination of the Consistency With the Exchange Act

The Exchanges filed the proposed rule changes with the Commission. As discussed below, the Wireless Connections are ''facilities of an exchange.'' Under Section 19(b), the Commission must approve or disapprove the proposed rule changes.[52]

As summarized in Section II.B above, the Exchanges' asserted position about the regulatory status of the Wireless Connections relies upon an analysis that focuses narrowly on the corporate subsidiaries that hold the exchange licenses, and not on the broader group that operates the ''exchange'' as defined under the Exchange Act. In essence, the Exchanges reason that only the entities that hold the exchange licenses are relevant to assessing what is a facility of an exchange and, since the Wireless Connections are offered by IDS, a separate group of affiliated entities, they cannot be facilities of the Exchanges.[53] However, as discussed in detail below, the Commission finds the Wireless Connections constitute facilities of an exchange.

The definitions of ''exchange'' and ''facility'' of an exchange are set forth in Exchange Act Sections 3(a)(1) and 3(a)(2), respectively. Section 3(a)(1) of the Exchange Act defines an ''exchange'' to include an organization or group of persons, whether incorporated or unincorporated, that maintains a market place for bringing together purchasers and sellers of securities.[54] Under the statute, an ''exchange'' includes the market place and the market facilities maintained by such exchange. A particular function provided by a group of persons, whether incorporated or unincorporated, may fall within the statutory definition of ''exchange'' when business activities performed across the group constitute part of that market place for bringing together purchasers and sellers.[55] Thus, the application of the ''exchange'' definition does not turn on which particular entity directly holds a particular asset, including the exchange license.[56] What is relevant for purposes of this analysis, instead, is determining which functions are part of the relevant market place.

Section 3(a)(2) of the Exchange Act defines a ''facility'' of an exchange to include the exchange's premises, tangible or intangible property, or any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange.[57] Section

[47] *See* Wireless I Notice, *supra* note 3 at 8940; Wireless II Notice, *supra* note 8, at 10755.

[48] Under Exchange Act Section 3(a)(2): ''The term 'facility' when used with respect to an exchange includes ''its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.'' 15 U.S.C. 78c(a)(2).

[49] *See* Wireless I Notice, *supra* note 3, at 8940; Wireless II Notice, *supra* note 8, at 10755. The Exchanges state that the portion of the Mahwah Data Center where the ''exchange'' functions are performed (*i.e.,* the SRO Systems that bring together purchasers and sellers of securities and perform with respect to securities the functions commonly performed by a stock exchange) could be construed as the ''premises'' of the Exchange, but assert that a wireless network that is almost completely outside of the Mahwah Data Center should not be construed as the ''premises.'' *See id.*

[50] *See* Wireless I Notice, *supra* note 3, at 8940; Wireless II Notice, *supra* note 8, at 10755. *Id.*

[51] *See* Wireless I Notice, *supra* note 3, at 8939–41. The Exchanges state that these connections are not provided for ''the purpose of effecting or reporting a transaction on'' the Exchanges, but rather are provided to facilitate the customer's interaction with itself. *Id.*

[52] *See* 15 U.S.C. 78s(b).

[53] *See supra* notes 46–47, 50 and accompanying text (arguing that IDS is a distinct group of corporate entities and that assets of IDS are not assets of the Exchanges), and note 49 and accompanying text (noting that the Exchanges' focus on ''SRO Systems,'' which they define as the Exchanges' trading and execution systems).

[54] Specifically, Section 3(a)(1) of the Exchange Act defines ''exchange'' as ''any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.'' 15 U.S.C. 78c(a)(1). *See also* 15 U.S.C. 78c(a)(9) (''The term 'person' means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.''). In addition, Exchange Act Rule 3b–16 defines certain terms used in Section 3(a)(1). *See* 17 CFR 240.3b–16. Among other things, Rule 3b–16 provides that: ''[a]n organization, association, or group of persons shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange' . . . if [it]: (1) [b]rings together the orders for securities of multiple buyers and sellers; and (2) [u]ses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.''

[55] *See* 15 U.S.C. 78c(a)(1). For examples of how the Commission has assessed whether particular functions are commonly performed by a stock exchange that could result in regulation as a facility of an exchange, *see, e.g.,* Securities Exchange Act Release Nos. 44983 (October 25, 2001), 66 FR 55225, 55233–34 (November 1, 2001) (SR–PCX–00–25) (''PCX Order'') (assessing different functions provided by an exchange-affiliated broker-dealer); and 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (stating that, in general, the outbound order routing service provided to exchanges by broker-dealers is regulated as a facility of the exchange).

[56] *Cf.* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70852 (December 22, 1998) (''Regulation ATS Adopting Release'') (stating, in the context of entities providing trading systems that function as ATSs, that ''[t]he Commission will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility). . . . In addition, if an organization arranges for separate entities to provide different pieces of a trading system . . . , the organization responsible for arranging the collective efforts will be deemed to have established a trading facility.'').

[57] As noted above, under Section 3(a)(2) of the Exchange Act, ''[t]he term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange,

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3(a)(2) specifically includes services such as systems of communication to or from the exchange.[58] The Commission also has observed that the term facility of an exchange is defined ''very broadly,'' [59] and that whether a service is a facility of an exchange requires an analysis of the particular facts and circumstances.[60]

In this case, the Wireless Connections are provided by IDS which, like the Exchanges, is part of the group operating the exchange. As discussed above, in the case of a group such as ICE and its controlled subsidiaries that are operating the exchange market places, it is not important which corporate entity within the group directly holds a particular asset, so long as that asset is provided as part of the relevant exchange market place. Accordingly, the Wireless Connections are facilities of the Exchanges because they are services, in the form of a system of communication, offered by a group of persons providing a market place for bringing together purchasers and sellers of securities, and such services are for the purpose of effecting or reporting transactions on the Exchanges. In addition, the Wireless Connections are facilities of the Exchanges because they use the premises (*i.e.,* grounds of the Mahwah Data Center) and property (*e.g.,* the Data Center Pole or IDS network) of the group of persons providing a market place for bringing together purchasers and sellers of securities for such purposes. The Exchanges' arguments that they do not have the right to use premises and property provided by IDS or other ICE affiliates that contribute to the maintenance of this market place do not address the fact that the group operating the exchange market place has the right to use it.

The Exchanges take the position that the Wireless Connections are not facilities of the Exchanges by focusing on the ICE subsidiaries that hold the exchange licenses, and not on the broader operation of the exchange. Specifically, the Exchanges contend that the definition of ''exchange'' focuses on ''the exchange entity and what it does.'' [61] The Exchanges suggest that ''exchange functions'' are performed only by the Exchanges' SRO Systems housed in the Mahwah Data Center. For example, the Exchanges state that the Wireless Connections are not the ''premises'' of the Exchanges, reasoning that they consist of equipment owned by IDS and not the Exchanges.[62] Similarly, the Exchanges state that the Wireless Connections are not ''property'' or ''services'' of the Exchanges because the underlying wireless network is owned by, or provided through rights of, other ICE affiliates.[63] The Exchanges also take the position that the Wireless Connections do not fall within the definition of ''facility'' of an exchange because they simply connect a customer's equipment in one data center to that customer's equipment in another data center, and do not connect directly to the Exchanges' trading and execution systems.[64]

As discussed above, the statutory definition of an ''exchange'' includes any group of persons that maintains a market place for bringing together purchasers and sellers of securities, and the definition of ''facility'' (applicable to an exchange) references that exchange definition. Acknowledging that the functions performed by a group of persons can constitute an exchange does not mean that all of the assets or services of all of the ICE affiliates are ''automatically collapsed'' into the Exchanges.[65] Rather, with respect to national securities exchanges such as the Exchanges, only facilities ''for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood'' would be facilities of those exchanges.[66]

Several commenters addressed the purpose of the Wireless Connections, stating that the Wireless Connections are services purchased by market participants for the purpose of effecting and reporting transactions on, or communicating to or from, the Exchanges,[67] and are in fact used to send trading orders and receive market data for that purpose.[68] The

by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.'' 15 U.S.C. 78c(a)(2).

[58] The Commission has found that where a system of communication occupies a ''special position'' with respect to the exchange, such that it is ''uniquely linked to and endorsed by'' that exchange to provide such function, then that function will constitute a ''facility'' of an exchange under the Act. *See, e.g.,* PCX Order, *supra* note 55, at 55233–34 (considering an introducing broker function, order routing function, and electronic communications network (''ECN'') for trading securities ineligible for trading on ArcaEx, each provided by Wave, a broker-dealer in which the PCX exchange had an indirect ownership interest and that was affiliated with PCX's ArcaEx electronic trading facility, and determining that the optional order-routing function was a facility of PCX, but the introducing broker and ECN functions were not).

[59] *See* Securities Exchange Act Release No. 44201 (April 18, 2001), 66 FR 21025, 21029 (April 26, 2001) (File No. 79–9) (Order Granting Application for a Conditional Exemption by the National Association of Securities Dealers, Inc. Relating to the Acquisition and Operation of a Software Development Company by the Nasdaq Stock Market, Inc.).

[60] *See* Securities Exchange Act Release No. 76127 (October 9, 2015), 80 FR 62584, 62586 n.9 (October 16, 2015) (SR–NYSE–2015–36) (Order Approving Proposed Rule Change amending Section 907.00 of the Listed Company Manual). *See also supra* note 58.

[61] *See supra* note 46 and accompanying text.

[62] *See supra* note 49 and accompanying text.

[63] *See supra* notes 50–51 and accompanying text.

[64] *See supra* note 51 and accompanying text.

[65] *See supra* note 47 and accompanying text.

[66] *See* 15 U.S.C. 78c(a)(1).

[67] Specifically, commenters state that the reason market participants pay fees for the Wireless Connections is to effect transactions on the Exchanges. *See, e.g.,* Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial to Vanessa Countryman, Secretary, Commission, dated March 10, 2020 (''Virtu Letter I'') at 4–6, 7 (''NYSE's argument ignores the reality of market connectivity,'' and ''[a]s a useful analogy, no one would spend the money to buy a seat on an exchange floor just to sit in it.''); Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel Securities to Vanessa Countryman, Secretary, Commission, dated June 12, 2020 (''Citadel Letter'') at 1–2 (''When it is understood that the very purpose of the Services is to provide specific content (exchange market data), without which the offering makes no economic sense, the only conclusion is that the Services include, as a central component, the property of the exchange being distributed for the purposes of effecting transactions.'').

[68] *See e.g.,* Virtu Letter I at 7 (stating that while NYSE may not know the exact content of the data that is being sent, the purpose of the data being sent over the Wireless Bandwidth Connections is to facilitate competitive transactions being effected on the Exchanges); Letter from McKay Brothers, LLC to Vanessa Countryman, Secretary, Commission, dated March 10, 2020 (''McKay Letter I'') at 6 (stating that the Wireless Connections are facilities of the Exchange because they may be used to effect transactions on the Exchange and report transactions or other market data disseminated from the Exchange using Exchange property (the ''NYSE Private Pole''), and that the fact that orders and market data have to traverse a cross connect at the Mahwah Data Center before reaching the Exchanges' trading execution systems is an insufficient basis on which to conclude the Wireless Connections are not used for the purposes of effecting or reporting a transaction on the exchange); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association to Vanessa Countryman, Secretary, Commission, dated March 9, 2020 (''Healthy Markets Letter I'') at 3 (stating that the Exchanges have sought to defeat the operation of Exchange Act filing requirements by ''interpositioning'' an affiliate to provide exchange connectivity to customers indirectly instead of providing it directly); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. to Vanessa Countryman, Secretary, Commission, dated March 10, 2020 (''Bloomberg Letter I'') at 4 (addressing Wireless I and stating, ''it is clear that this is a system of communication to or from the exchange for 'effecting or reporting a transaction of the exchange.' ''); Letter from Matt Haraburda, President, XR Securities LLC to Vanessa Countryman, Secretary, Commission, dated March 18, 2020 (''XRS Letter'') at 3 (addressing Wireless I, and stating ''[n]othing is more critical in trading than timely access to exchange systems to submit orders and receive market data, and the Wireless Connections . . . being faster even if only by a microsecond can make a competitive difference); Letter from Joanna Mallers, Secretary, FIA Principal

Commission finds these comments persuasive, and agrees that market participants purchase the Wireless Bandwidth Connections offered by the Exchanges for the purpose of minimizing the latency of communications between the Mahwah co-location facility that houses the matching engines of the Exchanges and the Third Party Data Centers that house the matching engines of other exchanges trading the same securities, in order to enhance the efficiency of their trading strategies on the Exchanges and elsewhere.[69] The Commission similarly agrees that market participants purchase the Wireless Market Data Connections for the purpose of minimizing the latency of market data produced by the Exchanges and transmitted to them at the Third Party Data Centers, to enhance the efficiency of their trading strategies on the Exchanges and elsewhere.[70] Although the Exchanges take the position that the Wireless Connections cannot be facilities of the Exchanges because they do not connect directly to the Exchanges' trading and execution systems, the definition of facility of an exchange contains no such requirement. What is required for an exchange service to be a facility is that it be provided ''for the purpose of'' effecting or reporting a transaction on the Exchange which, as discussed above, is in fact the case.[71]

For the reasons discussed above, the Commission also agrees that the Wireless Connections are facilities of the Exchanges because they represent premises and property of the Exchanges. These premises and property include the Mahwah Data Center grounds, the Data Center Pole and equipment thereon used as a point of access to the Mahwah Data Center, and the underlying IDS network uniquely connecting the Markham and Mahwah Data Centers.[72] In this instance, IDS operates the Wireless Connections to and from Carteret and Secaucus via its exclusive access to the Data Center Pole.[73] IDS also operates the Wireless Connections between Markham and Mahwah via its own proprietary wireless network. Each of these assets, irrespective of which member of the group holds title to it, is provided as part of the market place for bringing together purchasers and sellers of securities.

Accordingly, the Commission finds the proposed Wireless Connections are facilities of the Exchanges.

B. The Proposed Rule Changes, as Modified by Partial Amendment No. 3, Are Consistent With the Act

1. The Applicable Standard for Review

The Commission has historically applied a ''market-based'' test in its assessment of market data fees, which has also been applied in the context of connectivity fees, such as those proposed here.[74] Under that test, the Commission considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.'' [75] If an exchange meets this burden, the Commission will find that its proposal is consistent with the Act unless ''there is a substantial countervailing basis to find that the terms'' of the proposal violate the Act or the rules thereunder.[76] If an exchange cannot demonstrate that it was subject to significant competitive forces, it must ''provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.'' [77]

After careful consideration of the proposed rule changes, as modified by Partial Amendment No. 3, comments received, and the Exchanges' responses thereto, the Commission finds that the proposed rule changes, each as modified by Partial Amendment No. 3, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[78] Specifically, the Commission finds that the proposed rule changes, as amended, are consistent with: (1) Section 6(b)(4) of the Act,[79] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities; (2) Section 6(b)(5) of

Traders Group, to Vanessa Countryman, Secretary, Commission, dated May 8, 2020 (''FIA Letter'') at 3 (stating similarly that nothing is more critical in trading than timely access to exchange systems to submit orders and receive market data).

[69] The Exchanges themselves state that these and similar services are offered ''as a means to facilitate the trading and other market activities of market participants.'' *See* Wireless I Notice, *supra* note 3, at 8945.

[70] *See, e.g.,* XRS Letter at 3 (''Nothing is more critical in trading than timely access to exchange systems to submit orders and receive market data, and the Wireless Connections have the fastest means of access to the Exchange via the on-premises private pole.''); FIA Letter at 3; SIFMA Letter at 3 (''For regulatory and competitive reasons, most broker-dealers feel they must purchase the fastest connectivity services to remain in business.'').

[71] In this regard, the Wireless Connections are analogous to co-location services. The purpose of co-location is to provide a service to use an exchange's premises or property (in this case, placing servers in its data center) for the purpose of effecting transactions on that exchange. To guide this inquiry, the Commission has in the past examined whether such services facilitate ''physical *proximity*'' to an exchange's trading systems—not direct connectivity. *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3610 (January 21, 2010) (''Concept Release on Equity Market Structure'') (emphasis added) (describing co-location as a service enabling market participants to place their servers in close physical proximity to a trading center's matching engine, and thereby minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants). The Wireless Connections are part of this same effort to facilitate access to and trading activity on the Exchanges using exchange premises and property. *See also* McKay Letter I at 6 (stating that to reasonably determine where the facilities of the Exchange begin, one must consider where and how one connects to the 'last mile' cable connection,'' and, therefore that connections to Exchange trading systems that originate or terminate on the Mahwah Data Center grounds, whether they are direct or indirect, are not materially different from connections to Exchange trading systems from market participant servers in co-location).

[72] *See* First NYSE Response at 10 (''[T]he pole was built on grounds that ICE already leased and over which it had control for security purposes.''); *id.* at 15 (''IDS, not the Exchanges, controls and maintains the Wireless Connections'').

[73] The Exchanges propose in Partial Amendment No. 3 to make these Wireless Connections subject to fiber-length equalization measures, which, as discussed below, support a finding that such Wireless Connections are offered on terms that are not unfairly discriminatory and do not impose an unnecessary burden on competition; but such measures do not alter the conclusion that the Wireless Connections are facilities of the Exchanges. *See also* PCX Order, *supra* note 55, 66 FR 55225, 55233 (exchanges offering ''advantages, such as greater access to information, improved speed of execution, or enhanced operational capabilities in dealing with the exchange might constitute unfair discrimination under the [Exchange] Act.'').

[74] *See* Securities Exchange Act Release Nos. 85459 (March 29, 2019), 84 FR 13363, 13367 (April 4, 2019) (File Nos. SR–BOX–2018–24; SR–BOX–2018–37; and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes To Amend the Fee Schedule on the BOX Market LLC Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network); and 88493 (March 27, 2020) 85 FR 18617 (April 2, 2020) (File Nos. SR–BOX–2018–24; SR–BOX–2018–37; and SR–BOX–2019–04) (Order Affirming Action by Delegated Authority and Disapproving Proposed Rule Changes Related to Connectivity and Port Fee) (''BOX Order'').

[75] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order'').

[76] *Id. See also* In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 84432, 22 (October 16, 2018), *available at https://www.sec.gov/litigation/opinions/2018/34-84432.pdf* (''SIFMA Decision''), *vacated on other grounds, NASDAQ Stock Mkt., LLC* v. *SEC,* 961 F.3d 421 (D.C. Cir. 2020).

[77] 2008 ArcaBook Approval Order, *supra* note 75, at 74781. *See also* SIFMA Decision, *supra* note 76, at 22. *See also* BOX Order, *supra note* 74, at 18622–24 (noting that the exchange had failed to demonstrate significant competitive forces, and therefore did not establish a basis on which to conclude that the proposed fees were equitable and reasonable.)

[78] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[79] 15 U.S.C. 78f(b)(4).

the Act,[80] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (3) Section 6(b)(8) of the Act,[81] which requires that the rules of a national securities exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In support of the proposals, as amended, the Exchanges argue principally that the Wireless Connections are subject to significant competitive forces because they are offered in a competitive environment where substitutes are available.[82] As discussed further below, the Commission believes that Partial Amendment No. 3, in which the Exchanges propose fiber length equalization measures to substantially mitigate the unique proximity advantage of the Data Center Pole, particularly strengthens the Exchanges' argument by establishing a basis upon which to find that there are substantially similar substitutes for the Wireless Connections offered by third party vendors who have not been placed at a meaningful competitive disadvantage created by the Exchange. Therefore, after considering the current competitive landscape, comments received, and Partial Amendment No. 3, the Commission finds that the Exchanges are subject to significant competitive forces in setting the terms on which they offer the Wireless Connections.

2. Review of Competitive Forces Applicable to the Wireless Connections

a. Competitive Environment

In the Wireless I and Wireless II Notices, the Exchanges state that the Wireless Connections are offered on terms that are reasonable, equitable, and not unfairly discriminatory and do not impose a burden on competition that is not necessary or appropriate because use of the Wireless Connections is voluntary and they are offered in a competitive environment where alternatives are available.[83] Describing this competitive environment, the Exchanges state that there are at least three other vendors that offer market participants wireless network connections between the Mahwah Data Center and the Secaucus and Carteret Third Party Access Centers using wireless equipment installed on towers and buildings near the Mahwah Data Center.[84] With respect to the Wireless Market Data Connections specifically, they state that other providers offer connectivity to Selected Market Data in the Third Party Data Centers, and believe that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity.[85] The Exchanges also state that they believe competing wireless connections offered by non-ICE entities provide connectivity at the ''same or similar speed'' as the Wireless Connections, and at the ''same or similar cost.'' [86] The Exchanges acknowledge that the Wireless Connections between the Mahwah Data Center and the Markham Third Party Data Center are the first public, commercially available wireless connections between the two points, creating a new connectivity option for customers in Markham.[87] With respect to all of the Wireless Connections, however, the Exchanges state that some market participants have their own proprietary wireless networks, and that market participants may create a new proprietary wireless connection, connect through another market participant, or use fiber connections offered by the Exchanges, ICE affiliates, other service providers, and third party telecommunications providers.[88]

The Exchanges acknowledge that the Wireless Connections between the Mahwah Data Center and Carteret and Secaucus currently rely upon the Data Center Pole, to which access is restricted,[89] but state that the access to such pole is not required for third parties to compete,[90] because (i) proximity to a data center is not the only determinant of a wireless network's speed; [91] (ii) latency is not the only consideration that a market participant may have in selecting a wireless network; [92] and (iii) fiber network connections may sometimes be more attractive since they are more reliable and less susceptible to weather conditions.[93] In the Exchanges' view, the location of the Data Center Pole to which ICE affiliates have exclusive access should not be determinative of whether third-party wireless connectivity providers can compete with IDS.[94]

The Exchanges state that the proposed pricing is reasonable because the services are voluntary, market participants may select the connectivity options that best suit their needs, and the fees reflect the benefit received by customers in terms of lower latency over the fiber optics options.[95] The Exchanges believe that the proposals involve an equitable allocation of fees among market participants because such fees would apply to all market participants equally and would not apply differently to distinct types or sizes of market participants.[96] In addition, the various options proposed offer market participants additional choices that they can select to best suit their needs.[97] For similar reasons, the Exchanges argue that the proposals are not unfairly discriminatory.[98]

The Exchanges also state that, because substitute connectivity providers are available, the proposals do not impose an unnecessary or inappropriate burden on competition.[99] According to the Exchanges, the proposals do not affect competition among national securities exchanges or among members of the

[80] 15 U.S.C. 78f(b)(5).

[81] 15 U.S.C. 78f(b)(8).

[82] *See infra* Section III.B.2.

[83] *See* Wireless I Notice, *supra* note 3, at 8943–44; Wireless II Notice, *supra* note 8, at 10757–59.

[84] *See* Wireless I Notice, *supra* note 3, at 8942.

[85] *See* Wireless II Notice, *supra* note 8, at 10757.

[86] *See* Wireless I Notice, *supra* note 3, at 8943; Wireless II Notice, *supra* note 8, at 10757.

[87] *See id.* Notably, the proposed Markham services do not rely upon the Data Center Pole. *See supra* note 32.

[88] *See* Wireless I Notice, *supra* note 3, at 8943; Wireless II Notice, *supra* note 8, at 10757.

[89] *See* Wireless I Notice, *supra* note 3, at 8943; Wireless II Notice, *supra* note 8, at 10759. The Exchanges state that IDS does not sell rights to third parties to operate wireless equipment on the pole due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together. *See* Wireless I Notice, *supra* note 3, at 8945; Wireless II Notice, *supra* note 8, at 10759.

[90] *See id.*

[91] *See id.* According to the Exchanges, other relevant variables include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection. *See id.*

[92] *See id.* According to the Exchanges, other considerations may include the bandwidth of the offered connection; amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions. *See id.*

[93] *See* Wireless I Notice, *supra* note 3, at 8943; Wireless II Notice, *supra* note 8, at 10757.

[94] *See* Wireless I Notice, *supra* note 3, at 8944–45; Wireless II Notice, *supra* note 8, at 10759.

[95] *See* Wireless I Notice, *supra* note 3, at 8943–44; Wireless II Notice, *supra* note 8, at 10757–58.

[96] *See* Wireless I Notice, *supra* note 3, at 8944; Wireless II Notice, *supra* note 8, at 10758.

[97] *See id.*

[98] *See* Wireless I Notice, *supra* note 3, at 8944; Wireless II Notice, *supra* note 8, at 10758–59.

[99] *See* Wireless I Notice, *supra* note 3, at 8944–45; Wireless II Notice, *supra* note 8, at 10759.

Exchanges.[100] Rather the Exchanges state that their filing of the proposals puts IDS at a competitive disadvantage relative to its commercial competitors that are not subject to filing requirements of Section 19(b) of the Act.[101]

Commenters on the original proposals disagreed. Because the Wireless Connections to the Secaucus and Carteret Third Party Data Centers begin and end at the Data Center Pole which is closer to the Exchanges' trading and execution systems than all other poles, commenters objected that IDS's exclusive access to the Data Center Pole would make fair competition in the relevant market impossible.[102] In short, commenters stated that the disparity in access to the Data Center Pole would give IDS an exclusive geographic latency advantage enabling IDS to provide the fastest possible means of communication to the Exchanges that competitors could not overcome.[103]

One of these commenters estimated the Data Center Pole to be ''approximately 700 feet closer to the NYSE matching engine'' than the closest commercial poles available to all other wireless connectivity vendors.[104] This commenter stated that ''timely receipt of market data is essential to trading competitively in today's markets,'' [105] and while it may not seem like a significant distance, ''the delay of data through 700 feet of fiber is meaningful in today's markets.'' [106] This commenter and others believed that the Wireless Connections, as originally proposed, were designed with a structural geographic latency advantage rendering the availability of true substitutes impossible, and therefore that the Wireless Connections were in fact proposed to be offered on terms that were unfairly discriminatory and would impose an inappropriate burden on competition, inconsistent with the Exchange Act.[107]

Relatedly, some commenters stated that restricted access to the Data Center Pole would enable the Exchanges to charge unreasonable or unfairly discriminatory fees.[108] One commenter stated that connecting to the Exchanges through another means, such as through fiber-optic cables or another connectivity service rather than through the Wireless Connections, results in a slower connection that harms a broker-dealer's ability to provide best execution to clients.[109] The commenter further stated that for regulatory and competitive reasons, most broker-dealers feel they must purchase the fastest connectivity services to remain in business—without regard to the price of the Exchanges' connectivity service offerings compared to alternatives.[110]

The Exchanges submitted a response to these comments defending their view that the Wireless Connections were subject to competition.[111] ''While having a pole 700 feet closer to a facility is a positive factor for latency,'' they stated, ''it is just one of a list of factors that determine the network's latency levels.'' [112] According to the Exchanges, the fact that the Wireless Connections and Data Center are not new and competition has ''continued to develop'' since 2016 demonstrates that use of the Data Center Pole is not required for third parties to compete with the Wireless Connections.[113] The Exchanges further defended the choice to limit access to the Data Center Pole, noting that it is smaller than commercial poles and that space limitations, security concerns, and interference are practical factors that are a ''real concern.'' [114] They also stated that IDS does not believe that its wireless network offers the fastest commercial option, and market participants ''often choose not to use IDS.'' [115]

Several commenters responded that these arguments were unpersuasive,[116] with one commenter in particular emphasizing that the key issue was not whether competition exists, but whether that competition is fair.[117] This commenter stated that space limitations, security concerns, and interference on the Data Center Pole were not a justification for the exclusive latency advantage for which the Exchanges were seeking approval, nor an explanation for why that advantage did not constitute unfair discrimination or a burden on competition not necessary or appropriate in furtherance of the Act.[118] Estimating the apparent geographic latency advantage to be approximately 700 feet (or approximately 1 microsecond), this commenter also expressed concern about the potential for less obvious ways that an exchange or its preferred provider might benefit from undisclosed latency advantages.[119] The commenter urged that the relevant inquiry with respect to the Wireless Connections is a comparison of (i) the length and latency of the connection between the matching engine and Mahwah Data Center Pole relative to (ii) the length and latency of the connection

[100] *See id.*

[101] *See id.*

[102] *See generally* McKay Letter I; Bloomberg Letter I; Virtu Letter I; XRS Letter; FIA Letter; SIFMA Letter I, Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC to Vanessa Countryman, Secretary, Commission, dated March 17, 2020 (''McKay Letter II''); Letter from Andrew Stevens, General Counsel, IMC Financial Markets to Vanessa Countryman, Secretary, Commission, dated March 12, 2020 (''IMC Letter''). *See also* Citadel Letter (stating its view that rigorous regulatory oversight over the ''modern version of the door of the exchange'' is necessary).

[103] *See, e.g.,* McKay Letter I at 8–10; (''McKay Letter II'') at 3; Bloomberg Letter I at 4; IMC Letter at 2; XRS Letter at 1–2; Virtu Letter I at 3, 8–10; FIA Letter at 3; SIFMA Letter I at 3.

[104] *See* McKay Letter I at 8–11 (noting that its distance estimate is a good-faith, educated guess, but that additional transparency on the matter is needed). This commenter also states that distribution of Selected Market Data via the Wireless Market Data Connections is discriminatory because it is distributed in a different manner than Selected Market Data obtained otherwise than via the Wireless Connections. *See* McKay Letter II at 2–3.

[105] *Id.* at 3.

[106] *See* McKay Letter I at 8.

[107] *See* McKay Letter I at 2, 8–12; McKay Letter II at 2–3. *See also* IMC Letter at 2 (''In a market where equidistant cabling is required for connections between a participant's co-located customer equipment to the Exchange's matching engine, NYSE's suggestion that the 700 foot difference between the NYSE Pole and others outside their premises is immaterial is ludicrous.''); FIA Letter at 2; McKay Letter I at 11; XRS Letter at 2–3. An additional commenter states that the contention that there is competition for exchange connectivity, and that other providers can offer the same or similar access and latency is ''simply false.'' *See* Virtu Letter I at 9. This commenter also contrasts exclusive access to the private pole with the Exchanges offering third-party firms the option to co-locate on their premises through other means. *See id.* at 2.

[108] *See, e.g.,* Bloomberg Letter I at 5 (adding that the ''little to no attempt'' is made to discuss the implications of the exclusive privilege afforded to IDS to operate the Wireless Connections that are on the Mahwah Data Center property); Virtu Letter I at 2; SIFMA Letter I at 3 (addressing the Wireless Market Data Connections specifically).

[109] *See* SIFMA Letter I at 3.

[110] *See id.*

[111] *See generally* First NYSE Response (stating that approval of the Wireless I and Wireless II proposals would enhance competition, while disapproval would reduce the number of competitors offering wireless connectivity services).

[112] *See id.* at 6. The Exchanges state that contrary to the suggestion of some commenters, the Wireless Connections do not use the Mahwah Data Center roof, nor does IDS expect to put any equipment on the roof for any services it offers or allow others to do so. *See id.* at 5.

[113] *See id.* at 6.

[114] *See id.* at 7.

[115] *See id.* at 5–6.

[116] *See* Letter from McKay Brothers, LLC to Vanessa Countryman, Secretary, Commission, dated June 12, 2020 (''McKay Letter III at 2; Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. to Vanessa Countryman, Secretary, Commission, dated June 12, 2020 (''Bloomberg Letter II'') at 4.

[117] *See* McKay Letter III at 4–7, 9, 9 n.33 (stating that its focus was on the segment closest to the Exchanges' data center that ''no competitor can replicate.'').

[118] *Id.* at 1–2.

[119] *See id.* at 9 (noting that some connections may have a longer fiber route than others within a data center or may have to go through various equipment or meet me rooms that an affiliate or preferred provider of an exchange does not).

between the matching engine and the nearest public pole.[120]

Following the submission of these comments, the Exchanges filed Partial Amendment No. 1, and a second response letter, proposing to add new rules to ''negate proximity differences and articulate a connectivity policy that requires the length of the connection into the data center from the Data Center Pole to be no less than the connection from the closest commercial pole to the same point.'' [121] Commenters on Partial Amendment No. 1 generally commended the Exchanges' efforts to eliminate any unfair competitive advantage enjoyed by the Wireless Connections,[122] but some expressed concern that Partial Amendment No. 1 lacked a firm commitment and sufficient detail to establish that the Exchanges were in fact proposing a level playing field for competitors.[123] One commenter, however, stated that limiting IDS's geographic advantage ''should provide other wireless connectivity service providers with the opportunity to compete with [IDS],'' and that despite the Exchanges proposing to charge market participants a significant initial fee and recurring monthly fees per wireless connection, ''the fact that competitors can offer the same level of wireless connectivity services should constrain the price for NYSE's wireless connectivity services.'' [124] This commenter urged the Commission to continue to monitor for other restrictions or conditions that would give IDS an advantage over competitors and consequently affect the ability for market participants to choose competing wireless connectivity services.[125]

Following the submission of these comments, the Exchanges withdrew Partial Amendment No. 1 and replaced it in its entirety with Partial Amendment No. 2.[126] In response to commenters' concerns, the Exchanges represented that they are ''committed to the principal of having no measurable latency differential due to [their] use of a Data Center Pole,'' [127] and made several changes to the measures proposed in Partial Amendment No. 1. Specifically, the Exchanges revised their proposed definition of ''Data Center Pole'' to define it by reference to its location on the grounds of the Mahwah Data Center, instead of defining it by which entities have access to it.[128] The Exchanges also added further specificity to their proposed measures, such as by describing the relevant length of equalization as the ''fiber path,'' and clarifying that the ''Data Center Pole'' or ''Commercial Pole'' includes ''a pole *or other structure*'' holding wireless equipment.[129] In addition, with respect to the Wireless Bandwidth Connections specifically, the Exchanges proposed to use the ''Patch Panel Point'' as the ''end point'' for the fiber length measurements.[130] Partial Amendment No. 2 did not incorporate the commenter suggestion that the Exchanges account for ''over-the-air'' latency differentials between the Data Center Pole and the Closest Commercial Pole with respect to each Third Party Data Center, arguing that any measurements of over-the-air distances to the Third Party Data Centers would be ''arbitrary at best.'' [131]

In addition, the Exchanges made several additional representations in Partial Amendment No. 2. Among them, the Exchanges represented that they would monitor their own compliance with the proposed rules.[132] In response to commenter requests that the proposed rules address what would happen if the Exchanges or an ICE affiliate used a wireless pole on private property off the grounds of the Mahwah Data Center, each of the Exchanges represented that ''the Exchange and IDS would have no special access or exclusive rights with respect to any commercial pole off the grounds of the Mahwah data center,'' and that ''[t]hey would compete for the use of such grounds or any pole built on them, just like IDS does for the other poles in its wireless network.'' [133] In addition, the Exchanges represented that ''if the rule is approved, once the required changes

[120] *Id.*

[121] *See* Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated July 31, 2020, responding to comments on Wireless I and Wireless II and describing Partial Amendment No. 1 (''Second NYSE Response'') at 4. Subsequently, IDS also submitted a comment letter stating that it ''strongly supports and agrees with'' the First NYSE Response and Second NYSE Response. *See* letter from Doris Choi, Co-General Counsel, ICE Data Services, to Vanessa Countryman, Secretary, Commission, dated September 14, 2020 at 2.

[122] *See* Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC to Vanessa Countryman, Secretary, Commission, dated August 28, 2020 (''McKay Letter IV'') at 1–2; Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial to Vanessa Countryman, Secretary, Commission, dated August 28, 2020 (''Virtu Letter II'') at 2; Letter from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated September 2, 2020 (''SIFMA Letter II'') at 3.

[123] *See, e.g.,* McKay Letter IV at 2–4, 6–8 (stating that the Exchanges should commit to retiring the exclusive Data Center Pole in the long term, but expressing support in the short term for a latency neutralization policy with additional detail and a firmer commitment to achieve latency neutralization (*e.g.,* with a revised definition of Data Center Pole to prevent the Exchanges from circumventing latency restrictions by opening the Data Center Pole to a limited number of affiliates or third parties without providing fair and equal access to all), and a commitment to equalize the length of the public fiber path to a customer's cabinet in co-location (as opposed to the more general ''length of the connection to the network row''), and account for the air path to each Third Party Data Center); Virtu Letter II at 2 (arguing similarly for additional details and a firmer commitment to achieve latency neutralization); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association to Vanessa Countryman, Secretary, Commission, dated September 11, 2020 (''Healthy Markets Letter II'') at 5 (''To what extent does Amendment No. 1 re-level the playing field between third-party providers and ICE Data Services?''). *See also* Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. to Vanessa Countryman, Secretary, Commission, dated August 28, 2020 (''Bloomberg Letter III'') at 3 (arguing that the Exchanges still had not justified adequately the proposed fees or provided information that would allow the Commission to determine their consistency with the Act); Healthy Markets Letter II at 4–5 (similarly arguing that the Exchanges' proposals, as modified by Partial Amendment No. 1, did not provide adequate information to establish that the proposals are not unfairly discriminatory, impose reasonable and equitably allocated fees, and do not impose undue burdens on competition).

[124] *See* SIFMA Letter II at 3.

[125] *See id.* at 4 (adding that SIFMA would not support ''practices that cannot be copied by competitors.''). *See also* Virtu Letter at 3 (''[W]e encourage NYSE and other exchanges be vigilant in ensuring that such offerings continue to be made available on fair and reasonable terms.'').

[126] *See supra* note 15 and accompanying text.

[127] *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 10; Wireless II Partial Amendment No. 2, *supra* note 15, at 10.

[128] *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 5; Wireless II Partial Amendment No. 2, *supra* note 15, at 5.

[129] *See id.* (emphasis added).

[130] The Exchanges represent that every provider of wireless connectivity to co-location customers, including IDS and each of its competitors, is connected to the Patch Panel Point, and that the length of the fiber path from the Patch Panel Point to each Customer Cabinet is the same. The proposed rules would therefore account for distances within the Mahwah Data Center by measuring to and from the Patch Panel Point, after which end point the fiber path length to each Customer Cabinet is already equalized. *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 6.

[131] *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 6; Wireless II Partial Amendment No. 2, *supra* note 15, at 5–6. The Exchanges also explain that they did not incorporate this suggestion since the proposed rule addresses the distance between any Data Center Pole and the Patch Panel Point, not the distance between a Data Center Pole and Third Party Data Centers. The Exchanges believe their proposed approach is reasonable, citing as support McKay Letter III, which stated that ''the relevant comparison is (a) the length and latency of the connection between the matching engine and the NYSE Private Pole relative to (b) the length and latency of the connection between the matching engine and the nearest public pole.'' *See id. See also supra* note 120 and accompanying text.

[132] *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 11 (''The Exchange will monitor its compliance with the proposed rule.''); Wireless II Partial Amendment No. 2, *supra* note 15, at 10.

[133] *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 6–7; Wireless II Partial Amendment No. 2, *supra* note 15, at 6.

are implemented, the Exchange[s] commit[] to have the latency of the fiber route between the Data Center Pole and Patch Panel Point measured.'' [134]

The Commission received two comment letters on Partial Amendment No. 2 before it was withdrawn. One commenter commended the Exchanges' additional measures, but objected that the Exchanges' efforts to neutralize the advantages enjoyed by the Wireless Connections are incomplete without, at a minimum, accounting for over-the-air geographic differences in connecting to Third Party Data Centers.[135] This commenter previously argued that, after accounting for ''over-the-air latency differentials'' between the Data Center Pole and the ''closest'' commercial pole with respect to each Third Party Data Center, a single ''closest'' commercial pole may be the closest for a connection to one Third Party Data Center but not another.[136] The other commenter concurred and further opined that the ''fairest configuration would be to have all equipment located together.'' [137]

Following the submission of these comments, the Exchanges withdrew Partial Amendment No. 2 and replaced it in its entirety with Partial Amendment No. 3.[138] In Partial Amendment No. 3, the Exchanges propose the same measures as those proposed in Partial Amendment No. 2, but now further propose to account for ''over-the-air'' distances in connecting to Third Party Data Centers.[139] Specifically, as described in more detail above,[140] and as suggested by commenters, the Exchanges propose to use geodesic distances in comparing the distances between the Data Center Pole and the Closest Commercial Pole in relation to the relevant Third Party Data Center.[141] The Exchanges believe that these measures take into account commenter concern that '' 'irrespective of the route taken from Nasdaq Inc.'s . . . data center in Carteret to the Mahwah Data Center, the minimum distance that must be traveled is shorter via the Data Center Pole than via the closest commercial pole.' '' [142] In addition, the Exchanges again represent they that would each monitor their own compliance with the proposed rules.[143] They also again represent that if the Exchanges or an ICE affiliate used a wireless pole on private property off the grounds of the Mahwah Data Center, then ''the Exchange and IDS would have no special access or exclusive rights with respect to any commercial pole off the grounds of the Mahwah data center,'' and ''[t]hey would compete for the use of such grounds or any pole built on them, just like IDS does for the other poles in its wireless network.'' [144] Further, the Exchanges again represent that ''if the rule is approved, once the required changes are implemented, the Exchange[s] commit[] to have the latency of the fiber route between the Data Center Pole and Patch Panel Point measured.'' [145]

b. Application of the Market Based Test

As discussed above,[146] the Commission's market-based test considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . ., including the level of any fees.'' [147] If an exchange meets this burden, then the Commission will find that its proposal is consistent with the Act unless ''there is a substantial countervailing basis to find that the terms'' of the proposal violate the Act or the rules thereunder,[148] as discussed further below.

The Commission believes the Exchanges have demonstrated that they are subject to significant competitive forces in setting the terms on which they offer Wireless Connections through the Data Center Pole, in particular because substantially similar substitutes are available.[149] The Commission has indicated that the availability of alternatives can impose competitive restraints to ensure that the Exchanges act equitably, fairly, and reasonably.[150]

The Exchanges describe several competing wireless connections offered

[134] Specifically, ''[i]f a third party that uses the closest Commercial Pole allows the Exchange or its ICE Affiliate to measure the latency of its fiber route between the closest Commercial Pole and the Patch Panel Point, the Exchange undertakes to ensure that its latency is no less than that third party's latency, so long as (a) the third party equipment is the same or substantially similar to the equipment that the Exchange or its ICE Affiliate uses, and (b) the third party allows the Exchange or its ICE Affiliate to make latency measurements at least annually.'' *See* Wireless I Partial Amendment No. 2, *supra* note 15, at 6–7. *See also* Wireless II Partial Amendment No. 2, *supra* note 15, at 10–11 (committing similarly to have the latency of the fiber route between the Data Center Pole and the Production Point measured).

[135] *See* Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC to Vanessa Countryman, Secretary, Commission, dated September 21, 2020 (''McKay Letter V'') at 1–2. This commenter also questions whether the Exchanges' statement that the length of the fiber path from the Patch Panel Point to each customer cabinet in the space used for co-location in the Mahwah Data Center is the same as committing to equalize latency between those two points. *See id.* at 5.

[136] *See* McKay Letter IV at 6 (commenting on Partial Amendment No. 1). For example, according to this commenter, the closest commercial pole for a connection from the Mahwah Data Center to the Third Party Data Center in Carteret (south of the Mahwah Data Center) may be different than for a connection from the Third Party Data Center in Markham (north of the Mahwah Data Center). *See id.*

[137] *See* Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Vanessa Countryman, Secretary, Commission, dated September 25, 2020 at 2.

[138] *See supra* note 16 and accompanying text.

[139] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6; Wireless II Partial Amendment No. 3, *supra* note 16, at 6.

[140] *See also supra* Section III.A (describing the measures proposed in Partial Amendment No. 3).

[141] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6; Wireless II Partial Amendment No. 3, *supra* note 16, at 6. The Exchanges state that ''[t]his approach is consistent with comments received.'' *See id.* (footnote omitted) (citing McKay Letter IV at 6–7). *See also* McKay Letter IV at 6–7 (footnote omitted) (emphasis added) (proposing that, for each Third Party Data Center, the Exchanges' rules require that latency be equalized between the Data Center Pole and the Closest Commercial Pole based on ''the sum of (i) the fiber length from each pole into the Data Center; and (ii) *any differential (positive or negative) in geodesic distance between the pole and the third party data center.*'').

[142] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6 (quoting McKay Letter V at 4); Wireless II Partial Amendment No. 3, *supra* note 16, at 6. *See also supra* note 136 and accompanying text.

[143] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 11 (''The Exchange will monitor its compliance with the proposed rule.''); Wireless II Partial Amendment No. 3, *supra* note 16, at 11.

[144] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6; Wireless II Partial Amendment No. 3, *supra* note 16, at 6.

[145] Specifically, ''[i]f a third party that uses the closest Commercial Pole allows the Exchange or its ICE Affiliate to measure the latency of its fiber route between the closest Commercial Pole and the Patch Panel Point, the Exchange undertakes to ensure that its latency is no less than that third party's latency, so long as (a) the third party equipment is the same or substantially similar to the equipment that the Exchange or its ICE Affiliate uses, and (b) the third party allows the Exchange or its ICE Affiliate to make latency measurements at least annually.'' *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 11. *See also* Wireless II Partial Amendment No. 3, *supra* note 16, at 11 (committing similarly to have the latency of the fiber route between the Data Center Pole and the Production Point measured). The Exchanges state that because no known commercial provider (including ICE affiliates) has a network that follows the geodesic route, and because the routes they do follow are both changeable and not publicly available, the Exchanges cannot ensure that they would have access to the information required to measure what differences exist in the path followed between the Closest Commercial Pole and any Third Party Data Center. *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 6; Wireless II Partial Amendment No. 3, *supra* note 16, at 6.

[146] *See supra* Section III.B.1.

[147] *See* ArcaBook Approval Order, *supra* note 75, at 74781 (emphasis added). If an exchange cannot demonstrate that it was subject to significant competitive forces, it must ''provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.'' *Id.*

[148] *Id.* (emphasis added).

[149] *See* ArcaBook Approval Order, *supra* note 75, at 74785; SIFMA Decision, *supra* note 76, at 43–44 (citation omitted) (''We recognize that products need not be identical to be substitutable.'').

[150] *See* ArcaBook Approval Order, *supra* note 75, at 74785.

by non-ICE entities that they state provide connectivity at the ''same or similar speed'' as the Wireless Connections, and at the ''same or similar cost,'' [151] and state that some market participants have their own proprietary wireless networks, as well as that market participants may create a new proprietary wireless connection, connect through another market participant, or use fiber connections offered by the Exchanges, ICE affiliates, other service providers, and third party telecommunications providers.[152] With respect to the Wireless Connections with Carteret and Secaucus, which make use of the Data Center Pole, commenters (including competitors to IDS as well as market participants choosing among competitors) objected that IDS's exclusive access to the Data Center Pole and its associated geographic latency advantage would essentially make the availability of true substitutes impossible. In Partial Amendment No. 3, however, the Exchanges substantially mitigate the geographic latency advantage by adding rules requiring fiber-length equalization measures on the segment closest to the Exchanges' data center over which they have control and which take into account the geodesic (or ''over-the-air'') distance of each Third Party Data Center. As such, the measures proposed in Partial Amendment No. 3 allow competitors to offer a more similar service than they otherwise could in the absence of these measures.

Some commenters stated that the Exchanges should also commit to providing competitors with full access to the Data Center Pole to level the playing field completely. While doing so may further reduce the potential for differences between competing services, as previously stated, services need not be identical to be substitutable.[153] Separately, the Wireless Connections with Markham do not use the Data Center Pole,[154] and one commenter states that ''there appears to be a level playing field for all market participants choosing to access NYSE's offering in Markham.'' [155]

Based on the record, the Commission believes that there are alternatives to the Wireless Connections and Partial Amendment No. 3 is designed to further ensure that competitors can offer wireless connectivity services sufficiently comparable to those offered by the Exchanges. Thus, the Commission finds that the Exchanges are subject to significant competitive forces that constrain the terms on which the Wireless Connections are offered, and will approve the proposals, as amended, because there is no substantial countervailing basis to find that the terms of the proposals, as amended, violate the Act or the rules thereunder.[156]

As discussed above, commenters on the original proposals argued that the Exchanges had not met their burden of demonstrating that the Wireless Connections are consistent with the Act because the proximity of the Data Center Pole to the Mahwah Data Center and IDS's exclusive access to it conferred an insurmountable geographic latency advantage to IDS that was unfairly discriminatory and an inappropriate burden on competition.[157] In response to these comments and others, the Exchanges have proposed new rules to substantially mitigate the geographic latency advantage associated with the Data Center Pole, thereby ensuring that competing wireless connectivity service providers will have the opportunity to compete without the measurable and ostensible geographic latency advantage the Wireless Connections would otherwise have by virtue of the location of a Data Center Pole, and offer wireless connectivity services sufficiently comparable to the Wireless Connections.[158] Accordingly, the Commission finds that the Wireless Connections are not offered on terms that are unfairly discriminatory or would impose an inappropriate burden on competition, and otherwise finds no substantial countervailing basis on which to disapprove the proposals, as amended.[159]

Based on its finding that there are substantially similar substitutes to the Wireless Connections that bring significant competitive forces to bear on the equitableness and reasonableness of fees, the Commission finds the proposed rule changes, as modified by Partial Amendment No. 3, to be consistent with Section 6(b)(4) of the Act,[160] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

Further, because the Wireless Connections are designed to offer market participants a means to minimize the latency of their communications and receipt of Selected Market Data and thereby enhance the efficiency of their trading strategies on the Exchanges and elsewhere, and competitors may offer a similar level of services as a result of the fiber-length equalization measures, the Commission finds the proposals to be consistent with the Section 6(b)(5) of the Act, which requires that the rules of a national securities exchange be 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[161]

In addition, the Commission believes that the fiber-length equalization measures proposed in Partial Amendment No. 3 will enhance competition in the market for wireless connectivity services between the Mahwah Data Center and Third Party Data Centers, and therefore that the proposals, as amended, are consistent with Section 6(b)(8) of the Act, which prohibits any national securities exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.

In making these findings, the Commission has also taken into consideration certain representations made by the Exchanges in Partial Amendment No. 3.[162] Consistent with their representations, the Commission expects the Exchanges to adhere to the principle of having no measurable latency differential due to their use of the Data Center Pole.[163] Further, the Commission expects the Exchanges, as well as the Commission staff, to monitor the Wireless Connections, particularly as market conditions and technology evolve, to assess whether conditions continue to permit competitors to offer

[151] *See supra* note 86 and accompanying text.

[152] *See supra* note 88 and accompanying text.

[153] *See supra* notes 146–150 and accompanying text.

[154] *See supra* note 32.

[155] Virtu Letter II at 3.

[156] *See* BOX Order, *supra* note 74, at 18620–21 (applying the Commission's market-based test).

[157] *See supra* notes 103, 107, 122–125 and accompanying text.

[158] *See supra* notes 122–125 and accompanying text (referencing comments that the originally proposed unfair competitive advantage could be addressed).

[159] The Exchanges argue that their filing of the proposals puts IDS at a competitive disadvantage relative to its commercial competitors that are not subject to the filing requirements of Section 19(b) of the Act. Because the Wireless Connections are facilities of the Exchanges, however, the Commission must assess whether the terms on which they are offered are consistent with the Exchange Act.

[160] 15 U.S.C. 78f(b)(4).

[161] 15 U.S.C. 78f(b)(5).

[162] *See* discussion of Partial Amendment No. 3 *supra*.

[163] *See* Wireless I Partial Amendment No. 3, *supra* note 16, at 10; Wireless II Partial Amendment No. 3, *supra* note 16, at 10.

substantially similar substitutes for the Wireless Connections.

IV. Solicitation of Comments on Partial Amendment No. 3

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Partial Amendment No. 3 to each of the Wireless I and Wireless II proposals 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 Nos. SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08 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 Nos. SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, and SR–NYSENAT–2020–08. The file numbers 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 the Exchanges. 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 publicly available. All submissions should refer to File Nos. SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, and SR–NYSENAT–2020–08 and should be submitted on or before November 12, 2020.

V. Accelerated Approval of Proposed Rule Changes, as Modified by Partial Amendment No. 3

The Commission finds good cause to approve the proposed rule changes, each as modified by Partial Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the amended proposal in the **Federal Register**. The revisions made to the proposals in Partial Amendment No. 3 would place restrictions on the use of a pole or other structure on the grounds of the Mahwah, New Jersey data center that is used for the Wireless Connections. The Commission believes that Partial Amendment No. 3 addresses issues raised by the comments and provides substantially greater support for the conclusion that the Wireless Connections are offered in a market characterized by significant competition in which substantially similar substitutes are available. Further, approval of the proposals will permit competition to continue, rather than reduce the number of competitors in the market for wireless connectivity services. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[164] to approve the proposed rule changes, each as modified by Partial Amendment No. 3, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[165] that the proposed rule changes (SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08) be, and hereby are, approved on an accelerated basis.

[164] 15 U.S.C. 78s(b)(2).

[165] *See id.*

By the Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–23250 Filed 10–20–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90207; File No. SR–LCH SA–2020–004]

Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Change Relating to the Clearing of Single Name Credit Default Swaps Referencing Monoline Insurance Companies and the Amendment of LCH SA's Rules in Accordance With Its Risk Policies

October 15, 2020.

I. Introduction

On August 28, 2020, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4,[2] a proposed rule change as described below. The proposed rule change was published for comment in the **Federal Register** on September 10, 2020.[3] The Commission did not receive comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

As discussed in more detail below, the proposed rule change would: (i) Allow LCH to clear credit default swap (''CDS'') contracts on a monoline insurance company (meaning an insurance company issuing financial guaranty insurance policies or similar financial guarantees); (ii) add two new types of margin and make other changes related to margin; (iii) apply LCH SA's stress testing to margin collateral; (iv) revise LCH's use of credit scores of Clearing Members; (v) enhance LCH SA's process for managing Clearing Member defaults; (vi) clarify the timeframes associated with the end of day price submission process and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; LCH SA; Notice of Filing of Proposed Rule Change Relating to the Clearing of Single Name Credit Default Swaps Referencing Monoline Insurance Companies and the Amendment of LCH SA's Rules in Accordance With its Risk Policies, Exchange Act Release No. 89760 (Sep. 3, 2020), 85 FR 55908 (Sep. 10, 2020) (SR–LCH SA–2020–004) (''Notice'').

enhance the consequences for failing to submit end of day prices; (vii) clarify certain aspects of the calculation of Clearing Members' contributions to the CDS Default Fund; and (viii) make other miscellaneous updates, including correcting typographical errors.[4]

A. CDS Contracts Referencing a Monoline Insurance Company

Currently, LCH SA clears CDS contracts on indices that contain monoline insurance companies as constituents, such as the CDX.NA.IG and CDS.NA.HY. LCH SA would now like to permit clearing of CDS contracts on a monoline insurance company as a single name, rather than as part of an index, using the additional legal provisions published by the International Swaps and Derivatives Association, Inc. on September 15, 2014 (the ''Monoline Supplement''). Thus, as a result of the changes described below, Clearing Members would be able to clear single name CDS contracts on monoline insurance companies, and the Monoline Supplement would apply to any single name CDS contract on a monoline insurance company.

To allow clearing of single name CDS contracts on monoline insurance companies, the proposed rule change would first amend the LCH SA CDS Clearing Supplement (the ''CDS Supplement''). The CDS Supplement specifies contractual provisions that apply to transactions among LCH, Clearing Members, and clients. Part B, Section 2, sets out the terms of cleared transactions for index CDS and single name CDS that incorporate the 2014 ISDA Credit Derivatives Definitions. In Part B, Section 2.3 of the CDS Supplement, the proposed rule change would amend paragraph (g) to include a reference to the Monoline Supplement. As a result of this change, the Monoline Supplement would apply to any single name cleared transaction involving a monoline insurer.

Similarly, the proposed rule change would amend Section 2.2 of Part B to include a reference to the Monoline Supplement. Part B, Section 2, sets out the terms of cleared transactions for index CDS and single name CDS that incorporate the 2014 ISDA Credit Derivatives Definitions, and Section 2.2 of Part B applies to index CDS transactions. Although, as discussed above, LCH currently clears CDS contracts on indices that contain monoline insurance companies as constituents, LCH believes it is unclear whether the Monoline Supplement would apply to such index transactions containing monoline insurance companies. Thus, LCH is making this change to remove any doubt and to clarify that the Monoline Supplement would be applicable to each constituent of an index that is a monoline insurer.

The proposed rule change also would amend Section 4 of the LCH SA CDS Clearing Procedures (the ''Procedures''), which specifies the requirements a transaction must satisfy to be eligible for clearing by LCH SA. The proposed rule change would modify these requirements to add two conditions to LCH SA's clearing of single-name CDS contracts on monoline insurance companies. Pursuant to these conditions, LCH SA would only clear a single-name CDS contract on a monoline insurance company where the contract type is Standard North American Corporate and the Monoline Supplement is specified as applicable.

Finally, LCH represents that the proposed introduction of clearing single name CDS contracts on monoline insurers requires no change in LCH SA's margin methodology or stress testing, and thus no further changes are needed to begin clearing.[5]

B. Changes Related to Margin

Unrelated to the clearing of single name CDS contracts referencing monoline insurers, the proposed rule change would also make a number of changes related to LCH SA's margin requirements.

First, the proposed rule change would add a new type of margin called Legal Entity Identifier Margin (''LEI Margin''). LCH SA is proposing this new type of margin to remedy a potential issue in how it treats Clearing Members and collects margin. Currently, LCH SA may, for operational or historical reasons, treat a single Clearing Member as two different Clearing Members, with separate transaction accounts and margin requirements. LCH SA represents that in most cases, this results in higher margins than should otherwise be the case, because the different accounts result in separate margin requirements that are not netted against each other (as they would be in a single account).[6] LCH SA also believes, however, that this arrangement could potentially undercount the liquidation costs that could result from having to liquidate both accounts simultaneously in the event the single Clearing Member defaulted, which could result from potential concentration effects not taken into account when the accounts are considered separately.

To remedy this potential undercounting, the proposed rule change would introduce LEI Margin. The LEI Margin would calculate an additional, incremental margin amount based on the open positions registered in the margin accounts of one or more Clearing Members identified by the same Legal Entity Identifier (''LEI''). Thus, the LEI Margin would address the potential undercounting of liquidation costs by considering the risks posed by the Clearing Member as a whole, in all accounts with the same LEI.

Second, the proposed rule change would add another additional margin, called Stress Test Loss Over Additional Margin/Net Capital Ratio Margin (''STLOAM''). The purpose of STLOAM would be to ensure that Clearing Members have enough capital to absorb losses that could materialize under an extreme but plausible market risk scenario. To calculate STLOAM, LCH SA would first determine a Clearing Member's stress risk—how much the cost of a Clearing Member's default in an extreme but plausible market risk scenario exceeds its margin and CDS Default Fund contributions already deposited with LCH SA. LCH SA would then charge the Clearing Member the amount needed to bring this stress risk to within 30 percent of the Clearing Member's net capital. In other words, LCH SA has determined that a Clearing Member's stress risk should not exceed 30 percent of its net capital, and STLOAM would charge to a Clearing Member the amount needed to ensure that its stress risk does not exceed 30 percent of its net capital.

The proposed rule change would implement these new margins by adding them to the LCH SA Reference Guide: CDS Margin Framework. The proposed rule change would also amend the definition of ''Margin'' in the Section 1.1.1 of the LCH SA CDS Clearing Rule Book (the ''Rule Book'') to include these two new margins. Moreover, as with other margins, the LEI Margin and STLOAM would be calculated in accordance with Section 2 of the Procedures. Thus, the proposed rule change would add to Section 2 new language to describe these margins and how they are calculated.

In addition to introducing these two new margins, the proposed rule change would also distinguish Vega Margin from Spread Margin. Because Vega Margin is currently calculated as part of Spread Margin, these changes would not

[4] This discussion is excerpted from the Notice, 85 FR at 55908. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the LCH SA CDS Clearing Rule Book, the LCH SA CDS Clearing Procedures, or the LCH SA CDS Clearing Supplement, as applicable.

[5] *See* Notice, 85 FR at 55909, n.4.

[6] *See* Notice, 85 FR at 55909.

result in a new or additional margin requirement. Rather, these changes would separate and distinguish Vega Margin from Spread Margin, with the goal of providing additional detail and clarity to Clearing Members regarding their amounts of Vega Margin. The proposed rule change would make this distinction by: Adding a new definition for Vega Margin in Section 1.1.1 of the Rule Book; amending the definition of Margin in Section 1.1.1 to include Vega Margin; and adding in Section 2 of the Procedures references to Vega Margin and new language to describe Vega Margin.

Finally, the proposed rule change would make two organizational changes with respect to defined terms related to margin. First, the proposed rule change would delete the defined term Margin Account Uncovered Risk from Section 1.1.1 of the Rule Book because this defined term is no longer used in the Rule Book. Rather, the term is currently only used in Section 6 of the Procedures when discussing the calculation of the CDS Default Fund. The proposed rule change would replace references to Margin Account Uncovered Risk in Section 6 of the Procedures with references to the defined term Group Member Uncovered Risk instead. The definition of Group Member Uncovered Risk is the same as the definition of Margin Account Uncovered Risk, except that the Group Member Uncovered Risk applies to a Clearing Member and its affiliates rather than just a Clearing Member. Thus, the Group Member Uncovered Risk covers the Margin Account Uncovered Risk, and, as such, there is no need to separately refer to the Margin Account Uncovered Risk.

Second, the proposed rule change would rearrange the order in which the various types of margin are listed in the definition of Margin in Section 1.1.1 of the Rule Book and in paragraph 2.2(a) of Section 2 of the Procedures to be consistent with the order of description of the margins in paragraph 2.7 of Section 2 of the Procedures. LCH SA is making this change to ensure consistency.[7]

C. Stress Testing

The proposed rule change also would amend LCH SA's stress testing to apply it to margin collateral. The proposed rule change would amend Appendix 4 of the LCH Group Financial Resource Adequacy Policy (the ''FRAP''). Appendix 4 contains a glossary of defined terms related to stress testing. The proposed rule change would amend the definition of Stress Test Loss so that the definition includes the profit and loss amount determined from LCH stress test scenarios to a Clearing Member's margin collateral. Currently, the definition of Stress Test Loss only includes the profit and loss amount determined from LCH stress test scenarios to a Clearing Member's portfolio. By including the profit and loss amount to a Clearing Member's margin collateral, as well as its portfolio, this proposed change would assure that LCH SA includes a Clearing Member's non-cash collateral in a stress test. LCH SA is making this change to implement a recommendation from a regulator that LCH SA better monitor the risks associated with Clearing Members posting non-cash collateral, including sovereign debt.[8]

The proposed rule change would make three other changes to further carry out this change. First, the proposed rule change would amend the LCH Group Collateral Risk Policy to describe the Stress Test Loss as the profit and loss amount determined from LCH stress test scenarios to a Clearing Member's portfolio and margin collateral. Second, the proposed rule change would amend the definition of ''Group Member Uncovered Risk'' in Section 1.1.1 of the Rule Book to add a reference to the stress-tested potential loss that would be incurred in relation to collateral. Third, the proposed rule change would amend the LCH SA CDSClear Default Fund Methodology to reflect the inclusion of a Clearing Member's margin collateral in stress tests.

Finally, the proposed rule change would amend the FRAP to specify that the Stress Testing Regime must be independently validated and reviewed at least annually in consultation with the LCH SA Risk Committee.

D. Credit Scores

Next, the proposed rule change would make amendments related to the use of Internal Credit Scores (''ICS'') of Clearing Members. The ICS is the credit score that LCH SA assigns to a Clearing Member based on its assessment of the Clearing Member's credit risk. LCH SA uses a Clearing Member's ICS as an input in determining various margins, such as the Default Fund Additional Margin. The proposed rule change would amend Appendix 4 of the FRAP to clarify that where a Clearing Member is part of a group of affiliated Clearing Members, each having a different ICS, then LCH SA would consider the ICS of the affiliate having the largest exposure to LCH SA.

Moreover, the proposed rule change would amend the LCH Group Counterparty Credit Risk Policy to clarify that where there is a change in a Clearing Member's ICS, LCH SA's Executive Risk Committee must approve the change. Currently, the policy only requires that a changed ICS be sent to the Executive Risk Committee for notification.

E. CDS Default Management

In addition to the changes discussed above, LCH SA proposes to make a number of changes to its Rule Book and Procedures to enhance its process for managing Clearing Member defaults. These proposed enhancements are a result of lessons learned from fire drills—simulated tests of LCH SA's default management process.[9] These changes fall into two groups: Changes to Article 4.3.3.1 of the Rule Book and changes to Appendix 1 of the Rule Book. In addition to these two groups of changes, the proposed rule change would also amend Article 5.1.1.3 of the Rule Book, relating to the default of a client's Clearing Member.

Article 4.3.3.1 generally identifies certain resources available to LCH SA for recourse following the default of a Clearing Member. Paragraph (i)(b) of Article 4.3.3.1 identifies the resources that LCH SA may use to reduce or cover any Damage that it incurs from the liquidation of non-ported transactions of a Defaulting Clearing Member in any client account. The proposed rule change would amend paragraph (i)(b) of Article 4.3.3.1 to add to these resources any remaining collateral posted by a Defaulting Clearing Member as margin in respect of a proprietary account in connection with another LCH SA clearing service where (i) LCH SA has declared the Defaulting Clearing Member to be in default and (ii) to the extent such collateral has not been applied in such other clearing service.

Specifically, this new provision would generally mirror current Article 4.3.3.1(i)(b)(y). Current Article 4.3.3.1(i)(b)(y) provides LCH SA recourse to any collateral posted by a defaulting Clearing Member for a CCM Individual Segregated Account Client in connection with another LCH SA clearing service in certain conditions. The proposed rule change would add to the existing conditions in Article 4.3.3.1(i)(b)(y) the additional condition that LCH SA has declared the Clearing Member to be in default. LCH SA is making this change to mirror the conditions in the new resource discussed immediately above, thus

[7] *See* Notice, 85 FR at 55910.

[8] *See* Notice, 85 FR at 55910.

[9] *See* Notice, 85 FR at 55910.

maintaining consistency between these two provisions.[10]

Finally, the proposed rule change would renumber the sub-paragraphs of paragraph (i)(b) of Article 4.3.3.1, consistent with these changes and additions.

The second group of changes would amend Appendix 1 of the Rule Book. Appendix 1 contains the provisions that govern LCH SA's default management process for its CDS service. Clause 4 of Appendix 1 describes the default management process for client clearing. Article 4.3 of Clause 4 sets out the process that LCH SA would use to transfer a client's open positions to a backup Clearing Member following the default of the client's primary Clearing Member. The proposed rule change would amend Article 4.3 to add references to a clearing notice which would be published by LCH SA. The clearing notice would explain how a client would inform LCH SA of the identity of its backup Clearing Member and how the backup Clearing Member would confirm to LCH SA its willingness to serve as the backup.

Clause 8 of Appendix 1 sets out the process for closure of LCH SA's CDS service. Service closure is the last step in the default management process following a Clearing Member's default. As part of the service closure process, LCH SA calculates the value of a Clearing Member's transactions and the value of a Clearing Member's collateral. LCH SA nets these values together to produce an amount that LCH SA owes to the Clearing Member or that the Clearing Member owes to LCH SA. The proposed rule change would reorganize the provisions relating to these calculations to better reflect how LCH SA makes the calculations in practice, with LCH SA first calculating the value of transactions and the value of collateral before netting the two together.[11]

Moreover, the proposed rule change would amend Clause 8 of Appendix 1 to reflect the value in Euro of collateral. Specifically, where LCH SA determines the value of a Clearing Member's transactions and this amount is negative (meaning the Clearing Member owes a payment to LCH SA), LCH SA would take into consideration, when determining the value of that Clearing Member's collateral, the value of Euro denominated cash collateral and any amount resulting from the liquidation in Euro of the collateral other than cash collateral denominated in Euro. Where LCH SA determines the value of a Clearing Member's transactions and this amount is positive (meaning LCH SA owes a payment to the Clearing Member), LCH SA would take into consideration, when determining the value of that Clearing Member's collateral, the value of Euro denominated cash collateral. In this case LCH SA would not take into consideration the amount resulting from the liquidation in Euro of collateral other than Euro cash collateral because LCH SA would return that non-cash collateral to the Clearing Member, rather than liquidating it.

Finally, the proposed rule change would make three other miscellaneous changes to Clause 8. First, Article 8.3 of Clause 8 describes the sources of prices that LCH would use to determine the value of a Clearing Member's transactions, as discussed above. Article 8.3 lists these sources in order of priority. The proposed rule change would reorganize this list of sources to reflect the priority in which LCH SA would access these sources in practice. Second, the proposed rule change would amend Article 8.6 regarding the time period by which LCH SA must notify a Clearing Member of the amounts which LCH SA will pay to the Clearing Member or which the Clearing Member must pay to LCH SA. Currently, LCH SA must notify a Clearing Member by 15:00 on the Early Termination Trigger Date or on the first Business Day following the Early Termination Trigger Date. LCH SA determined that this deadline was not feasible in practice because the values which it uses to determine the amount payable to or receivable from a Clearing Member are based on prices determined as at the end of the first Business Day following the Early Termination Trigger Date.[12] Thus, the proposed rule change would revise Article 8.6 to require instead that LCH SA notify a Clearing Member by no later than the end of the second Business Day following the Early Termination Trigger Date. Finally, the proposed rule change would amend Article 8.7 to specify the deadline by which LCH SA would repay or redeliver collateral to Clearing Members.

Finally, the proposed rule change also would amend Article 5.1.1.3 of the Rule Book. Article 5.1.1.3 sets out the provisions that apply to a client of a Clearing Member receiving clearing services from that Clearing Member. Among other things, Article 5.1.1.3 provides that LCH SA will rely on the latest documentation and information received from the Clearing Member for the purpose of making certain payments to the client upon the default of the client's Clearing Member. The proposed rule change would expand this provision to specify that LCH SA may rely on the latest documentation and information received from the Clearing Member on the client for that purpose or for any other purpose. LCH SA is making this change to account for the possibility that it may need to rely on this documentation for other purposes upon the default of a client's Clearing Member, such as communicating with the client regarding the transfer of the client's positions to a backup Clearing Member.[13]

F. Price Submissions

Next, the proposed rule change would amend Section 5 and Section 8 of the Procedures with respect to the submission of end of day prices by Clearing Members. The proposed rule change would first amend paragraph 5.18.3 of Section 5. Paragraph 5.18.3 details the procedures for Clearing Members to submit prices to LCH SA. Currently, paragraph 5.18.3 provides that files listing the open positions for which Clearing Members are required to submit prices will be available at certain specified times. Current paragraph 5.18.3 separately lists the times for CDS and options on index CDS even though the actual times are the same. Because these times are the same, the proposed rule change would combine the separately listed times, listing one time for both CDS and options on index CDS. The proposed rule change would make the same change to paragraph 5.18.5. Moreover, paragraph 5.18.3 notes that the files may be available at earlier times, as notified in advance by LCH SA, preceding certain holidays that are listed in paragraph 5.18.3. The proposed rule change would replace the list of holidays and instead specify that the files may be available at earlier times as notified in advance by LCH SA. LCH SA is making both of these changes to simplify the drafting of paragraph 5.18.3, and thereby reduce the possibility for confusion or error.[14]

The proposed rule change would next amend paragraphs 5.18.3, 5.18.4, and 5.18.5 to clarify that the existing references in those paragraphs to options on index CDS are options with a CDS contractual currency in Euro.

The proposed rule change would also replace the reference to ''Clearing Day'' in paragraph 5.18.5(d) with a reference to ''Price Contribution Day''. Paragraph 5.18.5(d) specifies certain deadlines associated with the price submission

[10] *See* Notice, 85 FR at 55910.

[11] *See* Notice, 85 FR at 55911.

[12] *See* Notice, 85 FR at 55911.

[13] *See* Notice, 85 FR at 55912.

[14] *See* Notice, 85 FR at 55912.

process for transactions with a contractual currency in Euro and for those with a contractual currency in US dollars. The definition of Price Contribution Day makes a distinction between transactions with a contractual currency in Euro and those with a contractual currency in US dollars, while the definition of Clearing Day does not. Thus, given the application of paragraph 5.18.5(d) to transactions with a contractual currency in Euro and those with one in US dollars, using the term Price Contribution Day is more appropriate and precise.[15]

Finally, throughout Section 5 of the Procedures, the proposed rule change would replace reference to the ''Operations department'' with a reference to the ''CDSClear Operations Department''.

Section 8 of the Procedures governs LCH SA's discipline of Clearing Members that breach their obligations. Among other things, these disciplinary procedures provide the measures that LCH SA will take where a Clearing Member fails to submit complete end of day prices. Currently, paragraph 8.3 gives the LCH SA CEO or the CDSClear CEO the ability to impose a fine on a Clearing Member who is alleged to have failed to submit complete prices as required. Under paragraph 8.3 as proposed to be revised, the LCH SA CEO or the CDSClear CEO would still be able to impose a fine on a Clearing Member who is alleged to have failed to submit complete prices as required. The proposed rule change would also, in certain circumstances, give the LCH SA CEO or the CDSClear CEO the ability to increase a Clearing Member's Contribution Requirement for the next monthly calculation by an amount equal to the aggregate amount of fines incurred for such failure to submit complete prices. With this change, rather than just fining a Clearing Member, LCH SA would be able to collect the amount of the fine each month as part of a Clearing Member's Contribution Requirement, which is a Clearing Member's required contribution to the CDS Default Fund. To further facilitate this change, the proposed rule change would amend Article 4.4.1.3 of the Rule Book, which deals with the calculation of a Clearing Member's Contribution Requirement, to reference actions taken by LCH SA under Section 8 of the Procedures. LCH SA represents that the failure to submit prices is not an issue among Clearing Members currently, but it is making the amendment to anticipate potential failures by Clearing Members admitted as their number grows and to assure that LCH SA has the authority to discipline a Clearing Member that repeatedly fails to provide timely and accurate pricing data.[16]

G. Amendments to Default Fund Contributions

Currently, LCH SA calculates a Clearing Member's contribution to the CDS Default Fund based on its initial margins calculated with respect to the Clearing Member's account over the last sixty clearing days, as provided in Article 4.4.1.3 of the Rule Book. The proposed rule change would not amend this provision, but it would add additional language to clarify that if there is less than sixty Clearing Days of initial margin calculations for a Clearing Member's account, then LCH SA would base the Clearing Member's contribution on the initial margin calculations of all of the available clearing days. LCH SA is making this change to facilitate the possible transfer of positions of Clearing Members to accounts at LCH SA. In that case LCH SA may not have sixty clearing days of initial margin calculations on which to base the calculation of the contribution.[17]

Next, the proposed rule change would amend Article 4.4.1.8 of the Rule Book. Currently, 4.4.1.8 provides that LCH SA may recalculate a Clearing Member's required contribution to the default fund outside of the normal monthly cycle in certain circumstances, such as a material change in the Clearing Member's business. Article 4.4.1.8 also provides, however, that nothing shall permit LCH SA to increase the contribution of a Clearing Member whose aggregate amount of initial margin has not increased. The proposed rule change would delete this provision, thus allowing LCH SA to recalculate and increase a Clearing Member's required contribution to the default fund outside of the normal monthly cycle in certain circumstances, even where the Clearing Member's aggregate amount of initial margin has not increased. LCH SA is making this change because it has found that there may be circumstances where a change in a Clearing Member's positions has increased its risk, and thus should increase its required default fund contribution, even though the Clearing Member's initial margin has not increased.[18]

Finally, the proposed rule change would amend Section 6 of the Procedures, which concerns calculating the size of, and making contributions to, the CDS Default Fund. The proposed changes would clarify that a Clearing Member, if required to make an additional contribution, must submit the contribution through the TARGET2 payment system. The proposed rule change also would clarify the deadlines for submitting the additional contribution, which would depend on when LCH SA sends out the request for additional contribution.

H. Miscellaneous Amendments

In addition to the specific amendments discussed above, the proposed rule change would update references and correct typographical errors in the Supplement, the Rule Book, and the Procedures. The proposed rule change would also make a number of miscellaneous updates to the Supplement, the Rule Book, and the Procedures, as discussed below.

With respect to the Supplement, the proposed rule change would amend Part A and Part B. Sections 4.8 in both Part A and Part B refer to a Cleared Transaction Portfolio Report. The proposed rule change would replace the specific references to the Cleared Transaction Portfolio Report with general references to the reports referred to in Section 5 of the Procedures. Other parts of the Supplement refer generally to the reports referred to in Section 5 of the Procedures rather than specific reports. Thus, LCH SA is making this change to be consistent with the approach taken in other parts of the Supplement. This change will also increase flexibility as it would avoid the need for modifying the Supplement if there is a change in the name of the reports provided for in Section 5 of the Procedures.[19]

Moreover, the proposed rule change would remove unnecessary language from Paragraph (c) of Sections 9.1 of Parts A and B of the Supplement. Currently, those sections refer to the risks resulting from a Clearing Member being party to a Self Referencing Transaction where the Reference Entity is that Clearing Member. Because Section 9.1 only applies to Self Referencing Transactions where the Reference Entity is the Clearing Member, LCH SA does not believe this additional language, specifying that the Self Referencing Transaction is one where the Reference Entity is that Clearing Member, is necessary.[20] Thus, the proposed rule change would delete the phrase ''where the Reference Entity is that Clearing Member'' from

[15] *See* Notice, 85 FR at 55913.

[16] *See* Notice, 85 FR at 55911.

[17] *See* Notice, 85 FR at 55911.

[18] *See* Notice, 85 FR at 55911.

[19] *See* Notice, 85 FR at 55912.

[20] *See* Notice, 85 FR at 55912.

Paragraph (c) of Sections 9.1 of Parts A and B of the Supplement.

With respect to the Rule Book, the proposed rule change would amend Section 1.2.2. Section 1.2.2 provides procedures that LCH SA must follow when modifying the CDS Clearing Documentation (which includes, among other things, the Rule Book and the Procedures). These procedures include, among other things, consultation with the appropriate legal, risk, operational and other forums established by LCH SA. Article 1.2.2.1 of Section 1.2.2 provides that LCH SA may only amend the CDS Clearing Documentation in accordance with Section 1.2.2. Article 1.2.2.1 further provides that Section 1.2.2 does not apply to LCH SA's issuance of clearing notices. The proposed rule change would amend this exception such that it does not apply to Article 1.2.2.8 and Article 1.2.2.9. Thus, while Section 1.2.2 does not generally apply to LCH SA's issuance of clearing notices, under Article 1.2.2.1 as proposed to be amended, Article 1.2.2.8 and Article 1.2.2.9 of Section 1.2.2 would apply to LCH SA's issuance of clearing notices. Both of those articles set out specific procedures and requirements with respect to LCH SA's issuance of clearing notices. Thus, both Article 1.2.2.8 and Article 1.2.2.9 should apply to the issuance of clearing notices and the general exception in Article 1.2.2.1 should not be read to override these more specific articles. LCH SA is therefore making this change to clarify the applicability of Article 1.2.2.8 and Article 1.2.2.9.[21]

The proposed rule change also would make a number of updates to defined terms in the Rule Book and rearrange the terms for alphabetical order. First, the proposed rule change would delete the defined term ''LCH Settlement Price'' from the Rule Book. The proposed rule change would likewise remove any reference to that defined term from the Rule Book, including in Section 4.2.7, Article 5.1.1.3, and Article 6.1.1.3. Currently, Section 4.2.7 of the Rule Book uses two terms to refer to settlement prices: For options on index CDS there is the LCH Settlement Price, and for index and single name CDS there is the Markit LCH Settlement Price. The proposed rule change would amend Section 4.2.7 to use, instead, only the term Markit LCH Settlement Price for index CDS, single name CDS, and options on index CDS. Thus, with this change, there is no need for the term LCH Settlement Price, and, accordingly, the proposed rule change would delete that term and references to it.

Next, the proposed rule change would amend the definition of ''CDS Contractual Currency'' from Section 1.1.1 of the Rule Book. CDS Contractual Currency means the currency required under the terms of any Cleared Transaction. The proposed rule change would amend this definition to specify that, for an option on an index CDS, it means the currency required under the terms of the Underlying Index Transaction. Relatedly, the proposed rule change would add to Section 1.1.1 of the Rule Book the defined term Underlying Index Transaction, which will have the meaning given to it in Part C of the Supplement (where it is defined as the index CDS subject to the option).

Moreover, the proposed rule change would delete the terms ''CDS Intraday Transaction'' and ''Index Swaption Intraday Transaction'' from Section 1.1.1 of the Rule Book and consolidate them together in the defined term ''Intraday Transaction.'' LCH SA maintains that it established a distinction between CDS and Index Swaption intraday transactions because, for a time, the weekly backloading service was only available to CDS transactions.[22] Because the weekly backloading service is now available to Index Swaption transactions as well, LCH SA believes this distinction is no longer necessary.[23] The proposed rule change would accordingly update references to these defined terms in the Rule Book and the Procedures.

The proposed rule change also would amend the definitions of ''FCM Client Margin Requirement'' and ''FCM House Margin Requirement'' to clarify that the types of margin referred to in those definitions do not include Variation Margin. Because LCH SA does not calculate Variation Margin for FCM Clearing Members, neither of those definitions should include Variation Margin. Thus, LCH SA is making this change to clarify the scope of these definitions and ensure they are consistent with current practice.[24]

Similarly, the proposed rule change would clarify the definition of ''Procedures'' by specifying that such documents are issued by LCH SA and entitled ''CDS Clearing Procedures.''

Finally, the proposed rule change would delete a redundant defined term. The defined term ''Converting Clearing Member'' is currently defined in both Article 3.1.10.8 and Section 1.1.1 of the Rule Book. The proposed rule change would delete the term from Article 3.1.10.8, leaving just the definition in Section 1.1.1.

With respect to the Procedures, the proposed rule change would remove all of the Appendices from Section 5 of the Procedures. The Appendices are template forms that are used to transfer client transactions from one Clearing Member to another. LCH SA is making this change so it can keep the contact information and other parts of the forms updated without having to amend Section 5 of the Procedures.[25]

III. Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.[26] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[27] Section 17A(b)(3)(G) of the Act,[28] and Rules 17Ad–22(e)(1), (e)(4)(v), (e)(4)(vi)(A), (e)(6)(i), (e)(6)(iv), and (e)(13) thereunder.[29]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions and to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible.[30]

The Commission believes the changes discussed in Part II.A above should facilitate LCH SA's clearance of single name CDS contracts on monoline insurance companies by allowing LCH SA to accept such contracts for clearing. Moreover, LCH is adding these particular contracts to its existing rules, which the Commission has determined generally to promote the prompt and accurate clearance and settlement of

[21] *See* Notice, 85 FR at 55912.

[22] *See* Notice, 85 FR at 55912.

[23] *See* Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Change Relating to Extension of Weekly Backloading Cycle to Index Swaptions, Exchange Act Release No. 87296 (Oct. 11, 2019), 84 FR 55992 (Oct. 18, 2019) (SR–LCH–SA–2019–006).

[24] *See* Notice, 85 FR at 55912.

[25] *See* Notice, 85 FR at 55913.

[26] 15 U.S.C. 78s(b)(2)(C).

[27] 15 U.S.C. 78q–1(b)(3)(F).

[28] 15 U.S.C. 78q–1(b)(3)(G).

[29] 17 CFR 240.17Ad–22(e)(1), (e)(4)(v), (e)(4)(vi)(A), (e)(6)(i), (e)(6)(iv), and (e)(13).

[30] 15 U.S.C. 78q–1(b)(3)(F).

derivatives transactions.[31] The Commission believes this aspect of the proposed rule change should promote the prompt and accurate clearance and settlement of derivatives contracts, *i.e.,* single name CDS contracts on monoline insurance companies, consistent with Section 17A(b)(3)(F) of the Act.[32]

The Commission believes the changes discussed in Part II.B above should facilitate LCH SA's collection of two additional margins: LEI Margin and STLOAM. Moreover, the Commission believes the changes discussed in Part II.B above should clarify the margin that LCH SA currently collects by distinguishing Vega Margin from Spread Margin, eliminating the no-longer used defined term Margin Account Uncovered Risk, and re-organizing the defined term Margin. The Commission believes all of these changes should improve LCH SA's collection of margin, thereby improving LCH SA's ability to use margin to protect against potential losses. Because such potential losses could impede LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, the Commission believes that the changes discussed in Part II.B above, in improving LCH SA's ability to use margin to protect against such potential losses, should be consistent with Section 17A(b)(3)(F) of the Act.[33]

The Commission believes the changes discussed in Part II.C above should improve LCH SA's stress testing by including a Clearing Member's collateral in stress testing, thereby expanding the coverage of such testing, and clarifying that stress testing would need to be independently validated. Because LCH SA uses stress testing to ensure it has additional financial resources to cover the default of the two Clearing Member families that would potentially cause the largest aggregate credit exposure for LCH SA in extreme but plausible market conditions (and, therefore, to meet their regulatory requirements under Rule 17Ad–22(e)(4)(ii)), the Commission believes that this aspect of the proposed rule change should help to ensure that LCH SA's financial resources are adequate and cover the potential losses resulting from Clearing Member collateral. Because such potential losses could impede LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, the Commission believes that the changes discussed in Part II.C above, in improving LCH SA's stress testing, should be consistent with Section 17A(b)(3)(F) of the Act.[34]

The Commission believes the changes discussed in Part II.D above should improve LCH SA's use of credit scores by better describing how LCH SA would determine credit scores for an affiliated group of Clearing Members and by explicitly requiring LCH SA's Executive Risk Committee to approve a change in credit score. The Commission believes these changes should improve LCH SA's ability to determine accurate credit scores for Clearing Members and groups of Clearing Members, thereby improving its ability to determine the financial risk associated with transacting with such Clearing Members. Moreover, because, as discussed in Part II.D above, LCH SA uses credit scores as a component in calculating certain margins, the Commission believes these changes should improve LCH SA's ability to calculate and collect those margins. The Commission thus believes these aspects of the proposed rule change should better enable LCH SA to manage the potential risks and losses associated with transacting with Clearing Members. Because such losses could impede LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, the Commission believes that the changes discussed in Part II.D above, in improving LCH SA's use of credit scores, should be consistent with Section 17A(b)(3)(F) of the Act.[35]

The Commission believes the changes discussed in Part II.E above should improve LCH SA's ability to manage Clearing Member defaults by providing an additional resource for recourse in certain circumstances. In giving LCH SA flexibility to specify in a clearing notice how clients would notify LCH SA of backup Clearing Members to be used in case of a default of their primary Clearing Members, the Commission believes the proposed rule change should improve the ability of clients to continue clearing through backup Clearing Members. Moreover, the Commission believes the changes discussed above regarding closure of the CDS clearing service should improve the process for such closure by better organizing and explaining how LCH SA would calculate payments owed to Clearing Members or owed by Clearing Members to it; allowing LCH SA to consider the liquidation value in Euro of non-cash collateral where Clearing Members owe payments to LCH SA; clarifying the order in which LCH SA would consider sources or prices; and clarifying timelines for payment and return of collateral. The proposed rule change should also allow LCH SA to rely on information provided by a Clearing Member with respect to its client for purposes of default management, including for purposes of making certain payments. The Commission believes that all of these changes should improve LCH SA's ability to manage the repercussions of a Clearing Member's default, including possible closure of LCH SA's CDS clearing service. In doing so, the Commission believes this aspect of the proposed rule change should help LCH SA avoid potential losses arising from such a default, thereby helping to maintain LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, consistent with Section 17A(b)(3)(F) of the Act.[36]

The Commission believes the changes discussed in Part II.F above should improve LCH SA's ability to collect end of the day prices from Clearing Members by clarifying the timelines associated with price collection and updating references. Moreover, by giving the LCH SA CEO and the CDSClear CEO the ability to increase a Clearing Member's Contribution Requirement for the next monthly calculation by an amount equal to the aggregate amount of fines incurred for such Clearing Member's failure to submit complete prices, the Commission believes that the proposed rule change should give LCH SA a tool to incentivize Clearing Members to submit complete prices. Because LCH SA uses prices as an input in calculating margin requirements, the Commission believes that these aspects of the proposed rule change, like the changes related to margin discussed above, should improve LCH SA's ability to use margin to protect against potential losses that could impede LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, consistent with Section 17A(b)(3)(F) of the Act.[37]

The Commission believes the changes discussed in Part II.G above should better allow LCH SA to adjust contributions to the CDS Default Fund

[31] *See* Self-Regulatory Organizations; LCH SA; Order Granting Application for Registration as a Clearing Agency and Request for Exemptive Relief, Exchange Act Release No. 79707 (Dec. 29, 2016), 82 FR 1398, 1408 (Jan. 5, 2017) (finding that ''LCH SA is so organized and has the capacity to facilitate the prompt and accurate clearance and settlement and has rules designed to promote these same goals, in accordance with Sections 17A(b)(3)(A) and 17A(b)(3)(F) of the Act'' and further that ''LCH SA's rules, policies and procedures meet the requirements of Sections 17A(b)(3)(A) and 17A(b)(3)(F) of the Exchange Act'').

[32] 15 U.S.C. 78q–1(b)(3)(F).

[33] 15 U.S.C. 78q–1(b)(3)(F).

[34] 15 U.S.C. 78q–1(b)(3)(F).

[35] 15 U.S.C. 78q–1(b)(3)(F).

[36] 15 U.S.C. 78q–1(b)(3)(F).

[37] 15 U.S.C. 78q–1(b)(3)(F).

by basing contributions on initial margin for all available clearing days if less than 60 clearing days are available; allowing LCH SA to recalculate a Clearing Member's contribution outside of the normal monthly cycle in certain circumstances even though the Clearing Member's aggregate amount of initial margin has not increased; and clarifying the deadlines and method for submitting an additional contribution to the CDS Default Fund. The Commission believes that these changes should enable LCH SA to ensure that the CDS Default Fund remains properly sized in accordance with the potential losses presented by Clearing Members' portfolios. Because LCH SA uses the CDS Default Fund to cover the default of the two Clearing Member families that would potentially cause the largest aggregate credit exposure for LCH SA in extreme but plausible market conditions, the Commission believes that this aspect of the proposed rule change should help to ensure that LCH SA's financial resources are adequate and cover the potential losses resulting from Clearing Member collateral. Because such potential losses could impede LCH SA's ability to promptly and accurately clear and settle transactions and safeguard securities and funds, the Commission believes that the changes discussed in Part II.G above, in improving LCH SA's ability to adjust Clearing Member contributions to the CDS Default Fund, should be consistent with Section 17A(b)(3)(F) of the Act.[38]

Finally, the Commission believes the changes discussed in Part II.H above should clarify and improve the readability of the Rule Book and the Procedures by updating references and correcting typographical errors; clarifying the applicability of Article 1.2.2.8 and Article 1.2.2.9; deleting the unused defined term LCH Settlement Price; making other updates to defined terms in the Rule Book; and removing the appendices from Section 5 of the Procedures. In doing so, the Commission believes that these aspects of the proposed rule change should help to ensure that the Rule Book and the Procedures are applied consistently with reduced chances for error or mistakes. For these reasons, the Commission believes these aspects of the proposed rule change should be consistent with Section 17A(b)(3)(F) of the Act.[39]

Taking these reasons together, the Commission finds that the proposed rule change is consistent with 17A(b)(3)(F) of the Act.[40]

B. Consistency With Section 17A(b)(3)(G) of the Act

Section 17A(b)(3)(G) of the Act requires, among other things, that the rules of LCH SA provide that its participants shall be appropriately disciplined for violation of any provision of the rules of LCH SA by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, or any other fitting sanction.[41] The Commission believes the changes discussed in Part II.F above, by giving the LCH SA CEO and the CDSClear CEO the ability to increase a Clearing Member's Contribution Requirement for the next monthly calculation by an amount equal to the aggregate amount of fines incurred for such Clearing Member's failure to submit complete prices, should give LCH SA a tool to collect fines and discipline Clearing Members for failing to submit complete prices, in violation of LCH SA's rules. For this reason, the Commission finds this aspect of the proposed rule change is consistent with Section 17A(b)(3)(G) of the Act.[42]

C. Consistency With Rule 17Ad–22(e)(1)

Rule 17Ad–22(e)(1) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[43] The Commission believes the changes discussed in Part II.A above should establish the legal basis for LCH SA's clearance of single name CDS contracts on monoline insurance companies by amending the CDS Supplement to establish the legal terms for such transactions and amending the Procedures to allow LCH SA to accept such contracts for clearing. Moreover, the Commission believes the changes discussed in Part II.H above should make the Rule Book and the Procedures more clear by updating references and correcting typographical errors; clarifying the applicability of Article 1.2.2.8 and Article 1.2.2.9; deleting the unused defined term LCH Settlement Price; making other updates to defined terms in the Rule Book; and removing the appendices from Section 5 of the Procedures. For these reasons, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(1).[44]

D. Consistency With Rule 17Ad–22(e)(4)(v)

Rule 17Ad–22(e)(4)(v) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining the financial resources required under Rule 17Ad–22(e)(4)(ii) in combined or separately maintained clearing or guaranty funds.[45] The Commission believes the changes discussed in Part II.G above would improve LCH SA's ability to maintain the CDS Default Fund, which consists of the financial resources required under Rule 17Ad–22(e)(4)(ii), by giving LCH SA the ability to base contributions on initial margin for all available Clearing Days; the ability to recalculate a Clearing Member's contribution outside of the normal monthly cycle in certain circumstances even though the Clearing Member's aggregate amount of initial margin has not increased; and clarifying the deadlines and method for submitting an additional contribution to the CDS Default Fund. For these reasons, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(4)(v).[46]

E. Consistency With Rule 17Ad–22(e)(4)(vi)(A)

Rule 17Ad–22(e)(4)(vi)(A) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by testing the sufficiency of its total financial resources available to meet the minimum financial resource requirements under Rules 17Ad–22(e)(4)(i) through (e)(4)(iii), as applicable, by conducting stress testing of its total financial resources once each day using standard predetermined

[38] 15 U.S.C. 78q–1(b)(3)(F).

[39] 15 U.S.C. 78q–1(b)(3)(F).

[40] 15 U.S.C. 78q–1(b)(3)(F).

[41] 15 U.S.C. 78q–1(b)(3)(G).

[42] 15 U.S.C. 78q–1(b)(3)(G).

[43] 17 CFR 240.17Ad–22(e)(1).

[44] 17 CFR 240.17Ad–22(e)(1).

[45] 17 CFR 240.17Ad–22(e)(4)(v). Rule 17Ad–22(e)(4)(ii) requires that LCH SA maintain additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for LCH SA in extreme but plausible market conditions.

[46] 17 CFR 240.17Ad–22(e)(4)(v).

parameters and assumptions.[47] The Commission believes the changes discussed in Part II.C above should improve LCH SA's stress testing by including margin collateral in stress testing, thereby expanding the coverage of such testing, and clarifying that stress testing would need to be independently validated. The Commission therefore believes this aspect of the proposed rule change should improve the conduct of LCH SA's daily stress testing required by Rule 17Ad–22(e)(4)(vi)(A).[48] Thus, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(4)(vi)(A).[49]

F. Consistency With Rule 17Ad–22(e)(6)(i)

Rule 17Ad–22(e)(6)(i) requires that LCH SA 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 considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[50] The Commission believes the changes discussed in Part II.B above, by facilitating LCH SA's collection of LEI Margin and STLOAM, should help to ensure that LCH SA's risk-based margin system considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. Moreover, the Commission believes the other changes discussed in Part II.B above, by distinguishing Vega Margin from Spread Margin, eliminating the no-longer used defined term Margin Account Uncovered Risk, and re-organizing the defined term Margin, should clarify the margin LCH SA collects and should thereby help ensure the consistent operation of LCH SA's risk-based margin system. Finally, because, as discussed in Part II.D above, LCH SA uses credit scores as a component in calculating certain margins, the Commission believes the changes discussed above with respect to credit scores should improve LCH SA's ability to calculate and collect those margins. For these reasons, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(6)(i).[51]

G. Consistency With Rule 17Ad–22(e)(6)(iv)

Rule 17Ad–22(e)(6)(iv) requires that LCH SA 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.[52] The Commission believes the changes discussed in Part II.F above should improve LCH SA's ability to obtain end of the day prices from Clearing Members by clarifying the timelines associated with price collection, updating references, and improving the ability of LCH SA to hold accountable Clearing Members that do not make complete price submissions. The Commission believes these aspects of the proposed rule change should help to ensure that LCH SA's risk-based margin system, which uses end of day prices submitted by Clearing Members to calculate margin, 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. Thus, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(6)(iv).[53]

H. Consistency With Rule 17Ad–22(e)(13)

Rule 17Ad–22(e)(13) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to, among other things, ensure LCH SA has the authority and operational capacity to take timely action to contain losses and liquidity demands.[54] The Commission believes the changes discussed in Part II.E above should improve LCH SA's ability to take timely action to contain losses and liquidity demands in managing Clearing Member defaults by providing an additional resource for recourse in certain circumstances. Moreover, in giving LCH SA flexibility to specify in a clearing notice how clients would notify LCH SA of backup Clearing Members to be used in case of a default of their primary Clearing Members, the Commission believes this change should improve clients' ability to designate a backup Clearing Member and thereby continue clearing in case of the default of a primary Clearing Member. The Commission further believes this should, in turn, reduce the possibility for losses resulting from the default of the primary Clearing Member. Finally, the Commission believes the changes discussed in Part II.E above regarding closure of the CDS clearing service should improve the process for such closure which should, in turn, help to ensure that LCH SA has the authority and operational capacity to take timely action to contain losses and liquidity demands resulting from such a closure. Thus, the Commission finds these aspects of the proposed rule change are consistent with Rule 17Ad–22(e)(13).[55]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act,[56] Section 17A(b)(3)(G) of the Act,[57] and Rules 17Ad–22(e)(1), (e)(4)(v), (e)(4)(vi)(A), (e)(6)(i), (e)(6)(iv), and (e)(13) thereunder.[58]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[59] that the proposed rule change (SR–LCH SA–2020–004) be, and hereby is, approved.[60]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[61]

J. Matthew DeLesDernier,

Assistant Secretary.

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[47] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[48] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[49] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[50] 17 CFR 240.17Ad–22(e)(6)(i).

[51] 17 CFR 240.17Ad–22(e)(6)(i).

[52] 17 CFR 240.17Ad–22(e)(6)(iv).

[53] 17 CFR 240.17Ad–22(e)(6)(iv).

[54] 17 CFR 240.17Ad–22(e)(13).

[55] 17 CFR 240.17Ad–22(e)(13).

[56] 15 U.S.C. 78q–1(b)(3)(F).

[57] 15 U.S.C. 78q–1(b)(3)(G).

[58] 17 CFR 240.17Ad–22(e)(1), (e)(4)(v), (e)(4)(vi)(A), (e)(6)(i), (e)(6)(iv), and (e)(13).

[59] 15 U.S.C. 78s(b)(2).

[60] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[61] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90196; File No. SR–EMERALD–2020–11]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees

October 15, 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, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'') to adopt certain membership fees for MIAX Emerald Members,[3] including: (1) One-time membership application fees and (2) monthly Trading Permit[4] fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, 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 the Fee Schedule to adopt certain membership fees, including: (1) Establishing one-time membership application fees based upon the applicant's status as either an Electronic Exchange Member (''EEM'')[5] or as a Market Maker;[6] and (2) adopting monthly Trading Permit fees for EEMs and Market Makers. MIAX Emerald commenced operations as a national securities exchange registered under Section 6 of the Act[7] on March 1, 2019.[8] The Exchange adopted its transaction fees and certain of its non-transaction fees in its filing SR–EMERALD–2019–15.[9] In that filing, the Exchange expressly waived, among other fees, its membership fees, including its one-time membership application fees and monthly Trading Permit fees, to provide an incentive to prospective EEMs and Market Makers to become Members of the Exchange. Accordingly, since the launch of the Exchange, all such membership fees have been waived for the Waiver Period.[10] When the Exchange adopted the framework for the membership fees, it stated that it would provide notice to market participants when the Exchange intended to terminate the Waiver Period for those fees. Accordingly, on September 15, 2020, the Exchange issued a Regulatory Circular which announced that the Exchange would be ending the Waiver Period for its membership fees, including the one-time membership application fees and monthly Trading Permit fees, among other non-transaction fees, beginning October 1, 2020.[11]

One-Time MIAX Emerald Membership Application Fee

The Exchange proposes to assess a one-time membership application fee based upon the applicant's status as either an EEM or as a Market Maker. The Exchange proposes that applicants for MIAX Emerald Membership as an EEM will be assessed a one-time application fee of $2,500. The Exchange proposes that applicants for MIAX Emerald Membership as a Market Maker will be assessed a one-time application fee of $3,000. The difference in the proposed membership application fee to be charged to EEMs and Market Makers is because of the additional review and resources involved in processing a Market Maker's application, as Market Makers have greater and more complex obligations with respect to doing business on the Exchange.[12] MIAX Emerald's proposed one-time membership application fees are the same as the one-time application fees in place at the Exchange's affiliate, Miami International Securities Exchange, LLC (''MIAX'') ($2,500 for an EEM and $3,000 for a MIAX Market Maker),[13] and similar to or less than application fees for the Cboe Exchange, Inc. (''Cboe'') ($3,000 for an individual applicant and $5,000 for an applicant organization)[14] and Nasdaq ISE, LLC (''Nasdaq ISE'') ($7,500 per firm for a primary market maker, $5,500 per firm for a competitive market maker, and $3,500 per firm for an electronic access member).[15] Below is the table showing the proposed one-time MIAX Emerald membership application fees for EEMs and Market Makers:

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The term ''Trading Permit'' means a permit issued by the Exchange that confers the ability to transact on the Exchange. *See* Exchange Rule 100.

[5] ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100 and the Definitions section of the Fee Schedule.

[6] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100 and the Definitions section of the Fee Schedule.

[7] 15 U.S.C. 78f.

[8] *See* Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10–233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange).

[9] *See* Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR–EMERALD–2019–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule).

[10] ''Waiver Period'' means, for each applicable fee, the period of time from the initial effective date of the MIAX Emerald Fee Schedule until such time that the Exchange has an effective fee filing establishing the applicable fee. The Exchange will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee. *See* the Definitions Section of the Fee Schedule.

[11] *See* MIAX Emerald Regulatory Circular 2020–41 available at *https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2020_41.pdf*.

[12] *See* Chapter VI of the Exchange's rules, generally.

[13] *See* MIAX Fee Schedule, Section 3)a).

[14] *See* Cboe Fees Schedule, p. 9, Cboe Trading Permit Holder Application Fees.

[15] *See* Nasdaq ISE, Options Rules, Options 7, Pricing Schedule, Section 9. Legal and Regulatory A. Application.

Type of membership	Application fee
Electronic Exchange Member	$2,500.00
Market Maker	3,000.00

Monthly Trading Permit Fees

The Exchange previously introduced the structure of Trading Permit fees (without proposing the actual fee amounts), but also explicitly waived the assessment of any such fees for the Waiver Period. Trading Permits are issued to Members who are either EEMs or Market Makers. The Exchange proposes to assess monthly fees for Trading Permits depending upon the category of Member that is issued a Trading Permit. Members issued Trading Permits during a calendar month will be assessed monthly Trading Permit Fees. The Exchange notes that the Exchange's affiliate, Miami International Securities Exchange, LLC (''MIAX''), charges a similar, fixed trading permit fee to its EEMs, and a similar, varying trading permit fee to its Market Makers, based upon the number of assignments of option classes or the percentage of volume in option classes.[16]

The Exchange proposes that monthly Trading Permit fees will be assessed, with respect to the calculation of such fee to EEMs (other than clearing firms), in any month the EEM is certified in the membership system and is credentialed to use one or more Financial Information Exchange (''FIX'') [17] ports in the production environment. Further, the Exchange proposes that monthly Trading Permit fees will be assessed with respect to EEM clearing firms in any month the clearing firm is certified in the membership system to clear transactions on the Exchange.

The Exchange proposes to assess EEMs a monthly fee of $1,000 for each Trading Permit. Below is the proposed table showing the Trading Permit fees for EEMs:

Type of trading permit	Monthly MIAX emerald trading permit fee
Electronic Exchange Member	$1,000.00

The Exchange proposes to assess monthly Trading Permit fees for Market Makers in any month the Market Maker (including a Registered Market Maker, Lead Market Maker, and Primary Lead Market Maker) is certified in the membership system, is credentialed to use one or more MIAX Emerald Express Interface (''MEI'') [18] ports in the production environment and is assigned to quote in one or more classes. Specifically, the Exchange proposes to adopt the following Trading Permit fees for Market Makers: (i) $7,000 for Market Maker Assignments in up to 10 option classes or up to 20% of option classes by national average daily volume (''ADV''); (ii) $12,000 for Market Maker Assignments in up to 40 option classes or up to 35% of option classes by ADV; (iii) $17,000 for Market Maker Assignments in up to 100 option classes or up to 50% of option classes by ADV; and (iv) $22,000 for Market Maker Assignments in over 100 option classes or over 50% of option classes by ADV up to all option classes listed on MIAX Emerald.

The Exchange also proposes to adopt an alternative lower Trading Permit fee for Market Makers who fall within the following Trading Permit fee levels, which represent the 3rd and 4th levels of the Market Maker Trading Permit fee table: (i) Market Maker Assignments in up to 100 option classes or up to 50% of option classes by volume; and (ii) Market Maker Assignments in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Emerald. Specifically, the Exchange proposes to adopt footnote ''■'' following the Market Maker Trading Permit fee table for these Monthly Trading Permit tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month, then the fee will be $15,500 instead of the fee otherwise applicable to such level.

Below is the proposed table showing the Trading Permit fees for Market Makers:

Type of trading permit	Monthly MIAX emerald trading permit fee	Market Maker assignments (the lesser of the applicable measurements below)	
		Per class	Percent of national average daily volume
Market Maker (includes RMM, LMM, PLMM)	$7,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
	12,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
	■17,000.00	Up to 100 Classes	Up to 50% of Classes by volume.
	■22,000.00	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX Emerald.

■ For these Monthly MIAX Emerald Trading Permit tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month, then the fee will be $15,500 instead of the fee otherwise applicable to such level.

For the calculation of the monthly Market Maker Trading Permit fees, the number of classes is defined as the greatest number of classes the Market Maker was assigned to quote in on any given day within the calendar month and the class volume percentage is based on the total national ADV in classes listed on MIAX Emerald in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly Market Maker Trading Permit fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average daily volume. The

[16] *See* the MIAX Fee Schedule, Section 3)b).

[17] ''FIX Port'' means an interface with MIAX Emerald systems that enables the Port user to submit simple and complex orders electronically to MIAX Emerald. *See* the Definitions Section of the Fee Schedule.

[18] The MEI is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. The Exchange offers Full Service MEI Ports, which provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. The Exchange also offers Limited Service MEI Ports, which provide Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

Exchange proposes to assess MIAX Emerald Market Makers the monthly Market Maker Trading Permit fee based on the greatest number of classes listed on MIAX Emerald that the Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national ADV measurement. The purpose of the alternative lower fee designated in proposed footnote ''■'' is to provide a lower fixed cost to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed costs to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation and lower market maker profitability. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed cost. The Exchange notes that the Exchange's affiliate, MIAX, provides a similar alternative lower Trading Permit fee for Market Makers who quote the entire MIAX market (or substantial amount of the MIAX market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on MIAX.[19] The Exchange also notes that other options exchanges assess certain of their membership fees at different rates, based upon a member's participation on that exchange,[20] and, as such, this concept is not new or novel. The proposed changes to the Trading Permit fees for Market Makers who fall within the 3rd and 4th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

Applicability to and Impact on Participants

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [21]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 16% market share.[22] Therefore, no exchange possesses significant pricing power. More specifically, for the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options.[23]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to non-transaction and transaction fee changes. For example, on February 28, 2019, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX PEARL'') filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[24] MIAX PEARL experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX PEARL March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX PEARL's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The proposed adoption of a one-time membership application fee and monthly Trading Permit fees applicable to EEMs and Market Markers would be applied uniformly to each of these market participants. Further, as there are currently 16 registered options exchanges competing for order flow with no single exchange accounting for more than approximately 16% of market share, the Exchange cannot predict with certainty whether any participant is planning to become a Member and thus would be subject to the proposed fees.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [25] in general, and furthers the objectives of Section 6(b)(4) of the Act [26] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the proposal to adopt a one-time membership application fee and Trading Permit fees applicable to EEMs and Market Markers, as described above, is reasonable in several respects. First, the Exchange is subject to significant competitive forces in the market for options transaction and non-transaction services that constrain its pricing

[19] *See supra* note 16.

[20] *See e.g.,* NYSE Arca Options Fees and Charges, p.1 (assessing market makers $6,000 for up to 175 option issues, an additional $5,000 for up to 350 option issues, an additional $4,000 for up to 1,000 option issues, an additional $3,000 for all option issues on the exchange, and an additional $1,000 for the fifth trading permit and for each trading permit thereafter); NYSE American Options Fee Schedule, p. 23 (assessing market makers $8,000 for up to 60 plus the bottom 45% of option issues, an additional $6,000 for up to 150 plus the bottom 45% of option issues, an additional $5,000 for up to 500 plus the bottom 45% of option issues, and additional $4,000 for up to 1,100 plus the bottom 45% of option issues, an additional $3,000 for all issues traded on the exchange, and an additional $2,000 for 6th to 9th ATPs; plus an addition fee for premium products). *See also* Cboe BZX Options Exchange (''BZX Options'') assesses the Participant Fee, which is a membership fee, according to a member's ADV. *See* Cboe BZX Options Exchange Fee Schedule under ''Membership Fees''. The Participant Fee is $500 if the member ADV is less than 5,000 contracts and $1,000 if the member ADV is equal to or greater than 5,000 contracts. *Id.*

[21] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[22] The Options Clearing Corporation (''OCC'') publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/market-data/volume/default.jsp.*

[23] *See id.*

[24] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(4) and (5).

determinations in that market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [27]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 16% of the market share of executed volume of multiply-listed equity and ETF options.[28] Therefore, no exchange possesses significant pricing power. More specifically, for the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options.[29]

The Exchange also believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to non-transaction and transaction fee changes. For example, on February 28, 2019, the Exchange's affiliate, MIAX PEARL, filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[30] MIAX PEARL experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX PEARL March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX PEARL's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

Further, the Exchange no longer believes it is necessary to waive these fees to attract market participants to the MIAX Emerald market since this market is now established and MIAX Emerald no longer needs to rely on such waivers to attract market participants. The Exchange believes that the proposal is equitable and not unfairly discriminatory because the elimination of the fee waiver for one-time membership application fees and monthly Trading Permit fees will uniformly apply to all EEMs and Market Makers seeking to become Members of the Exchange. Additionally, the Exchange believes its proposal for a one-time membership application fees applicable to EEMs and Market Markers is reasonable and well within the range of fees assessed among other exchanges, including the Exchange's affiliate, MIAX.[31] The Exchange also notes that the Exchange's affiliate, MIAX, charges a similar, fixed trading permit fee to its EEMs, and a similar, varying trading permit fee to its Market Makers, based upon the number of assignments of option classes or the percentage of volume in option classes.[32]

The Exchange believes its one-time membership application fees are reasonable, equitable and not unfairly discriminatory. As described above, the one-time application fees are similar to the application fees in place at other options exchanges,[33] and are associated with the time and resources of processing of such applications. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Maker applicants are charged slightly more than EEM applicants because of the additional review and resources involved in processing a Market Maker's application, as Market Makers have greater and more complex obligations with respect to doing business on the Exchange.[34]

The Exchange believes that the proposed monthly Trading Permit fees are reasonable, equitable and not unfairly discriminatory because they are within the range of comparable fees at other competing options exchanges.[35] As such, the proposal is reasonably designed to continue to compete with other options exchange by incentivizing market participants to register as Market Makers on the Exchange in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants. The proposed fees are fair and equitable and not unreasonably discriminatory because they apply equally to all Market Makers regardless of type and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange designed the fee rates in order to provide objective criteria for Market Makers of different sizes and business models to be assessed a Trading Permit Fee that best matches their quoting activity on the Exchange. The Exchange notes that trading volume and quoting activity in the options market tends to be concentrated in the top ranked options classes; with the vast majority of options classes being thinly quoted and traded. The Exchange believes that the proposed fee rates and criteria provide an objective and flexible framework that will encourage Market Makers to be assigned and quote in option classes with lower total national average daily volume while also equitably allocating the fees in a reasonable manner amongst Market Maker assignments to account for quoting and trading activity.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees for services and products, in addition to order flow, to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment.

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.

[27] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[28] *See supra* note 22.

[29] *See id.*

[30] *See supra* note 24.

[31] *See supra* notes 13, 14 and 15.

[32] *See supra* note 16.

[33] *See supra* notes 14 and 15.

[34] *See supra* note 12.

[35] *See supra* note 20.

Intra-Market Competition

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. Unilateral action by MIAX Emerald in the assessment of certain non-transaction fees for services provided to its Members and others using its facilities will not have an impact on competition. As a more recent entrant in the already highly competitive environment for equity options trading, MIAX Emerald does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Act. MIAX Emerald's proposed one-time membership application fees and monthly Trading Permit fees, as described herein, are comparable to fees charged by other options exchanges for the same or similar services, including those fees assessed by the Exchange's affiliate, MIAX.[36]

The Exchange believes that the proposed one-time membership application fees and monthly Trading Permit fees do not place certain market participants at a relative disadvantage to other market participants because the pricing is associated with the Exchange's time and resources to process such applications. The proposed one-time membership application fees do not apply unequally to different size market participants, but instead would allow the Exchange to charge for reviewing and processing Market Maker and EEM membership applications. Accordingly, the proposed one-time membership application fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

Further, the Exchange believes that the proposed rule change will promote transparency by making it clear to EEMs and Market Makers the fees that MIAX Emerald will assess for Membership application to MIAX Emerald. This will permit EEMs and Market Makers to more accurately anticipate and account for the costs of one-time membership application in order to become Members of the Exchange, which promotes consistency.

The Exchange believes that the proposal increases intra-market competition by enabling Market Makers to qualify for lower Trading Permit fee rates on the Exchange in a manner that is designed to provide objective criteria for Market Makers of different sizes and business models to be assessed a Trading Permit fee that best matches their quoting activity on the Exchange yet still be in the range of comparable fees on other exchanges. The Exchange believes that the proposal will increase competition amongst Market Makers of different sizes and business models by encouraging Market Makers to be assigned and quote in option classes with lower total national average daily volume.

Inter-Market Competition

The Exchange believes the proposed one-time membership application fees and monthly Trading Permit fees do not place an undue burden on competition on other SROs that is not necessary or appropriate. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. For the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options,[37] and the Exchange believes that the ever-shifting market share among exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to fee changes. In such an environment, the Exchange must continually adjust its fees and fee waivers to remain competitive with other exchanges and to attract order flow to the Exchange. The Exchange believes that the proposal reflects this competitive environment because it modify the Exchange's fees in a manner that continues to encourage market participants to register as Market Makers on the Exchange, to provide liquidity, and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[36] *See supra* notes 13, 14 and 15.

[37] *See supra* note 22.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[38] and Rule 19b–4(f)(2) [39] 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 shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2020–11 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–EMERALD–2020–11. 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

[38] 15 U.S.C. 78s(b)(3)(A)(ii).

[39] 17 CFR 240.19b–4(f)(2).

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–EMERALD–2020–11 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23256 Filed 10–20–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90193; File No. SR–NYSEAMER–2020–76]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend the NYSE American Options Fee Schedule

October 15, 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 9, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE American Options Fee Schedule (''Fee Schedule'') regarding the Strategy Execution Fee Cap. The Exchange proposes to implement the fee change effective October 9, 2020.[4] The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Fee Schedule to modify the Strategy Execution Fee Cap (''Strategy Cap''), effective October 9, 2020.

Currently, the Fee Schedule provides that transaction fees for ATP Holders are limited or capped at $1,000 for certain options strategy executions ''on the same trading day,'' meaning it is a daily fee cap.[5] Strategy executions that qualify for the Strategy Cap are (a) reversals and conversions, (b) box spreads, (c) short stock interest spreads, (d) merger spreads, and (e) jelly rolls, which are described in detail in the Fee Schedule (the ''Strategy Executions'').[6]

The Exchange proposes to modify the Strategy Cap to offer a lower cap of $200 for those ATP Holders that trade at least 25,000 monthly billable contract sides in Strategy Executions.[7] Thus, at the end of the month, qualifying ATP Holders would have transaction fees for their Strategy Executions for each day of the month capped at $200 (as opposed to $1,000 for non-qualifying ATP Holders).[8]

For example, assume an ATP Holder executes the following Strategy Executions against interest in the Trading Crowd on the third business day of the month on behalf of a non-Customer that is not a Specialist or e-Specialist, which participants are subject to a $0.25 per Manual transaction fee. Under the current Fee Schedule an ATP Holder would be charged a total of $1,000 in options fees, per the daily fee cap:

- *Trade 1:* A Reversal Conversion in DEF comprised of 3,000 call options against 3,000 put options would be $1,500 (at $0.25 per execution), absent the $1,000 Strategy Cap.
- *Trade 2:* A Reversal Conversion in ABC comprised of 1,000 call options against 1,000 put options would be $500 (at $0.25 per execution), absent the Strategy Cap. However, because the ATP Holder reached the daily cap (with Trade 1), the ATP Holder would not be charged for these transactions.

However, if, in addition to the two trades above, the ATP Holder executes a ''jelly roll'' consisting of 5,000 October puts and 5,000 October calls against 5,000 November calls and 5,000 November puts on the fifteenth business day of the month, the total fees for these qualifying Strategy Executions under the proposed Fee Schedule would be capped at $200 for this trading day, given that the total number of contracts on day three and day fifteen is above minimum 25,000 billable contract sides threshold. Similarly, having met this threshold, the fees charged on Trades 1 and 2 that were executed on the third business day would likewise be capped at $200. Thus, the fees for each of the third and fifteenth trading day would be capped at $200 each, for a monthly total of $400 for Strategy Executions.

The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similar Strategy Fee Caps.[9] Thus, ATP Holders have a choice of where they direct their order flow. This proposed change is designed to incent ATP Holders to increase their Strategy Execution volumes by executing (often smaller) strategies that are not necessarily economically viable on a per symbol basis, but which may be profitable when fees on Strategy Executions—regardless of symbol—are

[40] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on October 1, 2020. (SR–NYSEAMER–2020–72) and withdrew such filing on October 9, 2020.

[5] *See* Fee Schedule, Section I.J., Strategy Execution Fee Cap, *available here: https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.* Any reversal and conversion strategy executed as a QCC order is eligible for this cap; however, any other strategy executed as a QCC order is excluded from this fee cap. *See id.*

[6] *See id.*

[7] *See* proposed Fee Schedule, Section I.J., Strategy Execution Fee Cap.

[8] *See id.*

[9] *See e.g.,* Cboe fee schedule, footnote 13. Cboe caps fees for each participant at $0.00 for the following strategies executed on the same trading day: Short stock interest, reversal, conversion, jelly roll, and merger strategies.

capped for the trading day. The Exchange notes that all market participants stand to benefit from increased volume, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

The Exchange cannot predict with certainty whether any, or how many, ATP Holders would avail themselves of this proposed fee change. The Exchange believes that ATP Holders that execute Strategy Executions on the Exchange can achieve the proposed 25,000 minimum contract sides threshold to qualify for the proposed (reduced) Strategy Cap and this proposal may encourage ATP Holders to execute (and aggregate) Strategy Executions on the Exchange, which order flow would enhance price discovery.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

The Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[13] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, since August 2019, the Exchange has had less than 9% market share of executed volume of multiply-listed equity & ETF options trades.[14]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, modifications to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes that the proposed modification to the Strategy Cap is reasonable because it is designed to incent ATP Holders to increase their Strategy Executions submitted to and executed on the Exchange's Trading Floor. The Exchange offers a hybrid market system and aims to balance incentives for its ATP Holders to continue to contribute to deep liquid markets for investors on both its electronic and open outcry platforms. The Exchange notes that all market participants stand to benefit from any increase in volume transacted on the Trading Floor, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

To the extent that the proposed change attracts more Strategy Executions to the Exchange, this increased (open outcry) order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system.

Finally, to the extent the proposed change continues to attract greater volume and liquidity, the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors. The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similar Strategy Fee Caps.[15] Thus, ATP Holders have a choice of where they direct their order flow—including their Strategy Executions. The proposed rule change is designed to incent ATP Holders to direct liquidity, and specifically Strategy Executions, to the Exchange, thereby promoting market depth, price discovery and improvement and enhancing order execution opportunities for market participants.

The Exchange cannot predict with certainty whether any, or how many, ATP Holders would avail themselves of this proposed fee change. The Exchange cannot predict with certainty whether any, or how many, ATP Holders would avail themselves of this proposed fee change. [sic] The Exchange believes that ATP Holders that execute Strategy Executions on the Exchange can achieve the proposed 25,000 minimum contract sides threshold to qualify for the proposed (reduced) Strategy Cap and this proposal may encourage ATP Holders to execute (and aggregate) Strategy Executions on the Exchange, which order flow would enhance price discovery.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange and ATP Holders can opt to avail themselves of the Strategy Cap or not. The proposed Strategy Cap, as modified. [sic] applies to all qualifying Strategy Executions transacted on the Trading Floor. The Exchange believes that the proposed change would facilitate the execution of orders via open outcry, thus enhancing price discovery as a result of increased liquidity. Moreover, the proposal is designed to encourage ATP Holders to aggregate all Strategy Executions at the Exchange as a primary execution venue. To the extent that the proposed change attracts more Strategy Executions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[13] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/market-data/volume/default.jsp*.

[14] Based on OCC data, *see id.,* the Exchange's market share in equity-based options increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020.

[15] *See supra* note 9 (regarding Cboe Strategy Cap).

Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to modify the Strategy Cap because the proposed modification would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and ATP Holders are not obligated to try to achieve the modified Strategy Cap, nor are they obligated to execute any Strategy Executions. Rather, the proposal is designed to encourage ATP Holders to utilize the Exchange as a primary trading venue for Strategy Executions (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed change attracts more Strategy Executions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, 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.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [16]

Intramarket Competition. The proposed change is designed to attract additional order flow (particularly Strategy Executions) to the Exchange. The Exchange believes that the proposed modification to the Strategy Cap would incent market participants to direct their Strategy Execution volume to the Exchange. Greater liquidity benefits all market participants on the Exchange and increased Strategy Executions would increase opportunities for execution of other trading interest. The proposed reduced Strategy Cap would be available to all similarly-situated market participants that incur transaction fees on Strategy Executions, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[17] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in the second quarter of 2020, the Exchange had less than 9% market share of executed volume of multiply-listed equity & ETF options trades.[18]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to encourage ATP Holders to direct trading interest (particularly Strategy Executions) to the Exchange, to provide liquidity and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar Strategy Caps, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [19] of the Act and subparagraph (f)(2) of Rule 19b–4 [20] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[16] *See* Reg NMS Adopting Release, *supra* note 12, at 37499.

[17] *See supra* note 13.

[18] Based on OCC data, *see supra* note 14, the Exchange's market share increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–76 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2020–76. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2020–76, and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23254 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90160; File No. SR–FINRA–2020–033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Period Related to FINRA Rule 6121.02 (Market-Wide Circuit Breakers in NMS Stocks)

October 13, 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 8, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to extend the pilot period related to FINRA Rule 6121.02 (Market-wide Circuit Breakers in NMS Stocks) until October 18, 2021.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 6121.02 addresses the circumstances under which FINRA shall halt trading in all NMS Stocks due to extraordinary market volatility (*i.e.,* market-wide circuit breakers). The market-wide circuit breaker (''MWCB'') mechanism under Rule 6121.02 was approved by the Commission to operate on a pilot basis, 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''),[4] including any extensions to the pilot period for the LULD Plan.[5] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[6] In light of the proposal to make the LULD Plan permanent, FINRA amended Rule 6121.02 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.[7] FINRA then further extended the pilot through October 18, 2020.[8] FINRA now proposes to amend Rule 6121.02 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 6121.02.

The market-wide circuit breaker under Rule 6121.02 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

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release''). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[5] *See* Securities Exchange Act Release Nos. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (Order Approving File No. SR–FINRA–2011–054); and 68778 (January 31, 2013), 78 FR 8668 (February 6, 2013) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2013–011) (Proposed Rule Change to Delay the Operative Date of FINRA Rule 6121.02).

[6] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (Order Approving the Eighteenth Amendment to the National Market System Plan To Address Extraordinary Market Volatility).

[7] *See* Securities Exchange Act Release No. 85547 (April 8, 2019), 84 FR 14981 (April 12, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–010).

[8] *See* Securities Exchange Act Release No. 87078 (September 24, 2019), 84 FR 51669 (September 30, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–023).

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.[9] 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 6121.02, 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. If a Level 3 Market Decline occurs at any time during the trading day, FINRA shall halt trading otherwise than on an exchange in all NMS stocks 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, FINRA expects to work with the Commission, the other self-regulatory organizations (''SROs''), 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, FINRA and the other SROs moved forward in 2019 and 2020 with a plan to normalize their Day 2 opening procedures after a Level 3 MWCB halt, such that trading would reopen on Day 2 as it would on any other trading day. FINRA filed a rule change to that effect in March 2020.[10]

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days from the date of filing, so that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The market-wide circuit breaker mechanism under Rule 6121.02 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 under Rule 6121.02 for an additional year would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while FINRA 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. Based on the results of that study, FINRA expects to work with the Commission, the other SROs, 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.

FINRA 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 NMS stocks as a result of extraordinary market volatility. Based on the foregoing, FINRA believes the benefits to market participants from the MWCB under Rule 6121.02 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

FINRA 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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the

[9] *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) (Notice of Filing of Amendments No. 1 and Order Granting Accelerated Approval of Proposed Rule Changes as Modified by Amendments No. 1, Relating to Trading Halts Due to Extraordinary Market Volatility).

[10] *See* Securities Exchange Act Release No. 88425 (March 19, 2020), 85 FR 16971 (March 25, 2020) (Notice of Filing and Immediate Effectiveness of SR–FINRA–2020–009).

[11] 15 U.S.C. 78*o*–3(b)(6).

U.S. markets while FINRA 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, FINRA understands that other SROs 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA has designated this rule filing as non-controversial under Section 19(b)(3)(A)[12] of the Act and Rule 19b–4(f)(6)[13] 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.[14]

A proposed rule change filed under Rule 19b–4(f)(6)[15] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA 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 FINRA, and the other SROs 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.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2020–033 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–FINRA–2020–033. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2020–033 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] In addition, Rule 19b–4(f)(6)(iii) requires FINRA 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 Commission has waived this requirement.

[15] *Id.*

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] 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).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90197; File No. SR–IEX–2020–16]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add an Offset Peg Order Type

October 15, 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 5, 2020, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to add a new order type (a ''Offset Peg'' or ''O-Peg'' order) that pegs to the primary quote,[6] plus or minus an offset amount. The Exchange has designated this rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act[7] and provided the Commission with the notice required by Rule 19b–4(f)(6) thereunder.[8]

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statement [sic] may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend IEX Rule 11.190 to add a new Offset Peg or O-Peg order type that pegs to the primary quote,[9] plus or minus an offset amount specified by the User.[10] In addition, the Exchange proposes two accommodating amendments to IEX Rule 11.190 to describe how O-Peg orders will behave when executed at the Midpoint Price[11] and in locked and crossed markets.

Currently, the Exchange offers three types of pegged orders—primary peg, midpoint peg and Discretionary Peg[12]—each of which are non-displayed orders that upon entry into the System[13] and while resting on the Order Book,[14] are pegged to a reference price based on the national best bid and offer (''NBBO'') and the price of the order is automatically adjusted by the System in response to changes in the NBBO.

The Exchange proposes to add a new type of pegged order—an Offset Peg order—that is a non-displayed pegged order that upon entry and when posting to the Order Book, the price of the order is automatically adjusted by the System to be equal to and ranked at the less aggressive of the primary quote (*i.e.,* the NBB[15] for buy orders and NBO[16] for sell orders) plus or minus an offset amount specified by the User or the order's limit price, if any. While resting on the Order Book, (i) a buy order is automatically adjusted by the System in response to changes in the NBB plus or minus the offset amount up to the order's limit price, if any; and (ii) a sell order is automatically adjusted by the System in response to changes in the NBO plus or minus the offset amount down to the order's limit price, if any; and (iii) in locked and crossed markets, slide one MPV[17] less aggressive than the locking price or crossing price (*i.e.,* the lowest Protected Offer[18] for buy orders and the highest Protected Bid[19] for sell orders).[20] Further, an Offset Peg order would not be eligible to trade when the market is locked or crossed, either upon order entry or when resting on the Order Book.

While Offset Peg orders would not be limited to trading more aggressively than the primary quote, based on informal feedback from Members, IEX understands that Offset Peg orders would be useful to market participants seeking to trade between the primary quote and the Midpoint Price.

Accordingly, IEX proposes to amend subparagraph (b)(13) of IEX Rule 11.190, which is currently reserved, to add the Offset Peg order. As proposed, an Offset Peg order:

(A) Must be a pegged order.

(B) Must have a TIF of DAY, GTT, GTX, or SYS, as described in IEX Rule 11.190(a)(3).

(C) Is not eligible for routing pursuant to IEX Rule 11.230(b) and (c)(2).

(D) May not be an ISO, as defined in paragraph (12) above.

(E) May be submitted with a limit price or without a limit price (an ''unpriced pegged order'').

(F) Is eligible to trade only during the Regular Market Session. As provided in IEX Rule 11.190(a)(3)(E)(iii), any pegged order marked with a TIF of DAY that is submitted to the System before the opening of the Regular Market Session will be queued by the System until the start of the Regular Market Session; any pegged order that is marked with a TIF other than DAY will be rejected when submitted to the System during the Pre-Market Session. Any pegged order submitted into the System after the closing of the Regular Market Session will be rejected.

(G) May be a MQTY, as defined in paragraph (11) below.

(H) Is not eligible to display. Pegged orders are always non-displayed.

(I) May be an odd lot, round lot, or mixed lot.

(J) Is eligible to be invited by the System to Recheck as described in IEX Rule 11.230(a)(4)(D).

(K) Is not eligible to trade when the market is locked or crossed.

(L) May be submitted with an offset amount that is either aggressive or passive compared to the primary quote. If the offset amount would result in the price of an Offset Peg order being more aggressive than the Midpoint Price, the offset amount will be reduced so that the order is priced at the Midpoint Price until such time as the full value of the offset amount will not result in the price of the Offset Peg order being more aggressive than the Midpoint Price, except when the order is an active order.[21] If the offset amount would result in the price of an Offset Peg order being in an increment smaller than specified in IEX Rule 11.210, the price of a buy order will be rounded down and the price of a sell order will be rounded up to the nearest permissible increment. If no offset amount is specified, the System will consider the offset amount to be zero.

In addition, the Exchange proposes two accommodating amendments to other IEX rules. First, IEX Rule 11.190(a)(3) would be amended to specify that an Offset Peg may be executed in sub-pennies if necessary when the execution is at or constrained to the midpoint and the order executes

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] The primary quote is the national best bid for a buy order or the national best offer for a sell order. *See* IEX Rule 1.160(u).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4.

[9] *See supra* note 6.

[10] *See* IEX Rule 1.160(qq).

[11] *See* IEX Rule 1.160(t),

[12] IEX has two other order types that are based on the discretionary peg order type: The Retail Liquidity Provider order and the Corporate Discretionary Peg order. *See* IEX Rule 11.190(b)(14) and (16).

[13] *See* IEX Rule 1.160(nn).

[14] *See* IEX Rule 1.160(p).

[15] *See* IEX Rule 1.160(u).

[16] *See* IEX Rule 1.160(u).

[17] *See* IEX Rule 11.210.

[18] *See* IEX Rule 1.160(bb).

[19] *See* IEX Rule 1.160(bb).

[20] As with all pegged orders, each time the price of an Offset Peg order is adjusted by the System it receives a new timestamp, as described in IEX Rule 11.220.

[21] *See* IEX Rule 1.160(b).

at the Midpoint Price. This is consistent with the fact that midpoint peg orders and Discretionary Peg orders can execute at a Midpoint Price in sub-pennies.[22] Second, the Exchange proposes amendments to IEX Rule 11.190(h) to describe the manner in which Offset Peg orders will operate in locked and crossed markets. Specifically, when the market becomes locked, Offset Peg orders resting on or posting to the Order Book will be priced at the less aggressive of the locking price plus or minus an offset amount or the order's limit price, if any.[23] However, an Offset Peg with an offset amount that would otherwise result in the order being priced more aggressive than the locking price will be priced at the locking price pursuant to the Midpoint Price Constraint. When the market becomes crossed, the Exchange considers the Midpoint Price to be indeterminable,[24] and resting Offset Peg orders that would otherwise be subject to the Midpoint Price Constraint pursuant to IEX Rule 11.190(h)(3)(D) (*i.e.,* because the price of the order would be more aggressive than the Midpoint Price) will be priced to be no more aggressive than the crossing price, the lowest Protected Offer for buy orders and the highest Protected Bid for sell orders. Further, as proposed, Offset Peg orders resting on or posting to the Order Book while the market is crossed are priced at the least aggressive of (1) the crossing price (the lowest Protected Offer for buy orders and the highest Protected Bid for sell orders) plus or minus an offset amount, (2) the crossing price (the lowest Protected Offer for buy orders and the highest Protected Bid for sell orders), or (3) the order's limit price, if any.

The methodology for pricing Offset Peg orders during locked and crossed markets is designed to price such orders at the least aggressive price that is consistent with the terms of the order so as to avoid exacerbating the lock or cross.

In addition, Offset Peg orders will not be eligible to trade when the market is locked or crossed, and an Offset Peg order that would otherwise be eligible to trade against an active order will surrender its precedence on the Order Book for the duration of the System processing the current active order, pursuant to IEX Rule 11.220(a)(5).

The manner in which Offset Peg orders will operate in locked and crossed markets (as proposed) is similar to the manner in which other pegged order types operate, except that other pegged orders are eligible to trade when the market is locked or crossed. Offset Peg orders are designed to enable a market participant to capture part of the spread between the NBBO; when the NBBO is locked or crossed there is uncertainty as to the spread. Consequently, the Exchange believes that Offset Peg orders should not trade in such circumstances.

The Exchange notes that for many years other national securities exchanges have offered order types that peg to the NBB and/or NBO plus or minus an offset amount.[25] In this regard, the Exchange notes that this proposed rule change is substantially similar to order types offered by the Nasdaq Stock Market LLC (''Nasdaq''), NYSE Arca, Inc. (''Arca'') and CBOE BZX Exchange, Inc. (''BZX''), each of which offer a nondisplayed primary or market pegged order type or attribute that pegs to the inside quotation on the same side of the market (*i.e.,* the NBB for a buy order and the NBO for a sell order) and may also specify an aggressive or passive offset amount.[26]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[27] in general, and furthers the objectives of Section 6(b)(5),[28] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it is designed to increase competition among execution venues by providing an additional pegged order type that market participants can use to trade at an offset to the primary quote, as described in the Purpose section and thereby enable the Exchange to better compete with order types on other national securities exchanges that offer similar features to market participants.

Further, IEX believes that the proposal is consistent with the protection of investors and the public interest in that the Offset Peg order type would provide additional flexibility to market participants in their use of pegging orders. As described in the Purpose section, IEX already offers several different types of pegging orders that trade with reference to the primary quote (Discretionary Peg and primary peg), at the Midpoint Price (Midpoint Peg), and in some cases with the ability to also exercise price discretion in specified circumstances (Discretionary Peg and primary peg). As proposed, the Offset Peg order would function in a similar manner but provide flexibility to market participants to specify an offset to the primary quote. Such functionality could be used for a number of purposes, including to mitigate risk by posting an order at a price that is lower or higher than the prevailing NBB or NBO. Although broker-dealers could implement similar functionality on their own by consuming market data feeds and sending limit orders to the Exchange at prices that are offset from the NBBO, implementing this functionality through an exchange order type ensures that it is widely available to market participants on a fair and non-discriminatory basis. At the same time, the offset instruction would be offered on a purely voluntary basis, and with flexibility for Users to choose the amount of any offset, thereby providing flexibility to continue using current pegged order types without a User specified offset and to choose different offsets based on a User's specific needs. The Exchange does not believe that providing flexibility to Users to select the amount of any offset raises any significant or novel concerns, since similar offset functionality is already available on other national securities exchanges, as discussed in the Purpose section.[29]

Further, IEX believes that it is consistent with the Act to not permit an Offset Peg order to trade when the market is locked or crossed. While IEX's current pegged order types are eligible to trade in such circumstances, they are repriced away from the locking and crossing price (except for Midpoint Peg orders in a locked market which continue to be priced at the locking Midpoint Price) which is designed to

[22] An execution at a sub-penny Midpoint Price is not prohibited by Rule 612 under Regulation NMS so long as the execution did not result from an impermissible sub-penny order or quotation. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37556 (June 29, 2005) (File No. S7–10–04) (''NMS Adopting Release'').

[23] *See* IEX Rule 11.190(h)(3)(C).

[24] *See* IEX Rule 11.190(h)(3)(D).

[25] *See, e.g.,* Securities Exchange Act Release No. 52449 (September 15, 2005), 70 FR 55647 (September 22, 2005) (File No. SR–NASD–2005–107).

[26] *See* Nasdaq Rule 4703(d), NYSE Arca Rule 7.31–E(h)(1), and Cboe BZX Rule 11.9(c)(8)(A).

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(5).

[29] *See supra* note 26.

reduce the incidence of trading when the market is locked or crossed. As noted in the Purpose section, Offset Peg orders are designed to enable a market participant to capture part of the spread between the NBBO; when the NBBO is locked or crossed there is uncertainty as to the spread. Consequently, the Exchange believes that Offset Peg orders should not trade in such circumstances.[30] Moreover, similar order types on other national securities exchange are explicitly not eligible to trade in locked and crossed markets.[31] Additionally, IEX believes that the methodology for pricing Offset Peg orders during locked and crossed markets is consistent with the Act because it is designed to price such orders at the least aggressive price that is consistent with the terms of the order so as to avoid exacerbating the lock or cross.

In addition, the Exchange believes that it is consistent with the Act to round the price of a buy order down and a sell order up to the nearest permissible increment if the offset amount would result in the price of an Offset Peg order being in an increment smaller than specified in IEX Rule 11.210. Rounding assures that IEX is compliant with Regulation NMS Rule 612 [32] and IEX Rule 11.210. Moreover, this approach is consistent with the way other national securities exchanges handle pegged orders.[33]

Thus, IEX does not believe that the proposed changes raise any new or novel material issues that have not already been considered by the Commission in connection with existing order types offered by the IEX and other national securities exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposal is a competitive response to similar order types available on other exchanges.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Competing exchanges have and can continue to adopt similar order types, subject to the SEC rule change process, as discussed in the Purpose and Statutory Basis sections.[34]

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. All Members would be eligible to use an Offset Peg order type on the same terms.

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

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) [35] of the Act and Rule 19b–4(f)(6) [36] 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.

The Exchange believes that the proposed rule change meets the criteria of subparagraph (f)(6) of Rule 19b–4 [37] because it is substantially similar to order types previously approved or considered by the Commission and as discussed in the Statutory Basis and Burden on Competition sections.[38] Thus, IEX does not believe that the proposed changes raise any new or novel material issues that have not already been considered by the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [39] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–IEX–2020–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–IEX–2020–16. 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

[30] In contrast, IEX's other pegged order types are designed to enable a market participant to capture liquidity pursuant to the terms of the order type so the Exchange has chosen not to impose a restriction on trading in locked and crossed markets.

[31] *See, e.g.,* NYSE Arca Rule 7.31–E(h)(1)(B).

[32] *See* 17 CFR 242.612 *and* FAQs 8, 1, and 2 in Division of Market Regulation: Responses to Frequently Asked Questions Concerning Rule 612 (Minimum Pricing Increment) of Regulation NMS, available at *https://www.sec.gov/divisions/marketreg/subpenny612faq.htm* which provides that although exchanges (and broker-dealers) may not accept and round orders in NMS stocks explicitly priced in sub-penny increments (FAQs 8 and 1), they may accept such orders when the order is not ''explicitly'' priced in an impermissible sub-penny increment, meaning that a calculation must be performed to obtain the price of the order, in which case the exchange or broker-dealer may round the price of the stock to determine the ''actual explicit price for the order.'' (FAQ 2). IEX believes that Offset Peg orders would not be explicitly priced in sub-penny increments even if the offset amount specified is in a sub-penny increment because the Exchange would need to perform a calculation to obtain the price of the order by applying the offset amount to the NBB or NBO as applicable. Accordingly, IEX believes that rounding as proposed is consistent with Rule 612 under Regulation NMS and relevant FAQs, which provides that exchanges (and broker-dealers) may not accept and round orders in NMS stocks explicitly priced in sub-penny increments (FAQs 8 and 1), except for when the order is not ''explicitly'' priced in an impermissible sub-penny increment, in which case the exchange may round the price of the stock to determine the ''actual explicit price for the order.'' (FAQ 2).

[33] *See, e.g.,* Cboe U.S. Equities FIX Specification (Version 2.8.18) describing treatment of Tag 211 regarding ''Pegged Difference'' available at *https://cdn.cboe.com/resources/membership/Cboe_US_Equities_FIX_Specification.pdf.*

[34] *See supra* notes 26 and 29.

[35] 15 U.S.C. 78s(b)(3)(A).

[36] 17 CFR 240.19b–4(f)(6).

[37] 17 CFR 240.19b–4(f)(6).

[38] *See supra* notes 26, 29, and 34.

[39] 15 U.S.C. 78s(b)(2)(B).

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–IEX–2020–16, and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23257 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90206; File No. SR–BX–2020–031]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to BX Rule 11890

October 15, 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 13, 2020, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to BX Rule 11890 (Clearly Erroneous Transactions) to the close of business on April 20, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/bx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 11890, Clearly Erroneous Transactions, to the close of business on April 20, 2021. The pilot program is currently due to expire on October 20, 2020.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[6] In April 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 that change, the Exchange amended Rule 11890 to untie the pilot program'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] The Exchange later amended Rule 11890 to extend the pilot's effectiveness to the close of business on April 20, 2020,[9] and subsequently, to the close of business on October 20, 2020.[10]

The Exchange now proposes to amend Rule 11890 to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2021. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i)

[40] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BX–2010–040).

[4] *See* Securities Exchange Act Release No. 68818 (February 1, 2013), 78 FR 9100 (February 7, 2013) (SR–BX–2013–010).

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BX–2014–021).

[6] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[7] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[8] *See* Securities Exchange Act Release No. 85613 (April 11, 2019), 84 FR 16077 (April 17, 2019) (SR–BX–2019–009).

[9] *See* Securities Exchange Act Release No. 87359 (October 18, 2019), 84 FR 57131 (October 24, 2019) (SR–BX–2019–037).

[10] *See* Securities Exchange Act Release No. 88505 (March 27, 2020), 85 FR 18626 (April 2, 2020) (SR–BX–2020–005).

shall be null and void.[11] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Rule 11890. Extending the effectiveness of Rule 11890 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[12] in general, and Section 6(b)(5) of the Act,[13] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[17] 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 effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2020–031 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–BX–2020–031. 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/*

[11] *See* notes 3–5, *supra*. The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] 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).

rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2020–031 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23263 Filed 10–20–20; 8:45 am]

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[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34050; 812–15038]

YieldStreet Prism Fund Inc., et al.

October 15, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain closed-end management investment companies and business development companies (''BDCs'') to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

APPLICANTS: YieldStreet Prism Fund Inc. (''Company''); YieldStreet Management, LLC (''YSM''); YieldStreet Inc. (''YS''); YieldStreet Holdings, LLC, YS ALTNOTES I LLC, YS ALTNOTES II LLC, and YS ALTNOTES III LLC (collectively, the ''Existing YS Proprietary Accounts''); and YS BP CML I LLC and YS S3 REL I LLC (together, the ''Existing Affiliated Funds'').

FILING DATES: The application was filed on June 6, 2019, and amended on September 12, 2019, March 31, 2020, August 17, 2020, and October 9, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on November 9, 2020, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, *Secretarys-Office@sec.gov* Applicants: c/o Ivor C. Wolk, *iwolk@yieldstreet.com.*

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at 202–551–6879, or Trace W. Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The applicants request an order of the Commission under sections 17(d) and 57(i) of the Act and rule 17d–1 under the Act (''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), one or more Regulated Funds [1] and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or its Wholly-Owned Investment Sub (defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

Applicants

2. The Company is a closed-end management investment company registered under the Act and organized as a Maryland corporation. The Company has a five member Board [4] of which three members are Independent Trustees.[5]

3. YSM, a Delaware limited liability company that is registered under the Advisers Act, serves as the investment adviser to the Company pursuant to an investment advisory agreement and also serves as investment adviser to the Existing Affiliated Funds and YS ALTNOTES I LLC, YS ALTNOTES II LLC, and YS ALTNOTES III LLC (the ''YS Altnotes Vehicles'').

4. YS, a Delaware corporation, is privately held. YS owns and controls YSM.

5. Each Existing Affiliated Fund is a Delaware limited liability company that

[1] ''Regulated Funds'' means the Company and any Future Regulated Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, and (b) whose investment adviser is an Adviser.

''Adviser'' means YSM together with any future investment adviser that (i) controls, is controlled by or is under common control with YSM, (ii) is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''), and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means any Existing Affiliated Fund, any Future Affiliated Fund or any YS Proprietary Account (as defined below).

[3] All existing entities that currently intend to rely on the Order have been named as applicants and any existing or future entities that may rely on the Order in the future will comply with the terms and Conditions set forth in the application.

[4] ''Board'' means the board of directors (or the equivalent) of the applicable Regulated Fund.

[5] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Director of a Regulated Fund will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act.

6. Each of the Existing YS Proprietary Accounts is a Delaware limited liability company and is a direct or indirect, wholly- or majority-owned subsidiary of YS that, from time to time, may hold various financial assets in a principal capacity. YS Proprietary Accounts [6] may hold various financial assets in a principal capacity.

7. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[7] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

8. Applicants represent that YSM has established processes for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

9. Opportunities for Potential Co-Investment Transactions may arise when investment advisory personnel of an Adviser become aware of investment opportunities that may be appropriate for one or more Regulated Funds and one or more Affiliated Funds. If the Order is granted, the Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that, when such opportunities arise, the Adviser to the relevant Regulated Funds is promptly notified and receives the same information about the opportunity as any other Adviser considering the opportunity for its clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [8] and any Board-Established Criteria [9] of a Regulated Fund, the policies and procedures will require that the Adviser to such Regulated Fund receive sufficient information to allow such Adviser's credit committee to make its independent determination and recommendations under the Conditions.

10. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

11. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, such Adviser's credit committee will approve an investment amount. Prior to the External Submission (as defined below), each proposed order amount may be reviewed and adjusted, in accordance with the Adviser's written allocation policies and procedures, by the Adviser's credit committee.[10] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[11]

12. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[12] If, subsequent to such External

[6] ''YS Proprietary Accounts'' means the Existing YS Proprietary Accounts and any direct or indirect, wholly- or majority-owned subsidiary of YS that, from time to time, may hold various financial assets in a principal capacity, and intends to participate in the Co-Investment Program.

[7] ''Wholly-Owned Investment Sub'' means an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, directly or indirectly, 100% of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and in the case of an SBIC Subsidiary, maintain a license under the Small Business Investment Act of 1958 (''SBA Act'') and issue debentures guaranteed by the Small Business Administration (''SBA'')); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that would be an investment company but for section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the SBA to operate under the SBA Act as a small business investment company.

[8] ''Objectives and Strategies'' means (i) a Regulated Fund's investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (the ''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders.

[9] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify their approval of any Board-Established Criteria, though applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[10] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of each Adviser.

[11] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

[12] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-

Continued

Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[13]

B. Follow-On Investments

13. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments[14] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

14. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[15] If the Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer and only such funds are participating in the Follow-On Investment, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment and only such funds are participating in the Follow-On Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

15. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment[16] or (ii) a Non-Negotiated Follow-On Investment.[17] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

16. Applicants propose that Dispositions[18] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[19]

17. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition[20] or (ii) the securities are Tradable Securities[21] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the

Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

[13] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with Condition 2, 6, 7, 8 or 9, as applicable.

[14] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[15] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[16] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[17] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters.

''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[18] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[19] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review is required because such findings were not required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[20] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[21] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

18. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

19. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on matters specified in the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of rule 17d–1 and section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1 and/or section 57(b), as modified by rule 57b–1 thereunder, as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) YSM will control, be controlled by or be under common control with each other Adviser, (ii) YSM presently manages the Company pursuant to its investment advisory agreement, along with each YS Altnotes Vehicle, and may be deemed to control each; and (iii) an Adviser will manage each Future Regulated Fund and Future Affiliated Fund. Thus, each of the Company and the Affiliated Funds could be deemed to be a person related to the Future Regulated Funds in a manner described by rule 17d–1; and, therefore, the prohibitions of rule 17d–1 and section 57(a)(4) would apply respectively to prohibit each of the Company and Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds.

4. In addition, because the YS Proprietary Accounts are controlled by YS and, therefore, may be under common control with the Company, the Advisers and any Future Regulated Funds, the YS Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by section 57(b) (or section 17(d) in the case of Regulated Funds that are registered under the Act) and also prohibited from participating in the Co-Investment Program.

5. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

6. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order shall be subject to the following Conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a). The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b). When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a). If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b). If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds

the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c). After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i). The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii). the transaction is consistent with:

(A). The interests of the Regulated Fund's equity holders; and

(B). the Regulated Fund's then-current Objectives and Strategies;

(iii). the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A). The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Funds and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B). any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv). the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [22] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[23] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[24]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a). *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i). The Adviser to such Regulated Fund or Affiliated Fund [25] will notify

[22] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[23] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[24] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate.

''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in section 57(b) (after giving effect to rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D).

''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[25] Any YS Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for

each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b). *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c). *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i). (A) The participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [26] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii). each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d). *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a). *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii). the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b). *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i). The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii). the making and holding of the Pre-Boarding Investments were not prohibited by section 57 or rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c). *Additional Requirements:* The Disposition may only be completed in reliance on the Order if:

(i). *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii). *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii). *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iv). *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [27] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v). *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a). *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b). *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i). (A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[28] immediately

purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i) and 9(a)(i).

[26] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

[27] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[28] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of

Continued

preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii). it is a Non-Negotiated Follow-On Investment.

(c). *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d). *Allocation.* If, with respect to any such Follow-On Investment:

(i). The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii). the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e). *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a). *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i). The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii). the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii). the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b). *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c). *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i). *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii). *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iii). *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv). *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d). *Allocation.* If, with respect to any such Follow-On Investment:

(i). The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii). the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e). *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a). Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b). All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c). Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance.

(d). The Independent Directors will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Director Independence.* No Independent Director of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[29] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–23241 Filed 10–20–20; 8:45 am]

BILLING CODE 8011–01–P

[29] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0021]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Railroad Retirement Board (RRB). This matching program sets forth the terms, safeguards, and procedures under which RRB, as the source agency, will disclose RRB annuity payment data to SSA, the recipient agency. SSA will use the information to verify Supplemental Security Income (SSI) and Special Veterans Benefits (SVB) eligibility and benefit payment amounts. SSA will also record the railroad annuity amounts RRB paid to SSI and SVB recipients in the Supplemental Security Income Record (SSR).

DATES: The deadline to submit comments on the proposed matching program is 30 days from the date of publication of this notice in the **Federal Register**. The matching program will be applicable on March 2, 2021, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 966–0869, writing to Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security

Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* All comments received will be available for public inspection by contacting Mr. Ramsey at this street address.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Andrea Huseth, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–5855, or send an email to *Andrea.Huseth@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies

SSA and RRB.

Authority for Conducting the Matching Program

The legal authority for the disclosure under this agreement for the SSI portion are sections 1631(e)(1)(A) and (B) and 1631(f) of the Social Security Act (Act) (42 U.S.C. 1383(e)(1)(A) and (B) and 1383(f)). The legal authority for the disclosure under this agreement for the SVB portion is section 806(b) of the Act (42 U.S.C. 1006(b)).

Purpose(s)

This matching program establishes the conditions under which RRB, as the source agency, will disclose RRB annuity payment data to SSA, the recipient agency. SSA will use the information to verify SSI and SVB eligibility and benefit payment amounts. SSA will also record the railroad annuity amounts RRB paid to SSI and SVB recipients in the SSR.

Categories of Individuals

The individuals whose information is involved in this matching program are applicants for and recipients of SSI payments and SVB benefits.

Categories of Records

The electronic data file provided by RRB will contain approximately 600,000 records. The file will adhere to the characteristics and format shown in attachment B. The SSR has about 9 million records. SSA will match the Social Security number, name, date of birth, and RRB claim number on the RRB file and the SSR. SSA and RRB will conduct this match monthly.

System(s) of Records

RRB will provide SSA with an electronic data file containing annuity payment data from RRB's system of records, RRB–22 Railroad Retirement, Survivor, and Pensioner Benefits System, last published on May 15, 2015 (80 FR 28018). SSA will match RRB's data with data maintained in the SSR, Supplemental Security Income Record and Special Veterans Benefits, 60–0103, last fully published at 71 FR 1830 on January 11, 2006 and updated on December 10, 2007 (72 FR 69723), July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969). SVB data also resides on the SSR.

[FR Doc. 2020–23268 Filed 10–20–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11228]

60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to December 21, 2020.

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

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2020–0042'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.

FOR FURTHER INFORMATION CONTACT: Megan Herndon, Senior Regulatory Coordinator, Visa Services, Bureau of Consular Affairs at *PRA_BurdenComments@state.gov* or over telephone at (202)–485–8910.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Supplemental Questions for Visa Applicants.
- *OMB Control Number:* 1405–0226.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* CA/VO.
- *Form Number:* DS–5535
- *Respondents:* Certain immigrant and nonimmigrant visa applicants worldwide who have been determined to warrant additional scrutiny in connection with terrorism, national security-related, or other visa ineligibilities.
- *Estimated Number of Respondents:* 75,000.
- *Estimated Number of Responses:* 75,000.
- *Average Time Per Response:* 55 minutes.
- *Total Estimated Burden Time:* 68,750 hours.
- *Frequency:* Once per respondent's application.
- *Obligation to respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden of this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Department requests a revision on the collection of following information, if not already included in an application, from a subset of visa applicants worldwide, in order to more rigorously evaluate applicants for terrorism, national security-related, or other visa ineligibilities:

- Travel history during the last fifteen years, including source of funding for travel;
- Address history during the last fifteen years;
- Employment history during the last fifteen years;
- All passport numbers and country of issuance held by the applicant;
- Names and dates of birth for all siblings;

• Name and dates of birth for all children; and

• Names and dates of birth for all current and former spouses, or civil or domestic partners.

Regarding travel history, applicants may be requested to provide details of their international or domestic (within their country of nationality) travel, if it appears to the consular officer that the applicant has been in an area while the area was under the operational control of a terrorist organization as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B)(vi). Applicants may be asked to recount or explain the details of their travel, and when possible, provide supporting documentation. While the Department previously required applicants completing the DS–5535 to provide their social media platforms and identifiers, also known as handles, used during the last five years, and phone numbers and email addresses used during the last five years, the form no longer includes those fields, which are now incorporated into the DS–156 *Nonimmigrant Visa Application,* DS–160 *Online Nonimmigrant Visa Application.*

This information collection continues implementation of the directive of the President, in the *Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security* of March 6, 2017, to implement additional protocols and procedures focused on ''ensur[ing] the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.'' Consular posts worldwide regularly engage with U.S. law enforcement and partners in the U.S. intelligence community to identify characteristics of applicant populations warranting increased scrutiny. The additional information collected facilitates consular officer efforts to apply more rigorous evaluation of these applicants for visa ineligibilities. In accordance with existing authorities, visas may not be denied on the basis of race, religion, ethnicity, national origin, political views, gender, or sexual orientation.

Failure to provide requested information will not necessarily result in visa denial, if the consular officer determines the applicant has provided a credible explanation why he or she cannot answer a question or provide requested supporting documentation, such that the consular officer is able to conclude that the applicant has provided adequate information to determine the applicant's eligibility to receive the visa. The information requested on this form will not be used to deny visas based on applicants' race, religion, ethnicity, national origin, political views, gender, or sexual orientation.

Methodology

Department of State consular officers at visa-adjudicating posts worldwide will ask the additional questions to resolve an applicant's identity or to vet for terrorism, national security-related, or other visa ineligibilities when the consular officer determines that the circumstances of a visa applicant, a review of a visa application, or responses in a visa interview indicate a need for greater scrutiny. The additional questions may be sent electronically to the applicant or be presented orally or in writing at the time of the interview.

Edward J. Ramotowski,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2020–23222 Filed 10–20–20; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0997]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Noise Certification Standards for Subsonic Jet Airplanes and Subsonic Transport Category Large Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves the noise certification regulations for aircraft. This includes information collection requirements for the noise certification of subsonic aircraft—jet airplanes and subsonic transport category large airplanes, small propeller driven airplanes and rotorcraft. The information collected are the results of noise certification tests that demonstrate compliance with 14 CFR part 36. The original information collection was implemented to show compliance in accordance with the Aircraft Noise Abatement Act of 1968; that statute is now part of the overall codification of the FAA's regulatory authority over aircraft noise. The noise compliance report is used by the FAA in making a finding that the airplane is in noise compliance with the regulations. These compliance reports are required only once when an applicant wants to certificate an aircraft type. Without this data collection, the FAA would be unable to make the required noise certification compliance finding.

DATES: Written comments should be submitted by December 21, 2020.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Sandy Liu, Attn: AEE–100, 800 Independence Ave. SW, Washington, DC 20591.

By fax: 202–267–5594.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Sandy Liu by email at: *sandy.liu@faa.gov;* phone: 202–267–4748.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0659.

Title: Noise Certification Standards for Subsonic Jet Airplanes and Subsonic Transport Category Large Airplanes.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The aircraft noise information collected are the results of noise certification tests that demonstrate compliance with 14 CFR part 36. The original information collection was implemented to show compliance in accordance with the Aircraft Noise Abatement Act of 1968; that statute is now part of the overall codification of the FAA's regulatory authority over aircraft noise in 49 U.S.C. 44715. For this renewal, the FAA proposes to maintain this PRA collection at 14 total noise certification projects per year. Each applicant's collected information is incorporated into a noise compliance report that is provided to and approved by the FAA. The noise compliance report is used by the FAA in making a

finding that the airplane is in noise compliance with the regulations. These compliance reports are required only once when an applicant wants to certificate an aircraft type. Without this data collection, the FAA would be unable to make the required noise certification compliance finding.

Respondents: Aircraft manufacturer/applicant seeking type certification.

Frequency: Estimated 14 total applicants per year.

Estimated Average Burden per Response: Estimated 200 hours per applicant for the compliance report.

Estimated Total Annual Burden: $25,000 per applicant or cumulative total $350,000 per year for 14 applicants.

Issued in Washington, DC, on October 15, 2020.

Sandy Liu,

Engineer, Office of Environment and Energy, Noise Division (AEE–100).

[FR Doc. 2020–23238 Filed 10–20–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2020–0107]

Senior Executive Service Performance Review Boards Membership

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Notice of Performance Review Board (PRB) appointments.

SUMMARY: DOT published the names of the persons selected to serve on Departmental PRBs.

FOR FURTHER INFORMATION CONTACT: Lisa M. Williams, Director, Departmental Office of Human Resource Management (202) 366–4088.

SUPPLEMENTARY INFORMATION: The persons named below may be selected to serve on one or more Departmental PRBs as required by 5 U.S.C. 4314(c)(4).

Issued in Washington, DC, on September 17, 2020.

Keith E. Washington,

Deputy Assistant Secretary for Administration.

Department of Transportation

Federal Highway Administration

ALONZI, ACHILLE
ARNOLD, ROBERT E
BAKER, SHANA V
BEZIO, BRIAN R
BIONDI, EMILY CHRISTINE
BRIGGS, VALERIE ANNETTE
CAMIRE, ADRIENNE E
CHRISTIAN, JAMES C
CRONIN, BRIAN P
CURTIS, STEPHANIE
ETCHEN, ALEXANDER J
EVANS, MONIQUE REDWINE
EVERETT, THOMAS D
FINFROCK, ARLAN E JR
FLEURY, NICOLLE M
FOUCH, BRIAN J
GATTI, JONATHAN D
GIGLIOTTI, DANA
GRIFFITH, MICHAEL S
HARTMANN, JOSEPH L
HESS, TIMOTHY G.
HUGHES, CAITLIN GWYNNE
JENSEN, GARY ALAN
KALLA, HARI
KEHRLI, MARK R
KNOPP, MARTIN C
KRISHNAMOORTI, MALATHI
LEONARD, KENNETH
LEWIS, DAVID A
LUCERO, AMY C
MAMMANO, VINCENT P
MARQUIS, RICHARD J
OSBORN, PETER W
PETTY, KENNETH II
REGAL, GERALDINE K
RICHARDSON, CHRISTOPHER S
RICHTER, CHERYL ALLEN
RICO, IRENE
RIDGEWAY, MARY F
RUSNAK, ALLISON B
SCHAFTLEIN, SHARI M
SHEPHERD, GLORIA MORGAN
SIGEL, BETHANY RENEE
STEPHANOS, PETER J
TURNER, DERRELL E
WALKER, CHERYL J
WINTER, DAVID R
WRIGHT, LESLIE JANICE
ZIMMERMAN, MARY BETH

Federal Motor Carrier Safety Administration

DECK, JAMES WILEY
DELORENZO, JOSEPH P
EILERS-BOWSER, HEATHER AN
FROMM, CHARLES J
GRAYDON, AMY HEATHER
HERNANDEZ, SCOTT
HORAN, CHARLES A III
HUG, CARRIE A
JONES, DARIN G
KEANE, THOMAS P
KELLY, TAFT D
MINOR, LARRY W
PIDUGU, PAVANKUMAR
RIDDLE, KENNETH H.
RUBAN, DARRELL L
SCHREIBMAN, JACK L
SENTEF, JOSEPH
VAN STEENBURG, JOHN W

Federal Railroad Administration

ALEXY, JOHN KARL
ALLAHYAR, MARYAM
CIPRIANO, PETER
HAYWARD-WILLIAMS, CAROLYN
JAMES, DAVID WILLIAM
JORTLAND, BRETT ANDREW
KENDALL, QUINTIN C
LESTINGI, MICHAEL W.
LONG, MICHAEL T
NISSENBAUM, PAUL
PATTERSON, MARK A
RENNERT, JAMIE P.
REYES-ALICEA, REBECCA
REYNOLDS, GERALD ARTHUR
RIGGS, TAMELA LYNN

Federal Transit Administration

AHMAD, MOKHTEE
ALLEN, REGINALD E
BRENNAN, JOHN J III
BROOKINS, KELLEY
BUCHANAN, HENRIKA J.
BUTLER, PETER S
DALTON-KUMINS, SELENE FAE
GARCIA CREWS, THERESA
GEHRKE, LINDA M
GOODMAN, STEPHEN C
JAMES, FELICIA LANISE
LYSSY, GAIL C
NIFOSI, DANA C.
ROBINSON, BRUCE A
TAYLOR, YVETTE G
TELLIS, RAYMOND S
TERWILLIGER, CINDY E
TUCCILLO, ROBERT J
WELBES, MATTHEW J
WILLIAMS, KIMBERLY JANE

Maritime Administration

BALLARD, JOHN R
BALZANO, RICHARD A
BROHL, HELEN A
BUONO, JOACHIM
BURNETT, DOUGLAS R
DAVIS, DELIA P
DUNLAP, SUSAN LYNN
FISHER, ANTHONY JR
HARRINGTON, DOUGLAS M
KUMAR, SHASHI N
MC MAHON, CHRISTOPHER J
MOSCHKIN, LYDIA
PAAPE, WILLIAM
PIXA, RAND R.
TOKARSKI, KEVIN M

National Highway Traffic Safety Administration

BLINCOE, LAWRENCE J
CHEN, CHOU-LIN
COLLINS, ANNE L
DANIELSON, JACK H.
DOHERTY, JANE H
DONALDSON, K JOHN
GIUSEPPE, JEFFREY M
HATIPOGLU, CEM
HINES, DAVID M
JOHNSON, TIM J
KOLLY, JOSEPH M
KOLODZIEJ, KERRY E
MARSHALL, JOHN W
MATHEKE, OTTO G III
MORRISON, JONATHAN C
OWENS, JAMES C JR
PARKER, CYNTHIA D

PFISTER, JAMIE DURHAM
POSTEN, RAYMOND R
RIDELLA, STEPHEN A
RITTER, ROBERT G
RUSHTON, SEAN G
SRINIVASAN, NANDA N
SUMMERS, LORI K
VALLESE, JULIETTE M.

Office of the Secretary of Transportation

ABRAHAM, JULIE
AIZCORBE, CHRISTINA G
ALBRIGHT, JACK G
AUDET, ANNE H
AUGUSTINE, JOHN E
AYLWARD, ANNE D
BELLOCCHI, LUKE P
BOHNERT, ROGER V
CALLENDER, DUANE A
CARLSON, TERENCE W
CHAVEZ, RICHARD M
CHULUMOVICH, MADELINE M
COGGINS, COLLEEN P
CONNORS, SUSAN M
CONRAD, JESSICA MARIE
COTE, GREGORY D
COTE, RYAN ERNEST
FARAJIAN, MORTEZA
FLEMING, GREGG G
FRASER, ROBERT J
FULTON, THOMAS FINCH
FUNK, JENNIFER S
FURCHTGOTT-ROTH, DIANA EL
GAUTREAUX, CATHY FOSTER
GEIER, PAUL M
GENERO, LAURA
HERLIHY, THOMAS W
HOMAN, TODD M
HORN, DONALD H
HU, PATRICIA S.
HURDLE, LANA T
INMAN, JAMES TODD
IRVINE, PETER D
JACKSON, RONALD A
JAMES, CHARLES E.
JOYNER, GREGORY GILBERT
KALETA, JUDITH S
KING, DANIEL E.
KNOUSE, RUTH D.
LAWRENCE, CHRISTINE A
LEFEVRE, MARIA S.
LOHRENZ, MAURA C
MACECEVIC, LISA J
MARCHESE, APRIL LYNN
MARTIN, HAROLD W III
MARTINEZ, RAYMOND PHILLIP
MCCARTNEY, ERIN P
MCKENNA, WILLIAM
MCMASTER, SEAN K B
MORGAN, DANIEL S.
MORRIS, WILLIS A.
MOSS, JONATHAN P.
O'BERRY, DONNA
ORNDORFF, ANDREW R
PAIEWONSKY, LUISA M
PETROSINOWOOLVERTON, MARI
POPKIN, STEPHEN M
REID, PARKER ANDREW
REINKE, ANNE CHETTLE
SCHMITT, ROLF R
SHORT, DAVID E
SIMPSON, JOAN
SMITH, JARED LAINE
SMITH, LOREN A. JR
SMITH, WILLIE H
SOMERVILLE, TAMARA S.
SPRAGUE, MARY G.
SZAKAL, KEITH J
SZATMARY, RONALD ALLEN JR
TIMOTHY, DARREN P
WANG, CHEN-MING TIM
WASHINGTON, KEITH E
WILLIAMS, LISA M
WONG, EMILY MEE SAM
WONNENBERG, DAVID GLENN
WORKIE, BLANE A
ZIFF, LAURA M

Pipeline and Hazardous Materials Safety Administration

BORENER, SHERRY S
DAUGHERTY, LINDA
DAVIS, CAREY THOMAS
FARLEY, AUDREY L.
GORDON, STEPHEN N JR
MAYBERRY, ALAN K
MCMILLAN, HOWARD W
PEARCE, DRUE
QUADE, WILLIAM A III
ROBERTI, PAUL
SCHOONOVER, WILLIAM S
TAHAMTANI, MASSOUD
TSAGANOS, VASILIKI B

Saint Lawrence Seaway Development Corporation

CROOT, GARY
MIDDLEBROOK, CRAIG H

[FR Doc. 2020–21130 Filed 10–20–20; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, November 12, 2020.

FOR FURTHER INFORMATION CONTACT: Rosalind Matherne at 1–888–912–1227 or 202–317–4115.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Phone Lines Project Committee will be held Thursday, November 12, 2020 at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Rosalind Matherne. For more information please contact Rosalind Matherne at 1–888–912–1227 or 202–317–4115, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 15, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–23234 Filed 10–20–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Fred Smith at 1–888–912–1227 or (202) 317–3087.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be held Tuesday, November 10, 2020 at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Fred Smith. For more information please contact Fred Smith at 1–888–

912–1227 or (202) 317–3087, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.*

Dated: October 15, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–23233 Filed 10–20–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, November 12, 2020.

FOR FURTHER INFORMATION CONTACT: Robert Rosalia at 1–888–912–1227 or (718) 834–2203.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be held Thursday, November 12, 2020, at 1:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Robert Rosalia. For more information please contact Robert Rosalia at 1–888–912–1227 or (718) 834–2203, or write TAP Office, 2 Metrotech Center, 100 Myrtle Avenue, Brooklyn, NY 11201 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 15, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–23232 Filed 10–20–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

National Research Advisory Council, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App.2, that the National Research Advisory Council will hold a virtual meeting on Wednesday, December 2, 2020. The meeting will convene at 11:00 a.m. and end at 2:00 p.m. Eastern daylight time. The meeting is open to the public via WebEx link at: *https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m9d4cf10d0a787238c274c3ab5c31d07f.* Members of the public may also join by phone: 1–404–397–1596. The meeting number (access code) is: 199 052 5720, Meeting password: tpYPK9QU?96. This meeting is open to the public.

The purpose of the National Research Advisory Council is to advise the Secretary on research conducted by the Veterans Health Administration, including policies and programs targeting the high priority of Veterans' health care needs.

On December 2, 2020, the agenda will include a discussion of the white paper describing concrete steps to address minority representation in research; a presentation by the Office of Research and Development workgroup on diversity and inclusion; a discussion by the subcommittee on alternative strategies for VA research; and a discussion of the Annual Report to the Council. No time will be allocated at this meeting for receiving oral presentations from the public. Members of the public wanting to attend, have questions or presentations to present may contact Dr. Marisue Cody, Designated Federal Officer, Office of Research and Development (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–443–5681, or at *Marisue.Cody@va.gov* no later than close of business on November 28, 2020. All questions and presentations will be presented during the public comment section of the meeting. Any member of the public seeking additional information should contact Dr. Cody at the above phone number or email address noted above.

Dated: October 16, 2020.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–23336 Filed 10–20–20; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operator; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM18–9–000; Order No. 2222]

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to remove barriers to the participation of distributed energy resource aggregations in the capacity, energy, and ancillary service markets operated by Regional Transmission Organizations and Independent System Operators (RTO/ISO).

DATES: This rule is effective December 21, 2020. Each RTO/ISO must file the tariff changes needed to implement the requirements of this final rule by September 17, 2021.

FOR FURTHER INFORMATION CONTACT:

David Kathan (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6404

Karin Herzfeld (Legal Information), Office of General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8459

SUPPLEMENTARY INFORMATION:

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I. Introduction

1. In this final rule, the Federal Energy Regulatory Commission (Commission) is adopting reforms to remove barriers to the participation of distributed energy resource [1] aggregations in the Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets (RTO/ISO markets).[2] For the reasons discussed below, we find that existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of distributed energy resource aggregations in the RTO/ISO markets, which reduce competition and fail to ensure just and reasonable rates. Therefore, pursuant to the Commission's authority under Federal Power Act (FPA) section 206,[3] the Commission modifies § 35.28 [4] of its regulations to require each RTO/ISO to revise its tariff to ensure that its market rules facilitate the participation of distributed energy resource aggregations, as discussed further below.

2. As the Commission explained in the NOPR, barriers to the participation of new technologies, such as many types of distributed energy resources, in the RTO/ISO markets can emerge when the rules governing participation in those

[1] We define a distributed energy resource as any resource located on the distribution system, any subsystem thereof or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment. *See infra* P 114.

[2] For purposes of this final rule, we define RTO/ISO markets as the capacity, energy, and ancillary services markets operated by the RTOs and ISOs. We note that, in the Notice of Proposed Rulemaking (NOPR) in this proceeding, the Commission used ''organized wholesale electric markets'' and included that term in the proposed regulatory text. *See Electric Storage Participation in Markets Operated by Regional Transmission Organizations & Independent System Operators,* Notice of Proposed Rulemaking, 81 FR 86522, 157 FERC ¶ 61,121 (2016) (NOPR). We find that using ''RTO/ISO markets'' is sufficient to describe the markets at issue in this final rule and therefore will no longer use ''organized wholesale electric markets'' here or include that term in the regulatory text.

[3] 16 U.S.C. 824e.

[4] 18 CFR 35.28 (2020).

markets are designed for traditional resources and in effect limit the services that emerging technologies can provide.[5] For example, the Commission noted in the NOPR that, as a general matter, distributed energy resources tend to be too small to meet the minimum size requirements to participate in the RTO/ISO markets on a stand-alone basis, and may be unable to meet certain qualification and performance requirements because of the operational constraints they may have as small resources.[6] The Commission further stated that existing participation models [7] for aggregated resources, including distributed energy resources, often require those resources to participate in the RTO/ISO markets as demand response, which limits their operations and the services that they are eligible to provide.[8]

3. Where such barriers exist, resources that are technically capable of providing some services on their own or through aggregation are precluded from competing with resources that are already participating in the RTO/ISO markets.[9] These restrictions on competition can reduce the efficiency of the RTO/ISO markets, potentially leading an RTO/ISO to dispatch more expensive resources to meet its system needs. By removing barriers to the participation of distributed energy resource aggregations in the RTO/ISO markets, this final rule will enhance competition and, in turn, help to ensure that the RTO/ISO markets produce just and reasonable rates.

4. Facilitating distributed energy resource participation in RTO/ISO markets will provide a variety of benefits to those markets. Integrating these resources' capabilities into RTO/ISO planning and operations will help the RTOs/ISOs account for the impacts of these resources on installed capacity requirements and day-ahead energy demand, thereby reducing uncertainty in load forecasts and reducing the risk of over procurement of resources and the associated costs.[10] These resources are able to locate where price signals indicate that new capacity is most needed, potentially helping to alleviate congestion and congestion costs during peak load conditions and to reduce costs related to transmitting energy into persistently high-priced load pockets.[11] Indeed, in the NOPR, the Commission noted certain valuable characteristics that distributed energy resources can offer, including their ability to co-locate with load and provide associated benefits. Additionally, their relatively short development lead time allows distributed energy resources to respond rapidly to near-term generation or transmission reliability-related requirements, further improving their ability to enhance reliability and reduce system costs.

5. The rules that we adopt in this final rule will help enable the participation of distributed energy resources in the RTO/ISO markets by providing a means for these resources to, in the aggregate, satisfy minimum size and performance requirements that they may not meet on a stand-alone basis.[12] The Commission in the NOPR noted that distributed energy resource aggregations can help to address the commercial and transactional barriers to distributed energy resource participation in the RTO/ISO markets, such as sharing the significant costs of participating in those markets, including the costs of the necessary metering, telemetry, and communication equipment.[13]

6. To address barriers to the participation of distributed energy resource aggregations in the RTO/ISO markets, we require each RTO/ISO to revise its tariff to establish distributed energy resource aggregators as a type of market participant that can register distributed energy resource aggregations under one or more participation models in the RTO/ISO tariff that accommodate the physical and operational characteristics of each distributed energy resource aggregation.

7. Generally, we are adopting the specific reforms proposed in the NOPR, but with certain revisions based on the record in this proceeding, including input from the Commission technical conference convened April 10–11, 2018, responses to a post-technical conference notice, and responses to the Commission's September 5, 2019 Data Requests to RTOs/ISOs on policies and procedures that affect the interconnection of distributed energy resources. In particular, certain proposals in the NOPR have been altered in this final rule to better address the needs of different stakeholders, facilitate solutions to potential technical challenges, and to reflect the substantial efforts that have already been undertaken by some RTOs/ISOs to incorporate distributed energy resources into their markets, by providing for greater regional flexibility with respect to a number of proposed requirements.

8. For each RTO/ISO, the tariff provisions addressing distributed energy resource aggregations must (1) allow distributed energy resource aggregations to participate directly in RTO/ISO markets and establish distributed energy resource aggregators as a type of market participant; (2) allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models that accommodate the physical and operational characteristics of the distributed energy resource aggregations; (3) establish a minimum size requirement for distributed energy resource aggregations that does not exceed 100 kW; (4) address locational requirements for distributed energy resource aggregations; (5) address distribution factors and bidding parameters for distributed energy resource aggregations; (6) address information and data requirements for distributed energy resource aggregations; (7) address metering and telemetry requirements for distributed energy resource aggregations; (8) address coordination between the RTO/ISO, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities; (9) address modifications to the list of resources in a distributed energy resource aggregation; and (10) address market participation agreements for distributed energy resource aggregators. Additionally, each RTO/ISO must accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal

[5] *See* NOPR, 157 FERC ¶ 61,121 at P 2.

[6] *See id.* PP 13, 105.

[7] In addition to tariff provisions that apply to all market participants, the RTOs/ISOs create tariff provisions for specific types of resources when those resources have unique physical and operational characteristics or other attributes that warrant distinctive treatment from other market participants. The tariff provisions that are created for a particular type of resource are what we refer to in this final rule as a participation model.

[8] NOPR, 157 FERC ¶ 61,121 at P 106. Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR 35.28(b)(4).

[9] In Order No. 841, the Commission clarified that ''technically capable'' of providing a service means meeting all of the technical, operational, and/or performance requirements that are necessary to reliably provide that service. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations & Independent System Operators,* Order No. 841, 83 FR 9580, 162 FERC ¶ 61,127, at P 78 (2018), *order on reh'g,* Order No. 841–A, 84 FR 23902, 167 FERC ¶ 61,154 (2019), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 964 F.3d 1177 (D.C. Cir. 2020).

[10] NOPR, 157 FERC ¶ 61,121 at P 129.

[11] *Id.* P 130.

[12] *See id.* PP 105, 125.

[13] *Id.* P 126.

year. An RTO/ISO must not accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers to be bid into RTO/ISO markets by a distributed energy resource aggregator.

9. As discussed further below in Section IV.K (Compliance), each RTO/ISO must file the tariff changes needed to implement the requirements of this final rule within 270 days of the publication date of this final rule in the **Federal Register**.

II. Procedural History

10. This final rule arises out of the same Commission inquiry that led to Order No. 841,[14] in which the Commission amended its regulations under the FPA to remove barriers to the participation of electric storage resources in RTO/ISO markets. The Commission commenced that inquiry by hosting a panel to discuss electric storage resources at its November 19, 2015, open meeting. Subsequently, on April 11, 2016, Commission staff issued data requests to each of the six RTOs/ISOs seeking information about the rules in the RTO/ISO markets that affect the participation of electric storage resources. Concurrently, Commission staff issued a request for comments, seeking information from interested persons on whether barriers exist to the participation of electric storage resources in the RTO/ISO markets that may potentially lead to unjust and unreasonable wholesale rates. In addition to the responses from the RTOs/ISOs, Commission staff received 44 comments. Many of the responses and comments discussed types of distributed energy resources and general market participation issues beyond concerns specific to electric storage resources.[15]

11. On November 17, 2016, the Commission issued the NOPR in that proceeding. In addition to its proposed reforms to facilitate the participation of electric storage resources in RTO/ISO markets, the Commission proposed to amend its regulations under the FPA to remove barriers in current RTO/ISO market rules that may prevent new, smaller distributed energy resources that are technically capable of participating in the RTO/ISO markets from doing so.[16]

12. The Commission received 109 comments on the NOPR from a diverse set of stakeholders.[17] On February 15, 2018, the Commission issued Order No. 841. In that final rule, the Commission noted that more information was necessary to inform its consideration of its NOPR proposals regarding facilitating the participation of distributed energy resource aggregations in RTO/ISO markets and stated that it would continue to explore the proposed distributed energy resource aggregation reforms under Docket No. RM18–9–000.[18]

13. The Commission also announced that it would hold a technical conference to gather additional information regarding some distributed energy resource aggregation issues. The technical conference, which was held on April 10–11, 2018, addressed five issues related to this proceeding: Locational requirements, state and local regulator concerns, compensation for multiple services, coordination of distributed energy resource aggregations, and ongoing operational coordination.[19] During the technical conference, more than 50 individuals and entities offered a broad range of perspectives. The Commission issued a notice inviting post-technical conference comments and requesting comments on a number of follow-up questions related to each panel.[20] The Commission received 52 post-technical conference comments from a diverse set of stakeholders.

14. On September 5, 2019, Commission staff issued data requests to each of the six RTOs/ISOs seeking information regarding their policies and procedures that affect the interconnection of distributed energy resources. In addition to the responses from the RTOs/ISOs, Commission staff received 11 reply comments.

15. Some RTOs/ISOs in recent years have taken steps to facilitate the participation of distributed energy resource aggregations in their markets, and the Commission has approved these proposals. In June 2016 and January 2020, the Commission accepted proposals to allow distributed energy resource aggregations to participate in certain RTO/ISO markets.[21] In addition, RTOs/ISOs have implemented some participation models for distributed energy resource aggregations to participate in their markets, often as demand response resources, with a few exceptions.[22]

III. Need for Reform

16. In the NOPR, the Commission stated that its proposal is a continuation of efforts pursuant to its authority under the FPA to ensure that the RTO/ISO tariffs and market rules produce just and reasonable rates, terms, and conditions of service.[23] Specifically, the Commission noted that it had observed that market rules designed for traditional resources can create barriers to entry for emerging technologies. The Commission expressed its concern that existing RTO/ISO tariffs impede the participation of distributed energy resources in the RTO/ISO markets by providing limited opportunities for distributed energy resource aggregations.[24]

17. The Commission acknowledged in the NOPR that distributed energy resources can at times effectively provide the capacity, energy, and ancillary services that are purchased and sold in the RTO/ISO markets.[25] However, the Commission explained that sometimes these resources can be too small to participate in these markets individually. The Commission also noted that current RTO/ISO market

[14] Order No. 841, 162 FERC ¶ 61,127.

[15] *See, e.g.,* CAISO Response (AD16–20) at 2–3; ISO–NE Response (AD16–20) at 6–7, 26–27; PJM Response (AD16–20) at 20–21; Advanced Energy Economy Comments (AD16–20) on RTO/ISO Responses (AD16–20) at 16–18; RES Americas Comments (AD16–20) on RTO/ISO Responses (AD16–20) at 4–5.

[16] NOPR, 157 FERC ¶ 61,121 at PP 103, 124.

[17] *See* Appendix A for a list of entities that submitted comments and the shortened names used throughout this final rule to describe those entities.

[18] Order No. 841, 162 FERC ¶ 61,127 at P 5. The Commission incorporated by reference all comments filed in response to the NOPR in Docket No. RM16–23–000 into Docket No. RM18–9–000 and directed any further comments regarding the proposed distributed energy resource aggregation reforms should be filed henceforth in Docket No. RM18–9–000.

[19] *See* Supplemental Notice of Technical Conference, Docket Nos. RM18–9–000 and AD18–10–000 (Mar. 29, 2018), *https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14856384.*

[20] *See* Notice Inviting Post-Technical Conference Comments, Docket No. RM18–9–000 (Apr. 27, 2018), *https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14* 882250.

[21] *See Cal. Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 (2016); *N.Y. Indep. Sys. Operator, Inc.,* 170 FERC ¶ 61,033 (2020) (NYISO Aggregation Order).

[22] *E.g.,* CAISO Data Request Response (2019 RM18–9) at 6 (citing CAISO Tariff, Section 4.17); ISO–NE Data Request Response (2019 RM18–9) at 17–18 (stating that distributed energy resources may participate in wholesale markets as demand resources or Settlement Only Resources).

[23] NOPR, 157 FERC ¶ 61,121 at P 9 (citing *Integration of Variable Energy Resources,* Order No. 764, 139 FERC ¶ 61,246, *order on reh'g and clarification,* Order No. 764–A, 141 FERC ¶ 61,232 (2012), *order on clarification and reh'g,* Order No. 764–B, 144 FERC ¶ 61,222 (2013); *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, 73 FR 64100 (Oct. 28, 2008), 125 FERC ¶ 61,071 (2008), *order on reh'g,* Order No. 719–A, 74 FR 37776 (Jul. 29, 2009), 128 FERC ¶ 61,059 (2009), *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009)).

[24] *Id.* P 13.

[25] *See id.*

rules often limit the services that distributed energy resources are eligible to provide, in many cases only allowing these resources to be used as demand response or load-side resources when they are located behind a customer meter or by imposing prohibitively expensive or otherwise burdensome requirements.

18. The Commission preliminarily found that the barriers to the participation of distributed energy resources through distributed energy resource aggregations in the RTO/ISO markets may, in some cases, unnecessarily restrict competition, which could lead to unjust and unreasonable rates.[26] The Commission stated that effective wholesale competition encourages entry and exit and promotes innovation, incents the efficient operation of resources, and allocates risk appropriately between consumers and producers. Thus, the Commission stated that removing the barriers to participation by distributed energy resource aggregations will enhance the competitiveness, and in turn the efficiency, of RTO/ISO markets and thereby help to ensure just and reasonable and not unduly discriminatory or preferential rates for wholesale electric services.

A. Comments

19. Most commenters, including state entities and RTOs/ISOs, support requiring RTOs/ISOs to remove barriers to the participation of distributed energy resource aggregations in their markets, subject to the Commission's adopting certain modifications to the NOPR proposals and/or allowing for regional flexibility in implementing reforms in any eventual final rule.[27] Among other things, these commenters identify improved competition and reliability as benefits of the proposed reforms and note that they provide a better way to provide price signals to distributed energy resources than current retail programs,[28] which may reduce the cost of meeting power system needs.[29] AWEA notes that participation in wholesale markets allows distributed energy resources to receive real-time information about system needs.[30] Commenters also state that the removal of barriers to, and integration of, distributed energy resource aggregations could spur innovation, and allow these aggregations to serve important roles on the grid.[31] Several commenters emphasize that a distributed energy resource aggregation framework must ensure that aggregated distributed energy resources can provide all the services that they are capable of providing,[32] while competing on a level and technology-neutral playing field with other resources.[33] Some commenters note that distributed energy resources do not currently fit within existing paradigms, which were designed for, and favor, other resources.[34] Others state that for distributed energy resources and distributed energy resource aggregations to fairly participate, they must meet the same technical and commercial requirements as other resources, and pay equally for ancillary services and use of the transmission system.[35]

20. Several commenters assert that existing participation models discriminate against distributed energy resources. For instance, Public Interest Organizations argue that distributed energy resources in PJM are often forced into participating as demand response, or interconnecting as generation, which are cost prohibitive.[36] Stem asserts that CAISO's Non-Generator Resource and Distributed Energy Resource Provider models effectively prevent participation of behind-the-meter resources in CAISO.[37] Advanced Energy Economy contends that, despite the benefits that aggregated distributed energy resources provide,[38] performance penalties for deviation from the characteristics of traditional generation effectively preclude participation in the capacity market.[39]

21. Some commenters state that distributed energy resource aggregation integration can be accomplished in a reliable and cost-effective manner.[40] Other commenters argue that allowing distributed energy resource aggregations to participate in wholesale markets will create new opportunities and enhance the reliability and resilience of the grid, leading to benefits such as savings and efficiency.[41] Advanced Energy Buyers suggest that allowing distributed energy resources to participate in RTO/ISO markets will also provide such resources with additional revenue streams, making them more economic and candidates for greater investment, and provide additional benefit to the grid as a result of increased market activity.[42] Commenters also note that the pairing of dispatchable resources with non-dispatchable resources in an aggregation could create a portfolio that overall could be dispatchable to the bulk power system.[43] Other commenters assert that, if distributed energy resources are not able to participate in wholesale markets, it could result in system overbuild, inaccurate wholesale price formation, and lack of visibility into system conditions.[44]

22. Certain United States senators express support for the proposed rule which, they state, would help develop frameworks for how renewables can aggregate together to more effectively participate in energy markets, and provide useful guidance on how to better integrate these resources with existing energy providers. In addition,

[26] *See id.* P 14.

[27] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 31–32; Connecticut Department of Energy Comments (RM16–23) at 4; IPKeys/Motorola Comments (RM16–23) at 4; Leadership Group Comments (RM16–23) at 2; MISO Comments (RM16–23) at 2; Ohio Commission Comments (RM16–23) at 2–3.

[28] AWEA Comments (RM16–23) at 1–2; City of New York Comments (RM16–23) at 3, 5, 7; Maryland and New Jersey Commissions Comments (RM16–23) at 2; Ohio Commission Comments (RM16–23) at 2; Public Interest Organizations Comments (RM16–23) at 5–6.

[29] AWEA Comments (RM16–23) at 2.

[30] *Id.*

[31] California Energy Storage Alliance Comments (RM16–23) at 4; Microgrid Resources Coalition Comments (RM16–23) at 10; Union of Concerned Scientists Comments (RM16–23) at 9, 15, 17 (noting the lack of participation models for potential market service providers like domestic electric water heaters and distributed solar resources).

[32] *See, e.g.,* Advanced Energy Management Comments (2018 RM18–9) at 3; Direct Energy Comments (2018 RM18–9) at 5, 11–13; Energy Storage Association Comments (2018 RM18–9) at 2; Microsoft Comments (2018 RM18–9) at 16–17; NRG Comments (2018 RM18–9) at 5–6.

[33] Advanced Energy Economy Comments (2018 RM18–9) at 5; Advanced Energy Management Comments (2018 RM18–9) at 3; Microsoft Comments (2018 RM18–9) at 15–16; NRG Comments (2018 RM18–9) at 3.

[34] Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 1; Public Interest Organizations Comments (RM16–23) at 5–6.

[35] PJM Market Monitor Comments (RM16–23) at 10–11; New York Utility Intervention Unit Comments (RM16–23) at 3.

[36] Public Interest Organizations Comments (RM16–23) at 19.

[37] Stem Comments (RM16–23) at 12, 16.

[38] Advanced Energy Economy states that the benefits include the ability to provide a quick response to system emergencies, which gives other resources time to ramp up or procure fuel, the ability of demand response to prevent blackouts during times of peak demand, and the ability to be dispatched granularly to provide support to specific parts of the grid. Advanced Energy Economy Comments (RM16–23) at 42–43.

[39] *Id.* (arguing that PJM's capacity performance construct and ISO–NE's pay-for-performance construct both effectively require indefinite run times to avoid performance penalties that can amount to more than a year's worth of capacity revenue).

[40] Advanced Energy Economy Comments (2018 RM18–9) at 5.

[41] *See, e.g.,* Advanced Energy Buyers Comments (2018 RM18–9) at 3; CAISO Comments (2018 RM18–9) at 1; Direct Energy Comments (2018 RM18–9) at 11–13; NRG Comments (2018 RM18–9) at 5–6; Tesla Comments (2018 RM18–9) at 3.

[42] Advanced Energy Buyers Comments (2018 RM18–9) at 5.

[43] NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 4.

[44] *Id.;* Microsoft Comments (2018 RM18–9) at 13.

these United States senators maintain that the rulemaking comes at a critical time for renewable energy because renewables led the way in 2016 for new additions onto the energy grid.[45] These United States senators, as well as members of the United States House of Representatives, urge the Commission to adopt a final rule that provides all distributed energy resources with the opportunity to participate in RTO/ISO markets, noting that the changes proposed in the NOPR will help improve the reliability and resilience of the bulk power system by providing operators with new local tools to manage unanticipated events and potentially lower costs for customers. They state that renewable energy provided 10% of electricity generation in 2018 due to state and federal policies as well as consumer interest in choosing cost-competitive technologies.[46]

23. Mensah asserts that one of the biggest limitations that needs to be addressed is the ability of behind-the-meter distributed energy resources to inject onto the grid.[47] Tesla requests the Commission extend to distributed energy resource aggregations the finding in Order No. 841 that existing tariffs do not recognize the operational characteristics of electric storage resources and limit their participation in the markets.[48] Tesla urges the Commission to require that RTO/ISO tariffs allow distributed energy resources, including those resources physically located behind an end-use customer meter, to employ their full operational range by injecting energy onto the grid in order to provide any wholesale service through participation in distributed energy resource aggregations.[49]

24. Some commenters argue that the Commission needs to provide general guidance on distributed energy resource aggregation, with straightforward rules, clearly defined responsibilities, and data-driven market signals.[50] They explain that distributed energy resource aggregations must have transparent and predictable parameters for participation that are not overly restrictive and do not contain undue administrative delay.[51] Microsoft suggests that the Commission provide ''directional guidance'' to RTOs/ISOs to remove barriers.[52]

25. In contrast, EEI states that the Commission should defer to regional stakeholder processes and coordination with state-jurisdictional entities to formulate the detailed provisions required to implement distributed energy resource aggregation participation in the wholesale market.[53] APPA states that the evidence is thin to show that there is a great demand for distributed energy resource aggregation programs or that such programs will bring meaningful benefits to consumers in the RTO/ISO regions.[54]

B. Commission Determination

26. For the reasons discussed below, in this final rule, we affirm the preliminary finding in the NOPR that existing RTO/ISO market rules are unjust and unreasonable because they present barriers to the participation of distributed energy resource aggregations in the RTO/ISO markets, and such barriers reduce competition and fail to ensure just and reasonable rates. Specifically, current RTO/ISO market rules present barriers that prevent certain distributed energy resources that are technically capable of participating in the RTO/ISO markets on their own or through aggregation from doing so.[55] Permitting distributed energy resource aggregations to participate in the RTO/ISO markets may allow these resources, in the aggregate, to meet certain qualification and performance requirements, particularly if the operational characteristics of different distributed energy resources in a distributed energy resource aggregation complement each other.[56] The reforms adopted in this final rule will remove the barriers that qualification and performance requirements currently pose to the participation of distributed energy resources in the RTO/ISO markets.[57]

27. The reforms adopted in this final rule are timely, as there has been significant development of distributed energy technologies and deployment of distributed energy resources in recent years. Moreover, this development has generated discussions on the potential for such resources—including new distributed energy resources that are smaller, interconnected at lower voltages, and geographically dispersed—to provide grid services through participation in RTO/ISO markets. Wider scale use of distributed energy resources is enabled by increased deployment of, and improvements in, metering, telemetry, and communication technologies. Aggregations of new and existing distributed energy resources can provide new cost-effective sources of energy and grid services and enhance competition in wholesale markets as new market participants.

28. Individual distributed energy resources often do not meet the minimum size requirements to participate in the RTO/ISO markets under existing participation models and often cannot satisfy all the performance requirements of the various participation models due to their small size. In order to participate in RTO/ISO markets, distributed energy resources tend to participate in RTO/ISO demand response programs. While these demand response programs have helped reduce barriers to load curtailment resources, they often limit the operations of some

[45] September 22, 2017 Letter to Chairman Neil Chatterjee from United States Senators Sheldon Whitehouse, Cory A. Booker, Edward J. Markey, Ron Wyden, Elizabeth Warren and Bernard Sanders (filed Sept. 25, 2017) (September 22 Letter); *see also* May 23, 2018 Letter to Chairman Kevin McIntyre from United States Senators Sheldon Whitehouse, Edward J. Markey, Martin Heinrich, Jeanne Shaheen, Richard Blumenthal, Margaret Wood Hassan, Angus S. King, Jr., Dianne Feinstein, Bernard Sanders, Catherine Cortez Masto, Jack Reed, Ron Wyden, Jeff Merkley, Kamala D. Harris, Cory A. Booker, and Brian Schatz (filed May 23, 2018) (discussing 2016 estimates from the Energy Information Administration that distributed energy resources accounted for about two percent of the installed generation capacity in the United States). In response to the September 22 Letter, Chairman Chatterjee stated that the Commission has a role in fostering resource neutral, non-discriminatory policies with respect to the wholesale markets, including removing barriers to the participation of distributed energy resources in the wholesale markets. Chairman's Response to September 22 Letter (filed Oct. 5, 2017).

[46] February 11, 2019 Letter to Chairman Neil Chatterjee from United States Congress members Peter Welch, Mike Levin, Mike Quigley, Paul D. Tonko, Daniel W. Lipinski, Jerry McNerney, James R. Langevin, Kathy Castor, Raul M. Grijalva, Mark Pocan, Donald S. Beyer Jr., Matt Cartwright, Nanette Diaz Barragán, Sean Casten, Jamie Raskin, James P. McGovern, and Mike Doyle (filed Feb. 11, 2019); February 11, 2019 Letter to Chairman Neil Chatterjee from United States Senators Sheldon Whitehouse, Edward J. Markey, Cory A. Booker, Catherine Cortez Masto, Martin Heinrich, Brian Schatz, Ron Wyden, Jeffrey A. Merkley, Kamala D. Harris, Richard Blumenthal, Jack Reed, Angus S. King, Jr., Tina Smith, Jacky Rosen, Margaret Wood Hassan, Jeanne Shaheen, Dianne Feinstein, and Bernard Sanders (filed Feb. 21, 2019).

[47] Mensah Comments (RM16–23) at 3.

[48] Tesla Comments (2018 RM18–9) at 7.

[49] *Id.* at 1, 7.

[50] Advanced Energy Buyers Comments (2018 RM18–9) at 2; Advanced Energy Economy Comments (2018 RM18–9) at 5.

[51] Advanced Energy Buyers Comments (2018 RM18–9) at 5.

[52] Microsoft Comments (2018 RM18–9) at 13.

[53] EEI Comments (2018 RM18–9) at 3.

[54] APPA Comments (2018 RM18–9) at 10.

[55] *See* NOPR, 157 FERC ¶ 61,121 at P 124.

[56] *See id.* P 125.

[57] *See infra* section IV.C.4 (Minimum and Maximum Size of Aggregation) (agreeing with commenters that a minimum size requirement not to exceed 100 kW will help improve competition in the RTO/ISO markets and avoid confusion about appropriate minimum size requirements for distributed energy resource aggregations under existing or new participation models); Section IV.C.6 (Single Resource Aggregation) (explaining that a consistent minimum size requirement will minimize barriers in the event that an individual distributed energy resource ceases to participant in RTO/ISO markets as a single qualifying distributed energy resource aggregation).

types of distributed energy resources, such as electric storage or distributed generation, as well as the services that they are eligible to provide.[58]

29. We find that adopting the reforms described below will enhance the competitiveness, and in turn the efficiency, of RTO/ISO markets and thereby help to ensure just and reasonable and not unduly discriminatory or preferential rates for wholesale electric services.[59] Further, the reforms required by this final rule will help the RTOs/ISOs account for the impacts of distributed energy resources on installed capacity requirements and day-ahead energy demand, thereby reducing uncertainty in load forecasts and the risk of over procurement of resources and the associated costs, and provide numerous other benefits.[60] Accordingly, as discussed further below, we adopt the NOPR proposal to add § 35.28(g)(12)(i) to the Commission's regulations and require each RTO/ISO to have tariff provisions that allow distributed energy resource aggregations to participate directly in RTO/ISO markets.[61] While we agree with commenters that there are operational, technological, and cost implications that must be evaluated and addressed, as explained below, we find that the record in this proceeding provides sufficient basis for taking action to require the implementation of the generic requirements discussed herein.

30. To the extent that an RTO/ISO proposes to comply with any or all of the requirements in this final rule using its currently effective requirements for distributed energy resources, it must demonstrate on compliance that its existing approach meets the requirements in this final rule.

IV. Discussion

A. Commission Jurisdiction

1. Scope of Final Rule

31. In the NOPR, the Commission stated that it was proposing reforms pursuant to its legal authority under section 206 of the FPA to ensure that the RTO/ISO tariffs are just and reasonable and not unduly discriminatory or preferential.[62]

a. Comments

32. Several commenters assert that the basis for the Commission's jurisdiction is straightforward because sales from distributed energy resource aggregators into wholesale markets are sales at wholesale in interstate commerce.[63] Other commenters question the Commission's authority to implement the proposed reforms, seek clarification of the NOPR's scope, or ask the Commission to respect existing federal, state, and local jurisdictional boundaries.[64]

33. Stem asserts that the Commission should clarify that it has jurisdiction over participation in the wholesale markets and the associated transactions, while relevant electric retail regulatory authorities[65] have jurisdiction over the physical dispatch and the resulting electrical activity on the distribution system.[66] Connecticut State Entities argue that, while the management of the impacts of new generation on the distribution system remains with the states, the comprehensive and effective integration of these emerging technologies into the wholesale markets rests with the Commission.[67]

34. Harvard Environmental Policy Initiative argues that the Commission's proposal to assert jurisdiction over a distributed energy resource aggregator's sale of sink-related services to RTOs/ISOs would fall under the Commission's jurisdiction under the test applied by the U.S. Supreme Court in *FERC* v. *Electric Power Supply Ass'n,*[68] and that the Commission has authority under FPA section 206 to require RTOs/ISOs to enable the participation of distributed energy resource aggregators.[69] Harvard Environmental Policy Initiative further contends that a company's distribution system investments, even if motivated by a Commission rule, are not evidence that the Commission has overstepped its legal authority, and that, even if a change in state law were necessary to allow consumers to participate, the NOPR does not force states to do anything and does not require states to facilitate the development of distributed energy resources.[70]

35. In contrast, some commenters question the Commission's authority to impose the proposed reforms or seek clarification of federal and state jurisdictional boundaries.[71] APPA/NRECA interpret the NOPR to be limited to reforms to the RTO/ISO tariff rules governing RTO/ISO markets and they urge the Commission not to expand the scope of the NOPR beyond RTO/ISO markets and to preserve state and local authority over retail sales, generation facilities, and local distribution facilities.[72] TAPS similarly asserts that any final rule should be limited to (1) the treatment by RTOs/ISOs of energy and ancillary services from distributed energy resources after those resources have already been delivered to the RTO's/ISO's markets; and (2) assuring that any such participation of distributed energy resource aggregations in RTO/ISO markets is compatible with the safe and reliable operation of the distribution system, as well as relevant electric retail regulatory authority and distribution utility tariffs, rules, and requirements.[73] FirstEnergy argues that any rules adopted by the Commission must preserve state jurisdictional authority over distribution-level resources.[74] Similarly, the Maryland and New Jersey Commissions ask the Commission to confirm that state decisions on distribution system design, resource interconnection access, operations, and costs will not be viewed

[58] For example, when participating through demand response programs, distributed energy resources generally can only operate to reduce customer demand at the meter, and any injection/generation cannot exceed customer demand. Consequently, these resources are prevented from injecting additional electricity into the grid to make sales of electricity in RTO/ISO markets.

[59] *See infra* Section IV.C.1 (Participation Model); Section IV.C.2 (Types of Technologies); Section IV.C.3 (Double Counting of Services); Section IV.H.2 (Role of Distribution Utilities); Section IV.J (Market Participation Agreements).

[60] *See infra* Section IV.C.4 (Minimum and Maximum Size of Aggregation); Section IV.D (Locational Requirements).

[61] In addition, we adopt the proposal to add sections 35.28(b)(10) and (11) to the Commission's regulations incorporating the definitions for distributed energy resource and distributed energy resource aggregator.

[62] NOPR, 157 FERC ¶ 61,121 at P 1.

[63] *See, e.g.,* Sunrun Comments (2018 RM18–9) at 3–4 (citing 16 U.S.C. 824(b)(1)); Connecticut State Entities Comments (RM16–23) at 7; Stem Comments (2018 RM18–9) at 3.

[64] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 18–20; MISO Transmission Owners Comments (RM16–23) at 17–18; NESCOE Comments (RM16–23) at 16; TAPS Comments (RM16–23) at 4–5; Xcel Energy Services Comments (RM16–23) at 6–9, 23–24.

[65] The term ''relevant electric retail regulatory authority'' means the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission. *See* Order No. 719, 125 FERC ¶ 61,071 at P 158.

[66] Stem Comments (2018 RM18–9) at 3.

[67] Connecticut State Entities Comments (RM16–23) at 7.

[68] Harvard Environmental Policy Initiative Comments (RM16–23) at 3 (citing *FERC* v. *Electric Power Supply Ass'n,* 136 S. Ct. 760, 776 (2016) (*EPSA*)).

[69] *Id.* at 4–5.

[70] *Id.* at 9, 12.

[71] *See* EEI Comments (RM16–23) at 25; Icetec Comments (2018 RM18–9) at 1–2; Maryland and New Jersey Commissions Comments (RM16–23) at 2–3; Massachusetts Commission Comments (RM16–23) at 10; Stem Comments (2018 RM18–9) at 3.

[72] APPA/NRECA Comments (RM16–23) at 18–20.

[73] TAPS Comments (RM16–23) at 9.

[74] FirstEnergy Comments (2019 RM18–9) at 5 n.13.

as a barrier to wholesale competition or subject to Commission review.[75] MISO Transmission Owners assert that any final rule must not disturb a state's jurisdiction over retail electricity sales and retail distribution service, including state regulation of retail rates, net metering programs, and participation in wholesale markets by resources located behind a retail distribution service meter.[76]

36. The Maryland and New Jersey Commissions ask the Commission to enunciate clear federal and state jurisdictional lines pertaining to both the distribution system and distributed energy resources, whether in front of or behind the meter.[77] The Massachusetts Commission and EEI ask the Commission to clarify whether distribution system-connected and behind-the-meter distributed energy resources that participate in wholesale markets are Commission-jurisdictional facilities.[78] EEI notes that the Commission has exclusive jurisdiction over sales for resale under the FPA.[79] The Harvard Environmental Policy Initiative states that EEI confuses Commission jurisdiction over energy sales with state jurisdiction over generation facilities and argues that states will retain authority over the resources themselves.[80]

37. Icetec asks the Commission either to (1) clarify that retail customers transmitting power from distributed energy resources behind their retail service point to their retail point of interconnection are not considered public utilities subject to Open Access Transmission Tariff (OATT) and Open Access Same-Time Information System (OASIS) requirements, or (2) require RTOs/ISOs to include a *pro forma* request for waiver of those requirements in distributed energy resource participation agreements.[81] The Harvard Environmental Policy Initiative states that the Commission should establish a jurisdictional line that distinguishes between sales by distributed energy resource aggregators and sales by individual distributed energy resources by determining that an energy sale from an individual distributed energy resource is not a ''wholesale sale in interstate commerce'' but is instead ''any other sale'' under FPA section 201 and therefore not subject to Commission regulation.[82]

b. Commission Determination

38. FPA section 201 authorizes the Commission to regulate the transmission of electric energy in interstate commerce and the wholesale sale of electric energy in interstate commerce, as well as all facilities used for such transmission or sale of electric energy.[83] FPA section 201 also defines a public utility as a person who owns or operates facilities subject to the jurisdiction of the Commission.[84] FPA sections 205[85] and 206[86] provide the Commission with jurisdiction over all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the Commission's jurisdiction. Those sections also provide the Commission with jurisdiction over all rules, regulations, practices, or contracts affecting jurisdictional rates, charges, or classifications.

39. The Commission's authority to issue regulations pertaining to distributed energy resource aggregations stems from both the Commission's jurisdiction over the wholesale sales by distributed energy resource aggregators into RTO/ISO markets and from its jurisdiction over practices affecting wholesale rates.[87]

40. First, we find that the sales of electric energy by distributed energy resource aggregators for purposes of participating in an RTO/ISO market are wholesale sales subject to the Commission's jurisdiction. In Order No. 841, the Commission observed that an electric storage resource that injects electric energy back to the grid for purposes of participating in an RTO/ISO market engages in a sale of electric energy at wholesale in interstate commerce.[88] Similarly, to the extent that a distributed energy resource aggregator's transaction in RTO/ISO markets entails the injection of electric energy onto the grid and a sale of that energy for resale in wholesale electric markets, we find that the Commission has jurisdiction over such wholesale sales.[89]

41. Second, we find that RTO/ISO market rules governing sales in RTO/ISO markets by distributed energy resource aggregators from demand resources (*e.g.,* demand response and energy efficiency) are practices affecting wholesale rates. This finding aligns with the decision of the U.S. Supreme Court in *EPSA,* which interpreted the FPA as providing the Commission with jurisdiction over the participation in RTO/ISO markets of demand response resources: A type of non-traditional resource that, by definition, is located behind a customer meter and generally is located on the distribution system.[90] First, the Court found that the Commission's regulation of demand response participation in wholesale markets met the ''affecting'' standard in FPA sections 205 and 206 ''with room to spare.''[91] Second, the Court found that the Commission's regulation of demand response resources did not regulate retail sales in violation of FPA section 201(b).[92] These holdings apply equally to RTO/ISO market rules governing sales in RTO/ISO markets by distributed energy resource aggregators from demand resources.

42. We clarify that, to the extent a distributed energy resource aggregator makes sales of electric energy into RTO/ISO markets, it will be considered a public utility subject to the Commission's jurisdiction.[93] Such distributed energy resource aggregators must fulfill certain responsibilities set forth in the FPA and the Commission's rules and regulations.[94] If a distributed

[75] Maryland and New Jersey Commissions Comments (RM16–23) at 3.

[76] MISO Transmission Owners Comments (RM16–23) at 5–6.

[77] Maryland and New Jersey Commissions Comments (RM16–23) at 2.

[78] Massachusetts Commission Comments (RM16–23) at 11.

[79] EEI Comments (RM16–23) at 23–24 (citing 16 U.S.C. 824o(a)(1)).

[80] Harvard Environmental Policy Initiative Comments (RM16–23) at 12.

[81] Icetec Comments (2018 RM18–9) at 9.

[82] Harvard Environmental Policy Initiative Comments (RM16–23) at 13 (quoting 16 U.S.C. 824(b)(1)).

[83] 16 U.S.C. 824.

[84] *Id.* 824(e).

[85] *Id.* 824d.

[86] *Id.* 824e.

[87] *See Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 964 F.3d at 1186 (''FERC bears the responsibility of regulating the wholesale market, which encompasses 'both wholesale rates and the panoply of rules and practices affecting them.' '') (quoting *EPSA,* 136 S. Ct. at 773).

[88] Order No. 841, 162 FERC ¶ 61,127 at P 30.

[89] *See EnergyConnect, Inc.,* 130 FERC ¶ 61,031, at P 29 (2010). We note that injections of electric energy to the grid do not necessarily trigger the Commission's jurisdiction. *See Sun Edison LLC,* 129 FERC ¶ 61,146 (2009), *reh'g granted on other grounds,* 131 FERC ¶ 61,213 (2010) (the Commission's jurisdiction would arise only when a facility operating under a state net metering program produces more power than it consumes over the relevant netting period); *MidAmerican Energy Co.,* 94 FERC ¶ 61,340 (2001).

[90] *See* Order No. 841–A, 167 FERC ¶ 61,154 at P 33 (citing *EPSA,* 136 S. Ct. 760; 18 CFR 35.28(b)(4)).

[91] *EPSA,* 136 S. Ct. at 774 (referring to the Commission's jurisdiction under FPA sections 205 and 206 to regulate practices affecting jurisdictional rates).

[92] *Id.* at 784.

[93] *See EnergyConnect, Inc.,* 130 FERC ¶ 61,031 at P 29 (finding an aggregator of retail customers to be a public utility under FPA section 201(e) because its agreements to make sales of balancing energy for resale in RTO/ISO markets would constitute jurisdictional facilities under FPA section 201(b)).

[94] Examples of such responsibilities include filing rates under FPA section 205 (potentially including obtaining market-based rate authority); filing Electric Quarterly Reports; submitting FPA sections 203 and 204 filings related to corporate mergers and

Continued

energy resource aggregator (1) aggregates *only* demand resources; or (2) aggregates only customers in a net metering program that are not net sellers, that distributed energy resource aggregator would not become a public utility.[95]

43. We further clarify that we are only exercising jurisdiction in this final rule over the sales by distributed energy resource aggregators into the RTO/ISO markets. Hence, an individual distributed energy resource's participation in a distributed energy resource aggregation would not cause that individual resource to become subject to requirements applicable to Commission-jurisdictional public utilities.

44. As the Commission stated in Order Nos. 841 and 841–A, the Commission recognizes a vital role for state and local regulators with respect to retail services and matters related to the distribution system, including design, operations, power quality, reliability, and system costs.[96] As in Order No. 841, we reiterate that nothing in this final rule preempts the right of states and local authorities to regulate the safety and reliability of the distribution system and that all distributed energy resources must comply with any applicable interconnection and operating requirements.[97]

2. Opt-Out

45. In the NOPR, the Commission proposed to require each RTO/ISO to revise its tariff as necessary to accommodate the participation of distributed energy resource aggregations in RTO/ISO markets.[98] In the NOPR, the Commission stated that, to the extent existing rules or regulations explicitly prohibit certain technologies from participating in RTO/ISO markets, it did not intend to overturn those rules or regulations.[99] However, the Commission did not propose a mechanism by which relevant electric retail regulatory authorities could authorize or prohibit the participation of distributed energy resources or distributed energy resource aggregators in RTO/ISO markets. The Commission also explained that, because the individual resources in distributed energy resource aggregations likely will fall under the purview of multiple organizations (*e.g.,* the RTO/ISO, state regulatory commissions, relevant distribution utilities, and local regulatory authorities), the proposed market participation agreements [100] for distributed energy resource aggregators must require that the aggregator attest that its distributed energy resource aggregation is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any other relevant regulatory authority.[101] The Commission stated that this may include any laws or regulations of the relevant electric retail regulatory authority that do not permit demand response resources to participate in RTO/ISO markets as the Commission considered in Order No. 719.[102]

46. After the technical conference, the Commission sought comments on whether states could require distributed energy resources to choose to participate in either an RTO/ISO market or retail compensation program, but not allow participation in both.[103] The Commission also sought comments on the benefits and drawbacks of such an approach.

a. Comments

47. As described above,[104] numerous commenters question the Commission's authority to require RTOs/ISOs to accommodate the participation of distributed energy resource aggregations in RTO/ISO markets. They believe that, to mitigate their jurisdictional concerns, relevant electric retail regulatory authorities and/or distribution utilities must be allowed to either authorize or prohibit the participation of distributed energy resources and/or distributed energy resource aggregators in the RTO/ISO markets (*i.e.,* to opt in or opt out, respectively).[105] Thus, they specifically request that the Commission adopt an opt-out/opt-in provision similar to that established in Order No. 719 to allow relevant electric retail regulatory authorities to decide whether distributed energy resources may participate in aggregations in RTO/ISO markets.[106]

48. Some of these commenters contend that the Commission would be exceeding its statutory authority if the final rule does not include an opt-out.[107] They argue that the Commission may determine *how* distributed energy resources participate in RTO/ISO markets, but *whether* they participate is the exclusive province of the states.[108] APPA points to the existing opt-out for demand response resources established in Order No. 719 to argue that the applicability of relevant electric retail regulatory authority should not turn on the wholesale participation model selected by the aggregator.[109] APPA asserts that the authority of relevant electric retail regulators over the terms and conditions of interconnection to the distribution system includes the authority to limit the manner in which a distributed energy resource uses the distribution system.[110] APPA argues that an opt-out is consistent with the NOPR's proposal that market participation agreements include an attestation that an aggregation is compliant with distribution utility tariffs and the rules and regulations of any other relevant regulatory authority. APPA further argues that an opt-out conforms with the requirement in Order No. 841 that an electric storage resource must be ''contractually permitted'' to inject electric energy back onto the grid (*e.g.,* per the interconnection agreement between an electric storage resource that is interconnected on a distribution system or behind the meter and the distribution utility to which it is

other activities; and fulfilling FPA section 301 accounting obligations and FPA section 305(b) interlocking directorate obligations. *See* 16 U.S.C. 824b, 824c, 824d, 825, 825d(b).

[95] *See EnergyConnect, Inc.,* 130 FERC ¶ 61,031 at P 30 (finding that ''where an entity is only engaged in the provision of demand response services, and makes no sales of electric energy for resale, that entity would not own or operate facilities that are subject to the Commission's jurisdiction and would not be a public utility that is required to have a rate on file with the Commission''); *Sun Edison LLC,* 129 FERC ¶ 61,146 (the Commission's jurisdiction would arise only when a facility operating under a state net metering program produces more power than it consumes over the relevant netting period); *MidAmerican Energy Co.,* 94 FERC ¶ 61,340.

[96] Order No. 841, 162 FERC ¶ 61,127 at P 36; Order No. 841–A, 167 FERC ¶ 61,154 at P 42.

[97] *See* Order No. 841–A, 167 FERC ¶ 61,154 at P 46.

[98] NOPR, 157 FERC ¶ 61,121 at P 124.

[99] *Id.* P 133.

[100] See Section IV.J (Market Participation Agreements) below for more discussion of market participation agreements.

[101] NOPR, 157 FERC ¶ 61,121 at P 157.

[102] *Id.* P 157 n.238 (citing Order No. 719, 125 FERC ¶ 61,071 at P 154).

[103] Notice Inviting Post-Technical Conference Comments at 6.

[104] *See supra* Section IV.A.1 (Scope of Final Rule).

[105] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 21–22; DTE Electric/Consumers Energy Comments (RM16–23) at 7; MISO Transmission Owners Comments (RM16–23) at 6; NARUC Comments (RM16–23) at 4–5; TAPS Comments (RM16–23) at 10, 16–17.

[106] *See, e.g.,* AES Companies Comments (RM16–23) at 31; Kansas Commission Comments (2018 RM18–9) at 4; NRECA Comments (2018 RM18–9) at 6–7, 27–28; Organization of MISO States Comments (RM16–23) at 4–5; Southern Companies Comments (2018 RM18–9) at 3–4 (citing Order No. 719, 125 FERC ¶ 61,071; Order No. 719–A, 128 FERC ¶ 61,059); *see* discussion of opt-out/opt-in *infra* PP 59, 64.

[107] Kansas Commission Comments (2018 RM18–9) at 3; NARUC Comments (2018 RM18–9) at 2–3; *see* APPA Comments (2018 RM18–9) at 15.

[108] Kansas Commission Comments (2018 RM18–9) at 2–3; NARUC Comments (2018 RM18–9) at 2–3.

[109] APPA Comments (2018 RM18–9) at 17–18.

[110] *Id.* at 15–16 (noting that CAISO's Distributed Energy Resource Provider program requires compliance with applicable distribution utility tariffs and operating procedures, as well as applicable requirements of the relevant electric retail regulatory authority).

interconnected).[111] Xcel Energy Services argues that, to the extent distributed energy resource participation in RTO/ISO markets does occur, the applicable state has the authority to establish the parameters of the participation model, not the RTO/ISO.[112] Xcel Energy Services asserts that the Commission should not usurp the states' authority to address inappropriate arbitrage between retail and wholesale consumption.[113]

49. Multiple United States senators urge the Commission to preserve the authority of state and local authorities over distribution utilities with respect to distributed energy resource aggregators. They express concern that the final rule could have a negative effect on state and local authorities' ability to regulate retail and distribution service. They argue that, if the Commission authorizes the aggregation of distributed energy resources by entities other than the local distribution utility without authorization by the appropriate state or local regulator, the Commission would break precedent and expand Commission regulation into areas that are jurisdictional to state and localities under the FPA. They maintain that the relevant electric retail regulatory authority is best positioned to decide whether to authorize third-party distributed energy resource aggregators to transact with retail customers.[114]

50. Those commenters advocating for an opt-out also generally express concerns about the cost, and operational and reliability impacts, of distributed energy resource aggregations on distribution utilities and the distribution system.[115] With regard to cost impacts, some commenters suggest that costs borne by small utilities and their customer bases may outweigh the benefits of distributed energy resource aggregation participation in RTO/ISO markets, and that small to medium-sized distribution utilities may not have the resources needed to coordinate with distributed energy resource aggregators and RTOs/ISOs.[116] In addition, NRECA argues that opt-out/opt-in provisions would lessen the compliance burden on smaller entities and would be consistent with the deference to relevant electric retail regulatory authorities included in IEEE 1547.[117] NRECA also raises concerns that distributed energy resource aggregators may ''cherry-pick'' the more lucrative resources in a system, undermining reliability and the ability of utilities to develop and invest in their own integrated distributed energy resources portfolio.[118] Organization of MISO States suggests that even a temporary opt-out would allow for safe and reliable implementation with minimal disruption to the distribution system.[119]

51. Some commenters argue that, to relieve smaller entities of cost and coordination burdens, the Commission should at a minimum establish an express opt-in requirement for small distribution utilities similar to the one the Commission adopted in Order No. 719.[120] NRECA asserts that the distributed energy resource aggregation proposals would be costly for small cooperatives in rural, remote communities.[121] NRECA and TAPS recommend that the Commission require express permission from the relevant electric retail regulatory authority before the RTO/ISO may accept bids from distributed energy resource aggregations located on the system of a utility that distributes 4 million MWh or less, employing the same size threshold as the small utility opt-in allowed in Order No. 719–A.[122]

52. In contrast, other commenters caution against adopting the Order No. 719 construct.[123] Many of those commenters argue that an opt-out is not necessary because the Commission has exclusive jurisdiction over sales from distributed energy resource aggregators into RTO/ISO markets.[124] Moreover, several commenters argue that the responsibility for integrating emerging technologies into RTO/ISO markets rests with the Commission (while the states are responsible for managing the impacts on the distribution system) and that the Order No. 719 opt-out provision has effectively prevented the development of demand response in the Midwest and led to higher wholesale rates.[125] In addition, some commenters argue that providing states with an opt-out would be inconsistent with the Commission's denial of such an opt-out

[111] *Id.* at 16 (citing NOPR, 157 FERC ¶ 61,121 at P 157; Order No. 841, 162 FERC ¶ 61,127 at P 33).

[112] Xcel Energy Services Comments (RM16–23) at 23–24.

[113] *Id.* at 24.

[114] May 7, 2019 Letter to Chairman Neil Chatterjee from United States Senators John Hoeven, Kevin Cramer, John Barrasso, John Boozman, Lisa Murkowski, Michael B. Enzi, Joni K. Ernst, Roger F. Wicker, Shelley Moore Capito, Chuck Grassley, M. Michael Rounds, Steve Daines, John Thune, Thom Tillis, Mike Crapo, Cindy Hyde-Smith, Roy Blunt, James E. Risch, James Lankford, Deb Fischer, James M. Inhofe, and Bill Cassidy. In response to this letter, the Chairman noted that he asked state regulators participating at the April 2018 technical conference to discuss whether and why they view as important in the context of this rulemaking the type of flexibility that the Commission has provided to relevant electric retail regulatory authorities with respect to participation of demand response resources in wholesale electric markets. The Chairman also stated that he recognizes the important role of state and local regulators with respect to reliability and resilience, particularly with respect to the distribution system. Chairman's Response to May 7, 2019 Letter (filed June 4, 2019).

[115] *See, e.g.,* Vice Chairman Place Comments (2018 RM18–9) at 2–3; EEI Comments (2018 RM18–9) at 19–20; Eversource Comments (2018 RM18–9) at 12–13; NRECA Comments (2018 RM18–9) at 7–10, 12; *see also* AMP Comments (2019 RM18–9) at 1.

[116] APPA Comments (2018 RM18–9) at 7 (asserting that rate design challenges can be particularly acute for small to medium-sized distribution utilities), 9–10 (asserting that monitoring and responding to system impacts associated with distributed energy resource aggregation activity could be particularly difficult for small and medium-sized utilities); APPA/NRECA Comments (RM16–23) at 39 (asserting that the costs of installing new meters or new communication technology to capture wholesale market transactions would burden smaller distribution utilities in particular); NRECA Comments (2018 RM18–9) at 14 (asserting that smaller distribution cooperatives may not have staff or resources needed to conduct ongoing operational coordination with RTOs/ISOs and distributed energy resource aggregators), 26 (asserting that the considerable amount of funding required to potentially benefit a small number of customers imposes too large of a burden on small utilities); TAPS Comments (RM16–23) at 15–16 (asserting that, particularly for a small utility, the costs of ongoing coordination, metering, settlements, and rate-unbundling needed to support sales to RTO/ISO markets by distributed energy resources may far exceed the potential efficiency benefits from their participation in RTO/ISO markets).

[117] NRECA Comments (2018 RM18–9) at 27–28. IEEE–1547 is a standard of the Institute of Electrical and Electronics Engineers (IEEE) that provides a set of criteria and requirements for the interconnection of distributed energy resources.

[118] *Id.* at 22–23.

[119] Organization of MISO States Comments (2018 RM18–9) at 5–6.

[120] APPA Comments (2018 RM18–9) at 19–20; TAPS Comments (RM16–23) at 16; TAPS Comments (2018 RM18–9) at 19–21.

[121] NRECA Comments (2019 RM18–9) at 4–5.

[122] *Id.;* TAPS Comments (RM16–23) at 16–17; TAPS Comments (2018 RM18–9) at 19 & n.27.

[123] *See, e.g.,* Advanced Energy Buyers Comments (2018 RM18–9) at 6; Advanced Energy Management Comments (2018 RM18–9) at 7–8, 10–11; Icetec Comments (2018 RM18–9) at 10–11; SEIA Comments (2018 RM18–9) at 8; Stem Comments (2018 RM18–9) at 4–6.

[124] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 18; Energy Storage Association Comments (2018 RM18–9) at 5; Icetec Comments (2018 RM18–9) at 11; Stem Comments (2018 RM18–9) at 4–5 (arguing that the FPA does not permit a state to use its jurisdiction over generation or local distribution facilities to prevent distributed energy resources or distributed energy resource aggregators from accessing Commission-jurisdictional markets); Sunrun Comments (2018 RM18–9) at 3–4 (arguing that whether wholesale sales originate from facilities on the transmission system, the distribution system, or behind the meter is immaterial to the Commission's jurisdiction and that FPA section 201(b) distinguishes between authority to regulate transactions and authority to regulate facilities).

[125] Advanced Energy Economy Comments (RM16–23) at 44–45; Connecticut State Entities Comments (RM16–23) at 7; Organization of MISO States Comments (RM16–23) at 5 n.3 (noting concerns of Illinois Commission).

from electric storage participation in Order No. 841.[126]

53. With respect to the Commission's authority, some commenters assert that only the Commission has jurisdiction to determine eligibility for wholesale market participation [127] and that limiting or conditioning wholesale market participation through retail tariffs [128] or distribution interconnection agreements [129] would interfere with that jurisdiction. Advanced Energy Management asserts that because selling injections of electric energy in wholesale markets is governed under the FPA and distributed energy resources are not always behind the meter, there should not be a blanket opt-out available to relevant electric retail regulatory authorities.[130]

54. However, some commenters recognize that states do have the right to implement retail tariffs that disqualify a resource from participating in the state program if the resource elects to participate in RTO/ISO markets.[131] Several commenters caution that, if the Commission does consider an opt-out, it must be narrowly tailored.[132] Harvard Environmental Policy Initiative points to the Commission's proposed coordination provisions to demonstrate that the Commission will not preempt state authority over distribution system planning or create new authority for the Commission to allow distributed energy resources to connect to a distribution system without a utility's approval or knowledge.[133]

55. In response to concerns about the impact of distributed energy resource aggregations on the distribution system, several commenters argue that distributed energy resource aggregation participation in RTO/ISO markets does not introduce additional reliability or cost concerns beyond those that are addressed through the interconnection process.[134] In contrast with commenters that suggest that distributed energy resource aggregations introduce reliability or cost concerns, Advanced Energy Economy argues that an opt-out would limit RTO/ISO visibility into distributed energy resource operations, thereby preventing RTO/ISO operators from using them to maintain reliability and improve resilience, and would limit an RTO's/ISO's ability to efficiently optimize all of the resources available in its region, risking increased costs to consumers.[135]

b. Commission Determination

56. We decline to include a mechanism for all relevant electric retail regulatory authorities to prohibit all distributed energy resources from participating in the RTO/ISO markets through distributed energy resource aggregations (*i.e.,* to opt out). However, we modify the NOPR proposal in recognition of the potential indirect costs borne by smaller utilities due to this final rule. More specifically, and as discussed further below, we add § 35.28(g)(12)(iv) to the Commission's regulations to provide that RTOs/ISOs may not accept bids from distributed energy resource aggregators aggregating customers of small utilities [136] unless the relevant electric retail regulatory authority allows such customers of small utilities to participate in distributed energy resource aggregations (*i.e.,* to opt in).

57. We disagree with the suggestion that the Commission is legally required to grant an opt-out that enables all relevant electric retail regulatory authorities to prohibit all distributed energy resources from participating in the RTO/ISO markets through distributed energy resource aggregations. The Commission has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages.[137] As the Commission previously has found, establishing the criteria for participation in RTO/ISO markets, including with respect to resources located on the distribution system or behind the meter, is essential to the Commission's ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.[138]

58. This final rule addresses rules for participation in RTO/ISO markets by distributed energy resource aggregators. Like the Commission's rules governing demand response and electric storage resource participation in RTO/ISO markets, this final rule ''addresses—and addresses only—transactions occurring on the wholesale market.'' [139] Thus, we continue to find that the FPA and relevant precedent does not legally compel the Commission to adopt a relevant electric retail regulatory authority opt-out with respect to participation in RTO/ISO markets by all resources interconnected on a distribution system or located behind a retail meter.[140] As the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently explained, the Commission has jurisdiction to decide which entities may participate in wholesale markets, which means that a relevant electric

[126] *E.g.,* Advanced Energy Management Comments (2018 RM18–9) at 7–8 (citing Order No. 841, 162 FERC ¶ 61,127 at P 35).

[127] Advanced Energy Economy Comments (2018 RM18–9) at 18 (citing *Advanced Energy Econ.,* 161 FERC ¶ 61,245 (2017) (AEE Declaratory Order), *reh'g denied,* 163 FERC ¶ 61,030 (2018) (AEE Rehearing Order); Order No. 841, 162 FERC ¶ 61,127 at P 35); Advanced Energy Management Comments (2018 RM18–9) at 18; Icetec Comments (2018 RM18–9) at 11, 16.

[128] Advanced Energy Economy Comments (2018 RM18–9) at 18.

[129] Icetec Comments (2018 RM18–9) at 11; *see* Stem Comments (2018 RM18–9) at 15.

[130] Advanced Energy Management Comments (RM16–23) at 7. Advanced Energy Management states that there should be no restriction on where distributed energy resource aggregators can recruit customers to participate in the wholesale market. Advanced Energy Management Comments (2018 RM18–9) at 11.

[131] *See* Advanced Energy Management Comments (2018 RM18–9) at 11; Stem Comments (2018 RM18–9) at 11; Sunrun Comments (2018 RM18–9) at 8.

[132] *See* Advanced Energy Economy Comments (2018 RM18–9) at 21; Public Interest Organizations Comments (2018 RM18–9) at 8–10 (suggesting a Commission waiver process with a notice and comment period); Stem Comments (2018 RM18–9) at 6 (suggesting, as one basis to restrict distributed energy resource participation, the demonstration of a reliability violation that cannot be resolved through effective distribution system management).

[133] Harvard Environmental Policy Initiative Comments (RM16–23) at 12.

[134] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 17–18; Advanced Energy Management Comments (2018 RM18–9) at 9–10; Stem Comments (2018 RM18–9) at 9, 15; Sunrun Comments (2018 RM18–9) at 6; *see also* New Jersey Board Comments (2018 RM18–9) at 4.

[135] Advanced Energy Economy Comments (2018 RM18–9) at 15–16.

[136] As discussed below, we will consider small utilities to be those with a total electric output for the preceding fiscal year not exceeding 4 million MWh.

[137] Order No. 841–A, 167 FERC ¶ 61,154 at P 38; Order No. 841, 162 FERC ¶ 61,127 at P 35 (citing *EPSA,* 136 S. Ct. 760; AEE Declaratory Order, 161 FERC ¶ 61,245 at PP 59–60; *see also Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1187 (''FERC has the exclusive authority to determine who may participate in the wholesale markets.''); *Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 475 F.3d 1277, 1280–82 (D.C. Cir. 2007); *Transmission Access Policy Study Grp.* v. *FERC,* 225 F.3d 667, 696 (D.C. Cir. 2000).

[138] Order No. 841–A, 167 FERC ¶ 61,154 at P 31; *see also id.* P 38 (citing AEE Rehearing Order, 163 FERC ¶ 61,030 at P 36). The Supreme Court also has recognized that the Commission extensively regulates the structure and rules of wholesale auctions, in order to ensure that they produce just and reasonable results. *See Hughes* v. *Talen Energy Mktg., LLC,* 136 S. Ct. 1288, 1293–94 (2016) (*Hughes*); *EPSA,* 136 S. Ct. at 769.

[139] *EPSA,* 136 S. Ct. at 776; *see also Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1186, 1189 (finding that ''Order No. 841 solely targets the manner in which an [electric storage resource] may participate in wholesale markets'' and that Order Nos. 841 and 841–A ''do nothing more than regulate matters concerning federal transactions''); Order No. 841–A, 167 FERC ¶ 61,154 at P 44.

[140] Order No. 841–A, 167 FERC ¶ 61,154 at P 32; *see also* AEE Declaratory Order, 161 FERC ¶ 61,245 at P 62 (citing *EPSA,* 136 S. Ct. at 776).

retail regulatory authority cannot broadly prohibit the participation in RTO/ISO markets of all distributed energy resources or of all distributed energy resource aggregators as doing so would interfere with the Commission's statutory obligation to ensure that wholesale electricity markets produce just and reasonable rates.[141]

59. As commenters point out, the Commission in Order No. 719 granted relevant electric retail regulatory authorities an opt-out from allowing retail customers to participate directly in wholesale markets through aggregations of demand response resources.[142] As noted above, the Commission was not obligated to provide such an opt-out, but rather did so as an exercise of its discretion.[143] Consistent with that previous exercise of the Commission's discretion, we clarify that this final rule does not affect the ability of relevant electric retail regulatory authorities to prohibit retail customers' demand response from being bid into RTO/ISO markets by aggregators.[144]

60. However, unlike aggregators of demand response, distributed energy resource aggregators are capable of engaging in sales for resale of electricity and those distributed energy resource aggregators making such sales in the RTO/ISO markets are public utilities subject to the Commission's jurisdiction.[145] We recognize that the participation of distributed energy resource aggregators in RTO/ISO markets necessarily has effects on the distribution system,[146] and, as in Order No. 841, we have considered those effects in evaluating whether to exercise our discretion to grant an opt-out. Upon such consideration, we find that the benefits of allowing distributed energy resource aggregators broader access to the wholesale market outweigh the policy considerations in favor of an opt-out. Specifically, we find that the reliability, transparency, and market-related benefits of removing barriers to the participation of distributed energy resource aggregators in RTO/ISO markets are significant. Considering those benefits,[147] we are not persuaded that concerns about potential effects on the distribution system justify adopting an opt-out that could substantially limit that participation.[148] As discussed below, there are several ways that relevant electric retail regulatory authorities may address any such concerns without broadly prohibiting the participation of distributed energy resources or distributed energy resource aggregators in RTO/ISO markets. Therefore, we do not find it appropriate and thus decline to exercise discretion to adopt a broad opt-out with respect to distributed energy resource aggregations in this final rule.

61. We continue to recognize the important role that state and local authorities play with respect to distributed energy resources and their potential aggregation. This final rule does not curtail that authority. As in Order No. 841, the reforms adopted in this final rule do not preclude or limit state or local regulation of: Retail rates; distribution system planning, distribution system operations, or distribution system reliability; distributed energy resource facility siting; and interconnection of resources to the distribution system that are not subject to Commission jurisdiction, as discussed further below.[149] In addition, and again as recognized in Order No. 841, under a relevant electric retail regulatory authority's jurisdiction over its retail programs, such a regulatory authority is able to condition a distributed energy resource's participation in a retail distributed energy resource program on that resource not also participating in the RTO/ISO markets.[150] This should allow

[141] *See Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1187 (''[B]ecause FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause . . . requires that [s]tates not interfere. . . . FERC's statement in Order No. 841–A that [s]tates may not block RTO/ISO market participation 'through conditions on the receipt of retail service,' or impose any 'condition[ ] aimed *directly* at the RTO/ISO markets, even if contained in the terms of retail service,' is simply a restatement of the well-established principles of federal preemption.'') (quoting Order No. 841–A, 167 FERC ¶ 61,154 at P 41) (finding that states cannot intrude on the Commission's jurisdiction by prohibiting all consumers from selling into the wholesale market) (citing AEE Rehearing Order, 163 FERC ¶ 61,030 at P 37; AEE Declaratory Order, 161 FERC ¶ 61,245 at P 61); *see also Hughes,* 136 S. Ct. at 1298 (''States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates . . . .''); *Oneok, Inc.* v. *Learjet, Inc.,* 575 U.S. 373, 386 (2015) (finding that the proper test for determining whether a state action is preempted is ''whether the challenged measures are 'aimed directly at interstate purchasers and wholesalers for resale' or not'') (quoting *N. Natural Gas Co.* v. *State Corp. Comm'n of Kan.,* 372 U.S. 84, 94 (1963)); *Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1187 (similar).

[142] Order No. 719, 125 FERC ¶ 61,071 at PP 154–55.

[143] *See EPSA,* 136 S. Ct. at 779 (describing the opt-out as a ''notable solicitude toward the States,'' in recognition of ''the linkage between wholesale and retail markets and the States' role in overseeing retail sales''); *Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1190 (''Local Utility Petitioners correctly acknowledge that *EPSA* did not condition its holdings on the existence of an opt-out.'').

[144] *See* 18 CFR 35.28(g)(1)(iii). Similarly, we recognize Kentucky's existing right to exclude energy efficiency resources from wholesale market participation. AEE Declaratory Order, 161 FERC ¶ 61,245 at P 66.

[145] *See Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1190 (citing Order No. 841–A, 167 FERC ¶ 61,154 at PP 51–52 (distinguishing [electric storage resource] participation in wholesale sales from demand response resources participating in wholesale bids)).

[146] *See* Order No. 841–A, 167 FERC ¶ 61,154 at P 56 (citing *EPSA,* 136 S. Ct. at 776).

[147] *See, e.g., supra* PP 4 (explaining that integrating distributed energy resources' capabilities into RTO/ISO planning and operations will help the RTOs/ISOs account for the impacts of these resources on installed capacity requirements and day-ahead energy demand, thereby reducing uncertainty in load forecasts and reducing the risk of over procurement of resources), 27 (stating that distributed energy resource aggregations can provide new grid services and enhance competition in wholesale markets as new market participants), 29 (finding that the reforms in this final rule will enhance the competitiveness, and in turn the efficiency, of RTO/ISO markets); *see, e.g., infra* PP 114 (explaining that the revised definition of distributed energy resource adopted in this final rule is technology-neutral, thereby ensuring that any resource that is technically capable of providing wholesale services through aggregation is eligible to do so, which enhances competition in the RTO/ISO markets), 142 (stating that requiring RTOs/ISOs to allow heterogeneous aggregations will further enhance competition in RTO/ISO markets by ensuring that complementary resources, including those with different physical and operational characteristics, can meet qualification and performance requirements), 160, 163 (discussing how the final rule enhances competition and improves reliability by requiring RTOs/ISOs to allow participation of distributed energy resources in both wholesale and retail or multiple wholesale programs), 173 (finding that requiring RTOs/ISOs to establish a minimum size requirement not to exceed 100 kW will remove a barrier to distributed energy resource aggregations, improve competition in RTO/ISO markets, avoid confusion about appropriate requirements, and help ensure just and reasonable rates), 205 (discussing the benefits of single-node and multi-node aggregations).

[148] The list of benefits catalogued in the preceding footnote includes many of the same benefits that the D.C. Circuit pointed to when explaining why the Commission's decision not to provide an opt-out in Order No. 841 was not an unreasoned departure from Order No. 719. *See Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1190 (explaining that the Commission's decision to forgo an opt-out was ''neither unexplained nor unsupported'' and pointing to the Commission's consideration of the benefits of enabling broad participation of electric storage resources, including on ''competition,'' ''prices,'' and the ''diversity'' of resource types that can participate in RTO/ISO markets).

[149] *See Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1188 (noting that the similar decision in ''Order No. 841 does not 'usurp[ ] state power' '' and pointing to the fact that ''States retain their authority to impose safety and reliability requirements without interference from FERC, and [electric storage resources] must still obtain all requisite permits, agreements, and other documentation necessary to participate in federal wholesale markets'') (quoting *EPSA,* 136 S. Ct. at 777).

[150] *See Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1188 (''States retain their authority to prohibit local [electric storage resources] from participating in the interstate and intrastate markets simultaneously, meaning [s]tates can force local [electric storage resources] to choose which market they wish to participate in.''); Order No. 841–A, 167 FERC ¶ 61,154 at P 41 (acknowledging that states

Continued

a retail regulatory authority to address any specific concerns.

62. As to commenters' concerns regarding cost impacts on the distribution system, we note that, in Order No. 841, with respect to concerns about electric storage resources' use of the distribution system, the Commission observed that, in *PJM Interconnection L.L.C.,* the Commission permitted a distribution utility to assess a wholesale distribution charge to an electric storage resource participating in the PJM markets. Consistent with this precedent, the Commission found that it may be appropriate, on a case-by-case basis, for distribution utilities to assess a charge on electric storage resources similar to those assessed to the market participant in that proceeding.[151] Consistent with that conclusion, we find that it may also be appropriate, on a case-by-case basis, for distribution utilities to assess a wholesale distribution charge on distributed energy resource aggregators participating in RTO/ISO markets.

63. Moreover, we recognize that, where appropriate, the Commission previously has taken steps to address a potential burden imposed by a Commission final rule on smaller entities. For instance, the Commission has distinguished small utilities whose total electric output for the preceding fiscal year did not exceed 4 million MWh [152] for purposes of granting waivers from Order No. 889's [153] standards of conduct for transmission providers [154] and determining whether a specific cooperative should be considered a non-public utility outside the scope of a refund obligation involving the California energy crisis.[155] In Order No. 719–A, the Commission provided an opt-in for small utilities, which requires the relevant electric retail regulatory authority to give affirmative permission for the demand response of customers of utilities that distributed 4 million MWh or less in the previous fiscal year to be bid into RTO/ISO markets by an aggregator of those retail customers.[156]

64. Notwithstanding our finding that the benefits of this final rule outweigh the policy considerations in favor of a broad opt-out, we acknowledge that this final rule may place a potentially greater burden on smaller utility systems.[157] Recognizing this potentially greater burden on small utility systems, we will exercise our discretion to include in this final rule an opt-in mechanism for small utilities similar to that provided in Order No. 719–A. Specifically, we determine that customers of utilities that distributed 4 million MWh or less in the previous fiscal year may not participate in distributed energy resource aggregations unless the relevant electric retail regulatory authority affirmatively allows such customers to participate in distributed energy resource aggregations.

65. We therefore direct each RTO/ISO to amend its market rules as necessary to (1) accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed more than 4 million MWh in the previous fiscal year, and (2) not accept bids from distributed energy resource aggregators if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers to be bid into RTO/ISO markets by a distributed energy resource aggregator. We conclude that this opt-in mechanism appropriately balances the benefits that distributed energy resource aggregation can provide to RTO/ISO markets with a recognition of the burdens that such aggregation may create for small utilities in particular. Accordingly, we find that adopting this mechanism helps to ensure that any ''negative effects'' of this final rule are ''outweighed by the benefits,'' [158] listed above,[159] that it provides to RTO/ISO markets.

66. On compliance, we require each RTO/ISO to explain how it will implement this small utility opt-in. We note that an RTO/ISO may choose to implement this requirement in a similar manner as it currently implements the small utility opt-in provision under Order No. 719–A.

67. Although the Small Business Administration (SBA) no longer defines small utilities based on total electric output for the preceding fiscal year of 4 million MWh or less,[160] we use this standard for purposes of this final rule, as it is consistent with the Commission's use of this standard for the opt-in adopted in Order No. 719–A,[161] and is supported by commenters asking the Commission to include an opt-in as part of this rule.[162]

3. Interconnection

68. The NOPR did not propose any changes to RTO/ISO policies and procedures for the interconnection of distributed energy resources. However, the Commission stated that comments demonstrated that current RTO/ISO market rules often limit the services that distributed energy resources are eligible to provide, including by imposing prohibitively expensive or otherwise burdensome interconnection requirements.[163] The Commission also recognized that RTO/ISO demand response models often prohibit distributed energy resources from injecting power back onto the grid in

have the authority to include conditions in their own retail distributed energy resource or retail electric storage resource programs that prohibit any participating resources from also selling into RTO/ISO markets because, in that scenario, the owner of a resource has a choice between participating in the retail market or wholesale market); *see also* Arkansas Commission Comments (2019 RM18–9) at 2–4.

[151] Order No. 841, 162 FERC ¶ 61,127 at P 296 (citing *PJM Interconnection L.L.C.,* 149 FERC ¶ 61,185, at P 12 (2014) (wholesale distribution charge that ComEd will assess to Energy Vault is a weighted average carrying charge that is applied on a case-by-case basis, depending on the distribution facilities expected to be used in providing wholesale distribution service), *order on reh'g,* 151 FERC ¶ 61,231, at PP 16–18 (2015)).

[152] The 4 million MWh cutoff stems from the Small Business Size Standards component of the North American Industry Classification System, which previously defined a small utility as one that, including its affiliates, is primarily engaged in the generation, transmission, or distribution of electric energy for sale, and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 CFR 121.201 (2013) (Sector 22, Utilities, North American Industry Classification System (NAICS)). Currently, the number of employees is the basis used to measure whether electric power generation, transmission, and distribution industries are small businesses. 13 CFR 121.201 (2020) (Sector 22, Utilities, NAICS).

[153] *Open Access Same-Time Information System & Standards of Conduct,* Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996) (cross-referenced at 75 FERC ¶ 61,078), *clarified,* 76 FERC ¶ 61,009 (1996), *order on reh'g,* Order No. 889–A, FERC Stats. & Regs. ¶ 31,049 (cross-referenced at 78 FERC ¶ 61,221), *reh'g denied,* Order No. 889–B, 81 FERC ¶ 61,253 (1997), *aff'd in relevant part sub nom. Transmission Access Policy Study Grp.* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000).

[154] *See Wolverine Power Supply Coop.,* 127 FERC ¶ 61,159, at P 15 (2009).

[155] *See San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs. in Mkts. Operated by the CAISO,* 125 FERC ¶ 61,297, at P 24 (2008).

[156] Order No. 719–A, 128 FERC ¶ 61,059 at PP 51, 59–60.

[157] *See supra* P 50 (citing APPA Comments (2018 RM18–9) at 7, 9–10; APPA/NRECA Comments (RM16–23) at 39; NRECA Comments (2018 RM18–9) at 14, 26–28; TAPS Comments (RM16–23) at 15–16).

[158] *Nat'l Ass'n of Regulatory Util. Comm'rs,* 964 F.3d at 1190.

[159] *See supra* n.147.

[160] The SBA now defines small utilities based on the number of employees. 13 CFR 121.201 (establishing a threshold of 1,000 employees for electric power distribution utilities).

[161] Order No. 719–A, 128 FERC ¶ 61,059 at PP 51, 59–60.

[162] NRECA Comments (2019 RM18–9) at 4–5; TAPS Comments (RM16–23) at 16–17; TAPS Comments (2018 RM18–9) at 19 & n.27.

[163] *See* NOPR, 157 FERC ¶ 61,121 at P 13 & n.30 (citing Energy Storage Association's comment that interconnection processes can pose prohibitively high transaction costs for the small project sizes that characterize behind-the-meter storage, which creates undue burdens on behind-the-meter storage participation in most RTOs/ISOs).

part because they are not studied in the interconnection process.[164]

69. On September 5, 2019, Commission staff issued data requests to each of the six RTOs/ISOs seeking information regarding their policies and procedures that affect the interconnection of distributed energy resources. The RTOs/ISOs filed their responses in October 2019, and several commenters subsequently submitted reply comments.

a. Comments and Data Request Responses

70. Several commenters state that any final rule should make clear that the interconnection of resources on a state-jurisdictional distribution system remains the responsibility of the distribution utilities and the states.[165] The Maryland and New Jersey Commissions seek confirmation that state jurisdiction would remain unchanged as to the siting and costs associated with interconnecting resources to the distribution system, and would apply to all resources, including distributed energy resources, having or seeking interconnection or access to the wholesale market.[166] The Maryland and New Jersey Commissions request that the Commission confirm that, in the context of interconnection requests for wholesale market access, states will continue to have discretion to review distribution utility company tariffs to justify how costs are allocated or how the resources and their proposed interconnection locations benefit ultimate ratepayers.[167] The Massachusetts Commission makes similar arguments.[168]

71. In order to avoid uncertainty and litigation, Duke Energy and EEI ask for additional clarity with respect to state-versus-Commission jurisdiction affecting interconnection, distribution planning, and investments to enable distributed energy resource aggregation.[169] TAPS asks that any final rule make clear that, absent proper application of a Commission-jurisdictional Generator Interconnection Agreement, the Commission does not seek to alter or preempt local and state rules governing interconnection to the distribution system.[170] Furthermore, TAPS asserts that, given the limited circumstances in which the Commission has the authority to require interconnection to, or deliveries over, distribution facilities, the NOPR appropriately does not attempt to establish new rules or requirements governing the details of interconnection of distributed energy resources.[171]

72. As to their own interconnection procedures and experience with distributed energy resources, ISO–NE, NYISO, and PJM's data request responses reference Order Nos. 2003 and 2006 and indicate that they apply the jurisdictional test for dual-use facilities established in those orders.[172] As explained in more detail below, Order Nos. 2003 and 2006 established what some RTOs/ISOs have labeled the ''first use'' test, under which the first interconnection to a distribution facility for the purpose of making wholesale sales is not subject to Commission jurisdiction, but triggers jurisdiction for any subsequent wholesale interconnection requests to the same distribution facility.[173] MISO explains that no distributed energy resources have requested to interconnect to distribution facilities subject to the MISO tariff but indicates that it would apply the jurisdictional test in Order Nos. 2003 and 2006 in processing subsequent interconnection requests to such facilities.[174] SPP states that it would consider an interconnection to be Commission jurisdictional only if the relevant distribution facilities were under SPP's functional control, and SPP's data request response appears to indicate that, even after the first wholesale use, such distribution facilities would not be subject to its tariff.[175] CAISO states that, if a distributed energy resource plans to participate in CAISO's markets, the interconnection is Commission jurisdictional pursuant to the utility distribution company's Wholesale Distribution Access Tariff.[176]

73. In response to CAISO's data request response, SoCal Edison clarifies that every SoCal Edison distribution facility with which a new resource seeks interconnection pursuant to the Wholesale Distribution Access Tariff is already subject to an OATT for purposes of making wholesale sales.[177] Pacific Gas & Electric states that the Commission-jurisdictional Wholesale Distribution Access Tariff is not only the primary, but also should be the exclusive, means of interconnecting certain distributed energy resources that wish to export energy for purposes of participating in the wholesale markets.[178] It states that this is important because California's Rule 21, a state-jurisdictional tariff, does not currently provide a methodology to separate wholesale from retail use and

[164] *See id.* P 15 & n.32 (citing PJM's response that demand-side resources are not studied by PJM through the generation interconnection process and are not allowed to inject energy beyond the customer's meter and onto the distribution or transmission system).

[165] *See, e.g.,* IRC Comments (RM16–23) at 9–10; Massachusetts Municipal Electric Comments (RM16–23) at 4; Massachusetts State Entities Comments (2019 RM18–9) at 11; NESCOE Comments (RM16–23) at 16; TAPS Comments (RM16–23) at 15.

[166] Maryland and New Jersey Commissions Comments (RM16–23) at 2–3.

[167] *Id.* at 3.

[168] Massachusetts Commission Comments (RM16–23) at 11.

[169] Duke Energy Comments (RM16–23) at 4; EEI Comments (RM16–23) at 25.

[170] TAPS Comments (RM16–23) at 15.

[171] *Id.* at 5–9.

[172] ISO–NE Data Request Response (2019 RM18–9) at 3–4, 9–10; NYISO Data Request Response (2019 RM18–9) at 1–2; PJM Data Request Response (2019 RM18–9) at 2, 5.

[173] *Standardization of Generator Interconnection Agreements & Procedures,* Order No. 2003, 104 FERC ¶ 61,103, at P 804 (2003), *order on reh'g,* Order No. 2003–A, 106 FERC ¶ 61,220, *order on reh'g,* Order No. 2003–B, 109 FERC ¶ 61,287 (2004), *order on reh'g,* Order No. 2003–C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied,* 552 U.S. 1230 (2008); *Standardization of Small Generator Interconnection Agreements and Procedures,* Order No. 2006, 111 FERC ¶ 61,220, *order on reh'g,* Order No. 2006–A, 113 FERC ¶ 61,195 (2005), *order granting clarification,* Order No. 2006–B, 116 FERC ¶ 61,046 (2006), *corrected,* 71 FR 53,965 (Sept. 13, 2006); *see also Reform of Generator Interconnection Procedures and Agreements,* Order No. 845, 163 FERC ¶ 61,043 (2018), *errata notice,* 167 FERC ¶ 61,123, *order on reh'g,* Order No. 845–A, 166 FERC ¶ 61,137 (2019), *errata notice,* 167 FERC ¶ 61,124, *order on reh'g,* Order No. 845–B, 168 FERC ¶ 61,092 (2019). We note that Order No. 845 did not make any changes to the ''first use'' test for distribution interconnection at issue here.

[174] *See* MISO Data Request Response (2019 RM18–9) at 6–7 (''If the [distributed energy resource] interconnection customer intends to connect the [distributed energy resource] unit to facilities listed on [MISO's list of transmission facilities transferred to its functional control] or a distribution facility that provides Wholesale Distribution Service, then the Interconnection Customer is required to follow the Generator Interconnection Procedures (Attachment X) of MISO Tariff. If [the distributed energy resource] is not interconnecting to such facilities, then the interconnection customer is required to follow the interconnection rules of the Host Distribution Provider.'').

[175] *See* SPP Data Request Response (2019 RM18–9) at 2–3, 6 (''Such distribution facilities are not subject to the Tariff in this situation. The Tariff would not apply to non-jurisdictional facilities; however, there might be an obligation for the utility to coordinate with SPP regarding potential impacts to the SPP Transmission System.'').

[176] CAISO Data Request Response (2019 RM18–9) at 2–4 (explaining that ''each CAISO transmission owner that is [Commission] jurisdictional and operates distribution facilities has a Wholesale Distribution Access Tariff with the express purpose of enabling [distributed energy resources] to interconnect to the distribution grid and still participate in the CAISO wholesale markets'').

[177] SoCal Edison Comments (2019 RM18–9) at 2.

[178] Pacific Gas & Electric Comments (2019 RM18–9) at 4. It states, however, that some wholesale market-participating distributed energy resources interconnect today under California's Rule 21, a state-jurisdictional tariff. For instance, it asserts that Rule 21 applies to Qualifying Facilities (QF) that make net surplus sales under California's net metering program, which are considered qualifying sales under the Public Utilities Regulatory Policy Act (PURPA).

thus could allow bypass of retail rates for behind-the-meter distributed energy resources that both consume and export electricity for both retail and wholesale purposes.[179]

74. Pacific Gas & Electric notes that CAISO's existing Demand Response Provider participation model allows existing retail loads interconnected under state-approved tariffs to participate in wholesale markets as non-exporting Proxy Demand Response resources without the risk of bypassing retail rates.[180] Pacific Gas & Electric explains that it and CAISO can avoid the risk of retail bypass by requiring any individual distributed energy resources in a distributed energy resource aggregation that had previously interconnected as non-exporting resources under California's Rule 21 and that now wish to export electricity to participate in wholesale markets to seek a new interconnection pursuant to, or to convert their existing interconnection to an agreement under, the Wholesale Distribution Access Tariff. Pacific Gas & Electric states that this framework complies with the Commission's implementation of the jurisdictional boundaries set forth in federal law.[181]

75. AMP asserts that some of the RTO/ISO responses erroneously state that a distribution facility becomes Commission jurisdictional when a wholesale sale occurs over that distribution facility. AMP asserts that it is the wholesale transaction, not the distribution line itself, that is subject to the Commission's jurisdiction.[182] AMP also notes that RTO/ISO processes should refer to local jurisdiction and interconnection processes in addition to state processes because decision making is often done at the local level pursuant to local jurisdictional authority separate and distinct from state regulatory authority.

76. Several commenters request that the Commission revise its interconnection policy as it applies to distributed energy resources.[183] Advanced Energy Economy states that the Commission could work with relevant electric retail regulatory authorities and distribution utilities to address interconnection requirements through standard interconnection tariffs in those states where distributed energy resources are not classified as QFs under PURPA [184] and for which no retail tariff exists.[185]

77. Eversource argues that, because the participation of distributed energy resources in RTO/ISO markets could convert a previously state-jurisdictional distribution facility into a Commission-jurisdictional distribution facility and potentially necessitate hundreds or thousands of interconnection agreement filings, the Commission should revisit the interconnection agreement filing criteria for distributed energy resources and develop a process that fairly balances the administrative burden on parties with respect for Commission and state jurisdictional lines.[186] Icetec requests that the Commission reinforce the traditional bright line between Commission and state jurisdiction at the transmission–distribution boundary by confirming that relevant electric retail regulatory authorities have sole jurisdiction over the interconnection of resources to the distribution system, while ensuring that that jurisdiction may not be used to discriminatorily restrict or condition distributed energy resource participation in RTO/ISO markets.[187]

78. Advanced Energy Management requests that the Commission recognize the clear distinction between the distribution interconnection process and the wholesale market registration process.[188] Advanced Energy Management states that the Commission has authority over the criteria for wholesale market registration and participation, and that state and local regulators have authority over the criteria for a non-discriminatory distribution interconnection process that ensures that interconnecting distributed energy resources that wish to participate in the wholesale market do not create distribution reliability issues.[189] According to Advanced Energy Management, if a distributed energy resource imposes costs on the grid when it interconnects, regardless of reason, those costs can be recovered as interconnection costs under the authority of state regulators.[190]

79. Stem recommends that the Commission initiate a process to revise distribution utilities' interconnection tariffs (*e.g.,* the Wholesale Distribution Access Tariffs in California) so that (1) individual distributed energy resources, participating through an aggregator, are not required to do more than satisfy the local interconnection requirements in order to offer residual capability through the RTO/ISO markets, and (2) the tariffs accommodate the potential for coordinated dispatch of a distributed energy resource aggregation such as including limitations on aggregated behavior due to distribution system constraints, which would be communicated to the RTO/ISO as a reduced size resource during registration as a market participant.[191] Microgrid Resource Coalition similarly asserts that a responsive distributed energy resource needs to specify its expected modes of operation during the interconnection process by establishing its physical capabilities subject to any residual distribution system constraints, which will establish the limits of its ability to provide services to the grid.[192]

80. Public Interest Organizations argue that some RTO/ISO tariffs present significant barriers to distributed energy resource interconnection, particularly those that require individual distributed energy resources to complete a wholesale interconnection process.[193] Therefore, Public Interest Organizations propose that distributed energy resource interconnection be solely under retail jurisdiction, and that RTO/ISO purview over distributed energy resource aggregations be limited to market rules, and where cause is shown, for transmission system impacts.[194]

81. Some commenters contend that PJM's interconnection processes impose significant transaction costs on distributed energy resources.[195] Icetec asserts that every distributed energy resource that wishes to participate in PJM markets, no matter how small, must go through PJM's interconnection queue; that an individual residential owner must file an OATT with the Commission registering the 120 volt wiring in its house as a transmission

[179] *Id.* at 5.

[180] *Id.* at 6.

[181] *Id.* at app. A.

[182] AMP Comments (2019 RM18–9) at 2.

[183] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 19–21; Eversource Comments (2018 RM18–9) at 9–10; Icetec Comments (2018 RM18–9) at 2–3, 11.

[184] 16 U.S.C. 796(17)–(18), 824a–3.

[185] Advanced Energy Economy Comments (2018 RM18–9) at 20–21 (asserting that resources in such states have no clear path to interconnection to the distribution system and a limited ability to participate in any wholesale distributed energy resource aggregation program).

[186] Eversource Comments (2018 RM18–9) at 9–10.

[187] Icetec Comments (2018 RM18–9) at 2–3, 11.

[188] Advanced Energy Management Comments (2018 RM18–9) at 18; Advanced Energy Management Comments (2019 RM18–9) at 3.

[189] Advanced Energy Management Comments (2018 RM18–9) at 18–19; Advanced Energy Management Comments (2019 RM18–9) at 3.

[190] Advanced Energy Management Comments (2018 RM18–9) at 10.

[191] Stem Comments (2018 RM18–9) at 9–10, 15–16.

[192] Microgrid Resources Coalition Comments (2018 RM18–9) at 12.

[193] Public Interest Organizations Comments (2019 RM18–9) at 3.

[194] *Id.* at 3–4.

[195] Icetec Comments (2018 RM18–9) at 7–9; UofD/Mensah Comments (2019 RM18–9) at 2–5.

provider before a third party can apply to interconnect distributed energy resources located behind a residential meter; and that PJM refers most distribution-connected projects to distribution utilities for further study, even if the resource is already interconnected and injecting power under a distribution interconnection tariff.[196] Icetec claims that, in contrast, distribution utilities may operate distributed energy resources attached to their systems without going through RTO/ISO interconnection, which creates partially discriminatory market access by placing merchant distributed energy resource developers at a significant disadvantage relative to incumbent utilities.[197] Icetec requests that the Commission require RTOs/ISOs to accept a distributed energy resource as deliverable to the wholesale transmission system, with further studies limited to the transmission system, when it is properly connected to the distribution system under an arrangement approved by the relevant electric retail regulatory authority.[198] Icetec also asks the Commission to both allow distributed energy resources that deliver to the transmission system at a bus that is primarily load-serving to participate in wholesale markets without further transmission studies and to direct RTOs/ISOs to file tariff revisions setting procedures and timelines for interconnection studies carried out by distribution utilities for interconnection of distributed energy resources intending to participate in RTO/ISO markets.[199]

82. UofD/Mensah similarly contend that PJM's existing processes are unjust and unreasonable in light of barriers that they present to small resources that interconnect under state or local jurisdiction.[200] According to UofD/Mensah, PJM imposes a more burdensome market participation process on resources that interconnect under state or local jurisdiction than on resources that interconnect under Commission jurisdiction.[201] Specifically, they contend that PJM's Small Generator Interconnection Procedures use screens based only on the local distribution system rather than studies to assess safety and reliability, require PJM to provide interconnection customers that pass the screens an Interconnection Service Agreement within 15–20 days of the request, and only cost $500—$5,000 depending on the circumstances. They assert, however, that for non-jurisdictional interconnections, each resource must wait up to six months for the queue study process to begin and undergo a Feasibility Study and sometimes a System Impact Study, expected to take three months each, before approval. They assert that UofD was required to provide deposits totaling $27,000 for its 933 kW electric vehicle project, which is nine times the deposit that they would have been charged if the interconnection was Commission jurisdictional.

83. UofD/Mensah therefore request that the Commission align the RTO/ISO market participation process requirements for non-Commission-jurisdictional interconnections with the Commission's Small Generator Interconnection Procedures.[202] UofD/Mensah also recommend that the current distributed energy resource interconnection process be improved by permitting a subset of small, behind-the-meter resources that already have state or local interconnection approval to be automatically approved to provide wholesale services.[203] For those resources not automatically approved, UofD/Mensah recommend that the Commission limit the allowable cost and time of existing RTO/ISO processes and allow aggregations to be studied as a group. Finally, after correcting the non-Commission-jurisdictional interconnection process, UofD/Mensah recommend that the Commission consider declining to exercise its authority over the interconnection of distributed energy resources that seek to provide wholesale services or at least clarify the ''dual-use doctrine'' in specific cases so that developers need not rely on RTOs/ISOs to interpret it.[204] In response to UofD/Mensah, PJM notes that its stakeholder process is currently considering reforms designed to provide a ''fast-track'' avenue for processing energy-only resources under 2 MW.[205]

84. Advanced Energy Economy asserts that the Commission does not need to address interconnection practices in order to issue a final rule, and suggests that, if the Commission is interested in exploring a different approach for interconnection of distributed energy resources, it should do so in a separate proceeding.[206] Advanced Energy Economy also asserts that each of the RTOs/ISOs described processes that are generally consistent with the Commission's long-standing ''dual use'' policy.[207]

85. Several commenters argue that distribution interconnection requirements should address distribution-level reliability concerns that are raised by the interconnection of distributed energy resources to distribution systems.[208] Vice Chairman Place of the Pennsylvania Public Utilities Commission argues for primacy of a distribution utility's interconnection requirements in determining the eligibility of distributed energy resources to participate in distributed energy resource aggregations, and asserts that distributed energy resource aggregations may necessitate new interconnection requirements or study.[209] Vice Chairman Place asserts that distribution utilities are authorized by state regulators to protect distribution operations, and that distributed energy resources participating in aggregations will need to comply with state-level interconnection agreements.[210] FirstEnergy argues that states must address the development of distributed energy resource interconnection standards and technical requirements, and that distribution utilities are best situated to identify system issues that may affect ongoing reliable operations on local systems.[211]

86. Several commenters argue that the RTOs/ISOs should perform some sort of study of a distributed energy resource aggregation because distribution-level interconnection reviews are only a reliability and safety check for individual resources, and do not evaluate the combined impact that an aggregation would have on the system or the impact that the distributed energy resource will have on the system if it chooses to participate in an aggregation.[212] EEI, PJM Utilities Coalition, and San Diego Gas & Electric recommend that an aggregation study be done if a distributed energy resource joins an aggregation and if the composition of an aggregation changes

[196] Icetec Comments (2018 RM18–9) at 7–8.

[197] *Id.* at 8.

[198] *Id.* at 8–9.

[199] *Id.* at 9.

[200] UofD/Mensah Comments (2019 RM18–9) at 2, 4.

[201] *Id.* at 2.

[202] *Id.* at 4–5.

[203] *Id.* at 5.

[204] *Id.* at 5–6.

[205] PJM Reply Comments (2019 RM18–9) at 4.

[206] Advanced Energy Economy Comments (2019 RM18–9) at 1–2, 7–8.

[207] *Id.* at 2–3.

[208] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 17; PJM Comments (2018 RM18–9) at 18–19; Stem Comments (2018 RM18–9) at 15.

[209] Vice Chairman Place Comments (2018 RM18–9) at 2.

[210] *Id.* at 2–3.

[211] FirstEnergy Comments (2019 RM18–9) at 4–5.

[212] EEI Comments (2018 RM18–9) at 14–16; Organization of MISO States Comments (2018 RM18–9) at 8–9; San Diego Gas & Electric Comments (2018 RM18–9) at 5; SoCal Edison Comments (2018 RM18–9) at 11.

after registration.[213] TAPS agrees, and notes that, even for distribution utilities with robust generation interconnection processes that include rigorous modeling and studies, it may be impossible to anticipate and fully evaluate every possible combination of loads, resources, and distribution system configurations to determine in advance whether potential RTO/ISO and distributed energy resource aggregator dispatch decisions might have adverse impacts.[214] Similarly, NRECA asserts that an interconnection agreement with the distributed energy resource is necessary but not sufficient; NRECA argues that distribution utilities need to be able to conduct an integration study within a reasonable timeline that considers grid topology, as well as to modify their interconnection procedures to ensure third-party distributed energy resource participation in RTO/ISO markets will not create any safety, reliability or power quality concerns, and that implementation will conform with IEEE standards (such as IEEE 1547).[215] Pacific Gas & Electric concurs with the need to modify existing processes and protocols for distribution review requirements for assessing aggregation impacts and points to an ongoing collaborative process underway in California that requires additional time to complete.[216]

87. On the other hand, several commenters raise concerns about the use of distribution interconnection processes to limit participation of distributed energy resources in wholesale markets. Advanced Energy Economy argues that the distribution interconnection process should not be used as a lever to unduly limit participation in wholesale markets.[217] Similarly, Stem asserts that the Commission must prevent a distribution utility from imposing discriminatory state-level interconnection requirements that are intended to foreclose distributed energy resources from participating in the RTO/ISO markets.[218] Stem asserts that, for instance, the Commission should not allow the distribution utilities to effectively veto distributed energy resource participation in wholesale markets by unreasonably delaying necessary updates to interconnection tariffs.[219] Advanced Energy Management and Icetec agree that distributed energy resources should comply with distribution interconnection requirements, but argue that the exercise of state and local regulatory and distribution utility authority should occur prior to a distributed energy resource's registration in an RTO/ISO.[220] Specifically, they argue that state and local regulatory authorities and distribution utilities should define non-discriminatory interconnection procedures that ensure the distribution grid can accommodate distributed energy resources.[221] NRG argues that distributed energy resources should only be required to have one interconnection study and should not be subject to additional review, noting that collaboration on transmission and distribution impact studies may be necessary, and that NYISO, PJM, and CAISO are already engaged in some form of collaboration with distribution utilities on these matters.[222]

88. Several commenters argue that the relevant electric retail regulatory authorities must have discretion to allocate any distribution system-related costs incurred by utilities as a result of distributed energy resource participation in RTO/ISO markets.[223] Some commenters warn that, without proper cost allocation methods, retail customers effectively would be subsidizing wholesale market participation.[224] EEI argues that distribution utilities should not have to absorb any stranded costs if they invest in upgrades needed for distributed energy resource aggregation that are ultimately not utilized.[225] APPA and EEI argue that there is little evidence of significant demand for distributed energy resource aggregation programs, and so distribution utilities may have to invest in upgrades to the distribution system that are ultimately never needed.[226] The Indiana Commission asserts that distribution utilities may have to procure additional capacity to account for uncertainty in their forecasts regarding the amount of future distributed generation available to them.[227]

89. Other commenters argue that any cost allocation associated with a distributed energy resource aggregator participating in RTO/ISO markets would fall under the Commission's jurisdiction because the aggregator would be acting as a wholesale entity engaged in a Commission-jurisdictional transaction.[228] Hence, a few commenters suggest that, to the extent a distribution utility incurs additional costs to provide service to distributed energy resource aggregations, those costs should be recovered through a wholesale distribution tariff filed with the Commission.[229] NRECA asserts that the impact of a distributed energy resource or distributed energy resource aggregation interconnection on a host distribution utility must be considered in the interconnection process, whether under RTO/ISO procedures or state-jurisdictional procedures.[230] NRECA notes that to do so will require that cooperatives in RTO/ISO regions develop new distributed energy resource interconnection agreements and procedures.[231]

b. Commission Determination

90. For the reasons discussed below, we decline to exercise our jurisdiction over the interconnections of distributed energy resources to distribution facilities for the purpose of participating in RTO/ISO markets exclusively as part of a distributed energy resource aggregation. Thus, we will not require standard interconnection procedures and agreements or wholesale distribution tariffs for such interconnections.

91. In Order Nos. 2003 and 2006, the Commission first adopted standard interconnection procedures and agreements that apply when an interconnection customer ''that plans to engage in a sale for resale in interstate commerce or to transmit electric energy

[213] EEI Comments (2018 RM18–9) at 15–16; PJM Utilities Coalition Comments (2018 RM18–9) at 14; San Diego Gas & Electric Comments (2018 RM18–9) at 5.

[214] TAPS Comments (2018 RM18–9) at 12.

[215] NRECA Comments (2018 RM18–9) at 29, 30.

[216] Pacific Gas & Electric Comments (2018 RM18–9) at 14–15, 18.

[217] Advanced Energy Economy Comments (2018 RM18–9) at 18.

[218] Stem Comments (2018 RM18–9) at 15.

[219] *Id.* at 16.

[220] Advanced Energy Management Comments (2018 RM18–9) at 18; Icetec Comments (2018 RM18–9) at 18.

[221] Advanced Energy Management Comments (2018 RM18–9) at 18; Icetec Comments (2018 RM18–9) at 18–19.

[222] NRG Comments (2018 RM18–9) at 8–9.

[223] Vice Chairman Place Comments (2018 RM18–9) at 3; APPA Comments (2018 RM18–9) at 21; EEI Comments (2018 RM18–9) at 20; New Jersey Board Comments (2018 RM18–9) at 4.

[224] APPA Comments (2018 RM18–9) at 10; Indiana Commission Comments (2018 RM18–9) at 8; NRECA Comments (2018 RM18–9) at 12.

[225] EEI Comments (2018 RM18–9) at 20.

[226] APPA Comments (2018 RM18–9) at 10–12; EEI Comments (2018 RM18–9) at 21.

[227] Indiana Commission Comments (2018 RM18–9) at 8.

[228] Icetec Comments (2018 RM18–9) at 12 (citing *PJM Interconnection, LLC,* 149 FERC ¶ 61,185, *order on reh'g,* 151 FERC ¶ 61,231); SoCal Edison Comments (2018 RM18–9) at 6 (citing *Detroit Edison Co.,* 334 F.3d 48 (D.C. Cir. 2003)).

[229] Advanced Energy Economy Comments (2018 RM18–9) at 18 (citing Order No. 841, 162 FERC ¶ 61,127 at P 301); Icetec Comments (2018 RM18–9) at 12; Stem Comments (2018 RM18–9) at 3.

[230] NRECA Comments (2019 RM18–9) at 6–7.

[231] *Id.* at 7.

in interstate commerce'' [232] requests interconnection to the facilities of a public utility's Transmission System [233] or Distribution System [234] that, at the time that the interconnection is requested, are used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce pursuant to a Commission-filed OATT.[235] The Commission recognized that ''some [lower-voltage facilities] are used for jurisdictional service such as carrying power to a wholesale power customer for resale and are included in a public utility's OATT,'' and that ''in some instances, there is a separate OATT rate for using them, sometimes called a Wholesale Distribution Rate.'' [236] The Commission also noted that, with respect to a Commission-jurisdictional interconnection to a distribution facility, the cost of upgrades needed on the Distribution System to accommodate the interconnection must be directly assigned to the interconnection customer because an upgrade to the Distribution System generally does not benefit all transmission customers.[237] In Order No. 2003–C, the Commission concluded that, while it does not have the authority to directly regulate a ''local distribution'' facility that is used to transmit energy being sold at wholesale, ''the Commission may regulate the entire transmission component (rates, terms and conditions) of the wholesale transaction.'' [238]

92. In practice, Order Nos. 2003 and 2006 established what some RTOs/ISOs have labeled the ''first use'' test, under which the first interconnection to a distribution facility for the purpose of making wholesale sales is not subject to Commission jurisdiction. This is because, at the time of the request, the distribution facility is not used to transmit electric energy in interstate commerce or subject to wholesale open access under an OATT. Therefore, the first interconnecting resource ''that plans to engage in a sale for resale in interstate commerce or to transmit electric energy in interstate commerce'' [239] on a distribution facility is not required to use the transmission provider's Commission-jurisdictional Generator Interconnection Procedures or obtain a Commission-jurisdictional Generator Interconnection Agreement.[240] As a result, such interconnections are governed by the applicable state or local law.

93. However, under the ''first use'' test, subsequent interconnections of resources to the same distribution facility for the purpose of engaging in wholesale sales or transmission in interstate commerce *are* subject to Commission jurisdiction because the distribution facilities are already being used to facilitate wholesale transactions and therefore are subject to an OATT. Thus, any subsequent resources interconnecting to the same distribution facility for Commission-jurisdictional purposes (*e.g.,* to make wholesale sales in interstate commerce) must use the Commission-jurisdictional Generator Interconnection Procedures and Generator Interconnection Agreement established in Order Nos. 2003 and 2006 and later amended in Order No. 845. The United States Court of Appeals for the District of Columbia Circuit upheld this jurisdictional application as consistent with the FPA.[241]

94. The Commission adopted this limited jurisdictional approach to avoid ''allow[ing] a potential wholesale seller to cause the involuntary conversion of a facility previously used exclusively for state jurisdictional interconnections and delivery, and subject to the exclusive jurisdiction of the state, into a facility also subject to the Commission's interconnection jurisdiction,'' believing that this outcome would cross the jurisdictional line established by Congress.[242] Nevertheless, the Commission anticipated that its standard interconnection procedures and agreement terms would rarely apply to distributed generation: ''We recognize that Order No. 2003 does not apply to most distributed generation, since these facilities almost always interconnect to facilities that are not subject to an OATT.'' [243]

95. We agree with commenters that the integration of distributed energy resource aggregations into the RTO/ISO markets warrants our addressing the application of the Commission's interconnection policy to the distributed energy resource aggregations enabled by this final rule. As the Commission recognized in Order No. 792, renewable portfolio standards, state policies promoting distributed generation, and decreases in capital costs have driven a substantial increase in small generator interconnection requests.[244] In the intervening years, those trends have only intensified, further stimulating distributed energy resource development.[245] We anticipate that increased participation of distributed energy resources in RTO/ISO markets via distributed energy resource aggregations will substantially increase the number of distributed energy resource interconnections to distribution facilities for the purpose of engaging in wholesale transactions and/or transmission in interstate commerce. Such growth could increase the number of distribution-level interconnections subject to the Commission's jurisdiction. As Public Interest Organizations suggest, a large influx of distribution-level interconnections could create uncertainty as to whether certain interconnections are subject to Commission jurisdiction or state/local jurisdiction, and whether they would require the use of the Commission's

[232] Order No. 2003, 104 FERC ¶ 61,103 at P 804; *see also* Order No. 845, 163 FERC ¶ 61,043.

[233] The Commission defined ''Transmission System'' as ''[t]he facilities owned, controlled or operated by the Transmission Provider or the Transmission Owner that are used to provide transmission service under the Tariff.'' Order No. 2006, 111 FERC ¶ 61,220 at P 6.

[234] The Commission defined ''Distribution System'' as ''[t]he Transmission Provider's facilities and equipment used to transmit electricity to ultimate usage points such as homes and industries directly from nearby generators or from interchanges with higher voltage transmission networks which transport bulk power over longer distances. The voltage levels at which Distribution Systems operate differ among areas.'' *Id.* P 7.

[235] Order No. 2003, 104 FERC ¶ 61,103 at P 804; *see* Order No. 2006, 111 FERC ¶ 61,220 at P 5; *see also* Order No. 845, 163 FERC ¶ 61,043.

[236] Order No. 2003, 104 FERC ¶ 61,103 at P 803; *see also* Order No. 845, 163 FERC ¶ 61,043.

[237] Order No. 2003, 104 FERC ¶ 61,103 at P 697; *see also* Order No. 845, 163 FERC ¶ 61,043.

[238] Order No. 2003–C, 111 FERC ¶ 61,401 at P 53; *see also* Order No. 845, 163 FERC ¶ 61,043.

[239] Order No. 2003, 104 FERC ¶ 61,103 at P 804; *see also* Order No. 845, 163 FERC ¶ 61,043.

[240] *See* Order No. 2003–C, 111 FERC ¶ 61,401 at P 53; Order No. 2006, 111 FERC ¶ 61,220 at P 7*;* Order No. 845, 163 FERC ¶ 61,043; *see also PJM Interconnection, L.L.C.,* 114 FERC ¶ 61,191, at P 14, *order on reh'g,* 116 FERC ¶ 61,102 (2006).

[241] *See Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 475 F.3d at 1280–82 (''By establishing standard agreements FERC has exercised its jurisdiction over the *terms* of those relationships.'') (citing *Transmission Access Policy Study Grp.* v. *FERC,* 225 F.3d 667, 696 (D.C. Cir. 2000) (''FPA [section] 201 makes clear that *all aspects* of wholesale sales are subject to federal regulation, regardless of the facilities used.'')).

[242] Order No. 2003–C, 111 FERC ¶ 61,401 at P 51; *see also* Order No. 845, 163 FERC ¶ 61,043.

[243] Order No. 2003–A, 106 FERC ¶ 61,220 at P 739; *see also* Order No. 2006, 111 FERC ¶ 61,220 at P 8 (''Because of the limited applicability of this Final Rule, and because the majority of small generators interconnect with facilities that are not subject to an OATT, this Final Rule will not apply to most small generator interconnections.''); Order No. 845, 163 FERC ¶ 61,043.

[244] *Small Generator Interconnection Agreements & Procedures,* Order No. 792, 145 FERC ¶ 61,159, at P 23 (2013), *as modified, errata notice,* 146 FERC ¶ 61,019, *as modified, errata notice,* 148 FERC ¶ 61,215, *clarified,* Order No. 792–A, 146 FERC ¶ 61,214 (2014).

[245] *See* Public Interest Organizations Comments (2019 RM18–9) at 6–7. *See also* EIA, *August 2019 Monthly Energy Review* at Figure 7.2a, *https://www.eia.gov/totalenergy/data/monthly;* Office of Energy Projects, *Energy Infrastructure Update For July2019* at 4 (July 2019), *https://www.ferc.gov/legal/staff-reports/2019/july-energy-infrastructure.pdf*).

standard interconnection procedures and agreement.[246] It could additionally burden RTOs/ISOs with an overwhelming volume of interconnection requests.[247]

96. Given these concerns and the confluence of local, state, and federal authority over distributed energy resource interconnections, in this final rule, we decline to exercise jurisdiction over the interconnections of distributed energy resources to distribution facilities for those distributed energy resources that seek to participate in RTO/ISO markets exclusively as part of a distributed energy resource aggregation. We do not believe that requiring standard interconnection procedures and agreement terms for these interconnections is necessary to advance the objectives of Order Nos. 2003, 2006 and 845, which established standard interconnection procedures and agreements in order to prevent undue discrimination, preserve reliability, increase energy supply, lower wholesale prices for customers by increasing the number and types of new generation that would compete in the wholesale electricity market, reduce interconnection time and costs, and facilitate development of non-polluting alternative energy sources.[248] Rather, we agree with commenters that state and local authorities, which have traditionally regulated distributed energy resource interconnections, have the requisite experience, interest, and capacity to oversee these distribution-level interconnections.

97. Because we decline here to exercise our jurisdiction over the interconnection of a distributed energy resource to a distribution facility for the purpose of participating in RTO/ISO markets exclusively through a distributed energy resource aggregation, the interconnection of such a resource for the purpose of participating in a distributed energy resource aggregation would not constitute a first interconnection for the purpose of making wholesale sales under the ''first use'' test. As such, only a distributed energy resource requesting interconnection to the distribution facility for the purpose of directly engaging in wholesale transactions (*i.e.,* not through a distributed energy resource aggregation) would create a ''first use'' and any subsequent distributed energy resource interconnecting for the purpose of directly engaging in wholesale transactions would be considered a Commission-jurisdictional interconnection. We believe that this approach will minimize any increase in the number of distribution-level interconnections subject to the Commission's jurisdiction that this final rule may cause.

98. This final rule does not require any changes to the *pro forma* Generator Interconnection Procedures or Generator Interconnection Agreements. To the extent that the jurisdictional conditions described in Order Nos. 2003 and 2006 are met, those standard interconnection procedures and agreement terms originally established in Order Nos. 2003 and 2006 and later amended by Order No. 845 will continue to apply to the interconnections of distributed energy resources that participate in RTO/ISO markets individually, independent of a distributed energy resource aggregation. This final rule also does not revise the Commission's jurisdictional approach to the interconnections of QFs that participate in distributed energy resource aggregations.[249]

99. With respect to arguments that distributed energy resources should only be required to have one interconnection study—at the distribution interconnection stage—and should not be subject to additional review in connection with the possibility of RTO/ISO market participation, and competing arguments that both distribution interconnection studies and separate distributed energy resource aggregation studies are needed when distributed energy resources join an aggregation, we believe that there could be different approaches to this issue that would work in appropriate circumstances. We therefore decline to create new universal requirements or initiate a process to standardize tariffs with respect to these matters at this time. In response to increased demand for distributed energy resource aggregations for wholesale market participation, some state or local authorities may choose to voluntarily update their distribution interconnection processes to assess the impacts of distributed energy resource aggregations on the distribution system at the initial interconnection stage, while other state and local authorities may not. In the latter scenario, it may be both necessary and appropriate for the RTO/ISO, in coordination with affected distribution utilities, to conduct separate studies of the impact on the distribution system after a distributed energy resource joins a distributed energy resource aggregation. Moreover, as the individual distributed energy resources in an aggregation may change over time,[250] we cannot discount the possibility that the electrical characteristics of the aggregation will change significantly enough to require restudy. In practice, we expect that modifications to the list of resources in a distributed energy resource aggregation could occasionally indicate changes to the electrical characteristics of the distributed energy resource aggregation that are significant enough to potentially adversely impact the reliability of the distribution or transmission systems and justify restudy of the full distributed energy resource aggregation; therefore, RTOs/ISOs and distribution utilities may perform such aggregation restudies if necessary. Similarly, while the interconnections of distributed energy resources seeking to participate in RTO/ISO markets as part of a distributed energy resource aggregation would be subject to state or local interconnection procedures, we believe that coordination between RTOs/ISOs and distribution utilities, as discussed in Section IV.H below, should ensure that RTOs/ISOs have the information that they need to study the impact of the aggregations on the transmission system. In general, where needed, such studies of the impact of an aggregation as a whole on the transmission system should be the only aggregation-related studies that the RTO/ISO needs to undertake.[251]

100. In response to the comments of Advanced Energy Economy, we decline to require standard interconnection tariffs in those states where no retail tariff exists for distributed energy resources that are not QFs under PURPA. We believe that such a situation should be addressed at the state level, as discussed above.

101. While some commenters raise concerns that declining to create new

[246] Public Interest Organizations Comments (2019 RM18–9) at 9.

[247] *Id.* at 5.

[248] *See* Order No. 2003, 104 FERC ¶ 61,103 at P 1; Order No. 2006, 111 FERC ¶ 61,220 at P 1; Order No. 845, 163 FERC ¶ 61,043; *see also New York* v. *FERC,* 535 U.S. 1, 26–27 (2002) (upholding the Commission's discretion to issue a tailored remedy where ''the remedy it ordered constituted a sufficient response to the problems . . . identified in the wholesale market''). In issuing Order Nos. 2003 and 2006, the Commission acknowledged that their requirements would rarely apply to the interconnections of distributed energy resources. *See* Order No. 2003–A, 106 FERC ¶ 61,220 at P 739; Order No. 2006, 111 FERC ¶ 61,220 at P 8; Order No. 845, 163 FERC ¶ 61,043.

[249] *See* Order No. 2003, 104 FERC ¶ 61,103 at PP 813–815; Order No. 2006, 111 FERC ¶ 61,220 at PP 516–518; Order No. 845, 163 FERC ¶ 61,043.

[250] *See infra* Section IV.I (Modifications to List of Resources in Aggregation).

[251] However, as explained earlier, RTOs/ISOs may still need to study individually those distributed energy resources intending to individually participate in RTO/ISO markets rather than through aggregations.

universal distribution interconnection requirements or initiate a process to standardize distribution interconnection tariffs could result in uncertainty and delay, or could be used to unduly limit participation of distributed energy resource aggregations in wholesale markets, we believe that such concerns are speculative at this time. In this regard, we note that, while we are herein declining to exercise jurisdiction over the interconnections of distributed energy resources to distribution facilities for the purpose of participating in distributed energy resource aggregations, the Commission may revisit this policy decision in the future, should we discover abuses of the distribution interconnection process or the rise of unnecessary barriers to the participation of distributed energy resource aggregations in RTO/ISO markets.

102. With respect to the related arguments that the distribution interconnection process and the distributed energy resource aggregation registration process are separate but require coordination, we agree, and believe that the coordination requirements discussed in Section IV.H of this final rule appropriately address this need.

103. Although we find it appropriate to decline to exercise jurisdiction over the interconnections of distributed energy resources intending to participate in RTO/ISO markets exclusively through a distributed energy resource aggregation, we recognize that such distributed energy resources may already have interconnected pursuant to procedures that were accepted by the Commission prior to the effective date of this final rule. Therefore, to minimize disruption to existing interconnection agreements for distributed energy resources, we are not requiring distributed energy resources that already interconnected under Commission-jurisdictional procedures to convert to state or local interconnection agreements.

104. Accordingly, in its compliance filing, we require each RTO/ISO to make any necessary tariff changes to reflect the guidance above.

B. Definitions of Distributed Energy Resource and Distributed Energy Resource Aggregator

1. NOPR Proposal

105. In the NOPR, the Commission proposed to define a distributed energy resource as ''a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter.'' [252] The Commission added that these resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment. The Commission proposed to define a distributed energy resource aggregator as ''an entity that aggregates one or more distributed energy resources for purposes of participation in the capacity, energy and ancillary service markets of the regional transmission operators and independent system operators.'' [253]

2. Comments

106. Several commenters raise concerns with the proposed definition of distributed energy resource. EEI suggests that the Commission use a term besides ''source or sink of power'' to reflect the Commission's desire to include all electric devices that can produce or consume energy because a source or sink is a location and not a resource.[254] AES Companies, MISO Transmission Owners, and NYISO Indicated Transmission Owners seek clarification whether the definition of distributed energy resources includes resources that are behind and in front of the meter. AES Companies explain that it is not out of the ordinary for resources such as solar or batteries to be interconnected at the distribution system but not behind the meter, and NYISO Indicated Transmission Owners state that aggregations of front-of-the-meter distributed energy resources should be able to elect to participate in wholesale markets as part of a distributed energy resource aggregation.[255]

107. NYISO Indicated Transmission Owners caution that, while a general definition of a distributed energy resource is appropriate, rules for elective participation in RTO/ISO markets may still require individual classifications for types of distributed energy resources because differences in their capabilities may warrant specific operational, reliability, and compensation considerations.[256] NYISO points out that it has a broader definition of distributed energy resource than that proposed in the NOPR and therefore asks the Commission to permit regional flexibility to allow NYISO to fashion rules and market designs that meet its needs while still achieving the Commission's goal of integrating distributed energy resources into the wholesale markets.[257] NYISO notes that it has also proposed to allow small aggregations of community distributed generation to provide wholesale market services as distributed energy resources.[258] NRG encourages the Commission to direct the RTOs/ISOs to use a definition of distributed energy resources based on technology-neutral principles, including the capability to provide load curtailment, load consumption or charging, injection, and ancillary services (*e.g.,* regulation, reserves, and flexible ramping services).[259] According to NRG, regulatory authorities may differ in their definition of distributed energy resources, but generally reference their ability to ''generate and inject power into the distribution and/or transmission systems.'' Thus, NRG states, distributed energy resources should be defined as a class of assets that can both inject and curtail electricity.[260]

108. EEI asks the Commission to clarify the types of distributed energy resources that qualify as ''thermal storage,'' noting that if the thermal energy cannot be readily transformed into electric energy, then the storage device cannot be used as an electric resource.[261] Public Interest Organizations seek clarification that thermal storage includes, but is not limited to, both grid-enabled water heaters and grid-enabled thermostats, which can precool or preheat to avoid energy usage during peak demand, make and store ice to use as air conditioning, and direct control of smart-home energy management.[262]

109. Some commenters seek to capture a broad range of distributed

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[252] NOPR, 157 FERC ¶ 61,121 at PP 1 n.2, 104.

[253] *Id.* P 5 n.13.

[254] EEI Comments (RM16–23) at 16 n.23.

[255] AES Companies Comments (RM16–23) at 40–41; NYISO Indicated Transmission Owners Comments (RM16–23) at 13.

[256] NYISO Indicated Transmission Owner Comments (RM16–23) at 15.

[257] NYISO Comments (RM16–23) at 11 (stating it defines distributed energy resource as ''a resource, or a set of resources, typically located on an end-use customer's premises that can provide wholesale market services but are usually operated for the purpose of supplying the customer's electric load''). We note that, on January 23, 2020, the Commission accepted NYISO's proposed tariff revisions related to aggregations, including its proposal to define Distributed Energy Resource as: (i) A facility comprising two or more Resource types behind a single point of interconnection with an Injection Limit of 20 MW or less; or (ii) a Demand Side Resource; or (iii) a Generator with an Injection Limit of 20 MW or less, that is electrically located in the [New York Control Area]. NYISO Aggregation Order, 170 FERC ¶ 61,033; *see* NYISO, NYISO Tariffs, NYISO MST, Section 2.4 MST Definitions—D (15.0.0).

[258] NYISO Comments (RM16–23) at 11.

[259] NRG Comments (2018 RM18–9) at 3.

[260] *Id.* at 5–6.

[261] EEI Comments (RM16–23) at 16 n.23.

[262] Public Interest Organizations Comments (RM16–23) at 15–16 & nn.45–46.

energy resources in the definition. Advanced Energy Economy asks the Commission to revise the definition to explicitly include energy efficiency and demand response resources of all types as well as ''customer site[s] capable of demand reduction.'' [263] Other commenters also request or support including energy efficiency resources in the definition of distributed energy resource.[264] NYISO Indicated Transmission Owners request clarification that intermittent generation may be considered a distributed energy resource, which can be aggregated into dispatchable distributed energy resource aggregations.[265] They add that certain behind-the-meter intermittent generation may not be a distributed energy resource if it participates in a distribution utility's net metering or other program regarding which the Commission has clarified that the resource is not engaging in a wholesale sale for jurisdictional purposes.[266]

110. Advanced Energy Management requests that the Commission clarify that its definition of distributed energy resources includes demand response resources, or that demand response resources can choose to participate in distributed energy resource participation models where they are a better fit.[267]

111. Commenters ask for assurance that the NOPR does not change existing demand response rules, and that resources currently participating as demand response could continue to do so, even if they would fall under the definition of a distributed energy resource.[268] They note that certain reforms may drive existing, low-cost commercial and industrial demand response from the market.[269] Advanced Energy Management argues that the NOPR may be more applicable to newer forms of distributed energy resources that currently are not accommodated by a demand response model and that the demand response model should not be changed.[270]

112. PJM, however, states that it does not view energy efficiency or load curtailment as distributed energy resources, based upon PJM's distinction between its existing and robust participation models for energy efficiency and demand response.[271] To limit disruption to its models, PJM distinguishes distributed energy resources by limiting them to generation and electric storage resources capable of injecting energy onto the distribution system.[272]

113. A few commenters discuss the definition of a distributed energy resource aggregator. E4TheFuture supports the Commission's proposal to require each RTO/ISO to revise its tariff to define distributed energy resource aggregators as a type of market participant.[273] Efficient Holdings asks the Commission to create a universal and comprehensive market participant definition for distributed energy resource aggregators that would be flexible enough to incorporate emerging technologies and provide these resources the same ability to offer multiple products afforded to large scale generators.[274] MISO Transmission Owners also assert that the term ''distributed energy resource aggregator'' should be formally defined; in addition, they ask whether that term is inclusive of behind- and front-of-the-meter products and whether a utility could bid its existing demand response peak shaving assets into the market as a distributed energy resource aggregator.[275] Advanced Energy Management requests clarification on the distinction between demand response and distributed energy resource aggregators, arguing that the former should consist of behind-the-meter resources that participate only in the demand response framework, while the latter could be either behind- or front-of-the-meter resources and participate in any model.[276]

3. Commission Determination

114. Upon consideration of the comments received, we modify the definition of distributed energy resource proposed in the NOPR. Specifically, we amend § 35.28(b) of the Commission's regulations to define a distributed energy resource as ''any resource located on the distribution system, any subsystem thereof or behind a customer meter.'' These resources may include, but are not limited to, resources that are in front of and behind the customer meter, electric storage resources, intermittent generation, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment—as long as such a resource is ''located on the distribution system, any subsystem thereof or behind a customer meter.'' [277] The revised definition of distributed energy resource that we adopt in this final rule is technology-neutral, thereby ensuring that any resource that is technically capable of providing wholesale services through aggregation is eligible to do so, which enhances competition in the RTO/ISO markets and, in turn, helps to ensure that these markets produce just and reasonable rates.[278]

115. In response to Advanced Energy Economy's request, we clarify that energy efficiency and demand response resources are capable of providing demand reductions at customer sites, and therefore ''customer sites capable of demand reduction'' may meet the definition of a distributed energy resource.[279] In response to requests for regional flexibility, we further note that RTOs/ISOs can propose their own definitions for the Commission's evaluation as long as the scope and applicability of the proposed definitions are consistent with the Commission's definition of distributed energy resource and consistent with all aspects of this final rule.

116. We find that the NOPR proposal to define a distributed energy resource as a source or sink of power risked creating unnecessary confusion because it was not clear as to which resources could qualify and the definition inadvertently excluded some resources

[263] Advanced Energy Economy Comments (RM16–23) at 21.

[264] E4TheFuture Comments (RM16–23) at 1; Efficient Holdings Comments (RM16–23) at 6–7; Public Interest Organizations Comments (RM16–23) at 15–16.

[265] NYISO Indicated Transmission Owners Comments (RM16–23) at 15.

[266] *Id.* at n.17.

[267] Advanced Energy Management Comments (RM16–23) at 8–10.

[268] Advanced Energy Economy Comments (RM16–23) at 50–51 (noting that existing market rules recognize a distinction between demand response and distributed energy resource aggregations, such as in CAISO, where there are separate programs for exporting distributed energy resources and non-exporting distributed energy resources that operate as demand response); Advanced Energy Management Comments (RM16–23) at 6 (noting specifically the reforms in Section III.B.4 of the NOPR for distributed energy resource aggregators as it applies to commercial and industrial demand response); IRC Comments (RM16–23) at 7; PJM Comments (RM16–23) at 6.

[269] Advanced Energy Management Comments (RM16–23) at 7.

[270] *Id.* at 6–8.

[271] PJM Comments (2018 RM18–9) at 1.

[272] *Id.* at 2.

[273] E4TheFuture Comments (RM16–23) at 2.

[274] Efficient Holdings Comments (RM16–23) at 7.

[275] MISO Transmission Owners Comments (RM16–23) at 17–18.

[276] Advanced Energy Management Comments (RM16–23) at 6.

[277] As discussed further in Section IV.C.2 below, we find that RTOs/ISOs may not prohibit any particular type of distributed energy resource technology from participating in distributed energy resource aggregations. We note that the types of thermal storage described by EEI and Public Interest Organizations may qualify as demand response or energy efficiency resources under RTO/ISO market rules.

[278] *See infra* Section IV.C.2 (Types of Technologies).

[279] *See* Advanced Energy Economy Comments (RM16–23) at 21.

that could be aggregated to sell energy, capacity, or ancillary services. The revised definition of distributed energy resource is intended to be broad enough to encompass current and future technologies that qualify as distributed energy resources with no further need to clarify or revise the definition as new technologies are developed.

117. As discussed further below in Sections IV.C, IV.F, and IV.H, we clarify that distributed energy resource aggregations must be able to meet the qualification and performance requirements to provide the service that they are offering into RTO/ISO markets. For example, because a type of resource like energy efficiency cannot be dispatched, metered, or telemetered, it would likely be impossible for distributed energy resource aggregations comprised exclusively of energy efficiency resources to be able to provide energy or ancillary services to the RTOs/ISOs because the aggregation would not be technically capable of providing those services.

118. We also adopt a modified definition of distributed energy resource aggregator than was proposed in the NOPR, and therefore amend § 35.28(b) of the Commission's regulations to define a distributed energy resource aggregator as ''the entity that aggregates one or more distributed energy resources for purposes of participation in the capacity, energy and/or ancillary service markets of the regional transmission organizations and/or independent system operators.'' [280] We clarify that, because demand response falls under the definition of distributed energy resource, an aggregator of demand response could participate as a distributed energy resource aggregator. However, this final rule does not affect existing demand response rules.

C. Eligibility To Participate in RTO/ISO Markets Through a Distributed Energy Resource Aggregator

1. Participation Model

a. NOPR Proposal

119. In the NOPR, the Commission proposed to require each RTO/ISO to revise its tariff as necessary to allow distributed energy resource aggregators to offer to sell capacity, energy, and ancillary services in RTO/ISO markets.[281] Specifically, the Commission proposed to require that each RTO/ISO revise its tariff to define distributed energy resource aggregators as a type of market participant that can participate in RTO/ISO markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. The Commission explained that this means that the distributed energy resource aggregator would register as, for example, a generation asset if that is the participation model that best reflects its physical characteristics.[282] The Commission stated that, while it expects efficiencies to be gained by allowing distributed energy resource aggregations to participate under existing participation models, it also acknowledges that the use of existing participation models may not be possible in every RTO/ISO based on how market participation is structured. However, the Commission emphasized that, where participation under existing participation models is possible, the distributed energy resource aggregation must still satisfy the eligibility requirements of the applicable participation model before it can participate in RTO/ISO markets under that participation model. Therefore, to accommodate the participation of distributed energy resource aggregations, the Commission proposed that each RTO/ISO modify the eligibility requirements for existing participation models as necessary to allow for such participation.

b. Comments

120. Several commenters assert that a new participation model for distributed energy resource aggregations is necessary.[283] The Ohio Commission, Tesla/SolarCity, and Public Interest Organizations support the Commission's efforts to require each RTO/ISO to modify its tariff to provide a participation model for distributed energy resource aggregators.[284] AES Companies explain that a new and separate participation model is necessary to facilitate market participation of distributed energy resource aggregations due to their unique impacts on the bulk electric system and state-jurisdictional considerations.[285] Stem also asserts that each RTO/ISO needs to implement a model that accommodates behind-the-meter exporting resources or, if that is impractical, to implement a model in which behind-the-meter non-exporting resources can fully participate.[286] Microgrid Resources Coalition notes its support for allowing aggregations of behind-the-meter distributed energy resources to participate fully and notes that it is important to allow for the participation of distributed energy resources that have flexible controllable output.[287]

121. Commenters offer a range of views regarding how distributed energy resource aggregations should be treated under an RTO's/ISO's participation model. Some commenters suggest that when acting as a generator, distributed energy resource aggregations should be treated like any generator.[288] Other commenters focus on the need for clarity around what services distributed energy resources will be allowed to provide and how they can be aggregated.[289] For example, Xcel Energy Services contends that distributed energy resources will likely not have firm transmission service and may not be able to deliver services to the system that depend on firm transmission such as capacity or black start capability.[290] Some commenters argue that an aggregation of distributed energy resources should be treated as a single resource by the wholesale market operator, noting that this would reduce barriers and may improve performance.[291] Other commenters similarly support the ability of an aggregator to transact directly in the wholesale market without a load serving entity or electric distribution company as agent.[292]

122. Some commenters posit that the Commission should allow the

[280] As discussed further in Section IV.C.6, consistent with Order No. 719, we require each RTO/ISO to allow a single qualifying distributed energy resource to serve as its own distributed energy resource aggregator. *See* Order No. 719, 125 FERC ¶ 61,071 at P 158(d) (''An [aggregator of retail customers] can bid demand response either on behalf of only one retail customer or multiple retail customers.'').

[281] NOPR, 157 FERC ¶ 61,121 at P 124.

[282] *Id.* P 128.

[283] *See, e.g.,* Microsoft Comments (2018 RM18–9) at 15; NRG Comments (2018 RM18–9) at 4.

[284] Ohio Commission Comments (RM16–23) at 4; Public Interest Organizations Comments (RM16–23) at 21; Tesla/SolarCity Comments (RM16–23) at 20.

[285] AES Companies Comments (RM16–23) at 32 (noting that, because the proposed definition of a distributed energy resource aggregation includes resources that are both a source and a sink, the aggregation can be a distributed generation entity or a micro grid (includes generation, load, and distribution lines)).

[286] Stem Comments (RM16–23) at 12–13.

[287] Microgrid Resources Coalition Comments (2018 RM18–9) at 3, 4–5.

[288] NYISO Comments (RM16–23) at 13; PJM Comments (RM16–23) at 5–6.

[289] AES Companies Comments (RM16–23) at 39; Avangrid Comments (RM16–23) at 10; Tesla/SolarCity Comments (RM16–23) at 20; Xcel Energy Services Comments (RM16–23) at 12–13.

[290] Xcel Energy Services Comments (RM16–23) at 12–13.

[291] Advanced Microgrid Solutions Comments (RM16–23) at 7; NRG Comments (RM16–23) at 10; Stem Comments (RM16–23) at 5; Tesla/SolarCity Comments (RM16–23) at 20–21.

[292] Mosaic Power Comments (RM16–23) at 5.

distributed energy resource aggregator to determine the participation model for distributed energy resource aggregations based on the characteristics of the aggregation as a whole, even if it includes diverse technologies,[293] and that aggregators should be able to define the capabilities of the resources in their aggregations.[294] Some commenters stress the importance of allowing diverse technologies (*e.g.,* solar, storage, and demand response) [295] to be in the same aggregation, while others argue that entities that own multiple distributed energy resources should be allowed to participate in more than one aggregation.[296] Stem asserts that, if behind-the-meter resources are directed to an existing participation model, then the Commission should require a detailed review to show that the existing model does not discriminate against the capabilities of new resources.[297]

123. Advanced Energy Management states that, if an end-use customer is capable of curtailing load and discharging a battery located behind its meter, it is unclear whether the customer's distributed energy resource aggregator could aggregate both the storage and load curtailment into the same resource. Advanced Energy Management also states that it would be inefficient to have the same customer participate as part of two different resources or through two unnecessarily separate participation models.[298] MISO Transmission Owners request clarity on the interplay between the rules that apply to storage and the rules that apply to distributed energy resources, noting that some resources may fall into both categories, and any potential conflicts should be resolved. For example, MISO Transmission Owners seek clarity on whether an aggregator of electric vehicles is considered storage or a distributed energy resource aggregator, or both.[299]

124. Microgrid Resources Coalition argues that RTOs/ISOs should allow aggregators to bid their resources together or separately as demand response and delivered power.[300] Energy Storage Association also argues that any final rule should account for distributed energy resources' provision of bi-directional services,[301] and Icetec asserts that a participation model should allow sites that mix load reductions and distributed energy resources to offer their combined capacity as a single market resource.[302] Microgrid Resources Coalition also argues that distributed energy resource aggregations, particularly microgrids, do not fit neatly into existing participation models or the new participation model for electric storage resources proposed in the NOPR.[303]

125. Other commenters recommend that the Commission require the RTOs/ISOs to incorporate sufficient flexibility into their participation models. Public Interest Organizations suggest that, in order to take advantage of distributed energy resources' ability to absorb excess electricity, shift load, and reinject electricity onto the grid at peak times, participation models should be flexible and enable resources to act as demand-side resources and/or as generation and should not require resources to choose one participation model exclusively.[304] Efficient Holdings similarly contends that participation models should not force distributed energy resources to choose between individual categories of services to offer into the market at any given time.[305] NYISO Indicated Transmission Owners request that energy-only distributed energy resource aggregations be allowed in the distributed energy resource participation model, and consistent with existing practice for other energy-only resources, should not be required to offer in the day-ahead market and should be permitted in both the day-ahead and real-time markets.[306] NYISO also asks the Commission to permit regional flexibility that would allow NYISO to create rules and market designs that meet its needs while meeting the Commission's desire to integrate distributed energy resources into the wholesale energy, ancillary service, and capacity markets.[307]

126. New York State Entities ask the Commission to grant RTOs/ISOs the flexibility to devise participation models that reflect market conditions and ongoing initiatives such as those described in NYISO's Distributed Energy Resource Roadmap.[308] New York State Entities highlight that NYISO is attempting to harmonize the developing wholesale market enhancements with the complementary retail programs emerging from New York's Reforming the Energy Vision initiative.[309]

127. Some commenters note that the RTOs/ISOs need new and revised market rules to incorporate distributed energy resources, but not necessarily a new participation model.[310] ISO–NE argues that a new participation model would be costly and disruptive and create no additional value because distributed energy resources can monetize their value to the grid through several existing avenues.[311]

128. Advanced Energy Management argues that a final rule should not require RTOs/ISOs to replace their existing programs, such as demand response programs.[312] Icetec argues, however, that existing ''interconnected generation'' models and demand response models are not sufficient for distributed energy resource participation, and states that capacity market requirements for year-round performance in PJM prevent distributed energy resources from offering their full capacity value.[313] Tesla argues that, regardless of model, distributed energy resources should receive comparable compensation.[314]

c. Commission Determination

129. In this final rule, we adopt the NOPR proposal to require each RTO/ISO to have tariff provisions that allow

[293] Advanced Energy Economy Comments (RM16–23) at 21.

[294] Microgrid Resources Coalition Comments (RM16–23) at 6.

[295] Advanced Energy Economy Comments (RM16–23) at 21.

[296] NextEra Comments (RM16–23) at 14; Public Interest Organizations Comments (RM16–23) at 16.

[297] Stem Comments (RM16–23) at 13.

[298] Advanced Energy Management Comments (RM16–23) at 9.

[299] MISO Transmission Owners Comments (RM16–23) at 20.

[300] Microgrid Resources Coalition Comments (2018 RM18–9) at 8.

[301] Energy Storage Association Comments (2018 RM18–9) at 2.

[302] Icetec Energy Services Comments (2018 RM18–9) at 6.

[303] Microgrid Resources Coalition Comments (RM16–23) at 5–6 (noting that demand response participation models that are based on shutting down an industrial process or activating a seldom used generator are not appropriate for resources like a microgrid that uses multiple conventional and unconventional resources to manage multiple loads of varying flexibility and is optimized by sophisticated controls).

[304] Public Interest Organizations Comments (RM16–23) at 19.

[305] Efficient Holdings Comments (RM16–23) at 7–8.

[306] NYISO Indicated Transmission Owners Comments (RM16–23) at 10–11 (citing *Cal. Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at P 11 (accepting CAISO model that allows intermittent resources to participate in a dispatchable aggregation)).

[307] NYISO Comments (RM16–23) at 11.

[308] New York State Entities Comments (RM16–23) at 12, 13 (citing *Distributed Energy Resources Roadmap for New York's Wholesale Electricity Markets,* (January 2017), New York Independent System Operator, Inc.) (Distributed Energy Resource Roadmap); *see supra* note 21.

[309] New York State Entities Comments (RM16–23) at 13 (citing Distributed Energy Resource Roadmap at 4–6).

[310] Advanced Energy Economy Comments (2018 RM18–9) at 5–6; Advanced Energy Management Comments (2018 RM18–9) at 3; Icetec Energy Comments (2018 RM18–9) at 3–4, 6; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 5.

[311] ISO–NE Comments (2018 RM18–9) at 2–4.

[312] Advanced Energy Management Comments (2018 RM18–9) at 3.

[313] Icetec Comments (2018 RM18–9) at 5

[314] Tesla Comments (2018 RM18–9) at 1, 9.

distributed energy resource aggregations to participate directly in RTO/ISO markets. We conclude that existing participation models may create barriers to the participation of distributed energy resource aggregators in RTO/ISO markets by limiting the operation of distributed energy resource aggregations and the services that they may be eligible to provide.

130. We therefore adopt the NOPR proposal to add § 35.28(g)(12)(i) to the Commission's regulations and require each RTO/ISO to establish distributed energy resource aggregators as a type of market participant and to allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models in the RTO's/ISO's tariff that accommodate the physical and operational characteristics of the distributed energy resource aggregation. However, upon consideration of the comments, we modify the NOPR proposal to provide each RTO/ISO with greater flexibility to determine how best to revise the participation models set forth in its market rules to facilitate the participation of distributed energy resource aggregations. Specifically, to meet the goals of the final rule, each RTO/ISO can comply with the requirement to allow distributed energy resource aggregators to participate in its markets by modifying its existing participation models to facilitate the participation of distributed energy resource aggregations, by establishing one or more new participation models for distributed energy resource aggregations, or by adopting a combination of those two approaches. The Commission will evaluate each proposal submitted on compliance to determine whether it meets the goals of this final rule to allow distributed energy resources to provide all services that they are technically capable of providing through aggregation.

131. This approach will provide each RTO/ISO with the flexibility to facilitate the participation of distributed energy resource aggregations in its markets in a way that is efficient and cost-effective as well as fits the market design of the RTO/ISO. Permitting each RTO/ISO to create one or more new participation models for distributed energy resources addresses commenter concerns about the limitations of existing models. Likewise, permitting each RTO/ISO to modify existing participation models, instead of requiring creation of one or more new participation models, addresses commenter concerns that creating a new participation model may be too costly or disruptive, or that existing models do not need to be replaced.

132. Providing RTOs/ISOs with the flexibility to determine whether to modify existing participation models, create one or more new participation models, or use a combination of existing and new participation models will allow each RTO/ISO to reflect varying regional needs in its approach to allow distributed energy resource aggregators to participate in its markets.

2. Types of Technologies

a. NOPR Proposal

133. In the NOPR, the Commission stated that distributed energy resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment.[315] The Commission also preliminarily found that limiting the types of technologies that are allowed to participate in the RTO/ISO markets through distributed energy resource aggregators would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy and ancillary services that they are technically capable of providing.[316] The Commission stated that, while some individual resources or certain technologies may not be able to meet the qualification or performance requirements to provide services to the RTO/ISO markets on their own, they may satisfy such requirements as part of a distributed energy resource aggregation where resources complement one another's capabilities. The Commission further stated that combining electric storage resources with distributed generation could allow the aggregate resource to achieve performance requirements (such as minimum run times) that an electric storage resource could not meet on its own and provide services (such as regulation) that distributed generation may not be able to provide on its own.[317]

134. In the NOPR, the Commission proposed to require that each RTO/ISO revise its tariff so that it does not prohibit the participation of any particular type of technology in the RTO/ISO markets through a distributed energy resource aggregator.[318] This was to help ensure that the market rules that RTOs/ISOs develop to comply with any final rule issued in this proceeding were sufficiently flexible to accommodate the participation of new distributed energy resources as technology evolves, and to acknowledge the potential that a distributed energy resource may meet qualification or performance requirements by participating in a distributed energy resource aggregation that it cannot on its own. The Commission stated, however, that, to the extent that existing rules or regulations explicitly prohibit certain technologies from participating in RTO/ISO markets, it did not intend to overturn those rules or regulations.

b. Comments

135. Several commenters support the Commission's proposal not to prohibit the participation of any particular type of technology in RTO/ISO markets through a distributed energy resource aggregation.[319] Generally, they state that it is important for the market rules to be resource neutral, allowing other attributes such as cost, quality, flexibility, and other attributes sought by market participants, to dictate which resources can successfully participate in RTO/ISO markets. They assert that resource neutrality reduces risk for investment in new technologies and preserves flexibility for the participation of future technologies and avoid unnecessary barriers to entry.

136. Several commenters argue that distributed energy resource aggregation participation models must allow a variety of technology configurations. Efficient Holdings argues that third party aggregators of behind-the-meter resources must have better access to the markets, which can be achieved through reforms including refined product definitions, reduction of burdensome and expensive operational requirements, and rules to address distribution utility non-compliance, embracing the broadest array of technologies possible.[320] Energy Storage Association and Stem seek to ensure that front-of-the-meter resources, behind-the-meter exporting and non-exporting resources, and heterogeneous groups of resources are all able to participate in distributed energy

[315] NOPR, 157 FERC ¶ 61,121 at P 104; *see supra* Section IV.B. (Definitions of Distributed Energy Resource and Distributed Energy Resource Aggregation).

[316] NOPR, 157 FERC ¶ 61,121 at P 133.

[317] *Id.* P 133 n.231.

[318] *Id.* P 133.

[319] *See, e.g.,* AES Companies (RM16–23) at 32–33; CAISO Comments (RM16–23) at 23; City of New York Comments (RM16–23) at 8; Massachusetts Commission Comments (RM16–23) at 8–10; R Street Institute Comments (RM16–23) at 8.

[320] Efficient Holdings Comments (RM16–23) at 7–9.

resource aggregations.[321] Stem states that it is reasonable to restrict the mixing of front-of-the-meter, behind-the-meter exporting, and behind-the-meter non-exporting resources within a single aggregation.[322]

137. Commenters also note that allowing distributed energy resource aggregations to include multiple types of distributed technologies allows multi-technology aggregations such as microgrids and complementary resources such as solar and storage to participate in RTO/ISO markets, will provide RTOs/ISOs another source of flexible controllable output. CAISO states that, consistent with the Commission's proposal, its Commission-approved Distributed Energy Resource Provider model allows aggregations to consist of different distributed energy resource types.[323] AES Companies encourage the Commission to review the validity of any prohibitions on the participation of existing technologies (*i.e.,* rules currently exist prohibiting certain types of resources in the tariffs for direct market participation) in a separate docket rather than in this proceeding.[324]

138. In contrast, some commenters express general concerns about aggregations that include different types of technologies.[325] American Petroleum Institute contends that aggregating different types of distributed energy resources will make market optimization more difficult.[326] TAPS urges the Commission to give RTOs/ISOs discretion, claiming that combining multiple types of distributed energy resources within a single aggregation may be beneficial but could pose issues when determining locational and minimum size requirements for mixed aggregations.[327]

139. Several commenters state that RTOs/ISOs will need flexibility to avoid imposing additional costs or barriers to entry on different types and configurations of prospective distributed energy resource aggregations.[328] SPP argues that managing an aggregation as a discrete set of different assets may be infeasible in commitment and dispatch and that sub-categorizing different types of distributed energy resources within a single aggregation would be extremely complex.[329] PJM Market Monitor states that distributed generation and distributed storage should not be mixed within aggregations and that resources should be aggregated by type for each wholesale market node. For example, according to PJM Market Monitor, distributed generation should be aggregated, at the same node with other distributed generation, while distributed storage should be aggregated at the same node with other distributed storage.[330]

140. ISO–NE also asks for flexibility and provides several arguments as to why certain heterogeneous aggregations are not desirable.[331] More specifically, ISO–NE argues that (1) demand-side load resources should only be allowed to participate in aggregations with other load because of how certain charges and credits are allocated to load; [332] (2) electric storage resources would not benefit from participating in aggregations with non-storage distributed energy resources because of state-of-charge management issues; [333] and (3) aggregations of non-intermittent resources with different physical and economic characteristics would need to self-schedule, potentially adding financial risk for the participant, reducing the efficiency of the dispatch, and contributing to uplift or excess generation conditions.[334] In addition, ISO–NE states that demand response resources should not be allowed to participate in distributed energy resource aggregations because of their distinct settlement rules.[335] According to ISO–NE, in order to accommodate aggregations that include both demand response and non-demand response resource components, ISO–NE would need to establish rules to disaggregate these components for purposes of settlement. ISO–NE requests that, if they are not required to participate separately, the Commission clarify which rules must apply to such resources.[336] ISO–NE adds that its region is steadily transitioning its energy market away from self-scheduling and toward requiring all energy supply and demand to be priced and that being required to implement rules that accommodate aggregations composed of heterogenous resource types would be a significant step backwards in that effort.[337]

c. Commission Determination

141. To implement § 35.28(g)(12)(ii)(a) of the Commission's regulations, we require that each RTO's/ISO's rules do not prohibit any particular type of distributed energy resource technology from participating in distributed energy resource aggregations. We find that limiting the types of technologies that are allowed to participate in RTO/ISO markets through a distributed energy resource aggregator would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy, and ancillary services that they are technically capable of providing. Requiring that each RTO's/ISO's rules do not exclude any particular types of technology from participating in distributed energy resource aggregations in RTO/ISO markets will ensure a technology-neutral approach to distributed energy resource aggregations, which will ensure that more resources are able to participate in such aggregations, thereby helping to enhance competition and ensure just and reasonable rates.

142. We agree with commenters that generally support requiring RTOs/ISOs to allow groupings of different technology types in distributed energy resource aggregations.[338] Additionally, we agree with NRG that, while some individual resources or certain technologies may not be able to meet the qualification or performance requirements to provide certain services to RTO/ISO markets on their own, they may be able to satisfy such requirements as part of a distributed energy resource aggregation where resources complement one another's capabilities.[339] For instance, in the NOPR, the Commission stated that aggregating electric storage resources with distributed generation could allow the aggregation to achieve performance requirements (such as minimum run times) that an electric storage resource could not meet on its own and provide services (such as regulation) that

[321] Energy Storage Association (RM16–23) at 24–25; Stem Comments (RM16–23) at 7, 12, 13.

[322] Stem Comments (RM16–23) at 12, 13.

[323] CAISO Comments (RM16–23) at 23.

[324] AES Companies Comments (RM16–23) at 32–33.

[325] American Petroleum Institute Comments (RM16–23) at 10; ISO–NE Comments (RM16–23) at 31–35; TAPS Comments (RM16–23) at 27.

[326] American Petroleum Institute Comments (RM16–23) at 10.

[327] TAPS Comments (RM16–23) at 27.

[328] CAISO Comments (RM16–23) at 38; Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 3; New York State Entities Comments (RM16–23) at 21.

[329] SPP Comments (RM16–23) at 22.

[330] PJM Market Monitor Comments (RM16–23) at 15–16.

[331] ISO–NE Comments (RM16–23) at 31–36.

[332] *Id.* at 33.

[333] *Id.* at 33–34.

[334] *Id.* at 34–35.

[335] *Id.* at 32.

[336] *Id.* at 32–33.

[337] *Id.* at 34–35.

[338] *See, e.g.,* AES Companies (RM16–23) at 32–33; CAISO Comments (RM16–23) at 23; City of New York Comments (RM16–23) at 8; Energy Storage Association (RM16–23) at 24–25; Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 3; Massachusetts Commission Comments (RM16–23) at 8–10; New York State Entities Comments (RM16–23) at 21; R Street Institute Comments (RM16–23) at 8; Stem Comments (RM16–23) at 7, 12, 13.

[339] NRG Comments (RM16–23) at 19.

distributed generation may not be able to provide on its own.[340] Therefore, to implement § 35.28(g)(12)(ii)(a) of the Commission's regulations, we clarify the NOPR proposal and require each RTO/ISO to revise its tariff to allow different types of distributed energy resource technologies to participate in a single distributed energy resource aggregation (*i.e.,* allow heterogeneous distributed energy resource aggregations).[341] Requiring that RTOs/ISOs allow heterogeneous aggregations will further enhance competition in RTO/ISO markets by ensuring that complementary resources, including those with different physical and operational characteristics, can meet qualification and performance requirements such as minimum run times, which will help ensure that these markets produce just and reasonable rates.

143. We are unconvinced by arguments in favor of homogeneous aggregations. We find that the benefits of allowing heterogeneous aggregations outweigh the concerns regarding complexity of implementation. While SPP and ISO–NE indicate that market rules allowing for heterogeneous aggregations would be challenging to develop and implement,[342] neither explains why their markets are unique such that it would be necessary for the Commission to permit regional flexibility. In addition, concerns about RTOs'/ISOs' ability to manage a diverse set of distributed energy resources are misplaced because the distributed energy resource aggregator, not an individual distributed energy resource in the aggregation, is the market participant with whom the RTO/ISO would be interacting. Moreover, the aggregator, not the RTO/ISO, would be responsible for ensuring that the distributed energy resource aggregation meets applicable RTO/ISO performance and registration requirements.

144. We also are not persuaded by ISO–NE's reservations related to state-of-charge management and self-scheduling. We find that market participants are best positioned to make these participation decisions. If ISO–NE is correct that self-scheduling adds financial risk for the participant and that, because of state-of-charge management issues, electric storage resources would not benefit from participating in distributed energy resource aggregations, then we would expect market participants to act in their economic interest.

145. As to ISO–NE's concerns about incorporating demand response resources into distributed energy resource aggregations, we note that demand response aggregations and the resources in them that effectuate load reductions currently are not necessarily composed of the same types of technologies and are already providing services in numerous RTO/ISO markets. Therefore, similar to the Commission's finding in Order No. 745–A, from the perspective of the RTO/ISO, the means by which an aggregation is able to provide wholesale services does not change the value of that service to the wholesale grid.[343] In response to ISO–NE's request for clarification about which settlement rules apply to distributed energy resource aggregations composed of both demand response and non-demand response resources, we clarify that the requirements in Order No. 745 would apply to demand response resources participating in heterogeneous aggregations. In addition, while ISO–NE would prefer to exclude demand response resources from distributed energy resource aggregations to simplify settlement and the allocation of charges and credits to load, we reiterate that the benefits of allowing heterogeneous aggregations outweigh ISO–NE's preference to limit the types of resources that can participate in aggregations. We clarify, however, that the participation of demand response in distributed energy resource aggregations is subject to the opt-out and opt-in requirements of Order Nos. 719 and 719–A. Therefore, if the relevant electric retail regulatory authority where a demand response resource is located has either chosen to opt out or has not opted in, then the demand response resource may not participate in a distributed energy resource aggregation.[344]

146. As to ISO–NE's concern that self-scheduling will reduce the efficiency of the dispatch and contribute to uplift or excess generation conditions, we note that no other RTOs/ISOs raise this concern. Market rules allowing for heterogeneous aggregations are already in place in CAISO,[345] and the Commission recently accepted market rules allowing for heterogeneous aggregations in NYISO.[346] Based on the record before us, ISO–NE has not sufficiently demonstrated why it is uniquely unable to implement market rules that can overcome these dispatch, uplift, and excess generation challenges.

3. Double Counting of Services

a. NOPR Proposal

147. In the NOPR, the Commission stated that it is appropriate for each RTO/ISO to limit the participation of resources in RTO/ISO markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program.[347] The Commission explained that, because resources able to register as part of a distributed energy resource aggregation will be located on the distribution system, they may also be eligible to participate in retail compensation programs, such as net metering, or other wholesale programs, such as demand response programs. Therefore, to ensure that there is no duplication of compensation, the Commission proposed that distributed energy resources that are participating in one or more retail compensation programs such as net metering or another wholesale market participation program will not be eligible to participate in RTO/ISO markets as part of a distributed energy resource aggregation.

b. Comments

148. Most commenters that address the issue of double counting agree that distributed energy resources should not be compensated twice for providing the same service but disagree on what constitutes ''the same service,'' how to implement such a requirement, or who should be responsible.[348] In this regard, Pacific Gas & Electric supports prevention of double compensation and discusses the processes in California that protects against the bypass of retail rates for behind-the-meter distributed energy resources that both consume and

[340] NOPR, 157 FERC ¶ 61,121 at P 133 n.231.

[341] ISO–NE defines a heterogeneous aggregation as consisting of ''different resource types, such that, for example, a single aggregation might consist of a battery, distributed generation assets, and electric vehicles.'' ISO–NE Comments (RM16–23) at 31.

[342] ISO–NE Comments (RM16–23) at 32; SPP Comments (RM16–23) at 21–22.

[343] As the Commission stated in Order No. 745–A, ''[f]rom the perspective of the grid, the manner in which a customer is able to produce such a load reduction from its validly established baseline (whether by shifting production, using internal generation, consuming less electricity, or other means) does not change the effect or value of the reduction to the wholesale grid.'' *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745–A, 137 FERC ¶ 61,215, at P 66 (2011), *reh'g denied,* Order No. 745–B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n* v. *FERC,* 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. EPSA,* 136 S. Ct. 760.

[344] *See supra* P 59.

[345] *Cal. Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at P 11.

[346] NYISO Aggregation Order, 170 FERC ¶ 61,033.

[347] NOPR, 157 FERC ¶ 61,121 at P 134.

[348] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 33–34; Calpine Comments (2018 RM18–9) at 6–7; Dominion Comments (RM16–23) at 9–10; Microsoft Corporation Comments (2018 RM18–9) at 17; New York State Entities Comments (RM16–23) at 13.

export electricity for both retail and wholesale purposes.[349] Some commenters also assert that the NOPR proposal provides a solution to prevent double compensation,[350] provides clear jurisdictional lines,[351] reduces confusion,[352] and could ease coordination issues for distributed energy resources and alleviate the limitations of metering and accounting practices to distinguish between wholesale and retail activities.[353] In addition, some commenters posit that allowing distributed energy resources that earn compensation in out-of-market retail programs to participate in RTO/ISO markets may distort price formation, skewing market results and clearing prices.[354] Other commenters express concern that dual wholesale and retail participation could enable distributed energy resources to arbitrage between retail and wholesale markets, creating opportunities for market manipulation,[355] or to cherry pick between retail and wholesale constructs, preventing effective distribution system planning.[356] To address this concern, some commenters suggest that the Commission should require RTOs/ISOs to restrict the ability of distributed energy resources to switch between wholesale and retail participation by imposing a waiting period of at least one year.[357]

149. CAISO comments that, consistent with the NOPR proposal, its Distributed Energy Resource Provider model specifies that resources participating in a wholesale market aggregation may not participate in a retail net energy metering program if that program does not expressly also permit wholesale market participation.[358] CAISO states that this rule extends to various aspects of retail net metering programs such as net metering with storage or virtual net metering.[359] CAISO explains that the rationale for this rule is that CAISO's Distributed Energy Resource Provider model requires continuous wholesale participation.[360] Additionally, CAISO states that under California's current net energy metering program rules, a participating resource already benefits from netting its excess energy against subsequent electricity bills.[361] Based on this netting approach, there is no energy available to offer into the CAISO markets because the excess energy is banked for later withdrawal. CAISO believes the Commission's approach in the NOPR is consistent with Commission orders determining that exports to the transmission grid under a net energy metering program do not constitute a sale for resale of electricity under the FPA because these customers are, on a net basis, consumers.

150. Some commenters ask the Commission to modify or clarify certain issues related to the NOPR proposal to prevent double counting. For instance, several commenters urge the Commission to give clear guidance about the definition of a retail compensation program or to clarify the scope of the retail prohibition.[362] A number of commenters argue that the RTOs/ISOs should be responsible for demonstrating how they will prevent duplicate compensation for the same service.[363] To that end, some commenters urge the Commission to, at a minimum, direct RTOs/ISOs to establish protocols that address duplicate compensation,[364] monitor distributed energy resource offers for true cost, and hold distributed energy resources accountable for performance, among other measures.[365] ISO–NE notes that if distributed energy resources have to choose between wholesale and retail participation, retail programs and behind-the-meter demand response may be more attractive in New England.[366]

151. Conversely, numerous commenters assert that the Commission should permit distributed energy resource aggregations to participate in both wholesale and retail markets,[367] provided that the distributed energy resources are technically capable of doing so and there are not physical system limitations that would prevent such participation.[368] Some of these commenters argue that distributed energy resources should not receive duplicate compensation for the same service but should receive compensation for each distinct or incremental value they provide at the retail or wholesale level, and that being allowed to do so will improve efficiency and lower overall costs.[369] Some commenters that are in favor of RTOs/ISOs allowing dual participation also note that relevant electric retail regulatory authorities have the ability to prevent it.[370] Several commenters contend that there is precedent for dual participation [371] and argue that a blanket ban would create a barrier to distributed energy resource participation, underestimating their capabilities, and inhibit competition, undermining the NOPR.[372] Icetec and Tesla point out that capacity markets have long avoided duplicate compensation for demand response and for generators providing multiple services at once (*e.g.,* energy and reserves) and urge the Commission to apply the logic of these constructs to

[349] Pacific Gas & Electric Comments (2019 RM18–9) at 5.

[350] Avangrid Comments (RM16–23) at 11; Pacific Gas & Electric Comments (RM16–23) at 17.

[351] Delaware Commission Comments (RM16–23) at 4.

[352] *See, e.g.,* Calpine Comments (2018 RM18–9) at 6; Organization of MISO States Comments (2018 RM18–9) at 8; PJM Utilities Coalition Comments (2018 RM18–9) at 13.

[353] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 39–40; EEI Comments (RM16–23) at 25–26; Massachusetts Municipal Electric Comments (RM16–23) at 3; National Hydropower Association Comments (RM16–23) at 11; Six Cities Comments (RM16–23) at 6.

[354] Calpine Comments (2018 RM18–9) at 6; EPSA Comments (2018 RM18–9) at 15; TAPS Comments (2018 RM18–9) at 25.

[355] TAPS Comments (2018 RM18–9) at 26.

[356] PJM Utilities Coalition Comments (2018 RM18–9) at 13.

[357] APPA Comments (2018 RM18–9) at 25 (suggesting a waiting period of one year); Calpine Comments (2018 RM18–9) at 7 (suggesting a waiting period of five years as in PJM's Fixed Resource Requirement process).

[358] CAISO Comments (RM16–23) at 24 (citing *Cal. Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at P 6).

[359] *Id.* at 24.

[360] CAISO Comments (2018 RM18–9) at 15.

[361] CAISO Comments (RM16–23) at 24.

[362] ISO–NE Comments (RM16–23) at 54; SEIA Comments (RM16–23) at 16–17; TAPS Comments (RM16–23) at 11.

[363] *See, e.g.,* Advanced Microgrid Solutions Comments (RM16–23) at 6; Dominion Comments (RM16–23) at 9–10; EEI Comments (RM16–23) at 25–26; Gridwise Comments (RM16–23) at 2; Public Interest Organizations Comments (RM16–23) at 23–24; Stem Comments (RM16–23) at 4, 7–8.

[364] EPSA Comments (2018 RM18–9) at 14; TAPS Comments (2018 RM18–9) at 26–27.

[365] Calpine Comments (2018 RM18–9) at 7; EPSA Comments (2018 RM18–9) at 20.

[366] ISO–NE Comments (2018 RM18–9) at 3.

[367] *See, e.g.,* Advanced Energy Buyers Comments (2018 RM18–9) at 2; Genbright Comments (RM16–23) at 2–4; Global Cold Chain Alliance Comments (2018 RM18–9) at 2; MISO Transmission Owners Comments (RM16–23) at 6; New York Commission Comments (2018 RM18–9) at 16.

[368] Energy Storage Association (2018 RM18–9) at 2; Microsoft Corporation Comments (2018 RM18–9) at 17; NRG Comments (2018 RM18–9) at 6–8; SEIA Comments (RM16–23) at 16; Sunrun Comments (RM16–23) at 3.

[369] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 8, 12–13; American Petroleum Institute Comments (RM16–23) at 13; Direct Energy Comments (2018 RM18–9) at 11–13; EPSA Comments (2018 RM18–9) at 15; NARUC Comments (RM16–23) at 5; Viking Cold Solutions Comments (2018 RM18–9) at 2.

[370] California Commission Comments (2018 RM18–9) at 10–11; New York Commission Comments (2018 RM18–9) at 17–18.

[371] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 39; Advanced Energy Management Comments (RM16–23) at 11–14; City of New York Comments (RM16–23) at 10–11; NRG Comments (2018 RM18–9) at 7–8; NYPA Comments (2018 RM18–9) at 2.

[372] *See, e.g.,* California Energy Storage Alliance Comments (RM16–23) at 4–6; Genbright Comments (RM16–23) at 3–4; Microgrid Resources Coalition Comments (RM16–23) at 12; SEIA Comments (RM16–23) at 16; Stem Comments (RM16–23) at 4, 7.

distributed energy resources.[373] Advanced Energy Economy claims that the NOPR proposal would prevent the RTOs/ISOs from accessing a growing pool of resources located close to load that can be cost-effectively dispatched to ensure reliability.[374] Several commenters argue that requiring resources to choose between markets would diminish the incremental value of distributed energy resources, leading to less efficient and flexible markets and reducing distributed energy resources' commercial viability.[375] Commenters contend that, even if some services could qualify generally as the same service, it would be possible to distinguish them.[376] Some commenters identify a number of scenarios in which providing distinct wholesale and retail services is feasible and explain that dispatch triggers for these programs usually do not overlap, which further indicates that they are not the same services.[377] Additional commenters note potential discrepancies between the NOPR proposal and the Commission's recent policy statement enabling multiple-use applications for electric storage resources,[378] and contend that experience in CAISO has demonstrated that it is possible to differentiate between services.[379]

152. However, many commenters disagree over how the Commission should assess what constitutes ''the same service.'' Some commenters assert that ''same service'' should refer narrowly to retail and wholesale programs that compensate a distributed energy resource for the exact same kW or kWh for the same value, providing no incremental value to the system.[380] Other commenters argue that tools are necessary to prevent double compensation for the same service and suggest using performance requirements and dispatch triggers, contracting, market/participation rules, registration,protections, mathematical/accounting solutions, and/or a coordination framework, among other measures, to prevent double counting.[381] According to some of these commenters, market rules could prevent double compensation when a resource is dispatched simultaneously for multiple programs or to prevent a resource from being permitted to sell the same market product as both an individual resource and as part of an aggregation in the same timeframe.[382] Some commenters suggest using certain criteria to determine when a service provides incremental value to the retail or wholesale system or using metrics to enable segmentation of time or service provided.[383] PJM asks the Commission not to prohibit PJM from using accounting rules to delineate between a behind-the-meter distributed energy resource aggregation's wholesale and retail transactions, as applicable.[384]

153. IRC urges the Commission to work with states to set forth clear processes for resolving jurisdictional and rate issues to prevent double compensation based on the details of a particular retail program.[385] Some commenters suggest that the Commission collaborate with local regulatory authorities because local conditions may warrant special rules and restrictions for distributed energy resource participation in multiple markets or defer to state jurisdictions.[386] Some commenters request that the Commission clarify the right of state regulators to monitor and regulate potential duplicate compensation [387] and request that the Commission provide guidance to distribution utilities regarding the proposal.[388]

154. In addition, several commenters seek clarification that RTOs/ISOs are not precluded from allowing distributed energy resources to provide multiple non-overlapping wholesale services.[389] NYISO requests clarification on whether distributed energy resources are permitted to offer the ''same service'' to the wholesale markets and distribution system-level retail programs.[390] Lastly, some commenters state that the Commission should revisit and further examine the issue of dual participation in the future.[391]

155. Other commenters argue that the NOPR proposal would undermine state policy.[392] Numerous commenters argue that the NOPR proposal conflicts with the Commission's findings in *New York State Public Service Commission* v. *New York Independent System Operator, Inc.,* in which the Commission stated that ''[w]hile the wholesale- and the retail-level demand response programs may complement each other, they serve different purposes, provide different benefits, and compensate distinctly different services,'' [393] and would interfere with New York's existing programs and state objectives.[394] The California Commission maintains that dual participation of a distributed energy resource in retail programs and RTO/ISO markets is a retail matter under state jurisdiction.[395] The

[373] Icetec Comments (2018 RM18–9) at 14; Tesla Comments (2018 RM18–9) at 4.

[374] Advanced Energy Economy Comments (RM16–23) at 33–34.

[375] *See, e.g.,* Advanced Energy Management Comments (RM16–23) at 10–11; Advanced Microgrid Solutions Comments (RM16–23) at 6; Energy Storage Association Comments (RM16–23) at 22–23; Public Interest Organizations Comments (RM16–23) at 22–24; Tesla/SolarCity Comments (RM16–23) at 3.

[376] Energy Storage Association Comments (2018 RM18–9) at 2; New York Commission Comments (2018 RM18–9) at 15; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 13. *See also* California Commission Comments (2018 RM18–9) at 8 (noting that the California Commission declined to categorize the 22 services defined for the multiple use application framework adopted in D.18–01–003 by their service elements, which are either energy or capacity).

[377] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 34–35; California Energy Storage Alliance Comments (RM16–23) at 5–6; DER/Storage Developers Comments (RM16–23) at 2–3; Tesla/SolarCity Comments (RM16–23) at 5–7. Advanced Energy Management notes that dispatch for the Consolidated Edison programs only overlapped with dispatch for the NYISO programs in six percent of hours from 2011 to 2015. Advanced Energy Management Comments (RM16–23) at 12–13.

[378] Institute for Policy Integrity Comments (RM16–23) at 7; Open Access Technology Comments (RM16–23) at 4–5; Stem Comments (RM16–23) at 4 (citing *Utilization of Elec. Storage Res. for Multiple Servs. When Receiving Cost-Based Rate Recovery,* 158 FERC ¶ 61,051 (2017)).

[379] Leadership Group Comments (RM16–23) at 3 (citing *Cal. Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at P 11).

[380] Advanced Energy Management Comments (2018 RM18–9) at 13; New York Commission Comments (2018 RM18–9) at 15.

[381] *See, e.g.,* California Commission Comments (2018 RM18–9) at 9–10; Microgrid Resources Coalition Comments (2018 RM18–9) at 12–14; New York Commission Comments (2018 RM18–9) at 16, 18–19; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 13–14; Tesla Comments (2018 RM18–9) at 3–7.

[382] Advanced Energy Management Comments (RM16–23) at 13; AES Companies Comments (RM16–23) at 39; New York State Entities Comments (RM16–23) at 15–16.

[383] Advanced Energy Buyers Comments (2018 RM18–9) at 6; Advanced Energy Economy Comments (2018 RM18–9) at 13; Advanced Energy Management Comments (2018 RM18–9) at 14–15.

[384] PJM Comments (RM16–23) at 23.

[385] IRC Comments (RM16–23) at 3–5.

[386] EEI Comments (RM16–23) at 26–27; Pacific Gas & Electric Comments (2018 RM18–9) at 10.

[387] Massachusetts Commission Comments (RM16–23) at 11.

[388] ISO–NE Comments (RM16–23) at 54.

[389] NextEra Comments (RM16–23) at 14; NYISO Comments (RM16–23) at 14–15; Public Interest Organizations Comments (RM16–23) at 21–22.

[390] NYISO Comments (RM16–23) at 14–15.

[391] EEI Comments (RM16–23) at 25; New York Utility Intervention Unit Comments (RM16–23) at 6; Pacific Gas & Electric Comments (RM16–23) at 17–18; SoCal Edison Comments (RM16–23) at 10.

[392] California Commission Comments (RM16–23) at 6–7; City of New York Comments (RM16–23) at 13; New York State Entities Comments (RM16–23) at 18.

[393] *N.Y. Pub. Serv. Comm'n* v. *N.Y. Indep. Sys. Operator, Inc.,* 158 FERC ¶ 61,137, at P 33 (2017).

[394] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 35–36; Advanced Energy Management Comments (RM16–23) at 11–13; Harvard Environmental Policy Initiative Comments (RM16–23) at 7; New York State Entities Comments (RM16–23) at 14,16–18; Union of Concerned Scientists Comments (RM16–23) at 19.

[395] California Commission Comments (2018 RM18–9) at 10–11.

Arkansas Commission, with support from Advanced Energy Economy, states that dual participation of distributed energy resource aggregations in RTO/ISO and retail markets requires a cooperative federalism approach in which the Commission has authority over RTO/ISO eligibility rules, states have exclusive jurisdiction over retail customer programs and may set terms and conditions so long as they do not conflict with Commission orders, and state regulators play a complementary role.[396]

156. In addition, some commenters assert that the Commission does not have authority to prevent distributed energy resources from selling retail services.[397] The Harvard Environmental Policy Initiative argues that there is no legal barrier that prevents distributed energy resources from participating in both state and Commission programs, and that the Commission has the authority to allow each RTO/ISO to determine how to allow distributed energy resources to participate in both state-level and wholesale programs, though they note it may be operationally complex.[398] Tesla/SolarCity asserts that differences in jurisdiction must not prevent distributed energy resources from receiving compensation for distinct services [399] and argues that effects on retail rates should not be relevant.[400] Several commenters add that the Commission's decision in this final rule will not affect the ability of relevant electric retail regulatory authorities to restrict wholesale participation for distributed energy resources wishing to participate in retail programs.[401]

157. However, some commenters disagree with other commenters' proposed approaches to differentiate between wholesale and retail services. APPA contends that the methods proposed by some commenters of determining what constitutes the same service are flawed, an incremental value approach is conceptually complicated, and using dispatch triggers to distinguish services is problematic because a resource could not respond to a reliability event in both the wholesale and retail markets at once.[402] Similarly, Sunrun argues that a universal characterization of services would create litigation and confusion.[403] PJM asserts that the Commission should not ''over-define'' the services that distributed energy resources provide but instead should focus on the services traditionally addressed in the wholesale market (*e.g.,* capacity, energy and ancillary services), and require that any unit of capacity/resource adequacy only be compensated once across the wholesale and retail domains.[404] NYISO Indicated Transmission Owners point out that the ability to differentiate services is dependent on particular programs and markets, and suggest that the Commission consider programs as they are filed by the relevant RTOs/ISOs.[405] MISO states that it defers to relevant electric retail regulatory authorities to address any double compensation matters.[406] NYISO states that if competing dispatch obligations still arise, it will be the aggregator's responsibility to resolve the conflict and face penalties, as appropriate.[407]

158. NRG and Stem argue that the Commission should only be concerned with double compensation if retail participation interferes with the provision of wholesale services.[408] Similarly, other commenters argue that the Commission should focus on preventing distributed energy resources from receiving double payment for the same *wholesale* service and not whether those resources are also receiving retail level compensation.[409] NYISO Indicated Transmission Owners note that many distribution utilities have established programs to accommodate technology within retail service programs and argue that any changes to market rules for participation of distributed energy resource aggregations in wholesale markets should avoid encroaching upon or abrogating the jurisdictional status of these distribution-level programs, which, they state, do not involve wholesale sales.[410]

c. Commission Determination

159. To implement § 35.28(g)(12)(ii)(a) of the Commission's regulations and upon consideration of the comments received, we adopt the NOPR proposal, as modified and clarified below, to allow RTOs/ISOs to limit the participation of resources in RTO/ISO markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program.

160. However, we agree with many commenters that the NOPR proposal to prohibit distributed energy resources that are receiving compensation in a retail program from being eligible to participate in the RTO/ISO markets as part of a distributed energy resource aggregation was overly broad. Commenters identify multiple examples where participation in both wholesale and retail markets is feasible [411] and is already permitted and occurring,[412] and they identify a variety of existing and potential approaches to address reasonable concerns about double counting and overcompensation.[413] Therefore, rather than barring participation in both wholesale and retail or multiple wholesale programs, we modify the NOPR proposal to require each RTO/ISO to revise its tariff to: (1) Allow distributed energy resources that participate in one or more retail programs to participate in its wholesale markets; (2) allow distributed energy resources to provide multiple wholesale services; and (3) include any appropriate restrictions on the distributed energy resources' participation in RTO/ISO markets through distributed energy resource aggregations, if narrowly designed to avoid counting more than once the services provided by distributed energy resources in RTO/ISO markets. In compliance with this final rule, we

[396] Supplemental Comments of Arkansas Commission (2018 RM18–9–000) at 1–2; Answer of Advanced Energy Economy to Supplemental Comments of Arkansas Commission (2018 RM18–9) at 2.

[397] California Commission Comments (RM16–23) at 6; DER/Storage Developers Comments (RM16–23) at 2; SEIA Comments (RM16–23) at 16; Stem Comments (RM16–23) at 7.

[398] Harvard Environmental Policy Initiative Comments (RM16–23) at 6–7 (citing NOPR, 157 FERC ¶ 61,121 at P 134).

[399] Tesla/SolarCity Comments (RM16–23) at 2–3.

[400] *Id.* at 3 (quoting *EPSA,* 136 S. Ct. 760 at 776 (''When FERC regulates what takes place on the wholesale market, as a part of carrying out its charge to improve how that market runs, then no matter that effect on retail rates . . .'')).

[401] APPA Comments (2018 RM18–9) at 25–26; PJM Utilities Coalition Comments (2018 RM18–9) at 13; TAPS Comments (2018 RM18–9) at 25.

[402] APPA Comments (2018 RM18–9) at 24–25.

[403] Sunrun Comments (2018 RM18–9) at 9–10.

[404] PJM Comments (2018 RM18–9) at 14.

[405] NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 7–8.

[406] MISO Comments (2018 RM18–9) at 22.

[407] NYISO Comments (2018 RM18–9) at 9–11.

[408] NRG Comments (RM16–23) at 8; Stem Comments (RM16–23) at 7.

[409] Advanced Energy Economy Comments (2018 RM18–9) at 13; Energy Storage Association Comments (2018 RM18–9) at 5; New York Commission Comments (2018 RM18–9) at 18; Stem Comments (RM16–23) at 7.

[410] NYISO Indicated Transmission Owners Comments (RM16–23) at 8.

[411] *See, e.g.,* Advanced Microgrid Solutions Comments (RM16–23) at 5–6; American Petroleum Institute Comments (RM16–23) at 13; NRG Comments (RM16–23) at 8; Open Access Technology Comments (RM16–23) at 5; Public Interest Organizations Comments (RM16–23) at 22.

[412] Direct Energy Comments (2018 RM18–9) at 11–13; Energy Storage Association Comments (2018 RM18–9) at 5; NRG Comments (2018 RM18–9) at 6–8.

[413] NESCOE Comments (RM16–23) at 14–15 (citing *Utilization of Electric Storage Resources for Multiple Services When Receiving Cost-Base Rate Recovery,* 158 FERC ¶ 61,051 at P 2); SEIA Comments (RM16–23) at 16 (citing *Utilization of Electric Storage Resources for Multiple Services When Receiving Cost-Based Rate Recovery,* 158 FERC ¶ 61,051).

require each RTO/ISO to describe how it will properly account for the different services that distributed energy resources provide in the RTO/ISO markets.

161. We find that it is appropriate for RTOs/ISOs to place narrowly designed restrictions on the RTO/ISO market participation of distributed energy resources through aggregations, if necessary to prevent double counting of services. For instance, if a distributed energy resource is offered into an RTO/ISO market and is not added back to a utility's or other load serving entity's load profile, then that resource will be double counted as both load reduction and a supply resource. Also, if a distributed energy resource is registered to provide the same service twice in an RTO/ISO market (*e.g.,* as part of multiple distributed energy resource aggregations, as part of a distributed energy resource aggregation and a standalone demand response resource, and/or a standalone distributed energy resource), then that resource would also be double counted and double compensated if it clears the market as part of both market participants. Thus, we find that it is appropriate for RTOs/ISOs to place restrictions on the RTO/ISO market participation of distributed energy resources through aggregations after determining whether a distributed energy resource that is proposing to participate in a distributed energy resource aggregation is (1) registered to provide the same services either individually or as part of another RTO/ISO market participant;[414] or (2) included in a retail program to reduce a utility's or other load serving entity's obligations to purchase services from the RTO/ISO market.

162. This restriction is similar to that adopted by the Commission in Order No. 719 in the context of aggregations of demand response, which states that ''[a]n RTO or ISO may place appropriate restrictions on any customer's participation in an [aggregation of retail customers]-aggregated demand response bid to avoid counting the same demand response resource more than once.'' [415] In addition, as discussed in Section IV.A.2 above, relevant electric retail regulatory authorities may decide whether to permit the customers of small utilities to participate in the RTO/ISO markets through distributed energy resource aggregations and relevant electric retail regulatory authorities continue to have authority to condition participation in their retail distributed energy resource programs on those resources not also participating in RTO/ISO markets,[416] which should allow them to mitigate any double-compensation concerns.

163. We agree with many commenters that the NOPR proposal could undermine the effectiveness of existing retail and wholesale programs, render current RTO/ISO market participants ineligible to continue their participation, and reduce competition in RTO/ISO markets, which could lead to unjust and unreasonable rates. Further, there may be instances in which an individual distributed energy resource could technically, reliably, and economically provide multiple, distinct services at wholesale and retail levels, and therefore preventing it from doing so may undermine the final rule by creating a new barrier to participation in RTO/ISO markets, thereby inhibiting competition and decreasing reliability. We believe the modified rules that we adopt herein will enable efficient outcomes in RTO/ISO markets by capturing the full value of distributed energy resources and enabling efficient resource allocation while also requiring RTOs/ISOs to address double-counting concerns.

164. In addition to addressing the potential market and reliability impacts of the NOPR proposal described above, we find that the reforms we adopt here are consistent with the Commission's determination that a single distributed energy resource can participate in both retail and wholesale programs and be compensated in each for providing ''distinctly different services.'' [417] While commenters suggest several tests to identify duplicate services, the record does not include a consistent or practical method for the Commission to universally define ''same services'' across wholesale and retail markets, and we therefore do not believe that it is appropriate to prescribe an approach across all RTOs/ISOs. For this reason, we will grant RTOs/ISOs regional flexibility with respect to the restrictions they propose in their tariffs to minimize market impacts caused by the double counting of services provided by distributed energy resources in the RTO/ISO markets.

4. Minimum and Maximum Size of Aggregation

a. NOPR Proposal

165. In the NOPR, the Commission proposed that distributed energy resource aggregations must meet any minimum size requirements of the participation model under which they elect to participate in RTO/ISO markets.[418] The Commission stated that, for example, if a distributed energy resource aggregator decides to register using the participation model for electric storage resources given the cumulative physical and operational characteristics of the distributed energy resources in its aggregation, then its distributed energy resource aggregation would be required to meet the 100 kW minimum size requirement that the Commission required for that participation model. The Commission stated that, alternatively, if the distributed energy resource aggregator registered as a generator, then its aggregation would be required to meet the minimum size requirement for the generator participation model in the relevant RTO/ISO market.

166. After the April 2018 technical conference, the Commission sought comments on whether reducing the minimum size of distributed energy resource aggregations to participate in RTO/ISO markets would help alleviate concerns about requiring distributed energy resource aggregations to locate only at a single node.[419]

b. Comments

167. SPP agrees with the Commission's proposal for aggregations to meet any minimum size requirements of the participation model under which they elect to participate, noting that that is consistent with SPP's registration requirements for any resource type.[420]

168. In contrast, several commenters argue that the Commission should require RTOs/ISOs to adopt a minimum size requirement of 100 kW for all distributed energy resource aggregations, regardless of the participation model in which they elect to participate.[421] NYISO states that it is currently working with stakeholders on a distributed energy resource market design proposal that would set a minimum aggregation size of 100 kW

[414] For example, as part of another distributed energy resource aggregation, a demand response resource, and/or a standalone distributed energy resource.

[415] Order No. 719, 125 FERC ¶ 61,071 at P 158.

[416] Supplemental Comments of Arkansas Commission (RM16–23–000) at 2.

[417] *N.Y. Pub. Serv. Comm'n* v. *N.Y. Indep. Sys. Operator, Inc.,* 158 FERC ¶ 61,137 at P 33.

[418] NOPR, 157 FERC ¶ 61,121 at P 136.

[419] Notice Inviting Post-Technical Conference Comments at 3.

[420] SPP Comments (RM16–23) at 16.

[421] *See, e.g.,* Advanced Energy Management Comments (RM16–23) at 16–17, 25–26; Mensah Comments (RM16–23) at 3; Efficient Holdings Comments (RM16–23) at 8; NYISO Comments (RM16–23) at 15–16; Tesla/SolarCity Comments (RM16–23) at 17, 26.

because this is the smallest increment that NYISO believes it can accurately model, commit, and dispatch with its current grid operations software.[422] Some of those commenters contend that a minimum size requirement above 100 kW runs counter to the NOPR's goal of improving competition in the wholesale markets while avoiding excessive registration of individual small resources and modeling complexity.[423] Tesla/SolarCity state that a minimum size requirement of 100 kW across all markets would avoid any confusion caused by artificial differences between the electric storage and distributed energy resource aggregation participation models.[424] Some commenters argue that minimum size requirements greater than 100 kW pose a significant barrier to entry.[425] Direct Energy disagrees with ISO–NE's assertion at the technical conference that there is no real need for aggregation because there is no minimum size limitation for participating in ISO–NE's markets, stating that while Direct Energy is supportive of establishing a framework without minimum size limitations for distributed energy resources, the lack of such limitations should not serve as an alternative for aggregation.[426] NRG states that 100 kW is an efficient minimum size requirement but that the participation model for distributed energy resource aggregations should set minimum resource participation thresholds only to the extent necessary to accommodate existing metering and data management systems infrastructure.[427]

169. Several commenters argue that the Commission should provide the RTOs/ISOs with flexibility to establish any minimum size requirement for distributed energy resource aggregations based on their ability to model and dispatch these resources.[428] SoCal Edison states that each RTO/ISO should be allowed to determine its own minimum size requirements, providing the example of CAISO's requirement that distributed energy resource aggregations be at least 500 kW to help ensure that an aggregation is large enough to have a measurable impact on the transmission system.[429] EPRI and SoCal Edison both highlight the software challenges and potential costs associated with implementing a minimum size requirement at or below 100 kW.[430] Pacific Gas & Electric asserts that RTOs/ISOs must be allowed to account for the differences between interacting with aggregations and stand-alone resources in their markets.[431] MISO states that, to the extent the Commission deems it necessary to set a volume threshold for aggregated participation, the threshold should apply to registration minimums and not be related to how RTOs/ISOs model or dispatch resources.[432] NYISO Indicated Transmission Owners assert that aggregations should be subject to the same minimum size requirements as traditional resources that are based on the services they are providing.[433]

170. Energy Storage Association agrees that a lower limit is necessary but asserts that the Commission should not allow RTOs/ISOs to place upper limits on the size of distributed energy resource aggregations.[434] In contrast, CAISO believes that the Commission should adopt an upper limit on the size of these aggregations to ensure reliable operation of the transmission system while obtaining more experience with distributed energy resource aggregations. CAISO notes that its Distributed Energy Resource Provider model imposes a maximum capacity requirement of 20 MW on aggregations that span multiple pricing nodes to limit the impact of these aggregations on congestion on the CAISO grid without severely constraining the ability of distributed energy resource providers to form viable aggregations.[435] Similarly, SPP argues that the Commission should consider a maximum size requirement for aggregations across multiple nodes but that no maximum requirement is necessary for aggregations located at a single node.[436] University of Delaware's EV R&D Group argues that upper power limits should allow for an aggregation of 100–200 kW resources as this will better permit the participation of electric bus fleets.[437]

c. Commission Determination

171. We adopt the NOPR proposal, with modifications, and add § 35.28(g)(12)(iii) to the Commission's regulations to require each RTO/ISO to implement a minimum size requirement not to exceed 100 kW for all distributed energy resource aggregations. We agree with commenters that a minimum size requirement not to exceed 100 kW will help improve competition in the RTO/ISO markets and avoid confusion about appropriate minimum size requirements for distributed energy resource aggregations under existing or new participation models. We do not expect this requirement to overburden RTO/ISO modeling software with an excessive number of small resources because 100 kW is currently a commonly used resource size. In contrast, larger minimum size requirements that may have been designed for different types of resources could pose a significant barrier to entry for distributed energy resource aggregations. In addition, this minimum size requirement is consistent with the Commission's minimum size requirement for electric storage resources in Order No. 841.[438]

172. Several RTOs/ISOs support a minimum size requirement not to exceed 100 kW. PJM and SPP have a minimum size requirement of 100 kW for all resources and support the same requirement for distributed energy resource aggregations, and all of the RTOs/ISOs have at least one participation model that allows resources as small as 100 kW to

[422] NYISO Comments (RM16–23) at 15–16; PJM Comments (RM16–23) at 27. On January 23, 2020, the Commission accepted NYISO's tariff revisions establishing a new participation model for aggregations of resources, including distributed energy resources, which requires that each energy, ancillary service, and capacity transaction on behalf of an aggregation must have a minimum offer of 100 kW, and if an aggregation offers a combination of withdrawals, injections, and/or demand reductions, it must offer at least 100 kW of each. *See* NYISO Aggregation Order, 170 FERC ¶ 61,033 at P 14.

[423] Advanced Energy Management Comments (RM16–23) at 16–17; Advanced Energy Economy Comments (RM16–23) at 51–52 (citing NOPR, 157 FERC ¶ 61,121 at P 94); California Energy Storage Alliance Comments (RM16–23) at 7–8.

[424] Tesla/SolarCity Comments (RM16–23) at 26.

[425] Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 2 (citing MISO Market Subcommittee Presentation, November 29th, 2016, *https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/MSC/2016/20161129/20161*) (stating that the integration of distributed energy resources and smaller-scale resources is within the ''probable limit of current systems''); Tesla/SolarCity Comments (RM16–23) at 27 (citing *N.Y. Indep. Sys. Operator, Inc.,* 155 FERC ¶ 61,166 (2016)).

[426] Direct Energy Comments (2018 RM18–9) at 8–9 (citing Technical Conference Transcript at 22).

[427] NRG Comments (RM16–23) at 12; NRG Comments (2018 RM18–9) at 4.

[428] *See, e.g.,* AES Companies Comments (RM16–23) at 34; IRC Comments (RM16–23) at 7; ISO–NE Comments (RM16–23) at 36; MISO Comments (RM16–23) at 20; Pacific Gas & Electric Comments (RM16–23) at 17.

[429] SoCal Edison Comments (RM16–23) at 11 (citing CAISO Tariff, Section 4.17.5.1; CAISO, Transmittal Letter, Docket No. ER16–1085, at 9 (filed March 4, 2016)).

[430] EPRI Comments (2018 RM18–9) at 7–8; SoCal Edison Comments (2018 RM18–9) at 5.

[431] Pacific Gas & Electric Comments (RM16–23) at 17.

[432] MISO Comments (2018 RM18–9) at 16–17.

[433] NYISO Indicated Transmission Owners Comments (RM16–23) at 12.

[434] Energy Storage Association Comments (RM16–23) at 25–26.

[435] CAISO Comments (RM16–23) at 25–26.

[436] SPP Comments (RM16–23) at 16.

[437] University of Delaware EV R&D Group Comments (2018 RM18–9) at 1.

[438] Order No. 841, 162 FERC ¶ 61,127 at P 270.

participate in their markets.[439] However, we recognize concerns about the ability of modeling and dispatch software to handle a large number of small distributed energy resource aggregations. Therefore, while we require each RTO/ISO to implement on compliance a minimum size requirement not to exceed 100 kW for all distributed energy resource aggregations, we will consider any future post-implementation requests to increase the minimum size requirement above 100 kW if the RTO/ISO demonstrates that it is experiencing difficulty calculating efficient market results and there is not a viable software solution for improving such calculations.[440]

173. We agree with the post-technical conference comments that a minimum size requirement that is lower than some existing RTO/ISO minimum size requirements will help alleviate concerns about the ability of single node aggregations to achieve the necessary minimum size, particularly given our findings on locational requirements for distributed energy resource aggregations.[441] NYISO recently adopted this approach, stating that because it decided to limit distributed energy resource aggregations to a single pricing node in its distributed energy resources roadmap, NYISO thought it was appropriate to lower the minimum size threshold for distributed energy resource aggregations to 100 kW.[442] Therefore, not only will a minimum size requirement that does not exceed 100 kW remove a barrier to distributed energy resource aggregations, improve competition in RTO/ISO markets, avoid confusion about appropriate requirements, and help ensure just and reasonable rates, but application of this requirement in conjunction with our findings on locational requirements, discussed in Section IV.D below, will help alleviate any adverse competitive impacts that single node aggregations may have.[443]

174. We are not persuaded by commenters to adopt a maximum size requirement for distributed energy resource aggregations that span multiple pricing nodes. We do not see a need to adopt such a requirement because, as explained in Section IV.E below, to the extent that RTOs/ISOs allow for multi-node distributed energy resource aggregations, distribution factors and bidding parameters should provide the RTOs/ISOs with the information from geographically dispersed resources in a distributed energy resource aggregation necessary to reliably operate their systems regardless of the size of the aggregation.[444] We also note that, given our findings on locational requirements, we are not requiring RTOs/ISOs to establish multi-node distributed energy resource aggregations.[445]

5. Minimum and Maximum Capacity Requirements for Distributed Energy Resources Participating in an Aggregation

a. NOPR Proposal

175. The Commission proposed not to establish a minimum or maximum capacity requirement for an individual distributed energy resource to be able to participate in RTO/ISO markets through a distributed energy resource aggregator.[446] The Commission stated that it believes participation in RTO/ISO markets through a distributed energy resource aggregator should not be conditioned on the size of the resource but recognized that existing RTO/ISO market rules may require distributed energy resources to meet certain minimum or maximum capacity requirements under certain participation models. Therefore, the Commission sought comment on whether to establish a minimum or maximum capacity limit for individual distributed energy resources seeking to participate in RTO/ISO markets through a distributed energy resource aggregator, or whether to allow each RTO/ISO to propose such a minimum or maximum capacity requirement on compliance with any final rule issued in this rulemaking proceeding. To the extent that commenters believe that the Commission should adopt a minimum or maximum capacity requirement for individual distributed energy resources participating in RTO/ISO markets through a distributed energy resource aggregator, the Commission sought comment on what that requirement should be.

b. Comments

176. Several commenters support the Commission's proposal not to establish a minimum capacity requirement for individual distributed energy resources participating in RTO/ISO markets through distributed energy resource aggregations.[447] Some commenters state that minimum or maximum capacity requirements are not necessary for individual distributed energy resources because the aggregator will interact with the wholesale market as a single resource and, as such, that aggregation will be subject to eligibility rules.[448] Fluidic, Fresh Energy/Sierra Club/Union of Concerned Scientists, and Tesla/SolarCity argue that aggregators should be allowed to optimize their portfolio with any mix of resources to ensure the most cost-effective aggregation.[449] Energy Storage Association notes that, while many behind-the-meter electric storage resources are relatively small (only a few kW in some cases), in aggregate, they can operate nearly identically to a single, much larger electric storage resource.[450]

177. Several commenters ask the Commission to defer to the RTOs/ISOs to propose and justify to the Commission any minimum and maximum capacity requirements for individual distributed energy resources participating in RTO/ISO markets through distributed energy resource aggregations.[451] EEI argues that the RTO/ISO-established requirements should be based on their individual market rules and their ability to verify the accuracy of the metering and the verification process for the resource.[452] NYISO notes that it is evaluating whether there should be a maximum size for a distributed energy resource in an aggregation in order to permit

[439] *See, e.g.,* CAISO Data Request Response (AD16–20) at 10–11; ISO–NE Data Request Response (AD16–20) at 13–14; MISO Data Request Response (AD16–20) at 10; NYISO Data Request Response (AD16–20) at 9; PJM Data Request Response (AD16–20) at 10.

[440] The Commission offered the RTOs/ISOs a similar accommodation for the minimum size requirement for electric storage resources. *See* Order No. 841, 162 FERC ¶ 61,127 at P 275.

[441] *See infra* Section IV.D (Locational Requirements).

[442] Technical Conference Transcript at 27; *see* NYISO Aggregation Order, 170 FERC ¶ 61,033.

[443] *See infra* Section IV.D (Locational Requirements).

[444] *See infra* Section IV.E (Distribution Factors and Bidding Parameters).

[445] *See infra* Section IV.D (Locational Requirements).

[446] NOPR, 157 FERC ¶ 61,121 at P 135.

[447] *See, e.g.,* APPA/NRECA Comments (16–23) at 43; Fluidic Comments (RM16–23) at 5; Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 2; ISO–NE Comments (RM16–23) at 36; NYISO Indicated Transmission Owners Comments (RM16–23) at 12.

[448] *See, e.g.,* NYISO Indicated Transmission Owners Comments (RM16–23) at 12; R Street Institute Comments (RM16–23) at 8; SEIA Comments (RM16–23) at 18; SPP Comments (RM16–23) at 16; Tesla/SolarCity Comments (RM16–23) at 27.

[449] Fluidic Comments (RM16–23) at 5, Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 2; Tesla/SolarCity Comments (RM16–23) at 27.

[450] Energy Storage Association Comments (RM16–23) at 25–26.

[451] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 51; Duke Energy Comments (RM16–23) at 5; ISO–NE Comments (RM16–23) at 36; MISO Transmission Owners Comments (RM16–23) at 20; Pacific Gas & Electric Comments (RM16–23) at 16.

[452] EEI Comments (RM16–23) at 27.

independent modeling of relatively large distributed energy resources and provide grid operators more operational awareness and control over distributed energy resources that may be needed to address system conditions.[453]

178. MISO Transmission Owners argue that capacity limits should be identified at the RTO/ISO level unless a distribution utility is impacted, in which case the distribution utility should have discretion to set its own requirements so that any minimum size requirement respects capacity limitations on a distribution circuit, whether individual or in the aggregate.[454] Similarly, APPA/NRECA assert that the Commission has no jurisdiction over facilities used for generation or local distribution and that state and local regulators are likely best equipped to address minimum or maximum capacity requirements.[455]

c. Commission Determination

179. To implement § 35.28(g)(12)(ii)(a) of the Commission's regulations, we adopt the NOPR proposal, as modified below, and will not establish a minimum or maximum capacity requirement for individual distributed energy resources to participate in RTO/ISO markets through a distributed energy resource aggregation. Although we decline to establish a specific maximum capacity requirement for individual distributed energy resources in an aggregation, we direct each RTO/ISO to propose a maximum capacity requirement for individual distributed energy resources participating in its markets through a distributed energy resource aggregation or, alternatively, to explain why such a requirement is not necessary, as discussed further below.

180. We decline to require RTOs/ISOs to adopt minimum capacity requirements for individual distributed energy resources to participate in their markets through a distributed energy resource aggregation. We agree with commenters that minimum capacity requirements for distributed energy resources to participate in an aggregation are not necessary because each individual resource will participate in the market via an aggregation, which acts as a single resource. To this end, we note that distributed energy resource aggregators, as market-interfacing entities, are responsible for meeting applicable RTO/ISO qualification and performance requirements, including minimum size requirements, and for determining how any performance penalties or deratings determined by the RTO/ISO would apply to the individual resources in an aggregation.

181. While we find that minimum capacity requirements are unnecessary, we recognize the concerns raised by EEI and NYISO with respect to each RTO's/ISO's ability to accurately model and verify the metering of larger distributed energy resources. We believe that capping the maximum capacity size of an individual distributed energy resource participating in a distributed energy resource aggregation would ensure that larger resources are required to participate individually, thereby allowing RTOs/ISOs to independently model and verify the metering of these larger resources. Independent modeling and verification may provide system operators with greater operational awareness and control to address changing system conditions. Therefore, to implement § 35.28(g)(12)(ii)(a) of the Commission's regulations, we require each RTO/ISO, in compliance with this final rule, to either propose a maximum capacity requirement for individual distributed energy resources participating in its markets through a distributed energy resource aggregation or, alternatively, to explain why such a requirement is not necessary.

6. Single Resource Aggregation

a. NOPR Proposal

182. The NOPR proposed, consistent with Order No. 719, that each RTO/ISO revise its tariff to allow a single qualifying distributed energy resource to avail itself of the proposed distributed energy resource aggregation rules by serving as its own distributed energy resource aggregator.[456]

b. Comments

183. AES Companies, NextEra, and NYISO agree with the Commission's proposal to require each RTO/ISO to revise its tariff to allow a single qualifying distributed energy resource to avail itself of the proposed distributed energy resource aggregation rules by serving as its own distributed energy resource aggregator.[457] CAISO states that, consistent with the NOPR proposal, CAISO allows a distributed energy resource provider to aggregate one or more distributed energy resources for purposes of wholesale market participation.[458]

184. Xcel Energy Services suggests that a higher minimum threshold size should be established for single distributed energy resource aggregations because a proliferation of individual aggregators could increase administrative costs.[459]

c. Commission Determination

185. To implement § 35.28(g)(12)(ii)(a) of the Commission's regulations, we adopt the NOPR proposal to require each RTO/ISO to revise its tariff to allow a single qualifying distributed energy resource to avail itself of the proposed distributed energy resource aggregation rules by serving as its own distributed energy resource aggregator.[460]

186. We decline to require a minimum size greater than 100 kW for a single qualifying distributed energy resource that serves as its own distributed energy resource aggregator, as requested by Xcel Energy Services. We find that such a requirement is unnecessary at this time as the 100 kW minimum size requirement is a commonly used resource size that should not overburden RTO/ISO modeling software even if many individual resources choose to participate as such single distributed energy resource aggregations. In addition, a consistent minimum size requirement for aggregations of both single and multiple distributed energy resources will minimize barriers in the event that an individual distributed energy resource ceases to participate in a multi-resource aggregation and subsequently seeks to participate in RTO/ISO markets as a single qualifying distributed energy resource aggregation. As discussed above in Section IV.C.5, a single distributed energy resource aggregation would need to comply with all of the applicable RTO's/ISO's requirements, including any minimum or maximum capacity requirements for individual distributed energy resources.[461] We clarify that, like other distributed energy resources seeking to participate in RTO/ISO markets exclusively through a distributed energy resource aggregation, we will not exercise jurisdiction over the interconnection to a distribution facility of a distributed energy resource for the purpose of participating in RTO/ISO markets exclusively through a single-

[453] NYISO Comments (RM16–23) at 15. The Commission accepted NYISO's proposal to limit the size of resources in an aggregation to 20 MW or less. NYISO Aggregation Order, 170 FERC ¶ 61,033 at P 9.

[454] MISO Transmission Owners Comments (RM16–23) at 20.

[455] APPA/NRECA Comments (RM16–23) at 43.

[456] NOPR, 157 FERC ¶ 61,121 at P 137 (citing Order No. 719, 125 FERC ¶ 61,071 at P 158(d)).

[457] AES Companies Comments (RM16–23) at 39; NextEra Comments (RM16–23) at 14; NYISO Comments (RM16–23) at 16.

[458] CAISO Comments (RM16–23) at 26.

[459] Xcel Energy Services Comments (RM16–23) at 24.

[460] *See supra* P 118 n.280.

[461] *See supra* Section IV.C.5 (Minimum and Maximum Capacity Requirements).

resource aggregation. We also clarify that a single qualifying distributed energy resource that serves as its own aggregator would also be subject to any requirements applicable to distributed energy resource aggregators.

D. Locational Requirements

a. NOPR Proposal

187. In the NOPR, the Commission stated that it was concerned that some existing requirements for aggregations to be located behind a single point of interconnection or pricing node may be overly stringent and may unnecessarily restrict opportunities for distributed energy resources to participate in the RTO/ISO markets through a distributed energy resource aggregator.[462] The Commission noted that recent improvements in metering, telemetry, and communication technology should facilitate better situational awareness and enable management of geographically dispersed distributed energy resource aggregations, potentially rendering such restrictive locational requirements unnecessary.

188. Thus, the Commission proposed to require each RTO/ISO to revise its tariff to establish locational requirements for distributed energy resources to participate in a distributed energy resource aggregation that are as geographically broad as technically feasible.[463] The Commission stated that this proposal would give each RTO/ISO flexibility to adopt locational requirements that both allow for the participation of geographically dispersed distributed energy resources in the RTO/ISO markets through a distributed energy resource aggregation, where technically feasible, and also account for the modeling and dispatch of the RTO's/ISO's transmission system. The Commission further acknowledged that the appropriate locational requirements may differ based on the services that a distributed energy resource aggregator seeks to provide (*e.g.,* the locational requirements for participation in the day-ahead energy market may differ from those for participation in ancillary service markets).

189. To the extent that commenters would prefer that the Commission require the RTOs/ISOs to adopt consistent locational requirements, the Commission sought comment on what locational requirements it could require each RTO/ISO to adopt that would allow distributed energy resources to be aggregated as widely as possible without threatening the reliability of the transmission grid or the efficiency of RTO/ISO markets.[464] The Commission noted that, in some RTOs/ISOs and for some services, the only geographic limitations imposed on distributed energy resource aggregations are by zone or due to modeled transmission constraints.[465] The Commission also sought comment on potential concerns about dispatch, pricing, or settlement that the RTOs/ISOs must address if the distributed energy resources in a particular distributed energy resource aggregation are not limited to the same pricing node or behind the same point of interconnection.[466]

190. At the April 2018 technical conference, the Commission sought comment on how to establish locational requirements for distributed energy resource aggregations that are as broad as technically feasible.[467] After the technical conference, the Commission sought further comment on how RTOs/ISOs can accurately represent distributed energy resources in each node within a multi-node aggregation.[468]

b. Comments

191. Several commenters support the Commission's proposal to require distributed energy resource aggregations that are as geographically broad as technically feasible and cite numerous benefits of broad aggregation.[469] IRC states that this proposal strikes the appropriate balance between accommodating smaller distributed energy resources and providing the necessary flexibility to RTOs/ISOs.[470] Advanced Energy Economy contends that aggregation across a broad geographic area is fundamental to the distributed energy resource business model.[471] Advanced Energy Management contends that the larger the aggregation, the lower the chance of underperformance.[472] Several commenters support multi-node aggregation, stating that it will improve market entry and overall competitive benefits.[473] Others assert that multi-node aggregation will improve the services that distributed energy resource aggregations can provide, enhancing grid resilience and reliability.[474]

192. Several commenters highlight examples of current RTO/ISO activities supporting broad geographic aggregation. Advanced Energy Economy states that PJM and NYISO have allowed aggregation at a broad level for behind-the-meter resources.[475] Several commenters note that CAISO allows aggregation across nodes by permitting an aggregator to submit distribution factors.[476] Advanced Energy Management highlights that ISO–NE allows aggregation at the dispatch zone level, stating that this suggests that it is technically feasible to aggregate behind-the-meter resources to that level even for energy and ancillary services participation.[477]

193. Multiple commenters also articulate concerns regarding limiting distributed energy resource aggregations to a single node.[478] Advanced Energy Economy and Advanced Energy Management contend that aggregation limited to the nodal level will not meet the ''geographically broad as technically feasible'' standard, and Advanced Energy Management asks the Commission to clarify that it does not.[479] Advanced Energy Economy and CAISO further caution against the economic effects of single-node aggregation, stating that it would erode

[462] NOPR, 157 FERC ¶ 61,121 at P 138.

[463] *Id.* P 139.

[464] *Id.* P 140.

[465] *Id.* n.233 (citing CAISO and NYISO tariff provisions).

[466] *Id.* P 141. The Commission noted that its proposal to allow the relevant distribution utility or utilities to review the list of distributed energy resources in a distributed energy resource aggregation would help ensure that dispatch of the aggregated distributed energy resources as a single resource will not cause any reliability concerns.

[467] Supplemental Notice of Technical Conference at 2–3.

[468] Notice Inviting Post-Technical Conference Comments at 2–3.

[469] *See, e.g.,* Advanced Energy Management Comments (RM16–23) at 24; DER/Storage Developers Comments (RM16–23) at 4; Efficient Holdings Comments (RM16–23) at 17–18; IRC Comments (RM16–23) at 8; NRG Comments (RM16–23) at 10–11.

[470] IRC Comments (RM16–23) at 8.

[471] Advanced Energy Economy Comments (RM16–23) at 45.

[472] Advanced Energy Management Comments (RM16–23) at 24.

[473] *See, e.g.,* Advanced Energy Buyers Comments (2018 RM18–9) at 7; CAISO Comments (2018 RM18–9) at 10–11; EPRI Comments (2018 RM18–9) at 6; NRG Comments (2018 RM18–9) at 4–5; SEIA Comments (2018 RM18–9) at 14.

[474] Advanced Energy Management Comments (2018 RM18–9) at 5; Direct Energy Comments (2018 RM18–9) at 2–3; Lorenzo Kristov Comments (2018 RM18–9) at 14; SEIA Comments (2018 RM18–9) at 14.

[475] Advanced Energy Economy Comments (RM16–23) at 45.

[476] *Id.;* DER/Storage Developers Comments (RM16–23) at 4; Tesla/SolarCity Comments (RM16–23) at 28. CAISO uses load distribution factors to reflect the relative amount of load at each node. The sum of all load distribution factors for a single aggregation is one. *See* CAISO Tariff, Appendix A.

[477] Advanced Energy Management Comments (RM16–23) at 25.

[478] *See, e.g.,* AES Companies Comments (RM16–23) at 36; Efficient Holdings Comments (RM16–23) at 18; Public Interest Organizations Comments (RM16–23) at 24; R Street Institute Comments (RM16–23) at 9; Sunrun Comments (2018 RM18–9) at 14.

[479] Advanced Energy Economy Comments (RM16–23) at 46–47; Advanced Energy Management Comments (RM16–23) at 24.

the economics of aggregating distributed energy resources and create a barrier to their wholesale market participation.[480]

194. Several commenters state that, at the technical conference, CAISO and PJM described workable approaches to mitigate any reliability concerns and to achieve proper price formation for multi-node aggregations of distributed energy resources.[481] Other commenters point to approaches used elsewhere, such as multi-node aggregations of demand response resources in other regions.[482] Organization of MISO States comments that, in MISO, multi-node aggregation is allowed for purposes of capacity accreditation, but only for a limited set of resource types.[483]

195. Other commenters further express support for the feasibility of dispatching and settling distributed energy resource aggregations across multiple nodes. For instance, PJM explains that it already dispatches demand response resources across varying levels of geographic areas, including across different pricing nodes, which could be used as a foundation for developing similar rules to dispatch distributed energy resources injecting past the applicable retail meter.[484] Xcel Energy Services states that it is not concerned with aggregations across multiple nodes if the region has accurate topology models, volumetric weightings, and billing/settlement metering at each location (and penalties are assessed at the individual resource level to disincentivize gaming, manipulation, and price formation errors).[485] Avangrid contends that provisions that would allow ''settlement-only'' generation treatment for aggregated distributed energy resources would allow aggregation of these resources on a broader load zone basis for energy market settlement.[486]

196. Some commenters address the relationship between the minimum and maximum size requirement for distributed energy resource aggregations and the locational requirements for them. Eversource and other commenters state that limiting the maximum size of a distributed energy resource aggregation can also mitigate any negative operational impacts of geographically broad aggregations.[487] Tesla/Solar City state that a minimum size requirement of 100 kW would allow the reasonable development of aggregations within any locational requirement established for distributed energy resource aggregations.[488] In their comments in response to the Notice Inviting Post-Technical Conference Comments, multiple commenters agree that reducing the minimum size requirement for distributed energy resource aggregations to 100 kW may alleviate concerns about requiring aggregations to be located at a single node.[489] Organization of MISO States observes that lowering the minimum size requirement for distributed energy resource aggregations would decrease the need for broad aggregation across Local Balancing Authorities and that this could also reduce the size of resources, which inherently lowers any related reliability risk to the system.[490] Lorenzo Kristov states that single-node distributed energy resource aggregations that meet the minimum size threshold would be useful resources for the wholesale market, so the question is whether the additional complexity of multi-node distributed energy resource aggregations has commensurate benefits.[491] SEIA states that it supports a 100 kW minimize size limit, but does not support limiting aggregations to single pricing nodes.[492]

197. Other commenters, however, recommend that the Commission restrict aggregation to one pricing node or interconnection point.[493] Some commenters are concerned that a geographically broad locational requirement could have potential reliability impacts on the distribution system or the bulk electric system.[494] For instance, several RTOs/ISOs, including those that support multi-node aggregations, express concerns related to managing the aggravation of transmission constraints and resulting pricing and operational implications in real time if aggregated resources were to span both sides of a constraint.[495] PJM Market Monitor states that the potential addition of more distributed energy resources means they should be aggregated at a single node to allow operators to have visibility and control.[496] PJM Market Monitor asserts that it is impossible to ensure that dispatch of a multi-node aggregation of distributed energy resources does not exacerbate a transmission constraint in a nodal system.[497]

198. NYISO Indicated Transmission Owners argue that aggregations spanning more than one transmission zone could present both administrative and operational difficulties for the RTO/ISO and the distribution utility and that aggregations should be limited to a single transmission node unless price separation does not exist.[498] EPSA and the PJM Market Monitor argue that because all the RTOs/ISOs rely on nodal security constrained economic dispatch, it is appropriate for a generic rule to limit aggregations to a single node to ensure that the markets continue to be

[480] Advanced Energy Economy Comments (2018 RM18–9) at 22; CAISO Comments (2018 RM18–9) at 10–11.

[481] Advanced Energy Economy Comments (2018 RM18–9) at 22; Advanced Energy Management Comments (2018 RM18–9) at 5–6; Direct Energy Comments (2018 RM18–9) at 6 (citing Technical Conference Transcript at 17, 18, 53); Sunrun Comments (2018 RM18–9) at 14.

[482] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 22; Advanced Energy Management Comments (2018 RM18–9) at 6 (citing ISO–NE Comments, Docket No. AD16–20–000 (filed Feb. 13, 2017) (''ISO–NE explains that, for the capacity market, demand resources may consist of an aggregation of multiple end-use customers, though they must be at least 100 kW and located within a dispatch zone or load zone as required under the participation model through which they are participating. ISO–NE further explains that for the energy and reserve markets, demand response resources may also be aggregated as long as they are individually at least 10 kW, have an expected maximum interruptible capacity of 5 MW or less, and are located within a dispatch zone and reserve zone.'')); CAISO Comments (2018 RM18–9) at 10, 12–13; Lorenzo Kristov Comments (2018 RM18–9) at 14; PJM Market Monitor Comments (2018 RM18–9) at 7–8.

[483] Organization of MISO States Comments (2018 RM18–9) at 2 (citing Midcontinent Independent System Operator, Open Access Transmission, Energy, and Operating Reserve Markets Tariff, Module E–1, Section 69A.3.5).

[484] PJM Comments (RM16–23) at 28.

[485] Xcel Energy Services Comments (RM16–23) at 25.

[486] Avangrid Comments (RM16–23) at 12.

[487] Advanced Energy Economy Comments (2018 RM18–9) at 22 (citing Technical Conference Transcript, Comments of Andrew Levitt, Senior Market Strategist, PJM Interconnection, L.L.C., at p. 20, lines 2–8, and P 49, lines 21–24 (noting the ability of economic dispatch engines to manage any constraints that may be caused by dispatching individual resources within an aggregation)); CAISO Comments (2018 RM18–9) at 5; Eversource Comments (2018 RM18–9) at 13; PJM Comments (2018 RM18–9) at 5, 11–12; SEIA Comments (2018 RM18–9) at 14.

[488] Tesla/SolarCity Comments (RM16–23) at 26.

[489] *See, e.g.,* EPRI Comments (2018 RM18–9) at 7–8; Lorenzo Kristov Comments (2018 RM18–9) at 14; Organization of MISO States Comments (2018 RM18–9) at 2; PJM Comments (2018 RM18–9) at 12.

[490] Organization of MISO States Comments (2018 RM18–9) at 2.

[491] Lorenzo Kristov Comments (2018 RM18–9) at 14.

[492] SEIA Comments (2018 RM18–9) at 14.

[493] ISO–NE Comments (RM16–23) at 37–40; NYISO Comments (RM16–23) at 17; NYISO Indicated Transmission Owners Comments (RM16–23) at 13–14; PJM Market Monitor Comments (RM16–23) at 13.

[494] *See, e.g.,* American Petroleum Institute Comments (RM16–23) at 10–11; Duke Energy Comments (RM16–23) at 3, 5–6; EEI Comments (RM16–23) at 28–29; Institute for Policy Integrity Comments (RM16–23) at 9; Pacific Gas & Electric Comments (RM16–23) at 18–19.

[495] *See, e.g.,* CAISO Comments (RM16–23) at 27; ISO–NE Comments (RM16–23) at 37; MISO Comments (RM16–23) at 21–22; NYISO Comments (2018 RM18–9) at 6, 16; SPP Comments (RM16–23) at 17–19.

[496] PJM Market Monitor Comments (2018 RM18–9) at 12.

[497] *Id.* at 4.

[498] NYISO Indicated Transmission Owners Comments (RM16–23) at 13–14.

efficient and competitive.[499] EPRI states that aggregations at single nodes would generally be the most beneficial for the distributed energy resources financially, for the RTOs/ISOs with respect to reliability, and for consumers economically.[500] NYISO states that single-node aggregation allows NYISO to telemeter only the aggregation rather than each individual resource within the aggregation, reducing the cost of participation and better allowing smaller resources to participate in the NYISO markets.[501]

199. Commenters also address the dynamic nature of managing multi-node aggregations of distributed energy resources—such as the challenges that come from frequent changes in congestion patterns and system topology.[502] Several commenters express concerns that a geographically broad locational requirement for distributed energy resource aggregations could disrupt nodal pricing methods and result in different treatment of resources located at a single node (*i.e.,* among multi-node distributed energy resource aggregations and generators).[503] Calpine states that it may be possible to revisit procedures for multi-node aggregation of distributed energy resources as the system topology changes due to congestion, but that rules associated with locational requirements may not provide the flexibility necessary for the RTOs/ISOs to manage dynamic grid conditions in real time.[504]

200. With respect to whether the Commission should require the RTOs/ISOs to adopt consistent locational requirements for distributed energy resource aggregations, commenters provide varied recommendations. Tesla/SolarCity recommend that the Commission establish consistent locational requirements across the RTOs/ISOs, similar to CAISO's Distributed Energy Resource Provider framework.[505] Mensah supports locational requirements by distribution utility zones or defined sub-zones, while noting locational requirements may vary across RTOs/ISOs.[506] Mensah asserts that locational requirements should be consistent for all wholesale market services within an individual RTO/ISO in order to avoid unnecessary complications.

201. Other commenters suggest that the RTOs/ISOs should have flexibility to determine the locational requirements appropriate for their region. Noting CAISO's approach to distributed energy resource aggregation within ''sub-zones,'' ISO–NE's approach to self-scheduling distributed energy resources, and the PJM Market Monitor's desire for nodal aggregations, MISO argues that the Commission should allow each RTO/ISO to establish tailored approaches based on its regional needs.[507] Similarly, Calpine and SoCal Edison assert that the Commission should allow regional variations.[508] PJM asserts that the Commission should require RTOs/ISOs to adopt measures necessary to ensure control of congestion, but should allow flexibility to tailor those measures for individual systems.[509]

202. Other commenters, including AES Companies and MISO Transmission Owners, argue for regional flexibility but recommend that other entities besides the RTOs/ISOs, such as affected balancing authorities, distribution utilities, states, and non-regulated distribution cooperatives, determine the locational requirements.[510]

203. Several of the commenters that support the Commission adopting rules for multi-node aggregations suggest that the RTOs/ISOs could be permitted to present evidence in their compliance filings demonstrating that limiting aggregations is necessary for reliability reasons.[511] Direct Energy and NRG argue that any limits or boundaries on aggregations of distributed energy resources must be supported by a transparent, comprehensive, and data-driven regional analysis, and that a distributed energy resource's participation should only be precluded if its participation would undermine reliability.[512]

c. Commission Determination

204. We adopt the NOPR proposal and add § 35.28(g)(12)(ii)(b) to the Commission's regulations to require each RTO/ISO to revise its tariff to establish locational requirements for distributed energy resources to participate in a distributed energy resource aggregation that are as geographically broad as technically feasible. However, given the variety of approaches to locational requirements proposed by commenters, we will provide each RTO/ISO with flexibility to determine the locational requirements for its region, as long as it demonstrates that those requirements are as geographically broad as technically feasible. To the extent that an RTO/ISO seeks to continue its currently effective locational requirements for distributed energy resources, it must demonstrate on compliance that its approach meets this requirement. To comply with this rule, each RTO/ISO must provide a detailed, technical explanation for the geographical scope of its proposed locational requirements. This explanation could include, for example, a discussion of the RTO/ISO's system topology and regional congestion patterns, or any other factors that necessitate its proposed locational requirements.

205. We recognize the arguments for both multi-node and single-node aggregations. There are several benefits of multi-node aggregations, such as improved market entry and competition, lower chance of underperformance, and improved services that aggregations can provide. However, single-node aggregations may reduce the cost of participation for smaller resources by telemetering the aggregation rather than each individual resource and allows RTOs/ISOs to better manage intra-zonal price congestion. Additionally, as discussed above, the reduction of the minimum size requirement for distributed energy resource aggregations will help alleviate commenters' concerns about requiring aggregations to locate only at a single node.[513]

206. We are persuaded by comments that identify the various benefits of multi-node distributed energy resource

[499] EPSA Comments (2018 RM18–9) at 8–9; PJM Market Monitor Comments (2018 RM18–9) at 2–3.

[500] EPRI Comments (2018 RM18–9) at 6.

[501] NYISO Comments (2018 RM18–9) at 6, 8.

[502] CAISO Comments (2018 RM18–9) at 5–6; EPRI Comments (2018 RM18–9) at 3–4; MISO Comments (2018 RM18–9) at 18; NYISO Comments (2018 RM18–9) at 6; PJM Market Monitor Comments (2018 RM18–9) at 3.

[503] *See, e.g.,* American Petroleum Institute Comments (RM16–23) at 10–11; EEI Comments (RM16–23) at 28–30; ISO–NE Comments (RM16–23) at 37–40; NYISO Indicated Transmission Owners at 16–17; PJM Market Monitor Comments (RM16–23) at 13.

[504] Calpine Comments (2018 RM18–9) at 4–5 (citing comments of Dr. Joseph Bowring, Technical Conference Transcript at 37; comments of Jeff Bladen, Technical Conference Transcript at 36).

[505] Tesla/SolarCity Comments (RM16–23) at 27.

[506] Mensah Comments (RM16–23) at 3.

[507] MISO Comments (2018 RM18–9) at 20 (citing Technical Conference Transcript at 9–11, 14–15, 20–23).

[508] Calpine Comments (2018 RM18–9) at 5–6; SoCal Edison Comments (2018 RM18–9) at 3.

[509] PJM Comments (2018 RM18–9) at 6–7.

[510] AES Companies Comments (RM16–23) at 10, 34; MISO Transmission Owners Comments (RM16–23) at 21.

[511] Advanced Energy Economy Comments (2018 RM18–9) at 22–23; Advanced Energy Management Comments (2018 RM18–9) at 6; Direct Energy Comments (2018 RM18–9) at 3–4 (describing examples of distributed energy resource aggregations being operated in Belgium, France and Australia); NRG Comments (2018 RM18–9) at 5.

[512] Direct Energy Comments (2018 RM18–9) at 4–5, 6–7 (citing Technical Conference Transcript at 9, 34).

[513] *See supra* Section IV.C.4 (Minimum and Maximum Size of Aggregation).

aggregations. In particular, we are persuaded by CAISO's arguments that multi-node aggregations allow for greater market participation by reducing transaction costs and assembling appropriately sized resources optimized for the wholesale electricity markets, and by PJM's assertion that it already dispatches demand response resources across different pricing nodes.[514] We believe that the challenges of managing a multi-node aggregation—especially around a transmission constraint—can be overcome through coordination between RTOs/ISOs, aggregators, and distribution system operators. However, we also recognize that existing differences—both operational and administrative—among RTOs/ISOs make such a uniform requirement challenging. Those differences are relevant here because some RTOs/ISOs already aggregate resources in a different manner, dynamic changes in system topology and congestion patterns vary across each RTO/ISO, and each RTO/ISO may have different solutions addressing reliability impacts on their respective systems. Accordingly, while each RTO/ISO must provide a detailed, technical explanation for the geographical scope of its proposed locational requirements, this final rule provides RTOs/ISOs with a certain degree of flexibility as to the technical aspects of a locational requirement that is as geographically broad as possible.

207. As to arguments regarding the relative merits of single node and multi-node aggregations, we find that providing RTOs/ISOs with the flexibility to establish their own locational requirements on compliance that are as geographically broad as technically feasible will allow such arguments to be considered in the stakeholder process and in each RTO/ISO-specific compliance proceeding. We also are not persuaded by Mensah's and Tesla/SolarCity's arguments for consistent locational requirements either across the RTOs/ISOs or for all wholesale market services within an individual RTO/ISO. We find that there is no need to standardize the locational requirements and therefore instead provide the RTOs/ISOs the flexibility to develop more tailored approaches based on their regional needs. In addition, we are not persuaded by AES Companies' and MISO Transmission Owners' arguments that entities other than the RTO/ISO should determine the locational requirements of distributed energy resources. We find that RTOs/ISOs have the primary responsibility of administering the regional markets and reliably operating the system, and are therefore in the best position to propose on compliance the appropriate locational requirements, as long as they demonstrate that those requirements are as geographically broad as technically feasible, to enable distributed energy resources to participate in a distributed energy resource aggregation for their regions.

E. Distribution Factors and Bidding Parameters

a. NOPR Proposal

208. In the NOPR, the Commission proposed to require each RTO/ISO to revise its tariff to include the requirement that distributed energy resource aggregators (1) provide default distribution factors [515] when they register their distributed energy resource aggregation; and (2) update those distribution factors if necessary when they submit offers to sell or bids to buy into the RTO/ISO markets.[516] The Commission also proposed to require each RTO/ISO to revise the bidding parameters for each participation model in its tariff to allow distributed energy resource aggregators to update their distribution factors when participating in RTO/ISO markets. The Commission sought comment on this proposal as well as comment on alternative approaches that may provide the RTOs/ISOs with the information from geographically or electrically dispersed resources in a distributed energy resource aggregation necessary to reliably operate their systems. The Commission also sought comment on whether bidding parameters in addition to those already incorporated into existing participation models may be necessary to adequately characterize the physical or operational characteristics of distributed energy resource aggregations.

209. After the April 2018 technical conference, the Commission sought additional information about bidding parameters or other potential mechanisms needed to represent the physical and operational characteristics of distributed energy resource aggregations in RTO/ISO markets.[517]

b. Comments

210. A number of commenters support the Commission's proposed requirement for distributed energy resource aggregators to provide default distribution factors to the RTO/ISO when registering distributed energy resource aggregations and to update those distribution factors as necessary.[518] Tesla/SolarCity states that this method strikes the proper balance between providing flexibility and market access to distributed energy resource aggregators while providing sufficient information to RTOs/ISOs about the locations of the individual distributed energy resources and how dispatching them will affect the system.[519] DER/Storage Developers assert that distribution factors would provide the RTO/ISO with sufficient information to maintain reliability without requiring unnecessary information about individual distributed energy resources.[520]

211. CAISO generally supports the Commission's proposal and notes that its Distributed Energy Resource Provider model rules require an aggregator to submit generation distribution factors with its bid.[521] CAISO states that multi-node aggregations require distribution factors to model the impact of the resource on the transmission system and that allowing resources to update distribution factors in the bid submission process mitigates the potential for inaccuracies. If an aggregator does not submit distribution factors with its bid, CAISO states that it uses the aggregation's default generation distribution factors registered in CAISO's Master File for a reasonable expectation of how the resource will perform across applicable pricing nodes.[522] CAISO notes that using distribution factors to schedule load is an acceptable and feasible practice despite inherent inaccuracies.[523] Microgrid Resources Coalition notes that CAISO's Distributed Energy Resource Provider model permits participation in aggregations of separately metered resources independent of the various attributes of the other loads and resources behind the meter and that the critical feature of this arrangement is the ability to define the limits of participation so that the aggregator and the system operator can dispatch the aggregation within those

[514] *See* CAISO Comments (2018 RM18–9) at 10; PJM Comments (RM16–23) at 28.

[515] Distribution factors indicate how much of the total response from a distributed energy resource aggregation would be coming from each node at which one or more resources participating in the aggregation are located.

[516] NOPR, 157 FERC ¶ 61,121 at P 143.

[517] Notice Inviting Post-Technical Conference Comments at 4–5.

[518] *See, e.g.,* CAISO Comments (RM16–23) at 30; DER/Storage Developers Comments (RM16–23) at 4; NextEra Comments (RM16–23) at 15; SEIA Comments (RM16–23) at 19; Xcel Energy Services Comments (RM16–23) at 25.

[519] Tesla/SolarCity Comments (RM16–23) at 28.

[520] DER/Storage Developers Comments (RM16–23) at 4.

[521] CAISO Comments (2018 RM18–9) at 11.

[522] CAISO Comments (RM16–23) at 30–31.

[523] CAISO Comments (2018 RM18–9) at 11.

limits.[524] Lorenzo Kristov also notes that the CAISO Distributed Energy Resource Provider structure enables multi-node aggregations using both default and biddable distribution factors.[525] Lorenzo Kristov states, however, that these provisions have not yet been practically tested by a non-demand-response resource. Conversely, NYISO states that it does not need distribution factors to dispatch distributed energy resource aggregations accurately because it intends to limit distributed energy resource aggregations to resources at a single transmission node.[526]

212. Other RTOs/ISOs assert that implementing the Commission's proposal may be technically difficult. SPP states that implementing distribution factors in the software is not trivial.[527] MISO states that it currently updates the distribution factors daily and that updating more frequently may result in a significantly large amount of data exchange and processing in the market system.[528]

213. Several RTOs/ISOs also describe the limitations of distribution factor requirements. SPP notes that distribution factors provide the reliability coordinator with the distribution of the resources in the aggregation, but those factors do not guarantee that the resources in the aggregation will move pro-rata. SPP asserts that the uncertainty in the aggregate response may cause a reliability issue by introducing uncertainty in its effective dispatch to resolve constraints. SPP adds that the economics and pricing of the aggregate may not reflect the actual response on the sub-aggregate level.[529] Similarly, ISO–NE also argues that distribution factors may vary based on the actual level of dispatch of the aggregate, for example, there could be a large difference between distribution factors based upon the maximum MW output and the minimum MW output of an aggregation.[530] Pacific Gas & Electric suggests that, because the distribution factors will impact settlements and congestion, distributed energy resource aggregations should use an outage management-like system to report if real-time distribution factors differ from those that are used for the market award.[531]

214. Some commenters assert that the Commission should not impose the distribution factor requirements in all regions. NYISO Indicated Transmission Owners state that the application of distribution factors may not be the optimal approach for dispatching resources within an aggregation in all systems, especially if it leads to dispatching resources on either side of a single constraint.[532] NYISO Indicated Transmission Owners argue that the Commission should require RTOs/ISOs to develop solutions that are regionally appropriate and that promote efficient dispatch of resources with effective resolution of constraints on both the transmission and distribution systems.

215. Similarly, ISO–NE asks the Commission to allow each RTO/ISO to develop an approach that works well in light of each region's particular network configuration, infrastructure, and existing operational processes.[533] ISO–NE explains that, rather than providing distribution factors, an aggregator could, for example, report the expected MW capability at each node, or that size limits for being dispatchable in the markets could be lowered, reducing the need to aggregate across multiple nodes to participate.[534] ISO–NE states that, for a mesh network such as most of New England, using distribution factors as the basis for dispatch is problematic.[535] ISO–NE explains that a participant would be unable to predict the changing power flows to multiple connected nodes without possessing the same detailed knowledge of grid configuration used by ISO–NE and the distribution utilities in real-time operations. As a result, ISO–NE contends that any stated distribution factors could bear little relation to real-time operations.

216. ISO–NE contends that, in scenarios where the distribution system is not radial to the transmission system, a single resource located in the distribution network may have sensitivities to multiple nodes in the transmission system.[536] ISO–NE argues that it is not reasonable for an aggregator to try to submit distribution factors for each node as they would not have visibility to these sensitivities. ISO–NE notes that it has addressed this problem with Asset-Related Demand by only supporting aggregations of Asset-Related Demand that have similar sensitivities to each node, so that an aggregated node can be modeled to reflect the impacts to the system of the Asset-Related Demand for which the Asset-Related Demand has a 100% distribution factor. ISO–NE states that this approach may or may not be appropriate for distributed energy resource aggregations and would require further evaluation and coordination with the distribution utilities.[537]

217. In response to the Commission's request for comment on whether bidding parameters in addition to those already incorporated into existing participation models may be necessary to adequately characterize the physical or operational characteristics of distributed energy resource aggregations, some commenters argue that RTOs/ISOs should be allowed to require additional bidding parameters for distributed energy resource aggregations to reliably operate the bulk power system and accurately reflect resources in the wholesale markets.[538] Stem suggests that bidding parameters in current RTO/ISO rules assume that a resource's physical attributes, such as ramp rate or maximum charge limit, are fixed values and that the resource is dispatchable to those levels at all times, which will need to change.[539] Stem argues that behind-the-meter resources should be able to elect to be out of the market at certain times, as long as their existing service obligations are met.[540] PJM Market Monitor asserts that, as long as distributed energy resources are priced and dispatched locationally, the existing offer parameters should address the characteristics of the resources.[541] Dominion argues that distributed energy resource aggregators should be allowed to communicate distributed energy resource aggregations' operating limitations to the RTO/ISO and control their dispatch to the same extent as other resources.[542] Dominion adds that certain distributed energy resources, such as solar generators, should also have the option to only be curtailed for reliability concerns.

218. NYISO Indicated Transmission Owners assert that distributed energy resource aggregations participating in capacity markets should bid a capacity value that reflects the aggregation's

[524] Microgrid Resources Coalition (2018 RM18–9) at 9.

[525] Lorenzo Kristov Comments (2018 RM18–9) at 14.

[526] NYISO Comments (RM16–23) at 17. The Commission accepted NYISO's tariff provisions related to aggregations, which require that facilities within an aggregation are electrically connected to the same transmission node. NYISO Aggregation Order, 170 FERC ¶ 61,033 at PP 6, 11.

[527] SPP Comments (RM16–23) at 19.

[528] MISO Comments (RM16–23) at 23.

[529] SPP Comments (RM16–23) at 19–20.

[530] ISO–NE Comments (RM16–23) at 42–43.

[531] Pacific Gas & Electric Comments (RM16–23) at 19.

[532] NYISO Indicated Transmission Owners Comments (RM16–23) at 20.

[533] ISO–NE Comments (RM16–23) at 41.

[534] *Id.* at 45.

[535] *Id.* at 42.

[536] *Id.* at 44.

[537] *Id.* at 44–45.

[538] Dominion Comments (RM16–23) at 11; NYISO Comments (RM16–23) at 17.

[539] Stem Comments (RM16–23) at 15, 16.

[540] *Id.* at 16.

[541] PJM Market Monitor Comments (2018 RM18–9) at 5.

[542] Dominion Comments (RM16–23) at 11.

value in satisfying the peak period resource adequacy requirements.[543] NYISO Indicated Transmission Owners state that the capacity value for distributed energy resource aggregations should take into account various factors, such as variability of the aggregation, extent to which the distributed energy resource aggregation is energy limited, and composition of technologies that comprise the aggregation, but underscores that solutions should be addressed during implementation in each RTO's/ISO's stakeholder process to ensure regional variations are accommodated.[544]

219. MISO states that it needs more time to further investigate and better understand the potential need for additional bidding parameters for distributed energy resource aggregations.[545] MISO asserts that such parameters will likely be needed to the extent a distributed energy resource may involve an aggregation of electric storage resources and if the RTO/ISO is expected to manage their state of charge. MISO explains that, as an example, distributed energy resource aggregations might need to provide information describing sub-aggregations for MISO to address security constraints associated with separate distribution networks or separate nodes within a distribution network.[546]

220. Advanced Microgrid Solutions asserts that RTOs/ISOs must have separate rules regarding attributes, bidding parameters, and dispatch in order to recognize the multiple uses for behind-the-meter electric storage resources.[547] Advanced Microgrid Solutions further explains that some requirements relevant to a single-site resource are irrelevant for an aggregation.[548] For instance, Advanced Microgrid Solutions states that an aggregation of behind-the-meter resources does not have an equivalent to a state of charge for a single-site distributed energy resource to be used as a bidding parameter for a fleet of aggregated distributed energy resources and, instead, the aggregator must bid based on calculated availability and should be penalized if the fleet does not perform as bid. Furthermore, Microgrid Resources Coalition asserts that microgrids can also provide wholesale services with suitable metering and controls but that their participation is frequently restricted.[549] Microgrid Resources Coalition argues that it is important that the resource be able to define the limits of participation within the aggregation, so that it can be dispatched within its own limits, noting that an aggregation would be subject to penalties if it cannot comply.

221. EPRI states that an injection of energy from a resource on the distribution system usually results in reduced losses as compared to the same injection on the transmission bus.[550] EPRI argues that this reduction of losses is one of the substantial values that distributed energy resources can provide and that this value should be reflected in marginal prices at distributed energy resource locations.[551] EPRI states that the RTO/ISO may not be able to calculate the value without information on the distribution system, so this value may need to be included as a bidding parameter, which may require verification by the distribution utility.

222. Several RTOs/ISOs do not believe that the Commission should mandate additional universal bidding parameters. SPP believes that each RTO/ISO should have the discretion to develop bidding parameters that reflect their unique needs relative to their individual software and applications.[552] CAISO notes that its existing market participation models available to distributed energy resource aggregations provide the means to account for the physical and operational characteristics of an aggregation and argues that no universal bidding parameters need to be established.[553]

223. Duke Energy argues that any RTO/ISO bidding parameters must treat all resources comparably and not favor certain new technologies or resources over others.[554] NRG contends that, for aggregations, bidding parameters should generally match the appropriate participation model. For example, NRG states generation bidding parameters should apply to aggregations composed strictly of distributed generators, and demand response bidding parameters should apply to aggregations containing only load resources with no ability to net inject into the system.[555] NRG notes that the bidding parameters for bi-directional resources should be general enough to encompass requirements of distributed energy resource aggregators as well as storage-only resources.

224. EPRI states that distribution factors are the primary unique parameter, noting that they may need to be allowed to vary dynamically in order for values to be as accurate as possible.[556] EPRI also suggests that the value of marginal distribution losses on the distribution system is unique and may help the RTO/ISO determine economically efficient resources.

c. Commission Determination

225. In this final rule, we adopt the NOPR proposal, as modified below, and add § 35.28(g)(12)(ii)(c) to the Commission's regulations to require each RTO/ISO to establish market rules that address distribution factors and bidding parameters for distributed energy resource aggregations. Specifically, we require each RTO/ISO that allows multi-node aggregations to revise its tariff to (1) require that distributed energy resource aggregators give to the RTO/ISO the total distributed energy resource aggregation response that would be provided from each pricing node, where applicable, when they initially register their aggregation and to update these distribution factors if they change; [557] and (2) incorporate appropriate bidding parameters into its participation models as necessary to account for the physical and operational characteristics of distributed energy resource aggregations.[558]

226. As the Commission explained in the NOPR, RTOs/ISOs need to know which resources in a distributed energy resource aggregation will be responding to their dispatch signals and where those resources are located.[559] As the Commission also explained in the NOPR, this information is particularly important if the resources in a distributed energy resource aggregation are located across multiple points of interconnection, multiple transmission or distribution lines, or multiple nodes on the grid.

227. Additionally, we agree with commenters that some bidding parameters for existing participation models may not accommodate the

[543] NYISO Indicated Transmission Owners Comments (RM16–23) at 11.

[544] *Id.* at 11–12.

[545] MISO Comments (RM16–23) at 23.

[546] *Id.* at 23–24.

[547] Advanced Microgrid Solutions Comments (RM16–23) at 7.

[548] *Id.* at 8.

[549] Microgrid Resources Coalition Comments (RM16–23) at 6.

[550] EPRI Comments (RM16–23) at 28.

[551] *Id.* at 29.

[552] SPP Comments (RM16–23) at 20.

[553] CAISO Comments (RM16–23) at 31.

[554] Duke Energy Comments (RM16–23) at 6–7.

[555] NRG Comments (RM16–23) at 14.

[556] EPRI Comments (2018 RM18–9) at 5.

[557] We note that distribution factors are only necessary to the extent that distributed energy resources participating in an aggregation are located at different nodes. This methodology would apply only when distributed energy resources located at different nodes participate in the same aggregation to provide a particular market service.

[558] For example, such bidding parameters could include response rates, ramp rates, and upper and lower operating limits. *See* CAISO Tariff, Section 30.5.2.1; NYISO Tariffs, NYISO MST, Section 4.2.1.3.3 (18.0.0).

[559] NOPR, 157 FERC ¶ 61,121 at P 142.

unique features of certain distributed energy resource aggregations, and that different bidding parameters may be needed to recognize distributed energy resources' multiple uses. Therefore, we further modify the NOPR proposal to require that each RTO/ISO incorporate appropriate bidding parameters into its participation models as necessary to account for the physical and operational characteristics of distributed energy resource aggregations. In meeting this requirement, each RTO/ISO must either (1) incorporate appropriate bidding parameters that account for the physical and operational characteristics of distributed energy resource aggregations into its one or more new participation models for such aggregations; and/or (2) adjust the bidding parameters of the existing participation models to account for the physical and operational characteristics of distributed energy resource aggregations.

228. We find that the revisions directed by this final rule will provide distributed energy resource aggregators with the flexibility to update their distribution factors and provide RTOs/ISOs with the information needed to model aggregations accurately enough to issue feasible dispatch instructions and maintain reliability.

229. However, several commenters contend that requiring the RTOs/ISOs to account for distribution factors and other bidding parameters as described in the NOPR may be technically difficult to implement, or of little benefit considering the RTO's/ISO's network configuration. In light of this concern, we find that, in meeting this requirement, each RTO/ISO may revise its tariff to manage the locational attributes of distributed energy resource aggregations in a manner that reflects the RTO's/ISO's unique network configuration, infrastructure, and existing operational processes. We will evaluate, upon compliance, the RTO's/ISO's proposal to ensure that it will provide the RTO/ISO with sufficient information from resources in a multi-node distributed energy resource aggregation that is necessary to reliably operate its systems without imposing undue burden on individual distributed energy resources or utility distribution companies.[560] RTOs/ISOs that allow multi-node aggregations must, at a minimum, propose clear protocols explaining how a distributed energy resource aggregation can provide the required information and update that information when needed.

[560] *Id.* P 143.

F. Information and Data Requirements

a. NOPR Proposal

230. In the NOPR, the Commission proposed that the distributed energy resource aggregator must initially provide to the RTO/ISO a description of the physical parameters of the distributed energy resource aggregation, including (1) the total capacity; (2) the minimum and maximum operating limits; (3) the ramp rate; (4) the minimum run time; and (5) the default distribution factors, if applicable.[561] The Commission also proposed to require each RTO/ISO to revise its tariff to require each distributed energy resource aggregator to provide the RTO/ISO with a list of the distributed energy resources in the distributed energy resource aggregation that includes information about each of those distributed energy resources, including each resource's capacity, location on the distribution system, and operating limits. In addition, the Commission proposed to require each RTO/ISO to revise its tariff to require distributed energy resource aggregators to maintain aggregate settlement data for the distributed energy resource aggregation so that the RTO/ISO can regularly settle with the distributed energy resource aggregator for its market participation.[562] Lastly, the Commission proposed to require distributed energy resource aggregators to maintain data, for a length of time consistent with the RTO's/ISO's auditing requirements, for each individual resource in its distributed energy resource aggregation so that each resource can verify its performance if audited. The Commission sought comment on these proposed data requirements and on whether there are information and data requirements imposed by RTOs/ISOs that apply to other market participants that should not apply to individual distributed energy resources participating in RTO/ISO markets through a distributed energy resource aggregation.[563]

b. Comments

231. Some commenters support the NOPR proposal to require information and data requirements for individual distributed energy resources. CAISO, EEI, and Organization of MISO States support requiring distributed energy resource aggregators to provide a list of individual resources and their location and technical capabilities.[564] The New York Commission asserts that local distribution utilities must have information on the activities of distributed energy resources, even when they are only providing wholesale services.[565] However, Mosaic Power requests that electric distribution companies address their operational need for information in the least restrictive manner possible, given that account owner registration requirements would create prohibitive costs under its business model.[566] ISO–NE and NYISO request that the Commission give them flexibility to develop their own information and data requirements and urge the Commission to provide only high-level guidance.[567]

232. In contrast, many developers argue that information and data requirements should only apply to the distributed energy resource aggregation as a whole because (1) it is the single interface with the RTO/ISO; and (2) it is not necessary for the RTO/ISO to model each and every resource included in an aggregation to effectively model and dispatch the aggregation.[568] Efficient Holdings claims that failure to account for the dynamic nature of a distributed energy resource aggregation asset's performance capabilities and the likely turnover of individual resources within a distributed energy resource aggregation will place undue burden on these assets.[569]

233. Several commenters believe RTOs/ISOs currently have information and data requirements for other market participants that should not apply to individual distributed energy resources participating in RTO/ISO markets through an aggregation.[570] For example, CAISO explains that it has certain requirements that do not apply to distributed energy resources in an aggregation (*e.g.,* its meteorological data requirements that apply to eligible intermittent resources do not extend to a distributed energy resource aggregation) and urges the Commission to maintain a degree of flexibility on this issue.[571] R Street Institute similarly

[561] *Id.* P 145.

[562] *Id.* P 147.

[563] *Id.* PP 146, 147.

[564] CAISO Comments (RM16–23) at 32; EEI Comments (RM16–23) at 31; Organization of MISO States Comments (RM16–23) at 8.

[565] New York Commission Comments (RM16–23) at 14.

[566] Mosaic Power Comments (RM16–23) at 6.

[567] ISO–NE Comments (RM16–23) at 46–47; NYISO Comments (RM16–23) at 17.

[568] *See, e.g.,* Advanced Microgrid Solutions Comments (RM16–23) at 8; AES Companies Comments (RM16–23) at 41, 45–46; DER/Storage Developer Comments (RM16–23) at 3–4; MISO Transmission Owners Comments (RM16–23) at 22; Stem Comments (RM16–23) at 13–14.

[569] Efficient Holdings Comments (RM16–23) at 20.

[570] CAISO Comments (RM16–23) at 33; Efficient Holdings Comments (RM16–23) at 11, 19–20; R Street Institute Comments (RM16–23) at 10.

[571] CAISO Comments (RM16–23) at 32–34.

argues that requiring the same meteorological data for distributed energy resource aggregators as stand-alone variable energy resources could impose undue burdens on individual distributed energy resources.[572] MISO argues that current data communication methods between MISO, the local balancing authority, and the generation operator may be cost prohibitive for distributed energy resource aggregators.[573] However, several distribution utilities argue that information and data requirements should be comparable for all wholesale market participants.[574]

234. Some commenters generally support the requirements for distributed energy resource aggregators to maintain aggregate settlement data [575] and maintain data for a defined length of time, consistent with the RTO's/ISO's auditing requirements, for each individual resource in the aggregation so that each resource can verify its performance if audited.[576] However, Sunrun requests that RTOs/ISOs only apply these requirements to the aggregation and not to individual resources within the aggregation.[577]

235. Advanced Energy Buyers state that RTOs/ISOs should facilitate streamlined data collection and sharing, including from the RTO/ISO to the distribution utility, to enable data-driven planning and operation to maximize efficiency, as well as to send good investment signals to enable customers to prioritize delivery of distributed energy resources where they will add maximum value.[578]

c. Commission Determination

236. Upon consideration of the comments, we adopt the NOPR proposal, with modifications, and add § 35.28(g)(12)(ii)(d) to the Commission's regulations to require each RTO/ISO to establish market rules that address information requirements and data requirements for distributed energy resource aggregations. Specifically, we require each RTO/ISO to revise its tariff to (1) include any requirements for distributed energy resource aggregators that establish the information and data that a distributed energy resource aggregator must provide about the physical and operational characteristics of its aggregation; (2) require distributed energy resource aggregators to provide a list of the individual resources in its aggregation; and (3) establish any necessary information that must be submitted for the individual distributed energy resources. We also require each RTO/ISO to revise its tariff to require distributed energy resource aggregators to provide aggregate settlement data for the distributed energy resource aggregation and to retain performance data for individual distributed energy resources in a distributed energy resource aggregation for auditing purposes.

237. With respect to the NOPR proposal that the distributed energy resource aggregator initially provide to the RTO/ISO ''a description of the physical parameters of the distributed energy resource aggregation,'' [579] we believe that the physical attributes of the distributed energy resource aggregation as a whole may already be captured by an RTO's/ISO's registration requirements for all market participants or may otherwise be inapplicable to distributed energy resource aggregations. Therefore, to avoid creating unnecessary or redundant requirements for distributed energy resource aggregations and to provide flexibility to the RTOs/ISOs, we do not adopt that proposal. Rather, we require the RTOs/ISOs to revise their tariffs to establish any necessary physical parameters that distributed energy resource aggregators must submit as part of their registration process only to the extent these parameters are not already represented in general registration requirements or bidding parameters applicable to distributed energy resource aggregations.

238. With respect to information requirements for individual distributed energy resources, we do not adopt the NOPR proposal to require each RTO/ISO to revise its tariff to require distributed energy resource aggregators to provide the RTO/ISO with specific information about each of the distributed energy resources in an aggregation, including each resource's capacity, location on the distribution system, and operating limits. Instead, we direct each RTO/ISO to revise its tariff to require distributed energy resource aggregators to provide a list of the individual distributed energy resources participating in their aggregations to the RTO/ISO. If an RTO/ISO needs additional information beyond this list, the RTO/ISO should identify and explain in its compliance filing what additional specific information about the individual distributed energy resources within an aggregation that the RTO/ISO needs. The RTO/ISO should also propose how the information requested must be shared with the RTO/ISO and affected distribution utilities. As part of these tariff revisions, and as further discussed in Section IV.I. below, each RTO/ISO must also require that the distributed energy resource aggregator update that list of individual resources and associated information as it changes. We find that this approach provides greater flexibility to RTOs/ISOs and imposes potentially less onerous requirements upon distributed energy resource aggregators, while ensuring that necessary information is conveyed to RTOs/ISOs.

239. We also clarify that the distributed energy resource aggregator, not an individual distributed energy resource in the aggregation, is the single point of contact with the RTO/ISO, and the aggregator would be responsible for managing, dispatching, metering, and settling the individual distributed energy resources in its aggregation. As such, the RTO/ISO may only need the information necessary to model and dispatch the distributed energy resource aggregation as a whole, and thus we agree with commenters that sharing detailed information about the individual distributed energy resources may be an unnecessary and unduly burdensome requirement. We believe that the modified approach described above strikes a reasonable balance between the information needs of RTOs/ISOs and the burden that providing such information can place on distributed energy resource aggregators seeking to participate in RTO/ISO markets.

240. With respect to the aggregate settlement data for a distributed energy resource aggregation, as well as performance data for individual distributed energy resources in a distributed energy resource aggregation, we find that these sets of information are necessary for the participation of any type of resource in RTO/ISO markets and to enable RTOs/ISOs to perform necessary audit functions. Therefore, we adopt the NOPR proposal to require each RTO/ISO to revise its tariff to require each distributed energy resource aggregator to maintain and submit aggregate settlement data for the distributed energy resource aggregation, so that the RTO/ISO can regularly settle with the distributed energy resource aggregator for its market participation,

[572] R Street Institute Comments (RM16–23) at 10.

[573] MISO Comments (2018 RM18–9) at 19.

[574] EEI Comments (RM16–23) at 31; Duke Energy Comments (RM16–23) at 6; Xcel Energy Services Comments (RM16–23) at 26.

[575] CAISO Comments (RM16–23) at 34; MISO Comments (RM16–23) at 25; Xcel Energy Services at 26.

[576] CAISO Comments (RM16–23) at 34; IRC Comments (RM16–23) at 10; SoCal Edison Comments (RM16–23) at 12–13.

[577] Sunrun Comments (RM16–23) at 5.

[578] Advanced Energy Buyers Comments (2018 RM18–9) at 7.

[579] NOPR, 157 FERC ¶ 61,121 at P 145.

and to provide, upon request from the RTO/ISO, performance data for individual resources in a distributed energy resource aggregation for auditing purposes.[580] However, we clarify that the requirements for settlement and performance data should be consistent with the settlement and auditing data requirements for other market participants. Additionally, while we believe that performance data for individual distributed energy resources will be necessary for distributed energy resource aggregations to comply with the data retention and auditing procedures of the RTOs/ISOs, we are also sympathetic to the concerns that data requirements for individual distributed energy resources in a distributed energy resource aggregation can be unduly burdensome. To reduce the burden on distributed energy resource aggregators and the RTOs/ISOs, we find that distributed energy resource aggregators should only be required to retain that performance data for individual distributed energy resources in an aggregation that the RTO/ISO deems necessary for auditing purposes. Therefore, to the extent that an RTO/ISO does not need certain performance data from individual distributed energy resources in a distributed energy resource aggregation for auditing purposes, it should not require a distributed energy resource aggregator to retain that information for individual distributed energy resources participating in a distributed energy resource aggregation. With respect to Advanced Energy Buyers' assertion that RTOs/ISOs should facilitate streamlined data collection and sharing, we decline to prescribe the specific manner in which information and data should be collected and shared with distribution utilities.

G. Metering and Telemetry System Requirements

a. NOPR Proposal

241. In the NOPR, the Commission stated that, while the distributed energy resources in an aggregation will need to be directly metered, the metering and telemetry system, *i.e.,* hardware and software, requirements RTOs/ISOs impose on distributed energy resource aggregators and individual resources in distributed energy resource aggregations can pose a barrier to the participation of these aggregations in RTO/ISO markets.[581] The Commission recognized that RTOs/ISOs need metering data for settlement purposes and telemetry data to determine a resource's real-time operational capabilities so that they can efficiently dispatch resources. The Commission found, however, that metering and telemetry systems are often expensive, potentially creating a burden for small distributed energy resources. The Commission stated that, while telemetry data about a distributed energy resource aggregation is necessary for the RTO/ISO to efficiently dispatch the aggregation, telemetry data for each individual resource in the aggregation may not be.

242. The Commission stated that, while it did not propose to require specific metering and telemetry systems for distributed energy resource aggregators, it proposed to require each RTO/ISO to revise its tariff to identify any necessary metering and telemetry hardware and software requirements for distributed energy resource aggregators and the individual resources in a distributed energy resource aggregation.[582] The Commission stated that these requirements must ensure that the distributed energy resource aggregator can provide necessary information and data to the RTO/ISO,[583] but must not impose unnecessarily burdensome costs on the distributed energy resource aggregators or individual resources in a distributed energy resource aggregation that may create a barrier to their participation in the RTO/ISO markets.

243. The Commission noted that there may be different types of resources in these aggregations, some in front of the meter, some behind the meter with the ability to inject energy back to the grid, and some behind the meter without the ability to inject energy to the grid.[584] The Commission therefore sought comment on whether the RTOs/ISOs need to establish metering and telemetry hardware and software requirements for each of the different types of distributed energy resources that participate in the RTO/ISO markets through distributed energy resource aggregations as well as whether the Commission should establish specific metering and telemetry system requirements and, if so, what requirements would be appropriate.

244. With respect to telemetry, the Commission stated that the distributed energy resource aggregator should be able to provide to the RTO/ISO the real-time capability of its aggregated resource in a manner similar to the requirements for generators, including the operating level of the resource and how much that resource can ramp up or ramp down over its full range of capability, including its charging capability for distributed energy resource aggregations that include electric storage resources.[585] The Commission further noted that these telemetry system requirements may also need to be in place at different locations for geographically dispersed distributed energy resource aggregations that have to provide distribution factors or other similar information.

245. With respect to metering, the Commission recognized that distributed energy resources may be subject to metering system requirements established by the distribution utility or local regulatory authority.[586] Therefore, the Commission proposed that each RTO/ISO rely on meter data obtained through compliance with these distribution utility or local regulatory authority metering system requirements whenever possible for settlement and auditing purposes, only applying additional metering requirements for distributed energy resource aggregations when this data is insufficient.

b. Comments

246. In their comments, the various RTOs/ISOs describe slightly different approaches to metering and telemetry requirements for distributed energy resource aggregations. CAISO states that, under its Distributed Energy Resource Provider model, the aggregator must follow the same metering and telemetry standards as other resources.[587] NYISO states that it will propose to require distributed energy resource aggregators to have six-second real-time metering and telemetry that will be sent either directly to NYISO or through the utility and to provide after-the-fact meter data uploads for settlement purposes.[588] ISO–NE states that individual distributed energy resources in an aggregation should meet

[580] *See id.* P 147.

[581] NOPR, 157 FERC ¶ 61,121 at P 150.

[582] *Id.* P 151.

[583] *Id.* (citing the Commission's proposal pertaining to information and data requirements).

[584] *Id.* P 151.

[585] *Id.* P 152.

[586] *Id.*

[587] CAISO Comments (RM16–23) at 38.

[588] NYISO Comments (RM16–23) at 18–19. NYISO's Aggregation Participation Model, accepted by the Commission on January 23, 2020, requires that (1) aggregations provide real-time telemetry every six seconds; (2) NYISO send real-time base point signals to, receive revenue-quality meter data for settlement purposes from, and receive real-time telemetry from an aggregation, not the individual facilities within an aggregation; (3) aggregations of like resource types are subject to the existing metering and telemetry rules for that resource type; and (4) metering and telemetry of the individual facilities in an aggregation derive from either directly measured or calculated values, or a combination thereof, in accordance with the requirements set forth in NYISO's procedures. *See* NYISO Aggregation Order, 170 FERC ¶ 61,033 at PP 57–74.

the same product-based metering and telemetry requirements as all other resources, whether the distributed energy resource is behind the meter or in front and whether or not it can inject power into the grid.[589] PJM states that, generally, it is reasonable for behind-the-meter distributed energy resources that seek to inject power onto the grid (either individually or as part of a distributed energy resource aggregation) to follow existing telemetry and metering rules from the generation framework for similarly sized resources, noting that metering and telemetry rules for generation may vary by resource size.[590]

247. A number of commenters support the Commission's proposal to provide the RTOs/ISOs with flexibility to establish and implement metering and telemetry rules to suit their individual needs.[591] CAISO states that local regulatory authorities already impose metering and telemetry standards and that RTOs/ISOs need flexibility to incorporate those local requirements without imposing additional costs or barriers to entry on prospective distributed energy resource aggregations.[592] A number of other commenters make similar points.[593] ISO–NE recommends that the Commission avoid being overly prescriptive so that ISO–NE can apply existing metering and telemetry requirements to distributed energy resources.[594] SoCal Edison asks that the Commission not issue a standard directive but rather encourage the distribution utilities in an RTO/ISO to work together with the RTO/ISO to continue the development of appropriate metering and telemetry technologies.[595] IRC asserts that RTOs/ISOs should be given the flexibility to define metering and telemetry requirements outside of their tariffs.[596] Tesla argues that RTOs/ISOs should allow alternatives to metering and telemetry requirements that could provide the needed information, such as sampling, end-use metering devices, or verifiable behavioral actions.[597]

248. Other commenters contend that the Commission should take a more active role in establishing specific metering and telemetry requirements for distributed energy resource aggregations. MISO believes that it is appropriate for the Commission to define the telemetry and metering requirements,[598] while others suggest that the Commission establish a set of standards or generally applicable criteria but allow RTOs/ISOs flexibility on how those standards are implemented or to exceed the Commission's requirements.[599]

249. Several commenters acknowledge that metering and telemetry requirements for distributed energy resource aggregators and individual resources participating in distributed energy resource aggregations can pose a barrier to the participation of these resources in RTO/ISO markets.[600] Advanced Energy Management and R Street Institute note that the costs of metering, telemetry, and communication equipment pose a disproportionately high burden for small distributed energy resources because they cannot spread the cost across as many MWs as large generators.[601] Advanced Energy Economy requests that the Commission clarify that real-time and short interval telemetry is not required for distributed energy resource aggregations and individual distributed energy resources.[602]

250. Several commenters argue that telemetry requirements comparable to those of traditional generators would be too burdensome, even if imposed only at the aggregation level.[603] Advanced Energy Economy asserts that such requirements would be prohibitively expensive and unnecessary to ensure reliability because equipment would need to be installed at every distributed energy resource site to obtain accurate readings.[604] These commenters and others instead suggest that telemetry requirements, particularly with respect to timing granularity, should be commensurate to the need of the system and service provided.[605] Advanced Energy Management recommends that virtual telemetry with after-the-fact meter data be allowed for aggregators of small resources.[606] Further, Advanced Energy Management recommends that the Commission not require that distributed energy resource aggregators that participate only in capacity markets implement new telemetry requirements.[607]

251. Several commenters assert that metering and/or telemetry requirements are necessary only at the aggregation level, and that telemetry requirements on individual distributed energy resources would be cost prohibitive and unnecessarily burdensome.[608] Public Interest Organizations, New York State Entities, and Advanced Energy Economy state that grid operators do not need telemetry information about each distributed energy resource in an aggregation because the loss of one would not interfere with system reliability or with the operation of the aggregation, and these parties request clarification that such telemetry is not required.[609] NRG and Advanced Energy Economy contend that the aggregator should be responsible for providing metering and telemetry that meets the RTO/ISO requirements to ensure that the aggregated performance of the distributed energy resources meets the

[589] ISO–NE Comments (RM16–23) at 48–50.

[590] PJM Comments (RM16–23) at 22 (citing PJM Manual 14D: Generation Operational Requirements, rev. 40, section 4.2.2 (Jan. 1, 2017)).

[591] *See, e.g.,* CAISO Comments (RM16–23) at 38; IRC Comments (RM16–23) at 10; ISO–NE Comments (RM16–23) at 48; New York State Entities Comments (RM16–23) at 21; SoCal Edison Comments (RM16–23) at 14–15.

[592] CAISO Comments (RM16–23) at 38.

[593] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 9; Advanced Energy Management Comments (2018 RM18–9) at 22–23; Microsoft Comments (2018 RM18–9) at 18 (citing Justin Gundlach & Romany Webb, *Distributed Energy Res. Participation in Wholesale Markets: Lessons from the California ISO,* 39 ENERGY L. REV. 47, 68–69 (2018)); NRG Comments (2018 RM18–9) at 3; Tesla Comments (2018 RM18–9) at 10–11 (citing NOPR, 157 FERC ¶ 61,121 at P 150).

[594] ISO–NE Comments (RM16–23) at 48.

[595] SoCal Edison Comments (RM16–23) at 14–15.

[596] IRC Comments (RM16–23) at 10.

[597] Tesla Comments (2018 RM18–9) at 10–11.

[598] MISO Comments (RM16–23) at 25.

[599] Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 3; Independent Energy Producers Association Comments (RM16–23) at 5; PJM Comments (RM16–23) at 22.

[600] *See, e.g.,* Advanced Energy Management Comments (RM16–23) at 17–18; New York State Entities Comments (RM16–23) at 21; NextEra Comments (RM16–23) at 15–16; Public Interest Organizations Comments (RM16–23) at 14; R Street Institute Comments (RM16–23) at 10.

[601] Advanced Energy Management Comments (RM16–23) at 18; R Street Institute Comments (RM16–23) at 10.

[602] Advanced Energy Economy Comments (RM16–23) at 47.

[603] *Id.* at 48; Advanced Energy Management Comments (RM16–23) at 17; City of New York Comments (RM16–23) at 9.

[604] Advanced Energy Economy Comments (RM16–23) at 48.

[605] *Id.;* Advanced Energy Management Comments (RM16–23) at 18; City of New York Comments (RM16–23) at 9; Energy Storage Association Comments (RM16–23) at 25; Public Interest Organizations Comments (RM16–23) at 24.

[606] Advanced Energy Management Comments (RM16–23) at 18–19. Advanced Energy Management describes virtual telemetry as statistical forecasting of an aggregated resource's performance, generally monitored by some form of communications to confirm aggregated resource performance, which provides the aggregator or scheduling coordinator a signal to send to the RTO/ISO.

[607] *Id.*

[608] *See, e.g.,* AES Companies Comments (RM16–23) at 36; Energy Storage Association Comments (RM16–23) at 25; New York State Entities Comments (RM16–23) at 20; Public Interest Organizations Comments (RM16–23) at 14–15; R Street Institute Comments (RM16–23) at 10.

[609] Advanced Energy Economy Comments (RM16–23) at 49; New York State Entities Comments (RM16–23) at 20; Public Interest Organizations Comments (RM16–23) at 14–15.

claimed and offered performance.[610] Stem asks that each RTO/ISO be required to justify any metering and telemetry rules regarding individual resources in an aggregation.[611]

252. Other commenters argue that metering and telemetry requirements are important for reliability and should be the same for distributed energy resource aggregations as for any other resource type.[612] EEI argues that this is important so the RTO/ISO knows the operating level of the resource and how much that resource can ramp up or ramp down over its full range of capability.[613] Energy Storage Association agrees, as long as the telemetry allows distributed energy resource aggregations to provide the same products and services as traditional generators.[614] PJM also agrees, but notes that smaller resources have lower-cost telemetry requirements in its market.[615] EPSA asserts that estimation, sampling, and other inexact methods provide insufficient precision and, therefore argues that distributed energy resources should be subject to the same metering requirements as traditional supply resources.[616] NYISO Indicated Transmission Owners contend that the cost of new or additional communications requirements should be considered a prerequisite to maintain the reliability of the system rather than a barrier to entry.[617]

253. Some commenters argue that metering and telemetry requirements should be placed on individual distributed energy resources within an aggregation.[618] Multiple commenters argue that distributed energy resources need to be directly metered to distinguish between wholesale and retail actions.[619] MISO believes that it is appropriate for the Commission to identify the criteria and process for differentiating retail versus wholesale transactions of distributed energy resources.[620] TAPS states that RTOs/ISOs should require telemetry on individual distributed energy resources for situational awareness and so that facilities are not inadvertently directed to operate beyond physical capabilities.[621] Moreover, ISO–NE argues that statistical estimation of an aggregation's output rather than direct metering and telemetry of individual distributed energy resources introduces error and that the impact of using estimation to determine distribution factors is not clear.[622] PJM and the IRC request that the Commission establish that RTOs/ISOs have the right to require metering and telemetry for individual distributed energy resources comparable to traditional resources in order to avoid seams issues and inconsistent industry roll-out.[623] Avangrid cautions that even with separate metering, ownership and reconciliation of the data for retail billing and wholesale settlement may be impractically complex.[624] NYISO Indicated Transmission Owners assert that resources above a certain size and within an aggregation may require additional metering to mitigate issues on a utility's distribution system.[625]

254. Several commenters agree with the Commission that telemetry system requirements may need to be in place at different locations for geographically dispersed distributed energy resource aggregations that have to provide distribution factors.[626] PJM Market Monitor argues that meter and telemetry information should be disaggregated at each node and that the RTO/ISO should provide nodal settlement.[627] MISO Transmission Owners argue that it is not clear how multi-node aggregations would be settled.[628] AES Companies contend that the Commission should permit the aggregation to include more than one metering point where the system characteristics indicate more are needed.[629] Duke Energy maintains that RTOs/ISOs should have access to telemetry information at individual points of interconnection and that the distribution utility may need to access similar data.[630]

255. Most commenters support the proposal in the NOPR that, when existing distribution utility metering requirements for distributed energy resources are sufficient, RTOs/ISOs should rely on that technology rather than impose new requirements.[631] Avangrid argues that the distribution utility might be able to provide the necessary data to the RTO/ISO on behalf of the distributed energy resource aggregator via a third-party agreement.[632]

256. APPA/NRECA express concern that the proposal to rely on meter data from the distribution utility would place significant burdens on distribution utilities and introduce new cybersecurity and privacy implications, issues which will require significant time and resources for utilities to address.[633] APPA asserts that such costs could undermine the benefits of distribution utilities' existing retail distributed energy resource programs, effectively imposing costs on retail customers to subsidize wholesale market participation.[634] Advanced Energy Management asserts that telemetry requirements to participate in a wholesale program should be driven by the RTO/ISO system needs, which are less granular than at the distribution level.[635] Advanced Energy Management adds that a distributed energy resource that only seeks participation in the wholesale market should only be required to fulfill the RTO's/ISO's metering requirements. Advanced Energy Economy states that RTOs/ISOs should adopt procedures that provide for regular information and communications flows to occur from the aggregator, to the RTO/ISO, and then to distribution utilities.[636]

257. Several commenters generally agree with the Commission that individual distributed energy resources in an aggregation will need to be

[610] Advanced Energy Economy Comments (RM16–23) at 49–50; NRG Comments (RM16–23) at 10.

[611] Stem Comments (RM16–23) at 14.

[612] *See, e.g.,* EEI Comments (RM16–23) at 34; Energy Storage Association Comments (RM16–23) at 25; ISO–NE Comments (RM16–23) at 48–50; New York Utility Intervention Unit Comments (RM16–23) at 3–5; TAPS Comments (RM16–23) at 23.

[613] EEI Comments (RM16–23) at 34.

[614] Energy Storage Association Comments (RM16–23) at 25.

[615] PJM Comments (RM16–23) at 22.

[616] EPSA Comments (2018 RM18–9) at 10, 13.

[617] NYISO Indicated Transmission Owners Comments (RM16–23) at 19.

[618] *See, e.g.,* DER/Storage Developers Comments (RM16–23) at 4; Independent Energy Producers Association Comments (RM16–23) at 8; ISO–NE Comments (RM16–23) at 48–50; NYISO Indicated Transmission Owners Comments (RM16–23) at 19; Organization of MISO States Comments (RM16–23) at 9.

[619] Avangrid Comments (RM16–23) at 15; Independent Energy Producers Association Comments (RM16–23) at 8; ISO–NE Comments (RM16–23) at 48–50; Organization of MISO States Comments (RM16–23) at 9.

[620] MISO Comments (RM16–23) at 25.

[621] TAPS Comments (RM16–23) at 23.

[622] ISO–NE Comments (RM16–23) at 51.

[623] PJM Comments (RM16–23) at 22.

[624] Avangrid Comments (RM16–23) at 15.

[625] NYISO Indicated Transmission Owners Comments (RM16–23) at 7.

[626] AES Comments (RM16–23) at 36; Duke Energy Comments (RM16–23) at 5; EEI Comments (RM16–23) at 34; MISO Transmission Owners Comments (RM16–23) at 24.

[627] PJM Market Monitor Comments (RM16–23) at 15.

[628] MISO Transmission Owners Comments (RM16–23) at 24.

[629] AES Companies Comments (RM16–23) at 37.

[630] Duke Energy Comments (RM16–23) at 5.

[631] *See, e.g.,* Advanced Energy Management Comments (RM16–23) at 18–19; EEI Comments (RM16–23) at 33; Mosaic Power Comments (RM16–23) at 5–6; SoCal Edison Comments (RM16–23) at 14–15; TAPS Comments (RM16–23) at 24.

[632] Avangrid Comments (RM16–23) at 15. Avangrid adds that the electric distribution companies should be allowed to charge for this service.

[633] APPA Comments (2018 RM18–9) at 9–10; NRECA Comments (2018 RM18–9) at 11–12, 30.

[634] APPA Comments (2018 RM18–9) at 10.

[635] Advanced Energy Management Comments (2018 RM18–9) at 22–23.

[636] Advanced Energy Economy Comments (2018 RM18–9) at 9 n.11.

directly metered. These commenters argue that behind-the-meter distributed energy resources should be metered separately from the host site's load due to the need to distinguish between wholesale and retail actions.[637] DER/Storage Developers ask the Commission to direct all RTOs/ISOs to allow direct metering of resources as an optional alternative to traditional baselines to determine performance.[638] Independent Energy Producers Association notes that dual-metering can serve other Commission goals such as minimizing cost shifts, ensuring reliability, and ensuring market integrity.[639] MISO states that visibility at the point of injection is needed to mitigate transmission risks and ensure that a distributed energy resource is following dispatch instructions, particularly as the volume of distributed energy resources grows.[640] EPSA argues that netting retail and wholesale services reduces RTO/ISO visibility which makes it difficult for RTOs/ISOs to efficiently dispatch resources, measure and verify resource performance, calculate baseline load levels, and support the reliability, planning, and modeling of system capabilities.[641] Avangrid cautions that even with separate metering, ownership and reconciliation of the data for retail billing and wholesale settlement may be impractically complex.[642]

258. Some commenters question the authority of the Commission or the RTOs/ISOs to impose specific metering and telemetry requirements on distributed energy resources. AES Companies argue that the only metering and telemetry requirements that the Commission or the RTOs/ISOs can dictate are for the aggregator's node or point of interconnection to the transmission system under RTO/ISO control.[643] IRC asks the Commission to acknowledge in any final rule that the RTOs/ISOs have no jurisdiction to require state-regulated utilities to install specific retail metering technology, but that wholesale metering rules for distributed energy resources must be met.[644] California Energy Storage Alliance recommends that local regulatory authorities develop and implement metering and telemetry requirements to avoid the Commission imposing any requirements outside the Commission's jurisdiction.[645] The Delaware Commission recommends that the Commission require distributed energy resources to employ separate metering and telemetry capability if they are providing both wholesale and retail services.[646]

259. Some state regulators, distribution utilities, and their representatives note that upgrades may be needed to current metering technology and associated networking and cyber security in order to support RTO/ISO needs [647] and argue that associated costs must be borne by the distributed energy resources or their aggregators or through wholesale level cost allocation, and not by distribution utilities.[648]

260. Several commenters discuss the relationship between RTOs/ISOs and distribution utilities and their respective metering and telemetry requirements. Fresh Energy/Sierra Club/Union of Concerned Scientists encourage the development of a framework to share metering data between the RTO/ISO, distribution utility, and distributed energy resource aggregator.[649] Duke Energy recommends that the final rule not preclude the transfer of telemetry data between the RTO/ISO and the electric distribution utility.[650] Similarly, EEI asserts that both the RTO/ISO and the distribution utility should be provided telemetry information,[651] while IRC states that wholesale and retail metering requirements need to be harmonized to prevent undue barriers to participation.[652] Xcel Energy Services recommends that the RTOs/ISOs and distribution utilities should define the role of a meter data management agent to provide needed meter data.[653]

261. NARUC, EEI, and MISO argue that, before metering and telemetry requirements can be established, additional information must be gathered about the type and purpose of metering and telemetry data needed, the access to and provision of this data, and the cost allocation involved.[654] On the other hand, Fresh Energy/Sierra Club/Union of Concerned Scientists ask the Commission to not let this debate hinder progress on establishing necessary distributed energy resource requirements.[655]

c. Commission Determination

262. We adopt the NOPR proposal and add § 35.28(g)(12)(ii)(f) to the Commission's regulations to require each RTO/ISO to revise its tariff to establish market rules that address metering and telemetry hardware and software requirements necessary for distributed energy resource aggregations to participate in RTO/ISO markets.

263. We understand the need to balance, on one hand, the RTO's/ISO's need for metering and telemetry data for settlement and operational purposes, and, on the other hand, not imposing unnecessary burdens on distributed energy resource aggregators. Therefore, we will not prescribe the specific metering and telemetry requirements that each RTO/ISO must adopt; rather, we provide the RTOs/ISOs with flexibility to establish the necessary metering and telemetry requirements for distributed energy resource aggregations, and require that each RTO/ISO explain in its compliance filing why such requirements are just and reasonable and do not pose an unnecessary and undue barrier to individual distributed energy resources joining a distributed energy resource aggregation.

264. To implement this requirement, we direct each RTO/ISO to explain, in its compliance filing, why its proposed metering requirements are necessary (*e.g.,* for the distributed energy resource aggregator to provide the settlement and performance data to the RTO/ISO discussed in Section IV.F or to prevent double counting of services as discussed in Section IV.C.3) and why its proposed telemetry requirements are necessary (*e.g.,* for the RTO/ISO to have sufficient situational awareness to dispatch the

[637] Avangrid Comments (RM16–23) at 15; Independent Energy Producers Association Comments (RM16–23) at 8; Microsoft Comments (2018 RM18–9) at 17; Organization of MISO States Comments (RM16–23) at 9; Stem Comments (2018 RM18–9) at 3, 19.

[638] DER/Storage Developers Comments (RM16–23) at 4.

[639] Independent Energy Producers Association Comments (RM16–23) at 8.

[640] MISO Comments (2018 RM18–9) at 19.

[641] EPSA Comments (2018 RM18–9) at 10–13 (citing Distributed Energy Resources Roadmap at 29–30).

[642] Avangrid Comments (RM16–23) at 15.

[643] AES Companies Comments (RM16–23) at 47.

[644] IRC Comments (RM16–23) at 6.

[645] California Energy Storage Alliance Comments (RM16–23) at 9.

[646] Delaware Commission Comments (RM16–23) at 5–7 (citing *FPC* v. *Fla. Power & Light Co.,* 404 US 461, 463 (1972)), 8.

[647] *See, e.g.,* Avangrid Comments (RM16–23) at 15; Dominion Comments (RM16–23) at 12; EEI Comments (RM16–23) at 13; NARUC Comments (RM16–23) at 6; SoCal Edison Comments (RM16–23) at 14.

[648] *See, e.g.,* Delaware Commission Comments (RM16–23) at 7; EEI Comments (RM16–23) at 33–34; IRC Comments (RM16–23) at 6; Massachusetts Municipal Electric Comments (RM16–23) at 4; Six Cities Comments (RM16–23) at 3; TAPS Comments (RM16–23) at 24.

[649] Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 3.

[650] Duke Energy Comments (RM16–23) at 5.

[651] EEI Comments (RM16–23) at 34.

[652] IRC Comments (RM16–23) at 6.

[653] Xcel Energy Services Comments (RM16–23) at 27.

[654] EEI Comments (RM16–23) at 33; MISO Comments (RM16–23) at 25; NARUC Comments (RM16–23) at 7.

[655] Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 3.

aggregation and the rest of the system efficiently). This explanation should also include a discussion about whether, for example, the proposed requirements are similar to requirements already in existence for other resources and steps contemplated to avoid imposing unnecessarily burdensome costs on the distributed energy resource aggregators and individual resources in distributed energy resource aggregations that may create an undue barrier to their participation in RTO/ISO markets. We find that this approach will provide each RTO/ISO with the flexibility to develop metering and telemetry requirements appropriate for the needs of its systems.

265. Given the variety of potential aggregation business models, as well as the variety of existing distribution utility requirements to which the distributed energy resources participating in aggregations will be subject, we find that imposing standard requirements is unwarranted. Standard metering and telemetry requirements could run the risk of imposing unnecessary costs on RTOs/ISOs, distributed energy resource aggregators, and the individual distributed energy resources. For example, imposing standard requirements could impede RTOs/ISOs from adequately incorporating metering and telemetry requirements already imposed on distributed energy resources by local regulatory authorities and thereby create a barrier to the participation of distributed energy resources in RTO/ISO markets. We find that adopting the NOPR proposal minimizes these risks and the costs associated with implementing these requirements because it allows RTOs/ISOs to propose metering and telemetry requirements in addition to those already in place only when they determine that such additional requirements are needed.

266. As clarified in Section IV.F, the distributed energy resource aggregator, not the individual distributed energy resources in the aggregation, is the single point of contact with the RTO/ISO, responsible for managing, dispatching, metering, and settling the individual distributed energy resources in its aggregation. We further clarify here that the distributed energy resource aggregator is also the entity responsible for providing any required metering and telemetry information to the RTO/ISO.

267. We decline the requests of some commenters to explicitly limit metering and/or telemetry requirements to the distributed energy resource aggregation level, or to require telemetry of individual distributed energy resources participating in an aggregation. Rather, consistent with the flexibility provided in Section IV.F, we will not require uniform metering requirements across all RTOs/ISOs, nor will we require each RTO/ISO to impose uniform metering requirements on individual distributed energy resources. Rather, we provide flexibility to RTOs/ISOs to propose specific metering requirements, including any that may apply to individual distributed energy resources that the RTO/ISO demonstrates are needed to obtain any required performance data for auditing purposes and to address double compensation concerns. Similarly, we provide flexibility to the RTO/ISO as to whether to propose specific telemetry requirements for individual distributed energy resources in an aggregation. The need for such requirements may depend, for example, on whether the RTO/ISO allows multi-node aggregations or how multi-node aggregations are implemented. By providing flexibility while also requiring that the RTO/ISO explain why any proposed metering and telemetry requirements are necessary, we allow the RTO/ISO to obtain the metering and telemetry information it needs without burdening the distributed energy resource aggregator to provide data that may not be necessary.

268. We also clarify that, consistent with this flexible approach, we are not requiring RTOs/ISOs to establish metering and telemetry hardware and software requirements for distributed energy resource aggregations that are identical to those placed on existing resources, or to establish different or additional metering and telemetry requirements for distributed energy resource aggregations. Rather, we expect that RTOs/ISOs will base any proposed metering and telemetry hardware and software requirements for distributed energy resource aggregations on the information needed by the RTO/ISO while avoiding unnecessary requirements that may act as a barrier to individual distributed energy resources joining distributed energy resource aggregations or to distributed energy resource aggregations participating in the wholesale markets. However, as explained in Section IV.F, we require that metering data for settlement purposes at the distributed energy resource aggregation level be consistent with settlement data requirements for other resource types. We recognize that metering and telemetry requirements may vary depending on the types of distributed energy resources participating in an aggregation, the size of the individual distributed energy resources or aggregated resource, or the particular service provided. For example, more granular or precise telemetry may be necessary for a distributed energy resource aggregation that is participating in the frequency regulation market than one that is exclusively providing energy or capacity. To ensure that the flexible approach outlined here provides the RTO/ISO with sufficient information to administer the wholesale markets and ensure reliability of the transmission system while not unduly burdening distributed energy resources and distributed energy resource aggregations, we require that each RTO/ISO explain in its compliance filing why its proposed metering and telemetry requirements for distributed energy resource aggregations are just and reasonable and do not pose an unnecessary and undue barrier to individual distributed energy resources joining a distributed energy resource aggregation.

269. We also adopt the NOPR proposal that each RTO's/ISO's proposed metering requirements should rely on meter data obtained through compliance with distribution utility or local regulatory authority metering system requirements whenever possible for settlement and auditing purposes. We further clarify that this requirement also applies to existing telemetry infrastructure. By using existing infrastructure whenever possible, RTOs/ISOs should be able to obtain the data they need and avoid proposing new metering and telemetry requirements that would be duplicative and could erect unnecessary barriers to entry for distributed energy resource aggregators and individual distributed energy resources participating in an aggregation. With respect to jurisdictional concerns raised by some commenters, we note that any additional RTO/ISO metering and telemetry requirements would not change those required by state or local regulatory authorities and would be required solely to assist with settlements and audits of activity in RTO/ISO markets, or to provide RTOs/ISOs with the real-time information needed to reliably and efficiently dispatch their systems.

270. In response to concerns about the potential costs and burdens that could be imposed on distribution utilities as a result of the requirement that RTOs/ISOs rely on metering and telemetry data obtained through compliance with distribution utility or local regulatory authority metering system requirements whenever possible, we expect that in

general, this information will be provided by individual distributed energy resources to distributed energy resource aggregators, and from distributed energy resource aggregators to RTOs/ISOs. However, to the extent that the RTO/ISO proposes that such information come from or flow through distribution utilities, we require that RTOs/ISOs coordinate with distribution utilities and relevant electric retail regulatory authorities to establish protocols for sharing metering and telemetry data, and that such protocols minimize costs and other burdens and address concerns raised with respect to privacy and cybersecurity.

271. In response to IRC's request for flexibility to define metering and telemetry requirements outside the RTO/ISO tariffs, we find that the RTO/ISO tariffs should include a basic description of the metering and telemetry practices for distributed energy resource aggregations as well as references to specific documents that will contain further technical details. Decisions as to whether an item should be placed in a tariff or in a business practice manual are guided by the Commission's rule of reason policy,[656] under which provisions that ''significantly affect rates, terms, and conditions'' of service, are readily susceptible of specification, and are not generally understood in a contractual agreement must be included in the tariff, while items better classified as implementation details may be included only in the business practice manual. We find that metering and telemetry requirements significantly affect the terms and conditions of the participation of distributed energy resource aggregations in RTO/ISO markets and, therefore, must be included in the RTO/ISO tariffs.

H. Coordination Between the RTO/ISO, Aggregator, and Distribution Utility

1. Market Rules on Coordination

a. NOPR Proposal

272. In the NOPR, the Commission noted that the market rules that each RTO/ISO adopts to facilitate the participation of distributed energy resource aggregations must address coordination between the RTO/ISO, the distributed energy resource aggregator, and the distribution utility to ensure that the participation of these resources in RTO/ISO markets does not present reliability or safety concerns for the distribution or transmission system.[657] Thus, the Commission proposed to require each RTO/ISO to revise its tariff to provide for coordination among the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utilities with respect to (1) the registration of new distributed energy resource aggregations; and (2) ongoing coordination, including operational coordination, between the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utility or utilities.

273. After the April 2018 technical conference, the Commission sought further information on certain proposals regarding detailed aspects of the coordination requirements.[658]

b. Comments

274. Many commenters support the coordination processes proposed in the NOPR because it will ensure that participation of distributed energy resource aggregations in RTO/ISO markets does not compromise these markets or the reliability or safety of the transmission and distribution systems.[659] For example, based on its experience with implementing CAISO's Distributed Energy Resource Provider framework, Pacific Gas & Electric states that it is vitally important that RTOs/ISOs coordinate with distribution utilities with respect to both registration of distributed energy resource aggregations and their ongoing operation.[660]

275. Advanced Energy Economy states that it recognizes that the RTOs/ISOs need visibility into distributed energy resource operations and that coordination among the RTO/ISO, the distribution utility, and distributed energy resource aggregators is necessary to ensure reliable operations.[661] Advanced Energy Economy asserts that these visibility and operational issues are surmountable and that certain RTOs/ISOs (particularly CAISO and ISO–NE) have made great progress in developing standards and rules to address these issues. Advanced Energy Economy states that fully integrating advanced energy technologies that are already available and growing rapidly will only enhance the ability to quickly address visibility and operational issues.

276. Commenters note that coordination would be further enhanced with the development of distribution system operators.[662] PJM believes that value may be added if an RTO/ISO were to coordinate with a distribution system operator, but states that without a true distribution system operator operating in the PJM region (or anywhere else in the country) it cannot opine on the specific benefits that such coordination could achieve.[663] SoCal Edison notes that, in California, distribution utilities are already performing the initial functions of a distribution system operator and that the utility is uniquely situated to provide this role in the future.[664]

277. While supportive of the coordination requirements in the NOPR, Mensah argues that the cost of registering an aggregation as well as ongoing operational coordination should not place any unnecessary burden on distributed energy resource aggregations.[665]

c. Commission Determination

278. We adopt the NOPR proposal, as modified and clarified below, and add § 35.28(g)(12)(ii)(g) to the Commission's regulations to require each RTO/ISO to revise its tariff to establish market rules that address coordination between the RTO/ISO, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities.

[656] *See, e.g., Energy Storage Ass'n* v. *PJM Interconnection, L.L.C.,* 162 FERC ¶ 61,296, at P 103 (2018) (*Energy Storage Ass'n* v. *PJM*) (citing *Midcontinent Indep. Sys. Operator, Inc.,* 158 FERC ¶ 61,003, at P 69 (2017); *PacifiCorp,* 127 FERC ¶ 61,144, at P 11 (2009); *City of Cleveland* v. *FERC,* 773 F.2d 1368, 1376 (D.C. Cir. 1985) (finding that utilities must file ''only those practices that affect rates and service *significantly,* that are reasonably *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous''); *Pub. Serv. Comm'n of N.Y.* v. *FERC,* 813 F.2d 448, 454 (D.C. Cir. 1987) (holding that the Commission properly excused utilities from filing policies or practices that dealt with only matters of ''practical insignificance'' to serving customers)).

[657] NOPR, 157 FERC ¶ 61,121 at P 153.

[658] Notice Inviting Post-Technical Conference Comments at 7–11.

[659] *See, e.g.,* CAISO Comments (RM16–23) at 39; Connecticut State Entities Comments (RM16–23) at 6; Dominion Comments (RM16–23) at 13; Institute for Policy Integrity Comments (RM16–23) at 9; NYISO Comments (RM16–23) at 19.

[660] Pacific Gas & Electric Comments (RM16–23) at 21.

[661] Advanced Energy Economy Comments (RM16–23) at 13.

[662] De Martini and Kristov define a distribution system operator as ''the entity responsible for planning and operational functions associated with a distribution system that is modernized for high levels of [distributed energy resources].'' Paul De Martini and Lorenzo Kristov, ''Distribution Systems in a High DER Future: Planning, Market Design, Operation and Oversight,'' Future Electric Utility Regulation Series, Lawrence Berkeley National Laboratory, October 2015, p. vi.

[663] PJM Comments (RM16–23) at 28.

[664] SoCal Edison Comments (RM16–23) at 8.

[665] Mensah Comments (RM16–23) at 4.

279. We agree with commenters that coordination requirements should not create undue barriers to entry for distributed energy resource aggregations. However, we must also consider the substantial role of distribution utilities and state and local regulators in ensuring the safety and reliability of the distribution system. We believe that the reforms adopted herein appropriately balance those needs.

280. Further, as discussed in Section IV.H.4 below,[666] although the NOPR did not discuss the role of state and local regulatory authorities in coordination efforts, we recognize that state and local regulatory authorities have a key role to play in such coordination efforts. Therefore, we have modified the NOPR proposal to ensure that the RTO/ISOs also coordinate with these entities.

2. Role of Distribution Utilities

a. NOPR Proposal

281. In the NOPR, the Commission proposed that the market rules on coordination provide the relevant distribution utility or utilities with the opportunity to review the list of individual resources that are located on their distribution systems and that enroll in a distributed energy resource aggregation before those resources may participate in RTO/ISO markets through the aggregation.[667] The Commission explained that the purpose of this coordination would be to ensure that all of the individual resources in the distributed energy resource aggregation are technically capable of providing services to the RTO/ISO through the aggregator and are eligible to be part of the aggregation.[668] The Commission further explained that the opportunity for the relevant distribution utility to review the list of these resources would allow them to assess whether the resources would be able to respond to RTO/ISO dispatch instructions without posing any significant risk to the distribution system and to ensure these resources are not participating in any other retail compensation programs. The Commission proposed to give the relevant distribution utility or utilities the opportunity to report such concerns or issues to the RTO/ISO for its consideration prior to the RTO/ISO allowing the new or modified distributed energy resource aggregation to participate in the organized wholesale electric market.

b. Comments

282. Numerous commenters generally support the NOPR proposal for distribution utility review,[669] but differ about the scope and the timing of this review.

283. While generally supportive of the NOPR proposal, several distribution utilities voice a broad range of concerns about their role in coordination and the impact of distributed energy resource aggregations on their distribution systems. In particular, distribution utilities generally argue for an even greater and decision-making role in reviewing distributed energy resource registrations.[670] NRECA argues for distribution utility review of individual distributed energy resource participation in distributed energy resource aggregations before the resources participate in RTO/ISO markets.[671] Additional commenters argue that distribution utilities and RTOs/ISOs must be afforded enough time to perform impact studies, preferably using study parameters adopted and implemented by state and local regulators, for each distributed energy resource and for the aggregation to ensure safe and reliable grid operation,[672] and other commenters specifically request that the Commission address the timing of the distribution utility review in the final rule.[673] MISO Transmission Owners request that any final rule require distribution utility approval of any aggregation arrangement to ensure that all of the appropriate distribution utility requirements for interconnection and other relevant regulations and processes have been met.[674] NRECA asserts that distribution utilities need detailed information in order to assess whether distributed energy resource participation is beneficial.[675]

284. Moreover, several distribution utilities seek more than review capability and assert that the distribution utility's consent to the participation of a distributed energy resource in an aggregation is a necessary prerequisite before the aggregation may operate.[676] According to these commenters, distribution utilities, who have the knowledge and understanding of distribution system challenges, should have the authority to make decisions regarding the participation of a distributed energy resource aggregation.[677] EEI further argues that distribution utilities must be able to restrict participation until the reliability and/or safety issue is addressed, and must be notified in real-time if a resource that is connected to its distribution system joins a distributed energy resource aggregation.[678]

285. Electric storage resource developers and advocates support the NOPR proposal, but raise concerns about the proposed distribution utility review process.[679] They are concerned that distribution utility review will act as a barrier by providing the distribution utility a ''gatekeeper'' role.[680] Furthermore, some commenters argue that distribution utilities do not have the right or the jurisdiction to veto what distributed energy resources may join aggregations or what aggregations may participate in organized wholesale electric markets.[681] Advanced Energy Management states that giving distribution utilities discretionary authority to approve distributed energy resources ''could usurp FERC's clear jurisdiction over the conditions for wholesale market eligibility.'' [682] Similarly, SEIA suggests that the discretion of distribution utilities should be limited to violations of interconnection agreements and that it

[666] *See infra* Section IV.H.4 (Role of Relevant Electric Retail Regulatory Authorities).

[667] NOPR, 157 FERC ¶ 61,121 at PP 149, 154.

[668] *Id.* P 154.

[669] *See, e.g.,* Avangrid Comments (RM16–23) at 16; Pacific Gas & Electric Comments (RM16–23) at 21; PJM Comments (2018 RM18–9) at 19; Robert Borlick Comments (RM16–23) at 5–7; SoCal Edison Comments (RM16–23) at 6; TAPS Comments (2018 RM18–9) at 27.

[670] *See, e.g.,* Dominion Comments (RM16–23) at 10; EEI Comments (RM16–23) at 35–36; MISO Transmission Owners Comments (RM16–23) at 19; SoCal Edison Comments (RM16–23) at 11–12; Xcel Energy Services Comments (RM16–23) at 28.

[671] NRECA Comments (2018 RM18–9) at 29.

[672] *See, e.g.,* Dominion Comments (RM16–23) at 10; EEI Comments (RM16–23) at 35–36; PJM Utilities Coalition Comments (2018 RM18–9) at 14–15.

[673] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 40; Advanced Energy Management Comments (RM16–23) at 21; NextEra Comments (RM16–23) at 17.

[674] MISO Transmission Owners Comments (RM16–23) at 19.

[675] NRECA Comments (2018 RM18–9) at 29.

[676] *See, e.g.,* EEI Comments (2018 RM18–9) at 10, 13; NRECA Comments (2018 RM18–9) at 29; PJM Utilities Coalition Comments (2018 RM18–9) at 14; TAPS Comments (RM16–23) at 25; TAPS Comments (2018 RM18–9) at 28.

[677] *See, e.g.,* EEI Comments (2018 RM18–9) at 13; TAPS Comments (2018 RM18–9) at 28.

[678] EEI Comments (2018 RM18–9) at 13.

[679] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 39, 40; Advanced Energy Management Comments (RM16–23) at 21, 22; Center for Biological Diversity Comments (RM16–23) at 3; Stem Comments (RM16–23) at 15.

[680] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 39, 40; Advanced Energy Management Comments (RM16–23) at 21, 22; Stem Comments (RM16–23) at 14–15.

[681] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 11; Advanced Energy Management Comments (2018 RM18–9) at 18; SEIA Comments (2018 RM18–9) at 16; Stem Comments (2018 RM18–9) at 15; Sunrun Comments (2018 RM18–9) at 6.

[682] Advanced Energy Management Comments (2018 RM18–9) at 18.

would be inappropriate for distribution utilities to have veto rights over distributed energy resource participation.[683] SEIA further draws a distinction between existing and new distributed energy resources. For existing distributed energy resources that are already operating on the grid, so long as the distributed energy resource does not modify the generation system outside of what has already been approved, SEIA recommends that the Commission ensure that there is a streamlined process to ensure that the existing distributed energy resources can participate through a distributed energy resource aggregator participation model.

286. Commenters in support of the NOPR proposal urge the Commission to include limits on the scope of this review or adopt specific parameters for this review. Global Cold Chain Alliance and Viking Cold Solutions raise concerns about distribution review processes that prevent development and adoption of new technologies.[684] Advanced Energy Management and Advanced Energy Economy further argue that distribution utilities should (1) be required to identify to RTOs/ISOs specific areas of their network where they have limited ability to accommodate additional distributed energy resource registrations, with a notification requirement only when the local ability has been exceeded; (2) allow customers and their distributed energy resource aggregators to see information provided by the utility if the RTO/ISO uses that information in a decision to prohibit a distributed energy resource registration, and provide the ability to appeal such a rejection; and (3) be prohibited from registering customers in their own distributed energy resource aggregations that they had previously disqualified for reliability reasons.[685] Advanced Energy Management also recommends that there should be no requirement for distribution utilities to review distributed energy resource registrations unless the customers are exporting to the grid.[686] After a specific timeline of review, Advanced Energy Management and Tesla recommend that the distribution utility still be given the opportunity to notify the RTO/ISO if the distributed energy resource does not have the necessary interconnection agreements or is participating in a retail tariff that did not allow wholesale participation.[687] In these limited ''exception only'' models, distribution utilities are not provided the ability to approve distributed energy resource participation in Commission-jurisdictional markets, but may review and raise objections.[688] Advanced Energy Management and Stem state that distribution utilities should exercise their authority prior to a distributed energy resource's registration in a RTO/ISO by defining non-discriminatory interconnection procedures that ensure the distribution grid can accommodate distributed energy resources, whether or not a distributed energy resource aggregation participated in a wholesale transaction.[689]

287. Multiple commenters suggest specific review criteria that the distribution utilities should adhere to. Several commenters assert that any denial of participation in distributed energy resource aggregation should only be based on specified operational coordination and reliability concerns, such as violation of state-regulated interconnection protocols and agreements that address binding distribution system constraints and reflect non-discriminatory agreements on exporting energy to the grid, or reflect customers who already participate in tariffs or other agreements that disallow wholesale participation.[690] NRECA offers the following criteria: That the participation of a distributed energy resource in an aggregation will not create any safety, reliability or power quality concerns on their systems, and that implementation of distributed energy resource aggregation will conform to the requirements of the IEEE standards.[691] NYISO Indicated Transmission Owners suggest that any interconnection agreement for a distributed energy resource participating in an aggregation must demonstrate the ability of an individual distributed energy resource to (1) participate in an aggregation; (2) communicate essential information to the distribution system operator and RTO/ISO using RTO/ISO communication and operating protocols, as appropriate; and (3) meet RTO/ISO performance standards.[692] Pacific Gas & Electric recommends that an individual distributed energy resource wishing to participate in an aggregation (1) will not cause voltage problems or overload existing equipment; (2) is able to comply with requirements in its individual interconnection agreement when operated in the aggregate; and (3) is not already participating in another distributed energy resource aggregation.[693] EEI argues that the criteria to determine distributed energy resource participation should be ''good utility practice.'' [694] In a similar vein, several commenters request clear standards or guidelines for distribution utility review, while APPA conversely urges the Commission to allow for flexibility in the criteria adopted by distribution utilities.[695]

288. Stem and Tesla/SolarCity do not support the NOPR proposal on distribution utility review and recommend that limits be placed on this review if the Commission chooses to include the requirement in a final rule. Stem argues that the Commission should not give local distribution utilities carte blanche to deny a distributed energy resource eligibility to participate in a distributed energy resource aggregation, RTO/ISO markets, or other participation model.[696] Stem recommends an alternative default approach that allows participation unless the local utility provides a specific, credible safety or reliability risk.[697] Tesla/SolarCity argue that having an appropriate level of communication between the RTO/ISO and distribution utility eliminates the need for distribution utility review.[698]

289. Commenters also express differing opinions on the length of time required to conduct the review of distributed energy resource participation. Several distribution utilities recommend that a reasonable timetable or no time limits be established for review, and argue that sufficient time is needed for review and/

[683] SEIA Comments (2018 RM18–9) at 16.

[684] Global Cold Chain Alliance Comments (2018 RM18–9) at 2–3; Viking Cold Solutions Comments (2018 RM18–9) at 3.

[685] Advanced Energy Economy Comments (RM16–23) at 39, 40; Advanced Energy Management Comments (RM16–23) at 21, 22.

[686] Advanced Energy Management Comments (RM16–23) at 21.

[687] Advanced Energy Management Comments (2018 RM18–9) at 19; Tesla Comments (2018 RM18–9) at 10.

[688] *See, e.g.,* Advanced Energy Management Comments (2018 RM18–9) at 17; Icetec Comments (2018 RM18–9) at 17–18; Sunrun Comments (2018 RM18–9) at 7; Tesla Comments (2018 RM18–9) at 9–10.

[689] Advanced Energy Management Comments (2018 RM18–9) at 18; Stem Comments (2018 RM18–9) at 15.

[690] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 11; Icetec Comments (2018 RM18–9) at 16; SEIA Comments (2018 RM18–9) at 16; Stem Comments (2018 RM18–9) at 14–15; Tesla Comments (2018 RM18–9) at 9.

[691] NRECA Comments (2018 RM18–9) at 30.

[692] NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 15, 17.

[693] Pacific Gas & Electric Comments (2018 RM18–9) at 17–18.

[694] EEI Comments (2018 RM18–9) at 14.

[695] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 39; APPA Comments (2018 RM18–9) at 27; Center for Biological Diversity Comments (RM16–23) at 3.

[696] Stem Comments (RM16–23) at 4, 15.

[697] *Id.* at 4.

[698] Tesla/SolarCity Comments (RM16–23) at 30.

or consultation between the distributed energy resource aggregator and distribution utility to ensure the distribution grid can be operated in a safe and reliable manner during the aggregated distributed energy resource operating conditions.[699] Distributed energy resource providers, such as Stem, take the opposite view and assert that RTOs and ISOs are not obligated to wait for the distribution utility to review the registration of a distributed energy resource if the distributed energy resource can prove it has completed an applicable state-level interconnection process.[700] Nevertheless, several commenters agree that it would be reasonable for an RTO/ISO to pause registration of a distributed energy resource to provide time (*e.g.,* 10 days or CAISO's 30-day timeline) for the distribution utility to ensure that sufficient interconnection procedures have been followed and approved interconnection agreements are in place, but they do not recommend the Commission require a specific timeline.[701] Icetec specifically requests that RTO/ISO rules be developed on the procedures and timelines for distribution-level studies if there is no state and local regulatory tariff governing these studies.[702]

290. RTOs/ISOs support the NOPR proposal but raise questions about their role in aggregation approvals and dispute resolution, communication system requirements, and the extent of the coordination proposed by the Commission.[703] PJM argues that the registration process and timing needed to participate in an RTO/ISO market should be straight forward, predictable, and transparent, and that any basis for the RTO/ISO to prohibit wholesale market participation should be set forth in its tariff.[704] CAISO, IRC, and PJM would also like the Commission to provide guidance on how and where disputes between the RTO/ISO and distribution utilities regarding coordination of distributed energy resources are to be resolved.[705] CAISO requests additional processes beyond sharing information, arguing that processes are needed to resolve or mitigate any problems the distribution utility may find during its review, including developing a solution with the distributed energy resource provider.[706]

291. Finally, while most comments focus on initial registration, TAPS states that a distribution utility should also be able to reopen the approval of an individual distributed energy resource's enrollment in a distributed energy resource aggregation if the distribution system is reconfigured.[707]

c. Commission Determination

292. To implement § 35.28(g)(12)(ii)(g) of the Commission's regulations, we adopt the NOPR proposal to require each RTO/ISO to modify its tariff to incorporate a comprehensive and non-discriminatory process for timely review by a distribution utility of the individual distributed energy resources that comprise a distributed energy resource aggregation, which is triggered by initial registration of the distributed energy resource aggregation or incremental changes to a distributed energy resource aggregation already participating in the markets. As described below, each RTO/ISO must coordinate with distribution utilities to develop a distribution utility review process that includes criteria by which the distribution utilities would determine whether (1) each proposed distributed energy resource is capable of participation in a distributed energy resource aggregation; and (2) the participation of each proposed distributed energy resource in a distributed energy resource aggregation will not pose significant risks to the reliable and safe operation of the distribution system. To support this review process, RTOs/ISOs must share with distribution utilities any necessary information and data collected under Section IV.F of this final rule about the individual distributed energy resources participating in a distributed energy resource aggregation. In addition, the results of a distribution utility's review must be incorporated into the distributed energy resource aggregation registration process.

293. To balance the need for distribution utility review with the need to avoid creating potential barriers to distributed energy resource aggregation, as noted by commenters, we require each RTO/ISO to demonstrate on compliance with this final rule, as discussed further below,[708] that its proposed distribution utility review process is transparent, provides specific review criteria that the distribution utilities should use, and provides adequate and reasonable time for distribution utility review.[709] A transparent review process with specific review criteria will allow distribution utilities to review and identify concerns regarding the ability of distributed energy resources to participate in a distributed energy resource aggregation without posing significant reliability risk to the distribution system. We also find that allowing an RTO/ISO to design this new process allows regional flexibility in developing review procedures appropriate for each particular RTO/ISO.

294. As explained above,[710] we decline to exercise jurisdiction over the interconnection of an individual distributed energy resource seeking to participate in RTO/ISO markets exclusively as part of an aggregation. We expect that the state and local interconnection processes for distributed energy resources will provide the appropriate platform to address and study potential distribution system impacts and provide the necessary information to inform distribution utility review during distributed energy resource aggregation registration. However, to the extent that some existing state and local interconnection processes do not already capture such information, this final rule in no way prevents state and local regulators from amending their interconnection processes to address potential distribution system impacts that the participation of distributed energy resources through distributed energy resource aggregations may cause. In addition, coordination between RTOs/ISOs, distributed energy resource aggregators, relevant electric retail regulatory authorities, and distribution utilities during the registration and distribution utility review processes should provide RTOs/ISOs with the information they need to study the impact of distributed energy resource aggregations on the transmission system.

295. We agree with commenters[711] that a lengthy review time or the lack of a deadline could erect a barrier to distributed energy resource

[699] *See, e.g.,* NRECA Comments (2018 RM18–9) at 29; Pacific Gas & Electric Comments (2018 RM18–9) at 13.

[700] Stem Comments (2018 RM18–9) at 15.

[701] *See, e.g.,* Icetec Comments (2018 RM18–9) at 17–18; Stem Comments (2018 RM18–9) at 15; Sunrun Comments (2018 RM18–9) at 7.

[702] Icetec Comments (2018 RM18–9) at 9.

[703] CAISO Comments (RM16–23) at 39, 41–43, 46; IRC Comments (RM16–23) at 9; ISO–NE Comments (RM16–23) at 54–55; PJM Comments (RM16–23) at 8, 26; SPP Comments (RM16–23) at 24.

[704] PJM Comments (2018 RM18–9) at 19.

[705] CAISO Comments (RM16–23) at 41; IRC Comments (RM16–23) at 9; PJM Comments (RM16–23) at 8.

[706] CAISO Comments (RM16–23) at 41.

[707] TAPS Comments (2018 RM18–9) at 28.

[708] *See infra* PP 295–297.

[709] For example, the approach used in the CAISO Distributed Energy Resource Provider program.

[710] *See supra* Section IV.A.3 (Interconnection).

[711] *See, e.g.,* Advanced Energy Management Comments (2018 RM18–9) at 19; Stem Comments (2018 RM18–9) at 15; Tesla Comments (2018 RM18–9) at 9.

participation in the RTO/ISO markets and may unduly delay participation. In response to these concerns, we clarify that any distribution utility review must be completed within a limited, but reasonable amount of time.[712] We expect a reasonable amount of time may vary among RTOs/ISOs but should not exceed 60 days. An RTO/ISO, on compliance, should propose a timeline that reflects its regional needs. In compliance with this final rule, we require each RTO/ISO to revise its tariff to specify, as part of its proposed distribution utility review process, the time that a distribution utility has to identify any concerns regarding a distributed energy resource seeking to participate in the RTO/ISO markets through an aggregation.

296. In addition, we agree with commenters that argue for specific standards and criteria to guide and govern the distribution utility review process. However, we are not standardizing the criteria that the RTOs/ISOs must adopt. We believe there are sufficient differences among the regions, such as their rules limiting participation in different programs, to warrant flexibility in determining specific standardized criteria. On compliance with this final rule, we require that each RTO/ISO revise its tariff to include, as part of its proposed distribution utility review processes, the distribution utility review criteria by which distribution utilities can determine that a distributed energy resource (1) is capable of participating in an aggregation, *e.g.,* the distributed energy resource is not already participating in a retail distributed energy resource program in which the relevant electric retail regulatory authority conditioned the resource's participation on not participating in RTO/ISO markets; and (2) does not pose significant risks to the reliable and safe operation of the distribution system.

297. We agree with multiple commenters, such as EEI and Advanced Energy Economy, that the RTOs/ISOs must include potential impacts on distribution system reliability as a criterion in the distribution utility review process. For example, if a distribution utility determines during the distribution utility review process that a distributed energy resource operated as part of an aggregation may increase voltage above acceptable limits or create potential equipment overloads, the distribution utility should have the opportunity to alert the RTO/ISO and recommend removal of that distributed energy resource from the distributed energy resource aggregation. In addition, the distribution utility should have the opportunity to request that the RTO/ISO place operational limitations on an aggregation or removal of a distributed energy resource from an aggregation based on specific significant reliability or safety concerns that it clearly demonstrates to the RTO/ISO and distributed energy resource aggregator on a case-by-case basis. For example, the RTOs/ISOs may consider requiring a signed affidavit or other evidence from the distribution utility that a distributed energy resource's participation in RTO/ISO markets would pose a significant risk to the safe and reliable operation of the distribution system, and processes to contest the distribution utility's recommendation for removal or for operational limitations to be placed on the aggregation.

298. In response to comments from EEI, TAPS, and multiple distribution utilities that argue for a larger and decision-making role for the distribution utilities during the review of distributed energy resource registrations, we decline to provide such a role. We find that requiring or permitting distribution utilities to authorize the participation of distributed energy resources in RTO/ISO markets directly or as part of an aggregation could create a barrier to distributed energy resource aggregation.[713] The distribution utility review processes and interconnection protocols discussed above should address and resolve the key distribution reliability concerns raised by these commenters. We find that the ability of distribution utilities to review and comment on distributed energy resource participation in aggregations, as well as the Commission's finding that individual distributed energy resources that will participate in aggregations will interconnect under state and local interconnection protocols, represents a balanced approach to removing barriers to the participation of distributed energy resource aggregations in RTO/ISO markets, while protecting reliability and the fundamental role of distribution utilities in operating their distribution systems.

299. In response to concerns raised by IRC and PJM regarding disputes about distribution utility review,[714] we find that any disputes over the application of coordination and distribution utility review processes between the RTO/ISO, the distribution utilities, and the distributed energy resource aggregators must be subject to a process for resolving disputes in the RTO/ISO tariff. Therefore, we require each RTO/ISO to revise its tariff to incorporate dispute resolution provisions as part of its proposed distribution utility review process. In its compliance filing, each RTO/ISO should describe how existing dispute resolution procedures are sufficient or, alternatively, propose amendments to its procedures or new dispute resolution procedures specific to this subject. Ensuring that disputes regarding the distribution utility review process are subject to dispute resolution provisions in RTO/ISO tariffs provides a formal mechanism for the interested party to attempt to resolve the issue with the RTO/ISO. Any parties in conflict over the distribution utility review processes may also bring such disputes to the Commission's Dispute Resolution Service, or file complaints pursuant to FPA section 206 at any time.[715]

3. Ongoing Operational Coordination

a. NOPR Proposal

300. In the NOPR, the Commission proposed to require that each RTO/ISO revise its tariff to establish a process for ongoing coordination, including operational coordination, among itself, the distributed energy resource aggregator, and the distribution utility to maximize the availability of the distributed energy resource aggregation consistent with the safe and reliable operation of the distribution system.[716] The Commission explained that the purpose of this ongoing coordination would be to ensure that the distributed energy resource aggregator disaggregates dispatch signals from the RTO/ISO and dispatches individual resources in a distributed energy resource aggregation consistent with the limitations of the distribution system. To account for the possibility that distribution facilities may be out of service and impair the operation of certain individual resources in a distributed energy resource aggregation, the Commission also proposed to require each RTO/ISO to revise its tariff to require the distributed energy resource aggregator to report to the RTO/ISO any changes to its offered quantity and related distribution

[712] For instance, CAISO utilizes a 30-day review period in its Distributed Energy Resource Provider program.

[713] *See supra* Section IV.A.2 (Opt-Out) for further discussion.

[714] *See, e.g.,* IRC Comments (RM16–23) at 9; PJM Comments (2018 RM18–9) at 8.

[715] For example, a dispute over how the RTO/ISO managed and implemented the distribution review process during a distributed energy resource aggregation registration could be brought to the Commission.

[716] NOPR, 157 FERC ¶ 61,121 at P 155.

factors that result from distribution line faults or outages.

301. In addition, the Commission sought comment on any related reliability, safety, and operational concerns and how they may be effectively addressed.

b. Comments

302. Several commenters express their support for ongoing coordination and emphasize the importance of real-time coordination to ensure safe and reliable operation of the transmission and distribution systems.[717] Many distribution utilities in support of the NOPR proposal suggest specific roles or priorities for distribution utilities as part of ongoing coordination. Pacific Gas & Electric states that services in support of distribution system safety and reliability must be prioritized, as determined by the distribution company, over wholesale market participation when distributed energy resources are providing multiple services.[718] NYISO Indicated Transmission Owners and Xcel Energy Services request that the Commission permit distribution utilities to limit the energy injections and ancillary services from specific distributed energy resources with advanced notice.[719] Other commenters argue that distribution utilities must have the ability to limit distributed energy resource generation in order to ensure safety and reliability because RTOs/ISOs do not have sufficient information to maintain the safety and reliability of the distribution grid.[720]

303. Several commenters provide input on the processes needed to alert distributed energy resource aggregators about problems on distribution systems. Dominion agrees with the NOPR requirement that a distributed energy resource aggregator should be responsible for reporting to the RTO/ISO when its offered quantity changes due to distribution facilities being out of service.[721] SPP notes it will require significant effort to coordinate with entities with which the RTO/ISO has not previously had two-way communications.[722] CAISO recommends that the approach being developed for its Distributed Energy Resource Provider program be used as a means to allow distribution utilities to identify problems on their distribution systems.[723] CAISO believes that a process is needed for distribution utilities to notify a distributed energy resource aggregator of changes to distribution system conditions that will affect the aggregated resource's ability to perform to its maximum capability, such as a red/green traffic signal.[724] The Organization of MISO States argues that distribution system operators must have the ability to communicate information on topology changes in real-time which may impact the ability of aggregations to participate in the wholesale market.[725] Several commenters indicate that the current data acquisition technologies are largely manual, but will be adequate initially for ongoing coordination.[726]

304. Multiple commenters state that, at higher distributed energy resource penetrations, enhanced equipment and information to increase coordination and communication between the distribution utility, distributed energy resource aggregator, and the RTO/ISO will be necessary and are still in the process of being developed.[727] TAPS and EEI argue that distribution utilities will need timely information on planned dispatch, and that there must be a realistic timeline for preventing a dispatch and notifying the distributed energy resource aggregator or the RTO/ISO if a dispatch would adversely affect retail service.[728]

305. Some commenters address the role of the distribution utility in ongoing operational coordination. Advanced Energy Economy and EEI state that the distribution utility should be made aware of all information collected by the aggregator.[729] More fundamentally, EEI comments that the distribution utility is in the best position to serve as the coordinator of distribution operations to ensure the complete provision of information is being provided to all parties.[730]

306. Several commenters offer suggestions or request guidance on aspects of ongoing coordination. Avangrid advocates that all communication during ongoing coordination be channeled through distributed energy resource aggregators.[731] Furthermore, Avangrid states that distributed energy resource aggregators should assume the responsibility for the performance of their aggregated resource and be responsible for any costs incurred by distribution utilities to mitigate and resolve power quality issues caused by distributed energy resources. TeMix states that dispatch of end customer load, distributed generation, and storage must be coordinated with the operators of the distribution grid circuits, which can be complex.[732]

307. Several commenters claim that the RTO/ISO tariffs should be less specific about what is required for ongoing coordination processes and rules. ISO–NE states that the Commission should not be overly prescriptive regarding the level of detail required in each RTO/ISO tariff regarding coordination among these entities on operational coordination, and requests that the Commission allow each RTO/ISO to develop these requirements in conjunction with stakeholders.[733] Pacific Gas & Electric states that it may be appropriate to include high-level requirements for information sharing and operational coordination, but more technical issues associated with distributed energy resource aggregation implementation are fluid and evolving, and thus tariff language may not be flexible or adaptable enough to account for needed useful, timely changes.[734] Advanced Energy Economy and Union of Concerned Scientists emphasize that ongoing coordination already occurs with other resources, such as remote and dispersed hydroelectric generation, and argue that existing protocols are sufficient.[735]

308. Most commenters agree that distribution utilities should have the right to override RTO/ISO dispatch instructions for distributed energy resources located on their distribution systems to resolve or avoid distribution

[717] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 45; Duke Energy Comments (RM16–23) at 7; EEI Comments (RM16–23) at 37; Exelon Comments (RM16–23) at 2, 11; Guannan He Comments (RM16–23) at 2; NYISO Comments (RM16–23) at 19.

[718] Pacific Gas & Electric Comments (RM16–23) at 21.

[719] NYISO Indicated Transmission Owners Comments (RM16–23) at 15–16; Xcel Energy Services Comments (RM16–23) at 28.

[720] Organization of MISO States Comments (2018 RM18–9) at 5; SoCal Edison Comments (RM16–23) at 7–8.

[721] Dominion Comments (RM16–23) at 13–14.

[722] SPP Comments (RM16–23) at 24.

[723] CAISO Comments (RM16–23) at 42–43.

[724] *Id.* at 42–44.

[725] Organization of MISO States Comments (2018 RM18–9) at 5.

[726] *See, e.g.,* NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 22; PJM Comments (2018 RM18–9) at 27.

[727] *See, e.g.,* Advanced Energy Management Comments (2018 RM18–9) at 21–22; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 23; Pacific Gas & Electric Comments (2018 RM18–9) at 22–23; PJM Comments (2018 RM18–9) at 27; TAPS Comments (2018 RM18–9) at 14.

[728] EEI Comments (2018 RM18–9) at 12; TAPS Comments (2018 RM18–9) at 14.

[729] Advanced Energy Economy Comments (2018 RM18–9) at 11; EEI Comments (2018 RM18–9) at 17.

[730] EEI Comments (2018 RM18–9) at 17.

[731] Avangrid Comments (RM16–23) at 17.

[732] TeMix Comments (RM16–23) at 4.

[733] ISO–NE Comments (RM16–23) at 55.

[734] Pacific Gas & Electric Comments (RM16–23) at 22.

[735] Advanced Energy Economy Comments (RM16–23) at 38; Union of Concerned Scientists Comments (RM16–23) at 9.

reliability issues.[736] Lorenzo Kristov indicates that the manner in which a distribution utility can override a dispatch instruction should be clarified so that distributed energy resource providers will be better able to estimate their risk of being curtailed due to distribution system conditions.[737] NYISO Indicated Transmission Owners state that the distribution utility should communicate potential issues with dispatch schedules to the distributed energy resource aggregators to provide them with an opportunity to re-adjust the distributed energy resource aggregation dispatch schedule.[738] Conversely, Stem argues that, because a distribution utility does not have visibility into the exact distribution level impacts of a wholesale market dispatch, the distribution utility should not be able to override a dispatch.[739]

309. Commenters disagree about how performance penalties should be applied in the event that a distribution utility overrides an RTO/ISO dispatch. Several commenters generally argue that distributed energy resource aggregators should be subject to performance penalties, like all other resources.[740] PG&E and PJM assert that non-deliverability penalties are subject to bilateral and contractual agreement between the distributed energy resource aggregator and the RTO/ISO.[741] Developers argue that the aggregator should not be assessed penalties due to an outage caused by the distribution system operator's controls.[742] Distribution utilities argue that, in the event of a curtailment, they must have protection from liability.[743]

c. Commission Determination

310. We agree with commenters that emphasize the importance of real-time coordination to ensure safe and reliable operation of the transmission and distribution systems. Consequently, to implement § 35.28(g)(12)(ii)(g) of the Commission's regulations, we adopt the NOPR proposal to require each RTO/ISO to revise its tariff to (1) establish a process for ongoing coordination, including operational coordination, that addresses data flows and communication among itself, the distributed energy resource aggregator, and the distribution utility; and (2) require the distributed energy resource aggregator to report to the RTO/ISO any changes to its offered quantity and related distribution factors that result from distribution line faults or outages. Further, we require each RTO/ISO to revise its tariff to include coordination protocols and processes for the operating day that allow distribution utilities to override RTO/ISO dispatch of a distributed energy resource aggregation in circumstances where such override is needed to maintain the reliable and safe operation of the distribution system. These processes that allow distribution utilities to override RTO/ISO dispatch must be contained in the tariff and must be non-discriminatory and transparent but still address distribution utility reliability and safety concerns. We find these operational coordination requirements will maximize the availability of the distributed energy resource aggregation consistent with the reliable and safe operation of the distribution system.

311. Commenters disagree over the level of specificity needed in RTO/ISO tariffs and describe different approaches to ongoing coordination. To account for different regional approaches and to provide flexibility, we are not prescribing specific protocols or processes for the RTOs/ISOs to adopt as part of the operational coordination requirements, but rather we will allow each RTO/ISO to develop an approach to ongoing operational coordination in compliance with this final rule.

312. We also require each RTO/ISO to revise its tariff to apply any existing resource non-performance penalties to a distributed energy resource aggregation when the aggregation does not perform because a distribution utility overrides the RTO's/ISO's dispatch. We find that this requirement will ensure that distributed energy resource aggregations are subject to non-performance penalties similarly to other resources participating in RTO/ISO markets. We note that this requirement will incent distributed energy resource aggregators to register individual distributed energy resources on less-constrained portions of distribution networks in order to minimize the likelihood of incurring non-performance penalties from the RTO/ISO.

313. We acknowledge that the timing and location of distribution utility overrides of dispatch instructions are outside of the control of distributed energy resource aggregators, and that aggregators may not have advance notice of overrides during an operating day. In response to commenters who state that distribution utilities must have protection from liability in the event of a curtailment or an outage caused by the distribution system operator's actions to preserve the safety and reliability of the distribution system,[744] we decline to impose any specific liability provisions. Given the arguments advanced by commenters, we are not persuaded that all distribution providers face similar liability concerns and that these concerns should be addressed through standardized liability provisions in RTO/ISO tariffs. Accordingly, we decline to establish a generic requirement for RTOs/ISOs with respect to liability provisions.

4. Role of Relevant Electric Retail Regulatory Authorities

a. NOPR Proposal

314. The NOPR did not directly address the role of relevant electric retail regulatory authorities in coordination with the RTO/ISO, the distributed energy resource aggregator, and the distribution utility when a distributed energy resource aggregation seeks to participate in an RTO/ISO market. However, after the April 2018 technical conference, the Commission sought comment on the role of relevant electric retail regulatory authorities in coordination.

b. Comments

315. Most commenters assert that relevant electric retail regulatory authorities have a central and key role in coordination and that the responsibilities of such authorities should be focused on setting rules and supervising distribution utility review of distributed energy resource participation in aggregations.

316. Some relevant electric retail regulatory authorities argue that they must have a central role in coordination to ensure that their jurisdiction is preserved as it relates to market activities on the distribution system by distributed energy resources participating in RTO/ISO markets.[745]

[736] *See, e.g.,* California Commission Comments (2018 RM18–9) at 18; Duquesne Comments (2018 RM18–9) at 7; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 23; Pacific Gas & Electric Comments (2018 RM18–9) at 24; SunRun Comments (2018 RM18–9) at 5–6; TAPS Comments (2018 RM18–9) at 29.

[737] Lorenzo Kristov Comments (2018 RM18–9) at 17.

[738] NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 23.

[739] Stem Comments (2018 RM18–9) at 17.

[740] Monitoring Analytics Comments (2018 RM18–9) at 13; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 23; PJM Comments (2018 RM18–9) at 27–28.

[741] Pacific Gas & Electric Comments (2018 RM18–9) at 24; PJM Comments (2018 RM18–9) at 27–28.

[742] Microgrid Resources Coalition Comments (2018 RM18–9) at 15; Stem Comments (2018 RM18–9) at 17; SunRun Comments (2018 RM18–9) at 6.

[743] Eversource Comments (2018 RM18–9) at 11; SoCal Edison Comments (2018 RM18–9) at 10; TAPS Comments (2018 RM18–9) at 29.

[744] *See, e.g.,* Eversource Comments (2018 RM18–9) at 11; SoCal Edison Comments (2018 RM18–9) at 10; TAPS Comments (2018 RM18–9) at 29.

[745] *See, e.g.,* Vice Chairman Place Comments (2018 RM18–9) at 8; Organization of MISO States Comments (2018 RM18–9) at 9–10.

Vice Chairman Place requests that the Commission require the role of relevant electric retail regulatory authorities be reflected in RTO/ISO rules, and that, if the Commission sets roles and responsibilities in RTO/ISO rules, relevant electric retail regulatory authorities should participate in setting these rules.[746] In addition, the Organization of MISO States contends that relevant electric retail regulatory authorities will need to be aware of coordination efforts and be able to participate in, and in some cases lead, these efforts based on jurisdictional scope, prevalence of distributed energy resource penetration, and state and local policy.[747] Vice Chairman Place requests that the relevant electric regulatory authority's ability to restrict distributed energy resource participation in the wholesale market be maintained.[748]

317. Distribution utilities generally agree with the comments from relevant electric retail regulatory authorities and support a central and key role for relevant electric retail regulatory authorities in coordinating the participation of aggregated distributed energy resource in RTO/ISO markets.[749] Specific roles and responsibilities for relevant electric retail regulatory authorities identified by distribution utility commenters include: Supervision of distribution utility review of distributed energy resource participation in aggregations; evaluation of distributed energy resources interconnection to distribution facilities; overseeing issues regarding distribution system operation and reliability; data sharing; and setting of metering requirements and related mechanisms to distinguish wholesale and retail transactions.[750] Moreover, APPA requests that the Commission be explicit that nothing in the final rule preempts or otherwise limits the ability of relevant electric retail regulatory authorities to adopt rules or tariffs, and to set rates to recover and allocate the costs associated with facilitating wholesale market participation by aggregated distributed energy resources.[751]

318. CAISO also comments in support of the role of relevant electric retail regulatory authorities in facilitating coordination. Based on its experience in California, CAISO identifies several possible coordination roles and responsibilities for relevant electric retail regulatory authorities, including: Establishing metering requirements for distributed energy resources; establishing rules for multi-use applications; providing oversight of distribution utility review of distributed energy resource participation in an aggregation; and resolving distributed energy resource aggregation controversies.[752] As an example of the importance of relevant electric retail regulatory authorities in distributed energy resource coordination, CAISO references its Commission-approved distributed energy resource process that requires that distributed energy resource providers comply with applicable utility distribution company tariffs, and operating procedures incorporated into those tariffs, as well as applicable requirements of the local regulatory authority.[753]

319. Conversely, other commenters argue for a somewhat more limited role for relevant electric retail regulatory authorities. Advanced Energy Management argues that the role of relevant electric retail regulatory authorities should be limited to defining non-discriminatory interconnection procedures that ensure the distribution grid can accommodate distributed energy resources, and ensuring that the distributed energy resource can safely deliver energy to the grid.[754] Icetec asserts that the coordination of distributed energy resource registrations should not become a vehicle for distribution utilities or relevant electric retail regulatory authorities to exercise improper authority over eligibility to participate in wholesale markets.[755] In order to forestall this possible intervention, Icetec recommends making distribution interconnection and registration for wholesale markets entirely separate processes.[756]

320. Some commenters urge the Commission to respect state and local concerns regarding distributed energy resource aggregations. APPA states that the Commission should afford distribution utilities and their relevant electric retail regulatory authorities a key role in coordinating the participation of aggregated distributed energy resources in RTO/ISO markets.[757] The Indiana Commission states that distributed energy resource wholesale participation must work in tandem with, and not in contravention of, Indiana's utility regulatory framework.[758] PJM Utilities Coalition urges the Commission to defer to relevant electric retail regulatory authorities in fashioning programs that integrate distributed energy resources into the distribution system, asserting that states are uniquely positioned to balance the benefits of distributed energy resource participation in wholesale markets with costs and other adverse impacts on distribution systems and retail load.[759]

321. The California Commission recommends that, given the complexity of ensuring just compensation for resources, it is most appropriate for local regulatory authorities to establish distinctly defined services and rules to govern coordination across wholesale and retail markets.[760]

c. Commission Determination

322. In consideration of the comments and to implement § 35.28(g)(12)(ii)(g) of the Commission's regulations, we require each RTO/ISO to specify in its tariff, as part of the market rules on coordination between the RTO/ISO, the distributed energy resource aggregator, and the distribution utility, how each RTO/ISO will accommodate and incorporate voluntary relevant electric retail regulatory authority involvement in coordinating the participation of aggregated distributed energy resources in RTO/ISO markets. We agree with commenters that relevant electric retail regulatory authorities have a role in coordination, *i.e.,* in setting rules at the distribution level and in RTO/ISO stakeholder discussions. Many relevant electric retail regulatory authorities indicate strong interest in participating in such coordination.

323. We note that the roles delineated in CAISO's Distributed Energy Resource Provider tariff provisions may provide an example of how relevant electric retail regulatory authorities could be involved in coordinating the participation of distributed energy resource aggregations in RTO/ISO

[746] Vice Chairman Place Comments (2018 RM18–9) at 8.

[747] Organization of MISO States Comments (2018 RM18–9) at 9.

[748] Vice Chairman Place Comments (2018 RM18–9) at 5.

[749] *See, e.g.,* APPA Comments (2018 RM18–9) at 2; New York Indicated Transmission Owners Comments (2018 RM18–9) at 17; Pacific Gas & Electric Comments (2018 RM18–9) at 16.

[750] *See, e.g.,* APPA Comments (2018 RM18–9) at 6; California Commission Comments (2018 RM18–9) at 1–3, 12; Organization of MISO States Comments (2018 RM18–9) at 9; Pacific Gas & Electric Comments (2018 RM18–9) at 16.

[751] APPA Comments (2018 RM18–9) at 4.

[752] CAISO Comments (2018 RM18–9) at 13–14.

[753] *Id.* at 14.

[754] Advanced Energy Management Comments (2018 RM18–9) at 18.

[755] Icetec Comments (2018 RM18–9) at 16.

[756] *Id.* at 18–19.

[757] APPA Comments (2018 RM18–9) at 2.

[758] Indiana Commission Comments (2018 RM18–9) at 2.

[759] PJM Utilities Coalition Comments (2018 RM18–9) at 10.

[760] California Commission Comments (2018 RM18–9) at 10–11.

markets. CAISO's Distributed Energy Resource Provider model requires that distributed energy resource providers comply with applicable utility distribution company tariffs and operating procedures incorporated into those tariffs, as well as applicable requirements of the local regulatory authority.[761]

324. We further note that possible roles and responsibilities of relevant electric retail regulatory authorities in coordinating the participation of distributed energy resource aggregations in RTO/ISO markets may include, but are not limited to: Developing interconnection agreements and rules; developing local rules to ensure distribution system safety and reliability, data sharing, and/or metering and telemetry requirements; overseeing distribution utility review of distributed energy resource participation in aggregations; establishing rules for multi-use applications; and resolving disputes between distributed energy resource aggregators and distribution utilities over issues such as access to individual distributed energy resource data. We require that any such role for relevant electric retail regulatory authorities in coordinating the participation of distributed energy resource aggregations in RTO/ISO markets be included in the RTO/ISO tariffs and developed in consultation with the relevant electric retail regulatory authorities. Further, as noted in Section IV.G, to the extent that metering and telemetry data comes from or flows through distribution utilities, we require that RTOs/ISOs coordinate with distribution utilities and the relevant electric retail regulatory authorities to establish protocols for sharing metering and telemetry data that minimize costs and other burdens and address concerns raised with respect to customer privacy and cybersecurity.

5. Coordination Frameworks

a. NOPR Proposal

325. As part of its proposal to require coordination in the NOPR, the Commission sought comment on the level of detail necessary in the RTO/ISO tariffs to establish a framework for ongoing coordination between the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utility or utilities.[762]

b. Comments

326. Several commenters propose that the Commission take a more proactive step and require RTOs/ISOs to establish a broader coordination structure, or ''coordination framework'' that addresses all aspects of coordination (planning, distributed energy resource registration, and operational coordination) between distributed energy resources, distributed energy resource aggregators, RTOs/ISOs, and distribution utilities. At the technical conference, panelist Jeffery Taft, Chief Architect at Pacific Northwest National Laboratory, described a coordination framework as a way to exchange information and control signals between the three levels of the U.S. electric system, namely the bulk power level, the distribution level, and the distributed energy resource/customer level.[763] R Street proposes two purposes for coordination frameworks, namely, to encourage technological innovation, and to coordinate policies between retail and wholesale markets.[764] Stem proposes three coordination frameworks (1) an operational framework; (2) a planning framework; and (3) a markets framework.[765] PJM suggests a framework that focuses on two components (1) reliability-related items; and (2) administrative items.[766] CAISO proposes an all-encompassing process that addresses each element of distributed energy resource aggregation.[767]

327. Several commenters express the belief that the development of a coordination framework will ensure that participation of distributed energy resource aggregations in RTO/ISO markets does not compromise the reliability or safety of the transmission and distribution systems.[768] For example, based on its experience with implementing CAISO's Distributed Energy Resource Provider framework, Pacific Gas & Electric states that it is important that RTOs/ISOs coordinate with distribution utilities.[769]

328. R Street Institute argues for a coordination framework that creates incentives for innovation and deployment of advanced active network management practices (*e.g.,* real-time operating procedures) and technologies (*e.g.,* software-enabled communications among control centers).[770] E4TheFuture notes that data creation, communications, and analytics are fundamental to successfully including distributed energy resources in the organized wholesale electric markets, and that the technologies and services surrounding these fundamentals and the standards that will support valuation and aggregation are evolving rapidly.[771] E4TheFuture asks the Commission to support the RTOs/ISOs in creating solutions to nimbly address the rapid development of these technologies over time.

329. Several commenters recommend that the Commission not require a specific coordination framework at this time. Public Interest Groups argue that the Commission should not specify a particular structure for coordination frameworks but instead allow the ''laboratories of innovation'' of state and distribution utilities to develop new practices and procedures.[772] Lorenzo Kristov emphasizes that these coordination efforts are at an early stage, noting that there are no best practices and no best coordination framework to adopt.[773] The California Commission asks that the Commission not establish specific requirements at this time, but instead to track the development of frameworks and architectures around the country and document best practices.[774]

c. Commission Determination

330. We believe that, among other benefits, a broader, holistic approach to coordination—referred to herein as a coordination framework—could help ensure that different elements of distributed energy resource aggregations do not work at cross-purposes. Because the topic of coordination frameworks is still developing and was not fully considered in this record, we encourage, but do not require, each RTO/ISO to develop a coordination framework that addresses the needs of its region.

331. We note that it may be beneficial for the RTOs/ISOs and their stakeholders to take into consideration in developing coordination frameworks the interoperability of new information technology and communications systems. Such systems will likely need to exchange mutually recognizable data, and will become more important as distributed energy resource penetration reaches higher levels. Early consideration of these issues could help prevent redundancy and unnecessary costs later.

[761] CAISO Comments (2018 RM18–9) at 14.

[762] NOPR, 157 FERC ¶ 61,121 at P 155.

[763] Technical Conference Transcript at 388.

[764] R Street Comments (RM16–23) at 10–11.

[765] Stem Comments (2018 RM18–9) at 7–8.

[766] PJM Comments (2018 RM18–9) at 19–21, 24.

[767] CAISO Comments (RM16–23) at 39–51.

[768] *See, e.g., id.* at 39; Institute for Policy Integrity Comments (RM16–23) at 9; NYISO Comments (RM16–23) at 19.

[769] Pacific Gas & Electric Comments (RM16–23) at 21.

[770] R Street Institute Comments (RM16–23) at 10.

[771] E4TheFuture Comments (RM16–23) at 2.

[772] Public Interest Organizations Comments (2018 RM18–9) at 11–12.

[773] Lorenzo Kristov Comments (2018 RM18–9) at 16–17.

[774] California Commission Comments (2018 RM18–9) at 12.

I. Modifications to List of Resources in Aggregation

a. NOPR Proposal

332. In the NOPR, the Commission proposed that each RTO/ISO revise its tariff to allow a distributed energy resource aggregator to modify the list of resources in its distributed energy resource aggregation without re-registering all of the resources if the modification will not result in any safety or reliability concerns.[775] The Commission emphasized, however, that, pursuant to other proposed requirements,[776] the relevant distribution utility or utilities must have the opportunity to review the list of individual resources that are located on their distribution system in a distributed energy resource aggregation before those resources may participate in RTO/ISO markets through the aggregation, so that they can assess whether the resources would be able to respond to RTO/ISO dispatch instructions without posing any significant risk to the distribution system.[777]

b. Comments

333. Many commenters support the Commission's proposal to allow a distributed energy resource aggregator to modify its list of resources without re-registering all of the resources in the distributed energy resource aggregation.[778] In support, University of Delaware's EV R&D Group states that within a substantial aggregation, small residential electric vehicle interconnection sites might enter and exit the aggregation even on a daily basis, as new participants and existing participants change vehicles, homes, or preferences.[779] However, NYISO asks the Commission to require the distributed energy resource aggregator to advise the RTOs/ISOs of any changes to the list of resources and changes in the aggregation's performance output or operating characteristics.[780]

334. Many commenters also generally support the proposal to allow distribution utilities to review the list of resources when it is revised.[781] Mensah states that any review should be streamlined as much as possible.[782] Stem stresses the importance of transparent standards of review and argues that opaque review methodologies create an unreasonable barrier to participation of distributed energy resources.[783] Additionally, many commenters emphasize the need to determine whether any changes in the list of resources affect safety and reliability at both the transmission and distribution levels.[784] Dominion adds that the review process to determine the impacts of a change in the list of resources on safety and reliability must be established in a final rule.[785]

c. Commission Determination

335. We adopt the NOPR proposal, as modified below, and add § 35.28(g)(12)(ii)(e) to the Commission's regulations to require each RTO/ISO to establish market rules that address modification to the list of resources in a distributed energy resource aggregation.

336. We require each RTO/ISO to revise its tariff to specify that distributed energy resource aggregators must update their lists of distributed energy resources in each aggregation (*i.e.,* reflect additions and subtractions from the list) and any associated information and data,[786] but that, when doing so, distributed energy resource aggregators will not be required to re-register or re-qualify the entire distributed energy resource aggregation. We note that any modification triggers the distribution utility review process (discussed in Section IV.H.2 above). This requirement is necessary to ensure that the RTOs/ISOs have accurate and current information about the individual distributed energy resources that make up a distributed energy resource aggregation and to allow distribution utilities the opportunity to review those modifications.[787] We find that this requirement will ensure minimal administrative burden, while protecting safety and reliability at both the transmission and distribution levels.

337. While any modification of a distributed energy resource aggregation will trigger distribution utility review, we clarify that it may be appropriate for each RTO/ISO to abbreviate the distribution utility's review of modifications to the distributed energy resource aggregations. As the Commission explained in the NOPR, the requirements for modifying the list of resources in a distributed energy resource aggregation can present a barrier to the participation of distributed energy resource aggregations in RTO/ISO markets.[788] We find that the incremental impacts on RTO/ISO markets and operations that would result from the addition or removal of individual distributed energy resources from a distributed energy resource aggregation, after the initial registration, are likely to be minimal and thus individual distributed energy resources should generally be able to enter and exit distributed energy resource aggregations participating in RTO/ISO markets without impairing safety and reliability. Because the impacts of modifications may often be minimal, an abbreviated review process should be sufficient for the distribution utility to identify the cases where an addition to the list of resources might pose a safety or reliability concern. As stated in Section IV.A.3, modifications to the list of resources in a distributed energy resource aggregation, and the resulting distribution utility and RTO/ISO review of those changes, could occasionally indicate changes to the electrical characteristics of the distributed energy resource aggregation that are significant enough to potentially adversely impact the reliability of the distribution or transmission systems and justify restudy of the full distributed energy resource aggregation.[789] However, even in such circumstances, we do not believe that participation of the distributed energy resource aggregation will need to be paused during the review of modifications or restudy. Aggregators should be able to continue to bid the unmodified portion of their aggregation into RTO/ISO markets. For example, in the event that a resource withdraws from an aggregation, the aggregator could continue to participate in the market by modifying its bidding parameters to reflect the aggregation's changed capability to perform.

338. Finally, to the extent that an RTO/ISO requires distributed energy resource aggregators to provide information on the physical or operational characteristics of its distributed energy resource aggregation (pursuant to Section IV.F), we require

[775] *Id.* P 149.

[776] *See supra* Section IV.H.2 (Role of Distribution Utilities).

[777] NOPR, 157 FERC ¶ 61,121 at P 154.

[778] *See, e.g.,* Advanced Microgrid Solutions Comments (RM16–23) at 8; Avangrid Comments (RM16–23) at 13; CAISO Comments (RM16–23) at 35–37; City of New York Comments (RM16–23) at 9–10; EEI Comments (RM16–23) at 32–33.

[779] University of Delaware's EV R&D Group Comments (2018 RM18–9) at 2.

[780] NYISO Comments (RM16–23) at 18.

[781] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 45; EEI Comments (RM16–23) at 32–33; Mensah Comments (RM16–23) at 4; MISO Transmission Owners Comments (RM16–23) at 23; NYISO Comments (RM16–23) at 18.

[782] Mensah Comments (RM16–23) at 4.

[783] Stem Comments (RM16–23) at 15.

[784] Avangrid Comments (RM16–23) at 12–13; CAISO Comments (RM16–23) at 34–35; Dominion Comments (RM16–23) at 11; Mensah Comments (RM16–23) at 4; Pacific Gas & Electric Comments (RM16–23) at 20.

[785] Dominion Comments (RM16–23) at 11.

[786] *See supra* Section IV.F (Information and Data Requirements).

[787] *See supra* Section IV.H.2 (Role of Distribution Utilities).

[788] NOPR, 157 FERC ¶ 61,121 at P 148.

[789] *See supra* P 99.

each RTO/ISO to revise its tariff to ensure that distributed energy resource aggregators must update such information if any modification to the list of resources participating in the aggregation results in a change to the aggregation's performance. We find that this requirement will ensure that the RTOs/ISOs have accurate and current information about the physical and operational characteristics of the distributed energy resource aggregations that are participating in their markets, with minimal administrative burden.

J. Market Participation Agreements

1. NOPR Proposal

339. In the NOPR, the Commission stated that, in order to ensure that a distributed energy resource aggregator complies with all relevant provisions of the RTO/ISO tariffs, it must execute an agreement with the RTO/ISO that defines its roles and responsibilities and its relationship with the RTO/ISO before it can participate in RTO/ISO markets.[790] The Commission explained that, because the individual resources in these distributed energy resource aggregations will likely fall under the purview of multiple organizations (*e.g.,* the RTO/ISO, state regulatory commissions, relevant distribution utilities, and local regulatory authorities), these agreements must also require that the distributed energy resource aggregator attest that its distributed energy resource aggregation is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any other relevant regulatory authority.[791] The Commission therefore proposed that each RTO/ISO revise its tariff to include a market participation agreement for distributed energy resource aggregators. The Commission did not propose specific requirements for such agreements in the NOPR; instead, the Commission sought comment on the information these agreements should contain.

340. The Commission also explained that, while these agreements will define the roles and responsibilities of the distributed energy resource aggregator, they should not limit the business models under which distributed energy resource aggregators can operate.[792] Therefore, the Commission proposed that the market participation agreement for distributed energy resource aggregators that each RTO/ISO must include in its tariff may not restrict the business models that distributed energy resource aggregators may adopt. The Commission stated that market participation agreements for distributed energy resource aggregators should not preclude distribution utilities, cooperatives, or municipalities from aggregating distributed energy resources on their systems or even microgrids from participating in the RTO/ISO markets as a distributed energy resource aggregation.

341. After the April 2018 technical conference, the Commission sought comment on whether the proposed use of market participation agreements addresses state and local regulator concerns about the role of distribution utilities in the coordination and registration of distributed energy resources in aggregations. The Commission further asked whether the proposed provisions in the market participation agreements that require that distributed energy resource aggregators attest that they are compliant with the tariffs and operation procedures of distribution utilities and state and local regulators are sufficient to address such concerns.[793]

2. Comments

342. All commenters that address this topic agree that market participation agreements between RTOs/ISOs and distributed energy resource aggregators are necessary. However, commenters disagree on the structure of these agreements.

343. Many commenters support the NOPR proposal to require a market participation agreement for distributed energy resource aggregators.[794] ISO–NE, however, urges the Commission to exclude from a final rule any specific directives regarding market participation agreements for aggregations of distributed energy resources, including requiring attestation from the aggregator.[795] ISO–NE states that such directives are not needed because its current generic market participant agreement is sufficient as a ''simple and proven'' approach to accommodate distributed energy resource aggregations and because other coordination processes, including the asset registration process, may be preferable mechanisms for gathering and verifying information related to a participant's assets.

344. Some commenters express concerns about the sufficiency of market participation agreements to address state and local regulatory concerns. The New York Commission, for example, cautions that a rule addressing the nature and use of market participation agreements should not create barriers that hinder a state regulator's ability to guide the ways that distributed energy resource aggregations can be formed, registered, managed, and operated, including the role of a distribution utility in the coordination and registration of distributed energy resource aggregations.[796] Organization of MISO States asserts that concerns remain about the ability to effectively police compliance with participation agreements, and that in order to comply, new lines of communication between distribution utilities, distributed energy resource aggregators, and the RTO/ISO will need to be developed.[797]

345. Organization of MISO States asserts that further participation agreements will need to be crafted to accommodate ever-evolving technology changes and to avoid such initial agreements becoming barriers to innovation. It asserts that the RTO/ISO stakeholder process is the appropriate place for these modifications to participation agreements to occur.[798]

346. Commenters express varying recommendations for the structure of an agreement or agreements and the parties required to enter them. AES Companies suggest a three-party agreement between the aggregator, distribution utility, and RTO/ISO is appropriate,[799] while Pacific Gas & Electric suggests two two-party agreements (one agreement between aggregator and RTO/ISO, and another between aggregator and distribution utility).[800] APPA/NRECA and MISO Transmission Owners favor the utilities being party to the agreements and argue that the agreement should demonstrate that the aggregation has been authorized by the utility or its relevant regulatory authority.[801] CAISO also suggests that

[790] NOPR, 157 FERC ¶ 61,121 at P 157.

[791] The Commission explained that this may include any laws or regulations of the relevant retail regulatory authority that do not permit demand response resources to participate in RTO/ISO markets as the Commission considered in Order No. 719. *Id.* n.238 (citing Order No. 719, 125 FERC ¶ 61,071 at P 154).

[792] *Id.* P 158.

[793] *See* Notice Inviting Post-Technical Conference Comments at 6.

[794] *See, e.g.,* APPA/NRECA Comments (RM16–23) at 46; California Commission Comments (2018 RM18–9) at 7; Mensah Comments (RM16–23) at 4; NYISO Comments (RM16–23) at 20; PJM Comments (RM16–23) at 28–29; SoCal Edison Comments (2018 RM18–9) at 2, 10–11.

[795] ISO–NE Comments (RM16–23) at 56–57.

[796] New York Commission Comments (2018 RM18–9) at 13.

[797] Organization of MISO States Comments (2018 RM18–9) at 4.

[798] *Id.* at 4–5.

[799] AES Companies Comments (RM16–23) at 12–13, 49.

[800] Pacific Gas & Electric Comments (RM16–23) at 24–26.

[801] APPA/NRECA Comments (RM16–23) at 46–47; MISO Transmission Owner Comments (RM16–23) at 26–27.

the Commission consider whether a separate Commission-jurisdictional agreement should apply between a distribution utility and a distributed energy resource aggregator.[802]

347. Some commenters request flexibility, further guidance from the Commission, and/or the participation of other parties in crafting market participation agreements. Most RTOs/ISOs suggest that some of their existing agreements may be applicable but argue for flexibility in establishing appropriate agreements.[803] Pacific Gas & Electric also argues that each RTO/ISO should be allowed to craft agreements appropriate for its markets.[804] NARUC requests that, for states that do allow third party aggregations, the Commission only provide broad policy direction in a final rule and allow the RTOs/ISOs to develop with state input the necessary details for implementation.[805] EEI similarly argues that RTOs/ISOs and distribution utilities should develop market participation agreements in conjunction with their stakeholders.[806] Xcel Energy Services goes further, stating that the details of market participation agreements will need to be addressed by states.[807] PJM asserts that further clarification as to the role of electric distribution companies and other relevant regulatory authorities is needed for PJM to finalize the appropriate market participant agreement design.[808] Massachusetts Municipal Electric requests sufficient flexibility for the agreement to accommodate different conditions at different distribution utilities.[809] Mensah, however, states that the participation agreement, and any necessary amendments, should be standardized, streamlined, and automated as much as possible to avoid unnecessary costs.[810]

348. Some commenters advocate for specific requirements in market participation agreements. EEI argues that the agreements should ensure that distributed energy resource aggregators are subject to comparable requirements as other resources.[811] AES Companies assert that an agreement should only obligate the aggregator to conform to the appropriate tariff rules and a proportionate share of essential reliability services as determined by each RTO/ISO and its stakeholders.[812] Pacific Gas & Electric states that an agreement between the aggregator and the distribution utility should include detailed requirements regarding operational coordination, mitigation of system impacts, cost allocation, and notification of changes to the aggregation.[813]

349. Avangrid emphasizes that the market participation agreement should be explicit that the aggregator is a wholesale market participant required to comply with the provisions in the tariff, including operational requirements.[814] MISO Transmission Owners and TAPS support requiring the distributed energy resource aggregator to attest to compliance with distribution utility tariffs and operating procedures and with the rules and regulations of any other relevant regulatory authority.[815] APPA/NRECA support requiring aggregators to demonstrate, rather than simply attest, that the relevant electric retail regulatory authority has authorized wholesale market participation by the resources in the aggregation, and to include in the market participation agreement requirements for notice to distribution utilities of any changes in resources and for compliance by the aggregator and its resources with the tariffs and operating procedures of the relevant distribution utilities.[816] MISO Transmission Owners make similar arguments in their comments.[817]

350. On the other hand, Tesla/SolarCity contend that, because many individual distributed energy resources may not be new nor installed by the aggregator, any attestation requirement should only require aggregators to state that, ''to the best of their knowledge,'' the distributed energy resources in the aggregation are compliant with distribution company tariffs and operating procedures and relevant regulatory authority rules and regulations.[818]

351. APPA/NRECA, Open Access Technology, MISO Transmission Owners, and NARUC support the NOPR proposal that market participation agreements should not restrict the business models for distributed energy resource aggregators, though the latter two commenters condition their support on the distributed energy resource aggregation having been permitted by the state regulatory body and, if applicable, the distribution utility.[819] NARUC supports the NOPR language that allows a scenario in which distribution utilities can act as aggregators so that the states can provide oversight of the terms and conditions of their relationship with distributed energy resources and customers, while allowing participation of the aggregator in RTO/ISO markets.[820] On the other hand, Xcel Energy Services asserts that the NOPR language may be too vague to protect yet-to-be-designed aggregator business models and also could inappropriately limit the ability of RTOs/ISOs to prevent business models that could threaten grid reliability.[821]

3. Commission Determination

352. We add § 35.28(g)(12)(ii)(h) to the Commission's regulations and adopt the NOPR proposal to require each RTO/ISO to establish market rules that address market participation agreements for distributed energy resource aggregators. Specifically, we require each RTO/ISO to revise its tariff to include a standard market participation agreement that defines the distributed energy resource aggregator's role and responsibilities and its relationship with the RTO/ISO and that an aggregator is required to execute before it can participate in the RTO/ISO markets. We also adopt the NOPR proposal that this market participation agreement must include an attestation that the distributed energy resource aggregator's aggregation is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any relevant electric retail regulatory authority. As the Commission explained in the NOPR, these requirements are necessary to ensure that a distributed energy resource aggregator complies with all relevant

[802] CAISO Comments (RM16–23) at 51–52.

[803] *Id.;* ISO–NE Comments (RM16–23) at 56–57; MISO Comments (RM16–23) at 26–27; NYISO Comments (RM16–23) at 20; PJM Comments (RM16–23) at 28–29.

[804] *See* Pacific Gas & Electric Comments (RM16–23) at 24.

[805] NARUC Comments (RM16–23) at 5.

[806] EEI Comments (RM16–23) at 39.

[807] Xcel Energy Services Comments (RM16–23) at 29.

[808] PJM Comments (RM16–23) at 29.

[809] Massachusetts Municipal Electric Comments (RM16–23) at 5.

[810] Mensah Comments (RM16–23) at 4.

[811] EEI Comments (RM16–23) at 39.

[812] AES Companies Comments (RM16–23) at 12–13.

[813] Pacific Gas & Electric Comments (RM16–23) at 24–25.

[814] Avangrid Comments (RM16–23) at 18.

[815] MISO Transmission Owners Comments (RM16–23) at 19 (citing NOPR, 157 FERC ¶ 61,121 at P 157); TAPS Comments (RM16–23) at 13–14.

[816] APPA/NRECA Comments (RM16–23) at 47.

[817] MISO Transmission Owners Comments (RM16–23) at 19, 26–27.

[818] Tesla/SolarCity Comments (RM16–23) at 31.

[819] APPA/NRECA Comments (RM16–23) at 47–48; MISO Transmission Owners Comments (RM16–23) at 26 (citing NOPR, 157 FERC ¶ 61,121 at P 158); NARUC Comments (RM16–23) at 5 (citing NOPR, 157 FERC ¶ 61,121 at P 158); Open Access Technology Comments (RM16–23) at 4.

[820] NARUC Comments (RM16–23) at 5 (citing NOPR at P158).

[821] Xcel Energy Services Comments (RM16–23) at 29.

provisions of the RTO/ISO tariffs, the tariffs and operating procedures of the distribution utilities, and the rules and regulations of any other relevant electric retail regulatory authority.[822] These requirements are also supported by a general consensus among commenters that market participation agreements are necessary and, as expressed by some commenters, that the use of market participation agreements could help address state and local regulatory concerns.

353. Also, as proposed in the NOPR, we require that the market participation agreements that the RTOs/ISOs include in their tariffs not limit the business models under which distributed energy resource aggregators can operate. Allowing distributed energy resource aggregators with varying business models to be included in such agreements should increase the ability of the distributed energy resource aggregators, and resources within such aggregations, to participate in the RTO/ISO markets.

354. With the exception of the attestation requirement and prohibition of business model limitations described above, we will not specify the exact terms and conditions of the market participation agreements. This approach will give the RTOs/ISOs and stakeholders flexibility to develop appropriate agreements, and increase the ability of the distributed energy resource aggregators, and resources within such aggregations, to participate in RTO/ISO markets by better tailoring agreements to the operating conditions and needs of those markets, and thereby help to enhance competition in the markets. Commenters, including the RTOs/ISOs, express a variety of views about the specific requirements that should be included in such agreements and the potential need for additional agreements, and most commenters request flexibility in ability to design these agreements. We believe that this flexibility will provide RTOs/ISOs working with their stakeholders the ability to design the appropriate agreements for their regions and the reasonableness of such proposals will be evaluated in each RTO/ISO-specific compliance proceeding.

355. We also are not persuaded by the suggestion of some commenters that we require additional agreements to help facilitate participation by distributed energy resource aggregations in RTO/ISO markets, or that we require additional entities, such as distribution utilities, distribution system operators, or relevant regulatory authorities, to be parties to the market participation agreements that we are requiring. We believe that the attestation requirement that we adopt in this final rule will help ensure distributed energy resource aggregator compliance with the tariffs and operating procedures of distribution utilities and the rules and regulations of other relevant regulatory authorities. RTOs/ISOs and their stakeholders are best equipped to determine the nature and composition of, and counterparties to, additional agreements. We note that RTOs/ISOs and stakeholders may choose to include additional parties or incorporate related agreements in the proposed market participation agreements. Moreover, as discussed above in Sections IV.H.2 and IV.I, our directive to RTOs/ISOs to establish market rules on coordination will address coordination among any parties not included as parties to the market participation agreements (*i.e.,* the distribution utility and the relevant state and local regulators), including the ability of distribution utilities to review modifications.[823]

356. In response to Xcel Energy Services' assertion that the NOPR proposal to prohibit RTOs/ISOs from limiting the business models under which distributed energy resource aggregators can operate does not protect future business models and may allow other business models that threaten grid reliability, we disagree. Instead, it is responsive to many commenters' requests to avoid undue Commission specificity with respect to the required contents of market participation agreements to allow RTOs/ISOs sufficient regional flexibility in developing these agreements, including to address any business model challenges and any implications for grid reliability. Further, we note that Xcel Energy Services does not provide examples or support for its concerns that certain business models could threaten grid reliability or future business models. We think permitting RTO/ISO prohibitions against certain business models in their market participation agreements is not necessary given a distributed energy resource aggregator's duty to adhere to RTO/ISO market rules, the attestation requirement that we require to be included in the market participation agreements, as well as the ability of RTOs/ISO to craft any necessary safeguards short of business model prohibitions within these agreements. In response to PJM's assertion that further clarification about the role of distribution utilities and other relevant regulatory authorities is needed for PJM to finalize the appropriate market participant agreement design, we believe that we have provided such clarification to the extent possible, elsewhere within this final rule.[824]

K. Compliance

357. In the NOPR, the Commission proposed to require each RTO/ISO to submit a compliance filing within six months of the date the final rule in this proceeding is published in the **Federal Register**. The Commission stated that it believed that six months is sufficient for each RTO/ISO to develop and submit its compliance filing, but recognized that implementation of the reforms proposed in the NOPR could take more time due to the changes that may be necessary to each RTO's/ISO's modeling and dispatch software. Therefore, the Commission proposed to allow 12 months from the date of the compliance filing for implementation of the proposed reforms to become effective.

1. Comments

358. Most RTO/ISO commenters, with the exception of PJM, indicate that they would need to modify their existing rules to appropriately integrate distributed energy resource aggregations.[825] PJM states that it does not require significant modifications to dispatch software, communication platforms, or automation tools, as PJM already has developed many tools that can be adapted for distributed energy resource aggregations, but that improved coordination with electric distribution providers may be a challenge.[826]

359. Eversource recommends that the Commission provide sufficient time for proposals to be developed through the stakeholder process on this complex issue.[827] Dominion suggests a pilot project should be undertaken first.[828] Duquesne Light notes that distributed energy resource integration should proceed in a ''measured'' way to assess operational, reliability, safety and cost implications, noting that some new technologies may require observation and testing before being deemed capable of providing expanded services such as being deemed a capacity resource.[829] Distributed energy resource developers and their advocates, as well as some

[822] *See* NOPR, 157 FERC ¶ 61,121 at P 157.

[823] *See supra* Section IV.H.1 (Market Rules on Coordination).

[824] *See supra* Section IV.C.3 (Double Counting of Services).

[825] *See* CAISO Comments (2018 RM18–9) at 4; PJM Comments (2018 RM18–9) at 8–9.

[826] PJM Comments (2018 RM18–9) at 8–9.

[827] Eversource Comments (2018 RM18–9) at 11.

[828] Dominion Comments (RM16–23) at 9.

[829] Duquesne Light Company Comments (2018 RM18–9) at 3–4.

state commissions, believe that the proposal is timely and should not be delayed, especially given the rapid pace of technological advancement.[830]

2. Commission Determination

360. After consideration of the comments submitted, we find that it is reasonable to provide RTOs/ISOs with additional time to submit their proposed tariff revisions in response to the final rule, given that the changes could require significant work on the part of RTOs/ISOs. Consequently, after consideration of the comments submitted, we will require each RTO/ISO to file the tariff changes needed to implement the requirements of this final rule within 270 days of the publication date of this final rule in the **Federal Register**. To the extent that an RTO/ISO proposes to comply with any or all of the requirements in this final rule using its currently effective requirements for distributed energy resources, it must demonstrate on compliance that its existing approach meets the requirements in this final rule.

361. Based on comments submitted about the complexity of changes to RTO/ISO market rules and systems, we will not require the implementation of the tariff provisions within 12 months from the date of the compliance filing, as proposed in the NOPR. Instead, we will require each RTO/ISO to propose a reasonable implementation date, together with adequate support explaining how the proposal is appropriately tailored for its region and implements this final rule in a timely manner. The Commission will establish on compliance the effective date for each RTO's/ISO's compliance filing.

L. Issues Beyond the Scope of This Rulemaking

1. Comments

362. Some commenters raise issues that were not addressed in the NOPR. For instance, commenters raise issues regarding how the deduction of behind-the-meter resources from reserve margin requirements affects price formation; [831] impacts of subsidizing resources on functioning of RTO/ISO markets; [832] capacity market mitigation policies for distributed energy resources; [833] impacts on system variability and unpredictable operation due to RTO/ISO market participation of distributed energy resources; [834] impacts of distributed energy resource aggregations on distribution system operations and reliability, and necessary distribution system adjustments; [835] reflecting distribution system benefits associated with distributed energy resource aggregations into RTO/ISO market operation; [836] distribution system configuration issues; [837] need for modernizing distribution system equipment, such as the deployment of distributed energy resource management systems (DERMS); [838] privacy and cybersecurity concerns; [839] data collection practices during distributed energy resource registration focused on attributes available for essential grid services, but not necessarily in support of a market product; [840] differing compensation for short-duration resources to account for reduced run times in the capacity market; [841] and clarification that the term electric storage resource as defined in Order No. 841 may include an aggregation of distributed electric storage resources.[842]

2. Commission Determination

363. The NOPR did not propose reforms related to these issues raised by commenters. Therefore, these issues are outside the scope of this proceeding and will not be addressed here.

V. Information Collection Statement

364. The information collection (IC) contained in this final rule is being submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995.[843] OMB's regulations,[844] in turn, require approval of certain information collection requirements imposed by agency rules. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

365. The Commission has submitted this IC to OMB as a revision of FERC–516H. OMB has assigned control number 1902–0303 to FERC–516H. The Commission is not asking OMB to change the expiration date of control number 1902–0303 (May 31, 2021).

A. Summary of This IC

Title: FERC–516H (Electric Rate Schedules and Tariff Filings, in Docket No. RM18–9–000).

OMB Control No. 1902–0303.

Type of Request: Revision of FERC–516H.

Abstract: This final rule, at 18 CFR 35.28(g)(12), includes two IC activities. Each RTO and ISO must have tariff provisions that allow DER aggregations to participate directly in the organized wholesale electric markets. In addition, each RTO and ISO must update the economic dispatch software accordingly.

Types of Respondent: RTOs and ISOs.

Frequency of Collection: One time.

Estimate of Annual Burden [845]: The Commission estimates the total annual burden and cost [846] for this IC in the following table:

In response to comments on the NOPR, we have increased the estimated burden and cost for the requirements of the final rule from those originally proposed in the NOPR. The estimated burden and cost for the requirements contained in this final rule follow.

[830] *See, e.g.,* AWEA Comments (RM16–23) at 4; Delaware Commission Comments (RM16–23) at 4; Fresh Energy/Sierra Club/Union of Concerned Scientists Comments (RM16–23) at 1.

[831] *See, e.g.,* NRG Comments (RM16–23) at 6.

[832] *See, e.g.,* PJM Market Monitor Comments (RM16–23) at 10.

[833] *See, e.g.,* NRG Comments (RM16–23) at 6.

[834] *See, e.g.,* Advanced Energy Economy Comments (2018 RM18–9) at 24; NYISO Indicated Transmission Owners Comments (2018 RM18–9) at 20; Organization of MISO States Comments (2018 RM18–9) at 10.

[835] *See, e.g.,* Advanced Energy Management Comments (2018 RM18–9) at 24; Vice Chairman Place Comments (2018 RM18–9) at 2–3; EEI Comments (2018 RM18–9) at 8–9, 19–21; Pacific Gas & Electric Comments (2018 RM18–9) at 20–21, 24–25; PJM Comments (2018 RM18–9) at 28; TAPS Comments (2018 RM18–9) at 7–11.

[836] *See, e.g.,* Stem Comments (2018 RM18–9) at 11.

[837] *See, e.g.,* NRECA Comments (2018 RM18–9) at 8.

[838] *See, e.g.,* CAISO Comments (2018 RM18–9) at 7; EPSA Comments (2018 RM18–9) at 9–13; Eversource Comments (2018 RM18–9) at 10–11.

[839] *See, e.g.,* California Commission Comments (2018 RM18–9) at 18; NRECA Comments (2018 RM18–9) at 11.

[840] *See, e.g.,* Union of Concerned Scientists Comments (RM16–23) at 10–11 (citing J. Nelson, Ph.D. and L.M. Wisland, *Achieving 50 Percent Renewable Electricity in California—The Role of Non-Fossil Flexibility in a Cleaner Electricity Grid* (2015), *http://www.ucsusa.org/sites/default/files/attach/2015/08/Achieving-50-Percent-Renewable-Electricity-In-California.pdf*).

[841] *See, e.g.,* Advanced Energy Economy Comments (RM16–23) at 42–43.

[842] *See, e.g.,* University of Delaware's EV R&D Group Comments (2018 RM18–9) at 1.

[843] *See* 44 U.S.C. 3507(d).

[844] 5 CFR pt. 1320 (2020).

[845] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to Title 5 Code of Federal Regulations 1320.3.

[846] Commission staff believes that industry is similarly situated in terms of cost for wages and benefits. Therefore, we are using the FERC 2020 average cost (for wages plus benefits) for one FERC full-time equivalent (FTE) of $172,329 ($83.00 per hour).

ADDITIONS TO FERC–516H, AS IMPLEMENTED IN THE FINAL RULE IN DOCKET NO. RM18–9–000

A	B	C	D	E	F	G
Types of response	Number of respondents	Avg. number of responses per respondent	Total number of responses (col. B × col. C)	Average burden (hours) and cost per response	Total annual burden hours and total annual cost (col. D × col. E)	Cost per respondent (col. F ÷ col. B)
One-Time Tariff Filing Due to RM18–9 Final Rule.	6	1	6	1,529 hrs; $126,907	9,174 hrs; $761,442	$126,907
Software Update	6	1	6	1,500 hrs; $124,500	9,000 hrs; $747,000	124,500
Total Burden				3029 hrs; $251,407	18,174 hrs; $1,508,442	251,407

B. Discussion

366. The Commission implements this final rule and FERC–516H to remove barriers to the participation of distributed energy resource aggregations in the capacity, energy, and ancillary service markets operated by RTOs and ISOs. This IC in this final rule conforms to the Commission's need for efficient information collection, communication, and management within the energy industry.

367. In this final rule, we are requiring each RTO/ISO to propose revisions to its tariff that (1) allow distributed energy resource aggregations to participate directly in RTO/ISO markets and establish distributed energy resource aggregators as a type of market participant; (2) allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models that accommodate the physical and operational characteristics of the distributed energy resource aggregations; (3) establish a minimum size requirement for distributed energy resource aggregations that does not exceed 100 kW; (4) address locational requirements for distributed energy resource aggregations; (5) address distribution factors and bidding parameters for distributed energy resource aggregations; (6) address information and data requirements for distributed energy resource aggregations; (7) address metering and telemetry requirements for distributed energy resource aggregations; (8) address coordination between the RTO/ISO, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities; (9) address modification to the list of resources in a distributed energy resource aggregation; and (10) address market participation agreements for distributed energy resource aggregators.

368. Interested persons may obtain information on the reporting requirements by contacting Ellen Brown, Office of the Executive Director, Email: *DataClearance@ferc.gov;* Phone: (202) 502–8663.

VI. Environmental Analysis

369. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[847] We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this final rule under § 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission's jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classifications, and services.[848]

VII. Regulatory Flexibility Act Certification

370. The Regulatory Flexibility Act of 1980 (RFA) [849] generally requires a description and analysis of rules that will have a significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rule and that minimize any significant economic impact on a substantial number of small entities. The SBA Office of Size Standards develops the numerical definition of a small business.[850] The small business size standards are provided in 13 CFR 121.201.

371. Under the SBA classification, the six RTOs/ISOs would be considered electric bulk power transmission and control, for which the small business size threshold is 500 or fewer employees.[851] Because each RTO/ISO has more than 500 employees, none are considered small entities.

372. Furthermore, because of their pivotal roles in wholesale electric power markets in their regions, none of the RTOs/ISOs meet the last criterion of the two-part RFA definition of a small entity: ''not dominant in its field of operation.'' [852]

373. The estimated cost related to this final rule includes: (a) Preparing and making a one-time tariff filing ($126,907 per entity, as detailed in the Information Collection section above), and (b) updating the economic dispatch software. We estimate the one-time software work will take 1,500 hours with an approximate cost of $124,500 per entity. Therefore, the total estimated one-time cost for the tariff filing and software work is $251,407 per entity (or $126,907 + $124,500); the total estimated one-time industry cost is $1,508,442.

374. As a result, we certify that the reforms required by this final rule would not have a significant economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

VIII. Document Availability

375. In addition to publishing the full text of this document in the **Federal**

[847] *Regulations Implementing the Nat'l Envt'l Policy Act of 1969,* Order No. 486, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs., ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[848] 18 CFR 380.4(a)(15) (2020).

[849] 5 U.S.C. 601–12.

[850] 13 CFR 121.101 (2020).

[851] 13 CFR 121.201 (Sector 22, Utilities).

[852] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. The SBA's regulations at 13 CFR 121.201 define the threshold for a small Electric Bulk Power Transmission and Control entity (NAICS code 221121) to be 500 employees. *See* 5 U.S.C. 601(3) (citing to section 3 of the Small Business Act, 15 U.S.C. 632).

Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

376. From FERC's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

377. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

IX. Effective Date and Congressional Notification

378. These regulations are effective December 21, 2020. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

Issued: September 17, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission amends part 35, chapter I, title 18, *Code of Federal Regulations,* as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.28 by adding paragraphs (b)(10) and (11) and (g)(12) as follows.

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(b) * * *

(10) *Distributed energy resource* as used in this section means any resource located on the distribution system, any subsystem thereof or behind a customer meter.

(11) *Distributed energy resource aggregator* as used in this section means the entity that aggregates one or more distributed energy resources for purposes of participation in the capacity, energy and/or ancillary service markets of the regional transmission organizations and/or independent system operators.

* * * * *

(g) * * *

(12) *Distributed energy resource aggregators.* (i) Each independent system operator and regional transmission organization must have tariff provisions that allow distributed energy resource aggregations to participate directly in the organized wholesale electric markets. Each regional transmission organization and independent system operator must establish distributed energy resource aggregators as a type of market participant. Additionally, each regional transmission organization and independent system operator must allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models in the regional transmission operator's or the independent system operator's tariff that accommodate the physical and operational characteristics of the distributed energy resource aggregation.

(ii) Each regional transmission organization and independent system operator, to accommodate the participation of distributed energy resource aggregations, must establish market rules that address:

(A) Eligibility to participate in the independent system operator or regional transmission organization markets through a distributed energy resource aggregation;

(B) Locational requirements for distributed energy resource aggregations;

(C) Distribution factors and bidding parameters for distributed energy resource aggregations;

(D) Information and data requirements for distributed energy resource aggregations;

(E) Modification to the list of resources in a distributed energy resource aggregation;

(F) Metering and telemetry system requirements for distributed energy resource aggregations;

(G) Coordination between the regional transmission organization or independent system operator, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities; and

(H) Market participation agreements for distributed energy resource aggregators.

(iii) Each regional transmission organization and independent system operator must establish a minimum size requirement for distributed energy resource aggregations that does not exceed 100 kW.

(iv) Each regional transmission organization and independent system operator must accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year. An independent system operator or regional transmission organization must not accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers to be bid into RTO/ISO markets by a distributed energy resource aggregator.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A: Abbreviated Names of Commenters

The following table contains the abbreviated names of all commenters in this docket.

Abbreviation	Commenter (full name)
Advanced Energy Buyers	Advanced Energy Buyers.
Advanced Energy Economy	Advanced Energy Economy.

Abbreviation	Commenter (full name)
Advanced Energy Management	Advanced Energy Management Alliance.
Advanced Microgrid Solutions	Advanced Microgrid Solutions, Inc.
Advanced Rail Energy Storage	Advanced Rail Energy Storage, LLC.
AES Companies	AES Companies.
Alevo	Alevo USA Inc.
Altametric	Altametric LLC.
Amanda Drabek	Amanda Drabek, Pantsuit Nation of East Texas.
American Petroleum Institute	American Petroleum Institute.
Vice Chairman Place	Vice Chairman Andrew Place of the Pennsylvania Public Utilities Commission.
APPA	American Public Power Association.
APPA/NRECA	American Public Power Association and National Rural Electric Cooperative Association.
Arkansas Commission	Arkansas Public Service Commission.
Avangrid	AVANGRID, Inc.
AWEA	American Wind Energy Association.
Beacon Power	Beacon Power, LLC.
Benjamin Kingston	Benjamin D. Kingston.
Bonneville	Bonneville Power Administration.
Brookfield Renewable	Brookfield Renewable.
CAISO	California Independent System Operator Corporation.
California Commission	Public Utilities Commission of the State of California.
California Energy Storage Alliance	California Energy Storage Alliance.
California Municipals	California Municipal Utilities Association.
Calpine	Calpine.
Center for Biological Diversity	Center for Biological Diversity.
City of New York	City of New York.
Connecticut Department of Energy	Connecticut Department of Energy and Environmental Protection.
Connecticut State Entities	Bureau of Energy and Technology Policy of the Connecticut Department of Energy and Environmental Protection and the Connecticut Public Utilities Regulatory Authority.
Delaware Commission	Delaware Public Service Commission.
DER/Storage Developers	DER and Storage Developers.
Direct Energy	Direct Energy.
Dominion	Dominion Resources Services, Inc.
DTE Electric/Consumers Energy	DTE Electric Company and Consumers Energy Company.
Duke Energy	Duke Energy Corporation.
E4TheFuture	E4TheFuture.
Eagle Crest	Eagle Crest Energy Company.
EEI	Edison Electric Institute.
Efficient Holdings	Efficient Holdings, LLC.
ELCON	Electricity Consumers Resource Council.
Energy Storage Association	Energy Storage Association.
EPRI	Electric Power Research Institute.
EPSA	Electric Power Supply Association.
EPSA/PJM Power Providers	Electric Power Supply Association and PJM Power Providers Group.
Eversource	Eversource Energy Service Company.
Exelon	Exelon Corporation.
FirstEnergy	FirstEnergy.
FirstLight	FirstLight Power Resources, Inc.
Fluidic	Fluidic Energy.
Fresh Energy/Sierra Club/Union of Concerned Scientists.	Fresh Energy, the Sierra Club, and the Union of Concerned Scientists.
Genbright	Genbright LLC.
Global Cold Chain Alliance	Global Cold Chain Alliance.
GridWise	GridWise Alliance.
Guannan He	Guannan He.
Harvard Environmental Policy Initiative	Harvard Environmental Policy Initiative.
Icetec	Icetec.
Imperial Irrigation District	Imperial Irrigation District.
Independent Energy Producers Association	Independent Energy Producers Association.
Indiana Commission	Indiana Utility Regulatory Commission.
Institute for Policy Integrity	Institute for Policy Integrity.
IPKeys/Motorola	IPKeys Technologies and Motorola Solutions.
IRC	ISO–RTO Council.
ISO–NE	ISO New England Inc.
Kansas Commission	Kansas Corporation Commission.
Kathy Seal	Kathy Seal.
Leadership Group	Leadership Group.
Liza White	Liza C. White.
Lorenzo Kristov	Lorenzo Kristov.
Lyla Fadali	Lyla Fadali.
Magnum	Magnum CAES, LLC.
Maryland and New Jersey Commissions	Maryland Public Service Commission and New Jersey Board of Public Utilities.
Massachusetts Commission	Massachusetts Department of Public Utilities.
Massachusetts State Entities	Massachusetts Department of Public Utilities and Massachusetts Department of Energy Resources.

Abbreviation	Commenter (full name)
Massachusetts Municipal Electric	Massachusetts Municipal Wholesale Electric Company.
Matthew d'Alessio	Matthew d'Alessio.
Mensah	AF Mensah Inc.
Microgrid Resources Coalition	Microgrid Resources Coalition.
Microsoft	Microsoft Corporation.
Minnesota Energy Storage Alliance	Minnesota Energy Storage Alliance.
MISO	Midcontinent Independent System Operator, Inc.
MISO Transmission Owners	MISO Transmission Owners.
Mosaic Power	Mosaic Power, LLC.
NARUC	National Association of Regulatory Utility Commissioners.
National Hydropower Association	National Hydropower Association.
NEPOOL	New England Power Pool.
NERC	North American Electric Reliability Corporation.
NESCOE	New England States Committee on Electricity.
New Jersey Board	New Jersey Board of Public Utilities.
New York Commission	New York Public Service Commission.
New York State Entities	New York Public Service Commission and New York State Energy Research and Development Authority.
New York Utility Intervention Unit	Utility Intervention Unit of the New York State Department of State.
NextEra	NextEra Energy Resources, LLC.
NRECA	National Rural Electric Cooperative Association.
NRG	NRG Energy, Inc.
NYISO	New York Independent System Operator, Inc.
NYISO Indicated Transmission Owners	Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., National Grid, New York Power Authority, Orange and Rockland Utilities, Inc., and Power.
NYPA	New York Power Authority.
Ohio Commission	Public Utilities Commission of Ohio.
Open Access Technology	Open Access Technology International, Inc.
OpenADR	OpenADR Alliance.
Organization of MISO States	Organization of MISO States.
Pacific Gas & Electric	Pacific Gas and Electric Company.
PJM	PJM Interconnection, L.L.C.
PJM Market Monitor	Monitoring Analytics, LLC.
PJM Utilities Coalition	American Electric Power Service Corporation, East Kentucky Power Cooperative, Inc., and FirstEnergy Service Company, on behalf of its affiliates.
Power Applications	Power Applications and Research Systems, Inc.
Protect Sudbury	Protect Sudbury.
Public Interest Organizations	Clean Wisconsin, Environmental Defense Fund, Environmental Law & Policy Center, Fresh Energy, GridLab, Natural Resources Defense Council, Northwest Energy Coalition, Sierra Club, Southern Environmental Law Center, Union of Concerned Scientists, Vote Solar, Western Grid Group.
R Street Institute	R Street Institute.
RES Americas	Renewable Energy Systems Americas Inc.
Research Scientists	Drs. Audun Botterud, Apurba Sakti, and Francis O'Sullivan.
Robert Borlick	Robert L. Borlick.
San Diego Gas & Electric	San Diego Gas & Electric.
San Diego Water	San Diego County Water Authority.
Schulte Associates	Schulte Associates LLC.
SEIA	Solar Energy Industries Association.
Silicon Valley Leadership Group	Silicon Valley Leadership Group.
Six Cities	Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.
SoCal Edison	Southern California Edison Company.
Southern Companies	Southern Company Services, Inc.
SPP	Southwest Power Pool, Inc.
Starwood Energy	Starwood Energy Group Global, L.L.C.
Stem	Stem, Inc.
Sunrun	Sunrun Inc.
TAPS	Transmission Access Policy Study Group.
TechNet	TechNet.
TeMix	TeMix Inc.
Tesla	Tesla, Inc.
Tesla/SolarCity	Tesla, Inc. and SolarCity Corporation.
Trans Bay	Trans Bay Cable LLC.
Union of Concerned Scientists	Union of Concerned Scientists.
University of Delaware's EV R&D Group	EV R&D Group, University of Delaware.
UofD/Mensah	EV R&D Group, University of Delaware and AF Mensah Inc.
Viking Cold Solutions	Viking Cold Solutions.
Xcel Energy Services	Xcel Energy Services Inc.

UNITED STATES OF AMERICA—FEDERAL ENERGY REGULATORY COMMISSION

	Docket No.
Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators.	RM18–9–000.

(Issued September 17, 2020)

DANLY, Commissioner, *dissenting:*

1. The Commission today approves a rule requiring Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to revise their tariffs to accommodate distributed energy resource (DER) aggregators. I dissent because, regardless of the benefits promised by DERs, the Commission goes too far in declaring the extent of its own jurisdiction and because the Commission should not encourage resource development by fiat.

2. The Federal Power Act (FPA) delineates the respective roles of the Commission and the States, assigning powers in accordance with each sovereigns' core interests.[853] The federal government is tasked with ensuring just and reasonable wholesale rates, prohibiting state action that would either encumber interstate commerce or harm other states. The States retain authority over the most local of concerns: Choice of generation, siting of transmission lines, and the entirety of retail sales and distribution. Each sovereign has a sphere of authority, and in each sphere, the relevant sovereign's powers are supreme.

3. Respect for the States' role in our federal system and under the FPA would counsel against even modest, non-essential declarations of our authority, if done at the States' expense. Why, when issuing a directive to the RTOs and ISOs (undoubtedly Commission-jurisdictional entities), must we also declare that ''retail regulatory authorit[ies] cannot broadly prohibit the participation in RTO/ISO markets of all distributed energy resources or of all distributed energy resource aggregators''? [854] Perhaps the States should not or cannot prohibit such participation.[855] But it is not for us to make sweeping declarations regarding the States' jurisdiction over distributed generation. Rather, the Commission's jurisdiction over wholesale rates would ideally be vindicated, were it to collide with a state prohibition, through a challenge to a specific enactment or regulation by making arguments ''armed with principles of federal preemption and the Supremacy Clause.'' [856]

4. Apart from the Commission's injudicious jurisdictional declarations, today's order stands as an imprudent exercise of the Commission's power. Why promulgate a rule at all? Reluctance to govern by fiat is counseled particularly in a case like this in which the generation resources the majority seeks to promote, by their very nature, inevitably will affect the distribution system, responsibility for which is assigned, with no ambiguity, to the States. We should allow the RTOs and ISOs (or the States or the utilities) to develop their own DER programs in the first instance. If the promises of DERs are what they purport to be, the markets will encourage their development. And if those programs result in wholesale sales in interstate commerce, then the question of the Commission's jurisdiction will be ripe. Commission directives are unnecessary to encourage the development of economically-viable resources. I have greater faith in the power of market forces and in the discernment of the utilities and the States.

For these reasons, I respectfully dissent.

James P. Danly,

Commissioner.

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[853] *See* 16 U.S.C. 824 (2018).

[854] *Final Rule,* Order No. 2222, 172 FERC ¶ 61,247, at P 58 (2020).

[855] I acknowledge the legal authority upon which the majority bases its exercise of jurisdiction. *Compare FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760 (2016), *with Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC,* 964 F.3d 1177 (D.C. Cir. 2020). The concern I express is prudential, not legal.

[856] *Midwest ISO Transmission Owners* v. *FERC,* 373 F.3d 1361, 1372 (D.C. Cir. 2004).

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Part III

Commodity Futures Trading Commission

17 CFR Parts 39 and 140
Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 140

RIN 3038–AE87

Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is adopting regulations that will permit derivatives clearing organizations (DCOs) organized outside of the United States (hereinafter referred to as ''non-U.S. DCOs'') to be registered with the Commission yet comply with the core principles applicable to DCOs set forth in the Commodity Exchange Act (CEA) through compliance with their home country regulatory regimes, subject to certain conditions and limitations. The Commission is also amending certain related delegation provisions in its regulations.

DATES: This rule is effective November 20, 2020.

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SUPPLEMENTARY INFORMATION:

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I. Background

A. Introduction

In July 2019, the Commission proposed changes to its registration and compliance framework for DCOs that would permit a non-U.S. DCO to be registered with the Commission yet comply with the core principles applicable to DCOs set forth in the CEA (DCO Core Principles) through compliance with its home country regulatory regime, subject to certain conditions and limitations.[1] To implement these changes, the Commission proposed a number of amendments to part 39 of the Commission's regulations (Part 39), as well as select amendments to part 140. After considering the comments received in response to the proposal, the Commission is adopting the amendments largely as proposed.[2]

B. DCO Registration Framework

Section 5b(a) of the CEA provides that a clearing organization may not ''perform the functions of a [DCO]'' [3] with respect to futures [4] or swaps unless the clearing organization is registered with the Commission.[5] The CEA permits the Commission to exempt a non-U.S. clearing organization from registration as a DCO for the clearing of swaps if the clearing organization is ''subject to comparable, comprehensive supervision and regulation'' by its home country regulator.[6] The Commission has granted exemptions from DCO registration but so far has limited exempt DCOs to clearing only proprietary swaps for U.S. persons due to uncertainty regarding the bankruptcy treatment of funds used to margin, guarantee, or secure cleared swaps customer positions if cleared at an exempt DCO.[7] As a result, some non-U.S. clearing organizations have opted to register with the Commission as a DCO in order to clear swaps for customers of futures commission merchants (FCMs).

The CEA requires that, in order to register and maintain registration as a DCO, a clearing organization must comply with each of the DCO Core Principles and any requirement that the Commission imposes by rule or

[1] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34819 (July 19, 2019).

[2] The Commission has made several clarifying changes to the rule text that do not otherwise alter the substance of the rules. In addition, in light of comments received, the Commission is adding a process for current non-U.S. DCOs to avail themselves of the new compliance regime without requiring *de novo* registration, but rather by amending the DCO's registration order in accordance with § 39.3(d).

[3] The term ''derivatives clearing organization'' is defined in the CEA to mean a clearing organization in general. However, for purposes of the discussion in this release, the term ''DCO'' refers to a Commission-registered DCO, the term ''exempt DCO'' refers to a derivatives clearing organization that is exempt from registration, and the term ''clearing organization'' refers to a clearing organization that: (a) Is neither registered nor exempt from registration with the Commission as a DCO; and (b) falls within the definition of ''derivatives clearing organization'' under section 1a(15) of the CEA, 7 U.S.C. 1a(15), and ''clearing organization or derivatives clearing organization'' under § 1.3, 17 CFR 1.3.

[4] Section 4(a) of the CEA restricts the execution of a futures contract to a designated contract market (DCM), and § 38.601 of the Commission's regulations requires any transaction executed on or through a DCM to be cleared at a DCO. *See* 7 U.S.C. 6; 17 CFR 38.601. Trades executed on or through a registered foreign board of trade must be cleared through a DCO or a clearing organization that observes the CPMI–IOSCO Principles for Financial Market Infrastructures and is in good regulatory standing in its home country jurisdiction. *See* 17 CFR 48.7(d).

[5] 7 U.S.C. 7a–1(a). Under section 2(i) of the CEA, 7 U.S.C. 2(i), activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either ''have a direct and significant connection with activities in, or effect on, commerce of the United States,'' or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (Dodd-Frank Act). Therefore, pursuant to section 2(i), the DCO registration requirement extends to any clearing organization whose clearing activities outside of the United States have a ''direct and significant connection with activities in, or effect on, commerce of the United States.''

[6] Section 5b(h) of the CEA, 7 U.S.C. 7a–1(h). Section 5b(h) also permits the Commission to exempt from DCO registration a securities clearing agency registered with the Securities and Exchange Commission; however, the Commission has not granted, nor developed a framework for granting, such exemptions.

[7] In 2018, the Commission proposed regulations that would codify the policies and procedures that the Commission currently follows with respect to granting exemptions from DCO registration to non-U.S. clearing organizations. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018). On July 11, 2019, as a supplement to that proposal, the Commission proposed to permit exempt DCOs to clear swaps for U.S. customers through foreign intermediaries. *See* Exemption From Derivatives Clearing Organization Registration, 84 FR 35456 (Jul. 23, 2019). All references to exempt DCOs contained in this release relate to the existing exempt DCO regime and are not indicative of the Commission's response to comments received on either of the proposals referenced in this paragraph.

regulation.[8] The Commission adopted the regulations in subpart B of Part 39 to implement the DCO Core Principles.[9]

Of the 15 DCOs currently registered with the Commission, five are organized outside of the United States.[10] These DCOs are also registered (or have comparable status) in their respective home countries, which means they are required to comply with the CEA and Part 39 as well as their home country regulatory regimes, and they are subject to oversight by both the Commission and their home country regulators. There are, however, meaningful differences in the extent to which these non-U.S. DCOs clear swaps for U.S. persons. For example, nearly half of the swap clearing activity at LCH Limited, if measured on the basis of required initial margin, is attributable to U.S. persons,[11] whereas the percentage of clearing activity generated by U.S. persons at other non-U.S. DCOs is far less. The Commission, recognizing this regulatory overlap yet mindful of its responsibilities, proposed and is adopting changes to its DCO registration and compliance framework to differentiate between DCOs organized in the United States (U.S. DCOs) and non-U.S. DCOs. The framework also distinguishes non-U.S. DCOs that do not pose substantial risk to the U.S. financial system from those that do.

The alternative compliance framework is not available to U.S. DCOs. U.S. DCOs must comply with the CEA and all Commission regulations applicable to DCOs, including all of subparts A and B of Part 39.[12] In addition, any non-U.S. DCO registered to clear futures listed for trading on a DCM is not eligible for the alternative compliance regime at this time. Most non-U.S. DCOs are registered for the purpose of clearing swaps only, and as noted in the proposal, the Commission's regulatory framework already distinguishes between clearing of futures executed on a DCM, for which DCO registration is required, and clearing of foreign futures, for which it is not.

Under Part 39 as now amended, a non-U.S. clearing organization that wants to clear only swaps for U.S. persons has two registration options. First, the non-U.S. clearing organization may apply for DCO registration under the existing procedures in § 39.3(a)(2) and be subject to all Commission regulations applicable to DCOs, including subpart B of Part 39. If, however, the non-U.S. clearing organization does not pose substantial risk to the U.S. financial system and meets the requirements of § 39.51, as discussed below, it now has the option to be registered and maintain registration as a DCO by relying largely on its home country regulatory regime, in lieu of full compliance with Commission regulations.

C. Overview of the New Requirements

The CEA requires a DCO to comply with the DCO Core Principles and any requirement that the Commission imposes by rule or regulation.[13] The CEA further provides that, subject to any rule or regulation prescribed by the Commission, a DCO has ''reasonable discretion'' in establishing the manner by which the DCO complies with each DCO Core Principle.[14] Currently, a DCO is required to comply with all of the regulations in subpart B of Part 39, which were adopted to implement the DCO Core Principles. The Commission is amending its regulations to allow a non-U.S. clearing organization that seeks to clear swaps for U.S. persons,[15] including FCM customers, to register as a DCO and, in most instances, comply with the applicable legal requirements in its home country as an alternative means of complying with the DCO Core Principles.[16]

A non-U.S. clearing organization applying for registration as a DCO subject to alternative compliance will be eligible if: (1) The Commission determines that the clearing organization's compliance with its home country regulatory regime would satisfy the DCO Core Principles;[17] (2) the clearing organization is in good regulatory standing in its home country; and (3) a memorandum of understanding (MOU) or similar arrangement satisfactory to the Commission is in effect between the Commission and the clearing organization's home country regulator. Each of these requirements is described in greater detail below.

An applicant for DCO registration subject to alternative compliance will be required to file only certain exhibits of Form DCO,[18] including a regulatory compliance chart in which the applicant identifies the applicable, legally binding requirements in its home country that correspond with each DCO Core Principle and explains how the applicant satisfies those requirements. If the application is approved by the Commission, the DCO will be permitted to comply with its home country regulatory regime rather than the regulations in subpart B of Part 39, with the exception of § 39.15, which concerns treatment of funds, and certain regulations related to those Core Principles for which the applicant has not demonstrated that compliance with the home country requirements satisfies them. Because the DCO will be permitted to clear swaps for customers[19] through registered FCMs, the DCO will be required to fully comply with the Commission's customer protection requirements,[20] as well as the swap data reporting requirements in part 45 of the Commission's regulations. The DCO also will be required to comply with

[8] 7 U.S.C. 7a–1(c)(2)(A)(i).

[9] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011).

[10] The five DCOs organized outside of the United States are Eurex Clearing AG, ICE Clear Europe Ltd, ICE NGX Canada Inc., LCH Ltd, and LCH SA.

[11] Nearly half of the total required initial margin that U.S. persons post globally in connection with cleared swaps is held at LCH Limited.

[12] In addition, any DCO that has elected to be subject to subpart C of Part 39, or that has been designated as systemically important by the Financial Stability Oversight Council, must comply with subpart C.

[13] 7 U.S.C. 7a–1(c)(2)(A)(i).

[14] 7 U.S.C. 7a–1(c)(2)(A)(ii).

[15] The Commission proposes to use the interpretation of ''U.S. person'' as set forth in the Commission's Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292, 45316—45317 (July 26, 2013) (''Cross-Border Guidance''), as such definition may be amended or superseded by a definition of the term ''U.S. person'' that is adopted by the Commission.

[16] The Commission is promulgating the final rule pursuant to its authority in section 5b(c)(2)(A), 7 U.S.C. 7a–1(c)(2)(A). The section confers on the Commission the authority and discretion to establish requirements for meeting DCO Core Principles through rules and regulations issued pursuant to section 8a(5), 12 U.S.C. 12a(5). In exercise of that discretion, the Commission has developed an alternative compliance regime whereby a non-U.S. DCO may comply with the Core Principles through compliance with its home jurisdiction's requirements.

[17] As described further below, if a non-U.S. DCO fails to demonstrate compliance with a particular DCO Core Principle, the DCO may nevertheless be able to rely on alternative compliance for those DCO Core Principles for which it is able to demonstrate compliance.

[18] Whereas an applicant for DCO registration must file the numerous and extensive exhibits required by Form DCO, an applicant for alternative compliance will only be required to file certain exhibits. *See* Appendix A to Part 39, 17 CFR part 39, appendix A.

[19] Section 2(e) of the CEA makes it unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a DCM. 7 U.S.C. 2(e). ''Eligible contract participant'' is defined in section 1a(18) of the CEA and § 1.3 of the Commission's regulations. 7 U.S.C. 1a(18); 17 CFR 1.3.

[20] Section 4d(f)(1) of the CEA makes it unlawful for any person to accept money, securities, or property (*i.e.,* funds) from a swaps customer to margin a swap cleared through a DCO unless the person is registered as an FCM. 7 U.S.C. 6d(f)(1). Any swaps customer funds held by a DCO are also subject to the segregation requirements of section 4d(f)(2) of the CEA and related regulations.

certain ongoing and event-specific reporting requirements that are more limited in scope than the reporting requirements for existing DCOs. The eligibility criteria, conditions, and reporting requirements will be set forth in new subpart D of Part 39.

Assuming all other eligibility criteria continue to be met, the non-U.S. DCO will be eligible for alternative compliance unless and until its U.S. clearing activity (as measured by initial margin requirements attributable to U.S. clearing members) increases to the point that the Commission determines the DCO poses substantial risk to the U.S. financial system, as described below.

D. Comments on the Notice of Proposed Rulemaking

The Commission requested comment on the proposed rulemaking and invited commenters to provide data and analysis regarding any aspect of the proposal. The Commission received a total of 15 substantive comment letters in response.[21] After the initial sixty-day comment period expired, the Commission extended the comment period for an additional sixty days.[22] After considering the comments, the Commission is largely adopting the rule changes as proposed, for the reasons explained below. In the discussion below, the Commission highlights topics of particular interest to commenters and discusses comments that are representative of the views expressed on those topics. The discussion does not explicitly respond to every comment submitted; rather, it addresses the most significant issues raised by the proposed rulemaking and analyzes those issues in the context of specific comments.

II. Amendments to Parts 39 and 140 of the Commission's Regulations

A. Regulation 39.2—Definitions

1. Good Regulatory Standing

The Commission proposed that, to be eligible for registration with alternative compliance, a DCO would have to be in good regulatory standing in its home country. The Commission further proposed that ''good regulatory standing'' be defined to mean either that there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the DCO.

In connection with the proposed definition of ''good regulatory standing,'' the Commission also requested comment on the following question: ''Although the Commission proposes to incorporate a standard of 'material' non-observance in the definition, should it instead remove references to materiality, and thus capture all instances of non-observance?''

The Commission did not receive any comments on the requirement that a DCO be in good regulatory standing in its home country to be eligible for registration with alternative compliance, but several commenters addressed the definition of ''good regulatory standing.'' Eurex, ICE, and CCIL supported the definition's standard of ''material'' non-observance. In contrast, Better Markets argued that the definition does not provide sufficient assurance of the DCO's compliance with relevant home country regulations because it allows non-U.S. DCOs that have been found non-compliant with certain home country regulations to maintain good regulatory standing. Better Markets argued that a non-U.S. DCO should be required to secure a representation from its regulator that it remains in good regulatory standing, without allowing for ''material non-observance'' of applicable law when that non-observance is in the process of being resolved to the satisfaction of the home country regulator.

The Commission is adopting the definition of ''good regulatory standing'' largely as proposed.[23] The Commission's supervisory experience with DCOs has shown that even well-functioning DCOs will experience instances of non-observance of applicable requirements—both material and immaterial. The Commission therefore seeks to refrain from adopting a mechanical or hyper-technical approach whereby isolated instances of non-observance would be disqualifying.[24] The Commission further believes that the definition provides adequate assurance of compliance with home country regulation, because any material non-observance must be resolved to the satisfaction of the home country regulator in order for the DCO to be deemed to be in good standing.

2. Substantial Risk to the U.S. Financial System

The Commission has a strong supervisory interest in any DCO that is registered, or required to register, with the Commission, regardless of its location. Given the global nature of the swaps market, these DCOs typically operate in multiple jurisdictions and are subject to overlapping or duplicative regulations. In developing the alternative compliance regime, the Commission has strived to allow for greater deference to foreign jurisdictions so as to reduce overlapping supervision and regulatory inefficiencies, while retaining direct oversight over non-U.S. DCOs that—due to the level of their U.S. clearing activity—raise a greater level of supervisory interests (relative to other non-U.S. DCOs).[25] The proposed

[21] The Commission received comment letters addressing the proposal submitted by the following: ASX Clear (Futures) Pty Ltd (ASX); Better Markets, Inc. (Better Markets); CCP12; The Clearing Corporation of India Ltd. (CCIL); Citadel; Eurex Clearing AG (Eurex); Futures Industry Association (FIA); Intercontinental Exchange, Inc. (ICE); International Swaps and Derivatives Association, Inc. (ISDA); Japan Securities Clearing Corporation (JSCC); Kermit R. Kubitz; LCH Ltd and LCH SA (LCH); Securities Industry and Financial Markets Association (SIFMA); World Federation of Exchanges (WFE); and ASX, JSCC, Korea Exchange Inc., and OTC Clearing Hong Kong Limited (''ASX, JSCC, KRX, and OTC Clear'').

[22] *See* Registration With Alternative Compliance For Non-U.S. Derivatives Clearing Organizations, 84 FR 49072 (Sept. 18, 2019).

[23] In an earlier, separate rulemaking, the Commission had proposed to define ''good regulatory standing'' in a way that would apply only to exempt DCOs. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39933 (Aug. 13, 2018). Therefore, in the proposal for this rulemaking, the Commission proposed a definition of ''good regulatory standing'' that retained the previously proposed definition for exempt DCOs but added a separate provision that would apply only to DCOs subject to alternative compliance. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34831 (July 19, 2019). The Commission is adopting only that portion of the definition that applies to DCOs subject to alternative compliance. The Commission will amend the definition of ''good regulatory standing'' as necessary if it finalizes the rulemaking on exempt DCOs.

[24] While the Commission expects, in almost all cases, to defer to the home country regulator's determination of whether an instance of non-compliance is or is not material, it does retain the discretion, in the context of the application of these rules of the Commission, to make that determination itself, and, in order to make such a determination, to obtain information from the home country regulator pursuant to the relevant MOU.

[25] In developing the alternative compliance regime, the Commission is guided by principles of international comity, which counsel courts and agencies to act reasonably and with due regard for the important interests of foreign sovereigns in exercising jurisdiction with respect to activities taking place abroad. *See* Restatement (Third) of Foreign Relations Law of the United States (the Restatement). With regard to deference, the G20 ''agree[d] that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.'' G20 Leaders' Declaration, St. Petersburg Summit, para. 71 (Sept. 6, 2013).

''substantial risk'' test is designed to assist the Commission's assessment of its supervisory interest in a particular non-U.S. DCO.

For purposes of this rulemaking, the Commission proposed to define the term ''substantial risk to the U.S. financial system'' to mean, with respect to a non-U.S. DCO, that (1) the DCO holds 20 percent or more of the required initial margin [26] of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20 percent or more of the initial margin requirements for swaps at that DCO is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20 percent, the Commission may exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system.

The first prong of the test addresses systemic risk, and the Commission's primary systemic risk concern arises from the potential for loss of clearing services for a significant part of the U.S. swaps market in the event of a catastrophic occurrence affecting the DCO. The second prong respects international comity [27] by ensuring that the substantial risk test captures only those non-U.S. DCOs with clearing activity attributable to U.S. clearing members sufficient to warrant more active oversight by the Commission. Even if a non-U.S. DCO satisfies the first prong, it may still qualify for registration subject to alternative compliance if the proportion of U.S. activity it clears does not satisfy the second prong.

Under the test, the term ''substantial'' would apply to proportions of approximately 20 percent or greater. The Commission reiterates that this is not a bright-line test; by offering this figure, the Commission does not intend to suggest that, for example, a DCO that holds 20.1 percent of the required initial margin of U.S. clearing members would potentially pose substantial risk to the U.S. financial system, while a DCO that holds 19.9 percent would not. The Commission is instead indicating how it would assess the meaning of the term ''substantial'' in the test.

The Commission recognizes that if a test were to rely solely on initial margin requirements of U.S. clearing members, it may not fully capture the risk of that DCO to the U.S. financial system. Therefore, under the substantial risk test, the Commission retains a degree of discretion to determine whether a non-U.S. DCO poses substantial risk to the U.S. financial system. In making its determination, the Commission may look at other factors that may reduce or mitigate the DCO's risk to the U.S. financial system, or provide other indication of the systemic risk presented by the DCO.

The Commission specifically requested comment on the following question: ''Is the proposed test for 'substantial risk to the U.S. financial system' the best measure of such risk? If not, please explain why, and if there is a better measure/metric that the Commission should use, please provide a rationale and supporting data, if available.''

The Commission received a variety of comments regarding the substantial risk test. Some comments were generally supportive of the test and its component parts, but the majority of comments raised questions and concerns about the test, including the elements of the test, the discretion afforded to the Commission, and the operation of the test and its ramifications. LCH and CCIL both supported the substantial risk test. In particular, LCH supported using initial margin as an indicator of a non-U.S. DCO's risk to the U.S. financial system. LCH asserted that initial margin is superior to gross notional for analyzing risk, arguing that for cleared swaps gross notional does not provide a clear indication of risk and could lead to an over-estimation of the underlying risk managed by the DCO. CCIL agrees with the proposed test for substantial risk to the U.S. financial system based on the joint application of the two thresholds in the test.

Two commenters questioned how the Commission developed the substantial risk test, particularly the thresholds in the test, and requested additional information regarding this process. ICE stated that it is not clear from the proposal how the Commission determined that the 20 percent thresholds indicate that a non-U.S. DCO poses a substantial risk to the U.S. financial system. ICE requested that the Commission provide an explanation of the basis for this determination. Citadel requested that the Commission provide further information regarding how the criteria were developed, as well as the expected practical impact if the test were applied, including how many currently registered non-U.S. DCOs the Commission would identify as posing substantial risk to the U.S. financial system. Better Markets specifically opposed the first prong of the substantial risk test, which asks whether the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs. It argued that because the Commission did not provide data regarding the value of 20 percent of the U.S. clearing members' initial margin across all swaps, and did not provide a data-based rationale for choosing 20 percent as the appropriate threshold, the implications of this prong of the test are highly speculative, which in turn limits the ability of the public to meaningfully comment on the proposal. Based on its analysis of 2018 data from ISDA, Better Markets suggested that LCH Ltd. would be the only non-U.S. DCO to meet the criteria for presenting a substantial risk to the U.S. financial system. Better Markets further noted that, based on the ISDA data, ICE Clear Credit (were it not U.S.-based) would be eligible for alternative compliance under the first prong of the definition, despite being deemed systemically important by the Financial Stability Oversight Council (FSOC).

In developing the ''substantial risk'' test, the Commission applied its experience in regulating non-U.S. DCOs, including circumstances in which there can be substantial overlap between the regulatory and supervisory activity of the DCO's home country regulator and that of the Commission, as well as any associated benefits and challenges. The Commission anticipates that based on current clearing activity, one non-U.S. DCO, LCH Ltd, would satisfy the substantial risk test. With respect to the reference to FSOC designation, the Commission observes that while both the substantial risk inquiry and FSOC designation relate generally to issues of systemic risk, the related assessments will necessarily differ given their different purposes and consequences.[28]

[26] In general, initial margin requirements are risk-based and are meant to cover a DCO's potential future exposure to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the DCO estimates that it would be able to liquidate a defaulting clearing member's portfolio. This risk-based element of the test focuses on the initial margin attributable to those clearing members who, by virtue of their relationship and connection to the U.S. financial system, raise systemic risk concerns. Accordingly, the Commission believes the relative risk that a DCO poses to the U.S. financial system can be identified by the cumulative sum of initial margin attributable to U.S. clearing members collected by the DCO.

[27] In developing this rulemaking, the Commission was guided by principles of international comity, which counsel due regard for the important interests of foreign sovereigns. *See* Restatement (Third) of Foreign Relations Law of the United States (the Restatement).

[28] Section 804 of the Dodd-Frank Act provides the FSOC the authority to designate a financial market utility (FMU), including a DCO, that the FSOC determines is or is likely to become systemically important because the failure of or a disruption to the functioning of the FMU could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or

Continued

The substantial risk test is designed to better calibrate the Commission's oversight of non-U.S. DCOs, based on the principle of deference to their home country regulators, while at the same time taking into consideration risk to U.S. clearing members and ultimately, the U.S. financial system. If a non-U.S. DCO is determined to pose ''substantial risk,'' the Commission may not defer to the home country regulatory regime and the DCO will be required to comply with both Commission requirements and its home country requirements if it conducts activities requiring registration with the Commission. On the other hand, the FSOC designation process focuses on identifying those FMUs whose failure or disruption could threaten the U.S. financial system.[29] The consequence of FSOC designation is that the FMU becomes subject to enhanced regulatory supervision. To date, the only DCOs designated by FSOC have been U.S. DCOs. Nevertheless, a non-U.S. DCO designated by FSOC would not be eligible for alternative compliance.[30]

The Commission disagrees that commenters did not have access to sufficient information to comment on the first prong of the substantial risk test. Better Markets' analysis of how the test would apply to various DCOs based on publicly available information is inconsistent with that claim. The Commission continues to believe that the first prong of the test is properly calibrated to capture those non-U.S. DCOs that pose substantial risk to the U.S. financial system. The Commission also observes that no commenter offered an alternative version of the test.

Several commenters supported the first prong of the substantial risk test but questioned the wisdom and utility of the second prong. ISDA opposed the second prong and requested that it be eliminated. ISDA stated that although it generally supports clear thresholds for determining whether a DCO poses substantial risk to the U.S. financial system, the second prong of the test does not gauge the risk of the relevant non-U.S. DCO to the U.S. financial system, but instead signifies the importance of U.S. clearing members to that particular DCO.[31] ISDA further argued that the second prong may incentivize non-U.S. DCOs to limit clearing for U.S. persons to avoid being designated as posing substantial risk to the U.S. financial system, and thus being ineligible for registration with alternative compliance. ISDA argued that this situation would harm U.S. banking groups, and could be viewed as violating the spirit of the Principles for Financial Market Infrastructures requirement to provide non-discriminatory treatment of all clearing members.[32] WFE and Eurex also acknowledged the first prong as an appropriate measure of risk, but questioned the second prong on similar grounds.

As the Commission explained previously, the second prong ensures that the test will capture a non-U.S. DCO only if a sufficiently large portion of its clearing activity is attributable to U.S. clearing members such that the United States has a substantial interest warranting more active Commission oversight. While a non-U.S. DCO could theoretically be incentivized to discriminate against U.S. clearing members to avoid satisfying the second prong, the Commission does not view this as a significant risk as a practical matter. It is unlikely that a DCO would have enough U.S. clearing member activity to satisfy the first prong, but would be able to avoid satisfying the second prong by manipulating its U.S. clearing member activity. In any event, the discretion afforded the Commission in the substantial risk test should dull any incentive for a DCO to reject U.S. clearing member business for the purposes of the test.

Three commenters questioned whether the substantial risk test should account for other factors, including the market share a non-U.S. DCO has with respect to clearing certain classes of products, as well as the DCO's size. Citadel questioned, given the relative size of the interest rate swap market, whether a DCO clearing swaps in another asset class (such as CDS) could ever be considered to pose substantial risk to the U.S. financial system under the proposed criteria. Citadel asserted that it would be a strange outcome if only non-U.S. DCOs clearing interest rate swaps would be subject to the Commission's full regulatory framework for DCOs. Similarly, Better Markets argued that the systemic risk of a non-U.S. DCO does not turn solely on the percentage of U.S. clearing member initial margin posted as a percentage of the clearing market as a whole, but also depends on other critical systemic risk factors, such as the prominence of a particular clearing organization in a particular market (such as credit-related swaps), and the potential for correlated losses to occur across U.S. and non-U.S. DCO clearing members participating in that and other markets. Because these considerations are not part of the substantial risk test, Better Markets believes that the substantial risk test does not sufficiently addresses systemic risk concerns.

The Commission recognizes that a test based solely on initial margin requirements may not fully capture the risk of a given DCO. That is why the Commission proposed to retain discretion in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system, particularly where the DCO is close to 20 percent on both prongs of the test. The Commission noted that, in making its determination in these cases, it would look at other factors that may reduce or mitigate the DCO's risk to the U.S. financial system or provide a better indication of the DCO's risk to the U.S. financial system.[33] In appropriate circumstances, the factors cited by the commenters, along with other similar factors, may be considered in connection with an exercise of Commission discretion. The Commission discusses these considerations in additional detail below, in connection with the discussion of Commission discretion. The Commission disagrees with the assertion that the test does not account for the size of the DCO. The first prong of the test, whether the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt

markets and thereby threaten the stability of the U.S. financial system. *See* Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763 (July 27, 2011).

[29] In making a determination with respect to whether a FMU is, or is likely to become, systemically important, the FSOC takes into consideration: The aggregate monetary value of transactions processed by the FMU; the aggregate exposure of the FMU to its counterparties; the relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing, or settlement activities; the effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system; and any other factors the FSOC deems appropriate. *See* 12 CFR 1320.10.

[30] The Commission did not propose to amend § 39.30(b), which subjects a ''systemically important [DCO]'' (defined in § 39.2 as a DCO designated by the FSOC for which the Commission acts as the Supervisory Agency) to the provisions of subparts A and B of Part 39.

[31] ISDA also did not recognize that the proposed definition of ''substantial risk to the financial system'' requires that both prongs of the test, and not only one or the other, be satisfied in order for a non-U.S. DCO to satisfy the test. Based on this misunderstanding, ISDA argued that the second prong does not provide an independent basis for finding that a non-U.S. DCO presents substantial risk to the financial system. In response to this comment, the Commission reaffirms that the substantial risk test is a two-prong test in which both the first and second prongs must be satisfied.

[32] *See* CPMI–IOSCO, Principles for Financial Market Infrastructures (PFMIs), at Principle 18 (Apr. 2012), available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf.*

[33] *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 3822 (Feb. 13, 2019).

DCOs, is closely correlated with the size of the DCO in that only a large DCO will hold that amount of initial margin.

Some commenters supported the proposal that the Commission retain the ability to exercise discretion for a prong of the substantial risk test that is close to the 20 percent threshold, as opposed to being limited to a mechanical application. WFE warned against any automatic trigger, stating that the Commission should be able to determine that a non-U.S. DCO does not pose substantial risk to the U.S. financial system, even if the DCO exceeds both thresholds in the substantial risk test. LCH supports the Commission's ability to exercise its discretion, but only when the non-U.S. DCO is close to 20 percent on both prongs of the substantial risk test. Similarly, CCP12 and JSCC requested that the Commission clarify that the Commission would exercise its discretion only if both of the two thresholds are close to 20 percent. Citadel recommended that the Commission retain sufficient discretion to conduct a thorough analysis of the systemic risks associated with each non-U.S. DCO seeking to use the alternative compliance framework, taking into account both U.S. participation on that DCO (including clearing members, customers, and affiliates of U.S. firms) and the DCO's market position within the relevant asset class.

Multiple commenters questioned or criticized the scope of the Commission's discretion under the substantial risk test. ICE argued that the potential scope of discretion, and the lack of definition of relevant factors that the Commission may consider, could create significant uncertainty as to how the Commission may classify a DCO, even potentially resulting in inconsistent determinations. ICE also argued that this lack of specificity could lead to unnecessary delays in the assessment of an applicant, which would increase compliance costs and may discourage clearing organizations from submitting an application. FIA similarly argued that the Commission's discretion should be subject to some parameters so as to create more transparency and clarity. FIA suggested that the Commission list factors it will consider in determining whether a non-U.S. DCO poses substantial risk. Similarly, LCH recommended there be greater transparency around the qualitative factors that may be considered in a non-U.S. DCO's substantial risk assessment, noting that any such factors should be measurable and relevant to addressing risk in the U.S. financial system. ISDA expressed concern about the Commission's proposed ability to retain discretion, arguing that this discretion undermines the Commission's objective to provide a bright-line test, and may lead to legal and compliance uncertainty. ISDA requested that the Commission clarify the factors that might reduce, mitigate, or provide a better indication of a non-U.S. DCO's risk to the U.S. financial system.

CCIL cautioned that the Commission's discretion to determine whether a non-U.S. DCO poses substantial risk based on one or both of the thresholds may have the effect of ''undoing'' the proposed test. FIA argued that if the Commission can exercise its discretion even when a DCO is approaching the threshold of only one prong of the test, then there would be no clarity or certainty regarding whether any particular DCO satisfies the test. Both FIA and CCP12 argued that the possibility that the Commission might exercise discretion and determine that a small non-U.S. DCO presents substantial risk to the U.S. financial system based on being close to the threshold on the second prong may create uncertainty that could lead to market fragmentation, possibly exacerbate systemic risk, or otherwise harm market participants, especially if the DCO attempts to reduce its existing U.S. clearing business, or limit new U.S. clearing business, to mitigate against perceived uncertainty.

Better Markets argued that the Commission retained too much discretion in its proposed definition of substantial risk, including discretion to determine that non-U.S. DCOs above both thresholds do not pose substantial risk to the U.S. financial system and therefore remain eligible for alternative compliance. Better Markets further stated that due to the breadth of this discretion, the substantial risk test effectively only provides one indication of how the Commission might consider eligibility for alternative compliance. In the view of Better Markets, the level of discretion appears to justify determinations that a given DCO does or does not pose substantial risk based on almost any criteria or factors, and thus asks the public to foresee the discretionary application of vague regulations with a potentially wide range of possible outcomes.

In response to comments expressing concern about the Commission exercising discretion on the substantial risk determination as a whole based on only one of the two prongs being close to a 20 percent threshold, the Commission has revised the rule text to clarify when it will exercise discretion. Specifically, the rule text has been revised to provide that where one or both of these thresholds are identified as being close to 20 percent, the Commission may exercise discretion in determining whether an identified threshold is satisfied for the purpose of determining whether the DCO poses substantial risk to the U.S. financial system. This was always the Commission's intent with respect to the exercise of discretion, but the Commission agrees with commenters who indicated that the language in the proposal was not sufficiently clear.

The Commission intends to consider all factors it believes are relevant to determine whether a non-U.S. DCO poses substantial risk to the U.S. financial system. The following non-exclusive examples illustrate the factors the Commission may consider in exercising discretion under the substantial risk test: The market share of the DCO in clearing a given asset class, and the importance of those products to the U.S. financial system; whether positions cleared at the DCO are portable to another DCO and the potential disruptions associated with transferring positions; whether the sudden failure of the DCO would significantly reduce the availability of clearing services to U.S. clearing members; and whether settlements at the DCO are primarily denominated in U.S. dollars.

As one commenter correctly observed, the Commission retained discretion to determine that non-U.S. DCOs above both thresholds nevertheless remain eligible for alternative compliance. The Commission wishes to clarify, however, that it does not intend to exercise discretion in a manner that would have the effect of negating the test. Exercising discretion is the exception, not the rule, and the Commission accordingly intends to exercise its discretion sparingly, and on a case-by-case basis, weighing and considering factors that possibly are unique to the DCO and its profile in the marketplace. Lastly, the Commission wishes to clarify that it intends to exercise its discretion on a sliding scale where the further the non-U.S. DCO is from the thresholds, the more numerous or compelling the factors will need to be for the Commission to exercise discretion.

The Commission received a number of process-related comments regarding the substantial risk test. Some of the comments were directly responsive to the Commission's request in the proposal for comment regarding the frequency with which the Commission should reassess whether a DCO presents substantial risk to the U.S. financial system, and across what time period after the DCO is registered under the

alternative compliance regime, or otherwise addressed that same topic.[34] Additionally, a number of commenters had other comments, questions, and recommendations regarding the process by which the Commission would apply the substantial risk test, as well as the nature and scope of a DCO's obligations in connection with that process.

With regard to the frequency with which the Commission will assess whether a DCO poses substantial risk to the U.S. financial system, LCH suggested that the Commission reassess a DCO's risk to the U.S. financial system annually. CCIL, CCP12, and JSCC stated that the Commission should reassess a DCO every two years, and CCP12 added that the Commission should also reassess following a material change to the DCO's clearing services or home country regulatory framework. CCP12 also suggested that the reassessment be regarded more as a ''check-up'' than a complete re-application process in which the DCO would have to resubmit already available data, because the Commission already would have been receiving regular reports from the DCO. FIA stated that the substantial risk test should not be applied too frequently, to avoid DCOs oscillating between being eligible or ineligible for alternative compliance. CCP12 and JSCC suggested that the Commission look at an average of the previous 12 months when reassessing each threshold to ensure that the results are not overly influenced by any specific event, such as quarter-end or year-end.

With regard to reassessments of a DCO's status under the substantial risk test, ICE asserted that it would be difficult for a DCO to determine where it stands in relation to the threshold in the first prong of the test because this information is not available to DCOs. ICE argued that although the Commission may have this information, the standard needs to be one that is predictable and assessable for the DCOs themselves. ICE further stated that it is not clear how often a DCO must test whether it poses substantial risk to the U.S. financial system, or how long it would have to come into compliance with all requirements applicable to DCOs that are not eligible for alternative compliance if it ceases to be eligible. Similarly, ISDA requested that the Commission affirm that the Commission will monitor the 20 percent threshold test by analyzing the data DCOs already report to the Commission, and that a non-U.S. DCO has no obligations with respect to the monitoring of the 20 percent threshold apart from its reporting requirements. CCP12 recommended that the Commission use an observation period of sufficient duration before determining that a non-U.S. DCO exceeds the thresholds in the substantial risk test, to verify whether the breach is a structural trend or a temporary condition.

FIA stated that there should be a formal process to designate a DCO as one that poses substantial risk to the U.S. financial system, and that the Commission should clearly establish the frequency with which the substantial risk test will be applied to DCOs. WFE suggested that the Commission adopt and implement formal milestones in the substantial risk determination process. Specifically, WFE suggested that when a DCO approaches a threshold in the substantial risk test, but prior to any Commission determination that the DCO poses substantial risk, the Commission should initiate discussions with both the DCO and its home country supervisor, and allow the DCO to raise substantive and procedural issues with the Commission. In addition, WFE stated that if the Commission determines that a DCO poses substantial risk to the U.S. financial system, that the determination should be accompanied by a communication outlining the factors the Commission took into consideration in making the determination, and that DCOs should be able to appeal the determination.

FIA stated that the DCO, home country regulator, and, if practicable, other interested parties should be given the opportunity to provide feedback to the Commission when it is determining whether a DCO presents substantial risk, and that the DCO should be given a grace period during which time it can attempt to drop under the relevant thresholds. FIA stated that the Commission should make clear what is expected to occur if a DCO that is registered subject to alternative compliance and clears for U.S. customers becomes ineligible for alternative compliance, and should allow an appropriate timeframe for the orderly transfer or close out of any accounts held by U.S. customers at the relevant DCO in the event the non-U.S. DCO decides to limit clearing activity by U.S. clearing members to attempt to remain below the thresholds in the substantial risk test. FIA argued that it is vital that clearing members be given ample notice of a proposed determination by the Commission, together with the basis for such determination. CCP12 also requested that the Commission provide sufficient notice to the DCO to permit it to adjust its clearing business prior to a determination that the DCO poses substantial risk to the U.S. financial system.

FIA asserted that because the substantial risk test is applied on an ongoing basis, the Commission should commit to publishing and updating as appropriate a list of non-U.S. DCOs that pose substantial risk to the U.S. financial system and are therefore ineligible for alternative compliance. FIA explained that market participants will assume that a DCO that does not currently pose substantial risk to the U.S. financial system will continue to be able to facilitate U.S. customer clearing. Firms will be better positioned to plan for, and potentially mitigate, the business and market disruptions that could result from a DCO's addition to the list if they have notice of the Commission's intention.

The Commission is mindful of the concerns raised by commenters regarding the frequency with which the Commission should assess whether a DCO presents substantial risk to the U.S. financial system. At this time, however, the Commission declines to define a specific time period for reassessment of whether a DCO presents substantial risk. The Commission notes that because it will be receiving the relevant data from DCOs daily, it intends to monitor whether a non-U.S. DCO subject to alternative compliance presents ''substantial risk to the U.S. financial system'' on an ongoing basis.

In response to the concerns commenters expressed regarding the process that the Commission will use to determine whether a non-U.S. DCO satisfies the substantial risk test, and to inform the DCO of that determination, the Commission notes that it has extensive experience with engaging DCOs on a cooperative basis, and anticipates doing so in circumstances in which a non-U.S. DCO may pose substantial risk to the U.S. financial system. The Commission anticipates early and significant dialogue with non-U.S. DCOs if they approach the thresholds, and welcomes engagement with the DCO and its home country regulators, especially if it appears that the DCO is projected to exceed the thresholds in the substantial risk test. In applying the test, the Commission will focus on the non-U.S. DCO's current U.S. clearing member activity relative to the thresholds, and whether any increases in activity by U.S. clearing members appear to be temporary, or are part of a persistent trend. The Commission does not intend that, absent extraordinary circumstances,

[34] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34826 (July 19, 2019).

non-U.S. DCOs will alternate between traditional registration and registration with alternative compliance, as that would not benefit the non-U.S. DCO, market participants, or the Commission. Lastly, the Commission does not intend to publish a list of non-U.S. DCOs that pose substantial risk to the U.S. financial system. If a non-U.S. DCO subject to alternative compliance becomes ineligible for alternative compliance for any reason, the Commission will modify the DCO's registration order, which is public, to provide that it must comply with all Commission regulations applicable to DCOs and to provide a reasonable period of time for it to do so, pursuant to § 39.51(d)(4). This process should not result in any disruption to market participants. In the unlikely event that a non-U.S. DCO responds to a determination that it is no longer eligible for alternative compliance by requesting a vacation of its registration, the Commission will work with the DCO and market participants to minimize market disruption.

The Commission is adopting the substantial risk test as proposed, with one exception. As explained above, the Commission is modifying the rule text to clarify the scope of Commission discretion under the test.

3. U.S. Clearing Member

The substantial risk test focuses on the clearing activity of U.S. clearing members at non-U.S. DCOs. For purposes of the test, the Commission proposed to define ''U.S. clearing member'' as a clearing member of a non-U.S. DCO that falls within one of three categories: It is organized in the United States; it is an FCM, which means it may clear for U.S. customers; or it is a non-U.S. entity whose ultimate parent company is organized in the United States.

The comments focused on one aspect of the proposed definition of U.S. clearing member. Specifically, ICE, ISDA, WFE, CCP12, FIA, JSCC, and Eurex opposed the definition's inclusion of clearing members that are organized outside of the United States, but whose ultimate parent company is organized in the United States.[35] For example, ICE stated that the definition of ''U.S. clearing member'' is overbroad and should instead focus only on the location and activity of the clearing member itself. ICE argued that the fact that a clearing member located outside of the United States has a U.S. parent does not mean that its clearing activity at a non-U.S. DCO has or can be expected to have an effect on U.S. markets. FIA stated that affiliates with parent companies in the U.S. are significant participants in the four currently exempt DCOs and that it is not clear why all trades cleared by such a clearing member would be considered to pose risk to the U.S. financial system. WFE argues that rather than considering a non-U.S. clearing member with a U.S. parent to be a U.S. clearing member in every instance, that the Commission consider clearing members' legal organization (including with respect to separate capitalization) and parent organization recovery and resolution plans and make a determination based on the particular facts and circumstances.

Two commenters argued that this aspect of the proposed definition of U.S. clearing member is inconsistent with the Commission's existing cross-border risk management framework for swaps.[36] ISDA recommended that non-U.S. subsidiaries of U.S. swap dealers be excluded from the definition of U.S. clearing member, on the basis that the Commission's Cross-Border Guidance provides that non-U.S. subsidiaries of U.S. swap dealers are not considered U.S. persons simply because they are part of a U.S. banking group. CCP12 argued that section 2(i) of the CEA requires that the focus be on whether a non-U.S. clearing organization's activities have a direct and significant connection with activities in, or effect on, commerce of the United States. CCP12 believes that, under this approach, the focus should be on the non-U.S. clearing organization's clearing for U.S. participants.

The Commission is adopting the definition of ''U.S. clearing member'' as proposed, including in the definition those clearing members that are organized outside of the United States, but whose ultimate parent company is organized in the United States. The Commission acknowledges that the definition of ''U.S. clearing member'' is more expansive than the definition of ''U.S. person'' in the Cross-Border Guidance in that a clearing member organized outside of the United States is always considered to be a ''U.S. clearing member'' if it has a U.S. parent. Because the risk associated with a non-U.S. clearing member can potentially flow to its U.S. parent, the Commission believes that it is appropriate to consider that activity, aggregated together with other relevant activity, in applying the substantial risk test. This approach has the important advantage of being easily administered as a bright-line test, making the calculation more predictable than it would be under an approach based on specific facts and circumstances. The Commission believes this is appropriate here, where the definition does not have jurisdictional consequences impacting issues such as the need for registration. Furthermore, this definition will be used in both the numerator and denominator to measure clearing activity as a percentage for the purposes of the first prong, limiting its impact in terms of the number of non-U.S. DCOs satisfying the test.

B. Regulation 39.3(a)(3)—Application Procedures

The Commission proposed to amend § 39.3(a) to establish application procedures for a non-U.S. clearing organization seeking to register as a DCO subject to alternative compliance. Proposed § 39.3(a) would require an applicant to submit to the Commission the following sections of Form DCO, in some instances modified as described: Cover sheet, Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–4 (detailed business plan), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A–9 (description of pending legal proceedings or governmental investigations), Exhibit A–10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F–1 through F–3 (documents that demonstrate compliance with the treatment of funds requirements with respect to FCM customers), and Exhibit R (ring-fencing memorandum).

As proposed, an applicant would be required to demonstrate to the Commission in Exhibit A–1 the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles. To satisfy this requirement, the applicant would be required to provide in Exhibit A–1 the citation and

[35] CCP12, JSCC, and ISDA expressed concern that defining U.S. clearing member to include non-U.S. entities could lead small non-U.S. DCOs with significant clearing activity from non-U.S. subsidiaries of U.S. parents to satisfy the substantial risk test, given the increased likelihood that they would satisfy the second prong. As discussed above, both prongs of the test must be satisfied for the Commission to determine that a non-U.S. DCO poses substantial risk, and small DCOs will not satisfy the test because they will not satisfy the first prong.

[36] *See* Cross-Border Guidance, 78 FR 45292, 45316–45317 (July 26, 2013).

full text of each applicable legal requirement in its home country that corresponds with each DCO Core Principle and an explanation of how the applicant satisfies those requirements. In the event the home country lacks legal requirements that correspond with a particular DCO Core Principle, the applicant should explain how it would satisfy the DCO Core Principle nevertheless.

The Commission requested comment on whether it should require additional, or less, information from an applicant for alternative compliance as part of its application under proposed § 39.3(a)(3). Several commenters stated that the Commission should require less information from applicants. CCP12 stated that the proposed application procedure is substantial and therefore burdensome in terms of processes and administrative filings. ICE stated that the requirement that an applicant submit a chart comparing its home country's requirements to each DCO Core Principle would require extensive work. ICE suggested that the Commission permit applicants to meet this requirement in a more flexible manner than by requiring the provision of a mapping document, such as by allowing applicants to address categories of regulatory objectives under the Dodd-Frank Act or Commission regulations. CCIL stated that the Commission should require applicants to provide only the information required to be disclosed by the quantitative and qualitative disclosure requirements under the PFMI standards. ICE similarly stated that the Commission should benchmark its comparability assessment with regard to compliance with international standards and, in particular, the PFMIs. Eurex and LCH recommended that an existing DCO applying for alternative compliance should not have to submit all of the exhibits required under proposed § 39.3(a)(3) because the Commission would already be aware of many of the documents required by the application.

One commenter, Mr. Kubitz, suggested that the Commission should require additional information from applicants, and specifically, the applicant's current clearing volume, an explanation of any differences between the DCO Core Principles and the applicant's home country regulatory regime, and a justification for any differences in the applicant's home country reporting requirements.

After reviewing the comments, the Commission continues to believe that the information required of applicants under proposed § 39.3(a)(3) is appropriate and necessary to evaluate an applicant's eligibility for alternative compliance. This includes the regulatory compliance chart in Exhibit A–1 of Form DCO, which is necessary to ensure that an applicant is subject to requirements in its home country jurisdiction that would satisfy the DCO Core Principles. The Commission must receive this information also to ensure that an applicant for alternative compliance actually satisfies the DCO Core Principles, as is required of all registered DCOs under the CEA.[37] In addition, the Commission could not evaluate an application based on PFMI compliance because the CEA specifically requires compliance with the DCO Core Principles.

The Commission also does not believe that it needs to require additional information beyond that contained in proposed § 39.3(a)(3). If the Commission determines that it needs additional information to process a particular application, existing § 39.3(a)(3) (proposed to be renumbered as § 39.3(a)(4)) permits the Commission to request that the applicant provide that information.

With respect to a DCO that has already registered with the Commission pursuant to the procedures in § 39.3(a)(2), and that may wish to be subject to alternative compliance, those DCOs would not need to follow the procedures set forth in proposed § 39.3(a)(3). Rather, a currently registered DCO that wishes to be subject to alternative compliance would need to submit a request to amend its order of registration pursuant to § 39.3(d). The initial request would need to include only Exhibits A–1 and A–8 as described in proposed § 39.3(a)(3). Recognizing that many of the current non-U.S. DCOs are subject to the European Market Infrastructure Regulation (EMIR), the Commission has undertaken an analysis of EMIR against the DCO Core Principles that a non-U.S. DCO that wishes to apply for alternative compliance may use in preparing Exhibit A–1.[38]

The Commission received some additional comments on proposed § 39.3(a) that do not relate to the request for comment. LCH stated that it supports the alternative compliance application process under proposed § 39.3(a)(3). Citadel and Mr. Kubitz suggested that the Commission provide a public comment period for alternative compliance applications, and Mr. Kubitz specifically suggested a period of 90–120 days. Citadel stated that market participants should be provided with an opportunity to comment on each application because the costs and benefits of alternative compliance, including the impact on U.S. market participants, may vary greatly depending on the specific application and the associated home country regulatory regime. Mr. Kubitz suggested that the MOU between the Commission and the applicant's home country regulator should be made public, and that alternative compliance applications should be provided to relevant Congressional committees, the Federal Reserve, and the Department of Treasury.

The Commission is declining to require a public comment period for alternative compliance applications. There is no Commission regulation requiring a comment period for applications for DCO registration, and the Commission believes that it is well-equipped, with the benefit of the information applicants will need to submit to the Commission pursuant to § 39.3(a)(3), to determine whether an applicant should be registered subject to alternative compliance. However, the Commission notes that, even without a required comment period, DCO applications may be posted for public comment when the Commission believes it is warranted.[39] In response to Mr. Kubitz, the Commission notes that it already publishes MOUs on its website.[40] Finally, the Commission does not believe that it should require that alternative compliance applications be provided to Congressional committees, the Federal Reserve, or the Department of Treasury given that these bodies have no role assigned by statute or regulation in deciding whether to approve or deny an application.

The Commission is adopting § 39.3(a)(3) as proposed, but with one modification. In those cases where an applicant's home country lacks legal requirements that correspond to a particular DCO Core Principle, the applicant would need to explain how it would comply with the DCO Core Principle nevertheless. The Commission is adding a sentence at the end of § 39.3(a)(3) to clarify that point.

[37] 7 U.S.C. 7a–1(c)(2)(A)(i).

[38] The analysis is provided in the appendix to this release.

[39] *See, e.g.,* CFTC Press Release, CFTC Requests Public Comment on Related Applications Submitted by LedgerX, LLC for Registration as a Derivatives Clearing Organization and Swap Execution Facility (Dec. 15, 2014), *https://www.cftc.gov/PressRoom/PressReleases/pr7078-14.*

[40] *See* Memoranda of Understanding, *available at: https://www.cftc.gov/International/MemorandaofUnderstanding/index.htm.*

C. Regulation 39.4—Procedures for Implementing DCO Rules and Clearing New Products

Regulation 39.4(b) requires a DCO to submit proposed new or amended rules to the Commission pursuant to the self-certification procedures of § 40.6,[41] as required by section 5c(c) of the CEA,[42] unless the rules are voluntarily submitted for Commission approval pursuant to § 40.5. Pursuant to the Commission's authority under section 4(c) of the CEA,[43] the Commission proposed to revise § 39.4(c)[44] to exempt DCOs that are subject to alternative compliance from submitting rules pursuant to section 5c(c) of the CEA and § 40.6, unless the rule is related to the DCO's compliance with the requirements of part 45 of the Commission's regulations,[45] or with section 4d(f) of the CEA,[46] parts 1 or 22 of the Commission's regulations,[47] or § 39.15,[48] which set forth the Commission's customer protection requirements, as such DCOs would remain subject to compliance with these requirements. The Commission proposed to adopt this limited exemption from the standard rule submission requirements given that DCOs subject to alternative compliance will be subject to the applicable laws in their home country and oversight by their respective home country regulators.

1. Rule Submission and Review Requirement

The Commission requested comment on whether it should require, as a condition of eligibility for alternative compliance, that an applicant be subject to a home country regulatory regime that has a rule review or approval process.

CCIL stated that it is unnecessary for the Commission to require an applicant's home country regime to have a rule review or approval process given the requirement that the home country regulator represent that an applicant is in good regulatory standing. ICE noted that regulators take different approaches to rule reviews and as such, the Commission should not require that the home country regulator have a process to review every rule, but rather should consider only whether material rule changes are reviewed by the home country regulator. ICE commented that the review process of the Bank of England, the home country regulator for central counterparties (CCPs) within the United Kingdom, only requires CCPs to file major initiatives and does not require a CCP to file each rule amendment for approval. ICE argued that as long as material rule changes are subject to review by the home country regulator, the Commission should neither deny alternative compliance nor impose a review of every rule change by either the home country regulator or the Commission for a non-U.S. DCO to be eligible for alternative compliance. Better Markets argued that permitting alternative compliance for a DCO with a home country regulatory regime that does not have a rule submission and review process commensurate with at least the Commission's part 40 rule certification process would constitute a ''black hole in DCO oversight.''

The Commission agrees with the general premise of CCIL and ICE's comments that the Commission should defer to the home country regulator, which is best situated to determine what rule submissions, if any, are necessary to effectively oversee a non-U.S. DCO's clearing activities given the other regulatory and supervisory elements of the home country regulatory regime. A DCO subject to alternative compliance will still be required to submit to the Commission rules related to critical customer protection safeguards and swap data reporting requirements. In addition, the DCO will be subject to the full extent of its home country regulator's oversight of the DCO's compliance with its home country legal requirements, compliance with which must constitute compliance with the DCO Core Principles. Even if that home country regime does not include a rule review or approval process, the lack of that specific process does not amount to an absence of oversight. The Commission further believes that its MOU with a non-U.S. DCO's home country regulator will provide the Commission with access to any additional information that it might need to evaluate or review the DCO's continued compliance with registration requirements. Therefore, the Commission is not adopting a requirement that the home country regulator of an applicant for alternative compliance have a rule review or approval process that is comparable to the Commission's part 40 rule submission procedures.

The Commission also requested comment on whether it should require a DCO to file other rules pursuant to section 5c(c) of the CEA in addition to rules that relate to the DCO's compliance with the requirements of section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15. If so, the Commission further requested comment on whether it should retain discretion in determining which other rules must be filed based on, for example, the particular facts and circumstances, or whether it should enumerate the types of rules that must be filed (*e.g.,* rules related to certain products cleared by the DCO).

Citadel argued that part 40 of the Commission's regulations, which among other things requires that a DCO publicly disclose its rule filings, is critical to providing U.S. market participants with sufficient transparency into a DCO's governance and operations, including with respect to the DCO's risk management and default management frameworks. Citadel argued that the Commission should ensure that market participants continue to have access to this information from DCOs registered under the alternative compliance framework. The Commission believes that the rules of a DCO subject to alternative compliance will remain sufficiently transparent, as the DCO will be subject to requirements that satisfy Core Principle L, which, among other things, requires a DCO to make information concerning the rules and operating and default procedures governing its

[41] 17 CFR 40.6. A ''rule,'' by definition, includes any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted. 17 CFR 40.1(i).

[42] 7 U.S.C. 7a–2(c).

[43] 7 U.S.C. 6(c). Section 4(c) of the CEA provides that, in order to promote responsible economic or financial innovation and fair competition, the Commission, by rule, regulation, or order, may exempt any transaction or class of transactions subject to futures trading restrictions under section 4(a), 7 U.S.C. 6(a), (including any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to, the transaction) from any of the provisions of the CEA other than certain enumerated provisions, if the Commission determines that the exemption would be consistent with the public interest and the purposes of the CEA, that the transactions will be entered into solely between appropriate persons, and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA. Section 2(d) of the CEA, 7 U.S.C. 2(d), extends the Commission's section 4(c) exemptive authority to swaps.

[44] The Commission is also renumbering existing § 39.4(c) through (e) as § 39.4(d) through (f).

[45] 17 CFR part 45 (setting forth swap data reporting and recordkeeping requirements).

[46] 7 U.S.C. 6d(f) (relating to segregation of customer funds).

[47] 17 CFR parts 1 and 22 (setting forth general regulations under the CEA, including treatment of customer funds, and requirements for cleared swaps, respectively).

[48] 17 CFR 39.15 (setting forth requirements for the treatment of customer funds).

clearing and settlement systems available to market participants.[49]

Better Markets criticized the scope of the Commission's rule certification exemption in § 39.4(c) as ''fatally and legally flawed'' because the Commission determined that it only needed to receive rule submissions in the customer protection and swap data reporting areas in which it will continue to exercise direct oversight. Better Markets did not, however, identify any specific additional rules that the Commission should require DCOs subject to alternative compliance to submit. Better Markets also suggested that the Commission require a DCO subject to alternative compliance to provide a notice filing for rules subject to the exemption in § 39.4(c) that demonstrates that a rule was filed with the home country regulator, and that discloses the nature and content of such a rule. The Commission is not adopting this suggestion, as a requirement along these lines would be inconsistent with the Commission's approach of deferring to the home country regulator on whether and to what extent the regulator reviews a DCO's rules.

2. CEA Section 4(c) Exemptive Authority

As noted in the proposal, the Commission believes the exemption in § 39.4(c) is consistent with the public interest and the purposes of the CEA, as required by section 4(c),[50] as it will allow the Commission to focus on reviewing those rules that relate to areas where the Commission exercises direct oversight. The exemption reflects the Commission's view that the protection of customers—and safeguarding of money, securities, or other property deposited by customers—is a fundamental component of the Commission's regulatory oversight of the derivatives markets and hence, DCOs subject to alternative compliance should be required to certify rules relating to the Commission's customer protection requirements. These customer protection-related rules will remain transparent to FCMs and their customers, as § 40.6(a)(2) requires a DCO to certify that it has posted on its website a copy of the rule submission.[51] At the same time, the exemption in § 39.4(c) will reduce the time and resources necessary for DCOs to file rules unrelated to the Commission's customer protection or swap data reporting requirements.

The Commission also believes the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA, as the Commission will continue to receive submissions for new rules or rule changes concerning customer protection and swap data reporting, matters for which a DCO subject to alternative compliance will still be subject to compliance with Commission regulation. Further, DCOs subject to alternative compliance satisfy section 4(c)(2)'s ''appropriate person'' element in clearing transactions (a rendered service) for U.S. persons.[52] These DCOs exclusively clear off-DCM swaps, which by virtue of section 2(e) of the CEA, a U.S. person cannot lawfully transact unless they qualify as an eligible contract participant (''ECP'').[53] As the Commission has previously affirmed, ECPs are appropriate persons within the scope of CEA section 4(c)(3)(K).[54]

The Commission requested comment as to whether the proposed exemption in § 39.4(c) from the rule submission requirements of section 5c(c) of the CEA meets the standards for exemptive relief set out in section 4(c) of the CEA.

Better Markets stated that the Commission should have proposed an exemption under section 5b(h) of the CEA (*i.e.,* the provision that permits the Commission to exempt DCOs from registration) instead of section 4(c). It argued that section 4(c)'s exemptive authority cannot be used to exempt non-U.S. DCOs from rule submission requirements, as doing so would impermissibly expand the Commission's general exemptive authority beyond its plain language. Better Markets contended that the plain language of section 4(c) limits the Commission to exempt agreements, contracts, or transactions that are subject to section 4(a), which only applies to futures, and that section 4(c) is best read not to contemplate an exemption with respect to swap activities at all. Therefore, Better Markets indirectly concluded that section 4(c) cannot be relied on to exempt non-U.S. DCOs, which may only list swaps, from rule submission procedures.[55] Further, Better Markets argued that relying on section 4(c) would inappropriately supersede the CEA's more specific exemptive authority within section 5b(h), and without specific, required statutory analyses.

The Commission disagrees with Better Markets' arguments. Section 5b(h) permits the Commission to exempt a DCO from registration if the Commission determines that the DCO is subject to ''comparable, comprehensive supervision and regulation'' by its home country regulator. The exemption at issue, however, is not an exemption from registration, and section 5b(h) does not provide the Commission with the ability to exempt a registered DCO from other requirements of the CEA. In addition, Better Markets' interpretation that the Commission's exemptive authority under section 4(c) is strictly limited to futures agreements, contracts, or transactions subject to section 4(a) of the CEA ignores section 2(d) of the CEA,[56] which extends the Commission's section 4(c) exemptive authority for futures transactions to swaps transactions.[57]

[49] 7 U.S.C. 7a–1(c)(2)(L).

[50] CEA section 4(c)(1) permits the Commission to exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction) from any of the requirements of subsection (a), which pertains to futures trading, or from any other provision of the CEA. 7 U.S.C. 6(c)(1).

[51] The Commission also publicly posts on its website all § 40.6 rule certifications for which confidential treatment is not requested.

[52] 7 U.S.C. 6(c)(2). Under section 4(c)(2)(B)(i) of the CEA, in order for DCOs subject to alternative compliance—*i.e.,* a class of persons that render clearing services for swap transactions—to be exempted from CEA provisions, the transactions they clear must ''be entered into solely between appropriate persons.'' 7 U.S.C. 6(c)(2)(B)(i). Section 4(c)(3) specifies categories of persons within the defined term ''appropriate person.'' 7 U.S.C. 6(c)(3). Subparagraph (K) defines ''appropriate person'' to include such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. 7 U.S.C. 6(c)(3)(K).

[53] Section 2(e) of the CEA makes it unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a DCM. 7 U.S.C. 2(e). ''Eligible contract participant'' is defined in section 1a(18) of the CEA and § 1.3 of the Commission's regulations. 7 U.S.C. 1a(18); 17 CFR 1.3. *See also,* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, 21754 (Apr. 11, 2013) (noting that the elements of the ECP definition set forth in section 1a(18)(A) and Commission regulation 1.3(m) generally are more restrictive than the comparable elements of the enumerated section 4(c)(3) ''appropriate person'' definition).

[54] *See, e.g.,* Exemption from Derivatives Clearing Organization Registration, 84 FR 35458 (July 23, 2019); Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21754 (April 11, 2013).

[55] *See* Better Markets, Inc. Letter on Exemption for Non-U.S. Derivatives Clearing Organizations, RIN 3038–AE65 (Nov. 22, 2019) at 7–8 (as cross-referenced in Better Markets Inc. Letter on Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (Nov. 18, 2019) at n. 74).

[56] 7 U.S.C. 2(d).

[57] The Commission also notes that section 4(c) provides that the Commission may use the exemptive authority thereunder ''except'' with respect to certain enumerated swap provisions,

The Commission believes that section 5b(h) reflects Congress's intent that the Commission defer to other regulators that offer ''comparable, comprehensive supervision and regulation'' of DCOs, in appropriate circumstances and to an appropriate extent. With this rulemaking, the Commission has endeavored to defer to a non-U.S. DCO's home country regulator while allowing the DCO to maintain its registration and clear for FCM customers. The Commission believes its use of its section 4(c) exemptive authority in this context is appropriate and fully meets the requisite statutory standards, as outlined in the proposal and explained above.

The Commission is adopting § 39.4(c) as proposed.

D. Regulation 39.9—Scope

The Commission proposed to amend § 39.9 to provide that the provisions of subpart B of Part 39 apply to any DCO, except as otherwise provided by Commission order. In the context of alternative compliance, the Commission's order of registration would provide for the inapplicability of most subpart B provisions and address those that do apply, such as § 39.15 and those requirements corresponding to any DCO Core Principle for which the Commission does not find there to be alternative compliance in the DCO's home country regulatory regime (in those cases in which the Commission determines nevertheless to grant alternative compliance). Amended § 39.9 would also allow the Commission to not apply to a particular DCO any subpart B requirement that the Commission deems irrelevant or otherwise inapplicable due to, for example, certain characteristics of the DCO's business model. The Commission did not receive any comments on this proposal. The Commission is adopting § 39.9 largely as proposed.[58]

E. Subpart D—Provisions Applicable to DCOs Subject to Alternative Compliance

1. Regulation 39.50—Scope

The Commission proposed new § 39.50 to state that the provisions of subpart D of part 39 apply to any DCO that is registered through the process described in § 39.3(a)(3) (*i.e.,* registration with alternative compliance). The Commission did not receive any comments on this proposal. However, the Commission is modifying § 39.50 by adding language that would allow subpart D to apply to a DCO ''as otherwise provided by order of the Commission.'' This will allow for subpart D to apply to a DCO registered pursuant to § 39.3(a)(2) that subsequently applies to amend its DCO registration order in accordance with § 39.3(d).

2. Regulation 39.51—Alternative Compliance

a. Eligibility for Alternative Compliance

The Commission proposed new § 39.51(a) to permit the Commission to register a non-U.S. clearing organization subject to alternative compliance for the clearing of swaps for U.S. persons if all of the eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) are met. Proposed § 39.51(a) also provides that the Commission could subject registration to any terms and conditions that the Commission determines to be appropriate.

The Commission proposed § 39.51(a)(1)(i) to require a Commission determination that a clearing organization's compliance with its home country regulatory regime would satisfy the DCO Core Principles; § 39.51(a)(1)(ii) to require that a clearing organization be in good regulatory standing in its home country; and § 39.51(a)(1)(iii) to require a Commission determination that the clearing organization does not pose substantial risk to the U.S. financial system.

The Commission proposed § 39.51(a)(1)(iv) to require that the Commission and the clearing organization's home country regulator[59] have an MOU or similar arrangement satisfactory to the Commission in effect. Among other things, the Commission proposed to require the home country regulator to agree within the MOU to provide the Commission with any information that the Commission deems appropriate to evaluate the clearing organization's initial and continued eligibility for registration and to review compliance with any conditions of registration. The Commission clarified in the proposal that satisfactory MOUs or similar arrangements would include provisions for information sharing and cooperation, as well as for notification upon the occurrence of certain events.[60] Although the Commission would retain the right to conduct site visits, the Commission stated that it did not expect to conduct routine site visits to DCOs subject to alternative compliance.

The Commission proposed § 39.51(a)(2) to provide the Commission with discretion to grant registration with alternative compliance subject to conditions if the clearing organization's home country regulatory regime lacks legal requirements that correspond to certain DCO Core Principles, if the relevant DCO Core Principles are less related to risk.

The Commission specifically requested comment on whether the Commission should take into account regulations in Part 39, in addition to the DCO Core Principles, in determining whether alternative compliance is appropriate for a non-U.S. clearing organization.

Eurex opined that the set of requirements applicable to non-U.S DCOs under the proposed alternative compliance framework was already substantial and therefore should not take into account additional regulations in Part 39.

Citadel argued that while the Commission should not require a foreign regulatory regime to precisely replicate the U.S. framework, the Commission should take into account more than just the ''relatively high-level'' DCO Core Principles when conducting its analysis. Citadel argued that several aspects of the Commission's implementing regulations, such as non-discriminatory access within various subsections of § 39.12, straight-through processing within § 39.12(b)(7), and public rule certifications pursuant to part 40, provide critical protections to U.S. market participants that are not explicit in the DCO Core Principles. Citadel was concerned that not requiring DCOs to provide these

unless there is an expressed authorization within the specific provision. Section 4(c) does not provide that the Commission may only use the 4(c) exemptive authority with respect to the enumerated provisions. Thus, a plain reading of the relevant text, joined with section 2(d), indicates that Congress extended the Commission's general exemptive authority under section 4(c) to swaps transactions with respect to those provisions that are not in the enumerated list. Section 5c(c) of the CEA is not included in the enumerated list. Further, the Commission has previously exercised its 4(c) exemptive authority with respect to swaps. *See, e.g.,* Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 43785 (July 22, 2013).

[58] The Commission had included in the proposal a previously proposed change to § 39.9 that would clarify that the provisions of subpart B do not apply to any exempt DCO. *See* Exemption from Derivatives Clearing Organization Registration, 83 FR 39929 (Aug. 13, 2018) (proposing an addition to § 39.9 providing that the provisions of subpart B do not apply to any exempt DCO, as defined in § 39.2). The Commission will amend § 39.9 as necessary if it finalizes the rulemaking on exempt DCOs.

[59] In jurisdictions where more than one regulator supervises and regulates a clearing organization, the Commission would expect to enter into an MOU or similar arrangement with more than one regulator. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34824 (July 19, 2019) n.38.

[60] For existing non-U.S. DCOs that wish to be subject to alternative compliance, the Commission believes the MOUs currently in place with their respective home country regulators would be sufficient to satisfy this requirement. *Id.* at n.39.

''fundamental protections'' to U.S. market participants could negatively impact market transparency, liquidity, and competition, as swaps cleared by such DCOs may be accessible to only certain types of market participants, thereby impairing market access and choice of trading counterparties. Citadel argued that the Commission recognized the importance of these key aspects of its underlying regulations when it assessed the comparability of the EU regulatory framework. Citadel urged the Commission to ''maintain this approach for purposes of other jurisdictions,'' and further recommended that the Commission reserve sufficient flexibility to conduct a case-by-case analysis of each non-U.S. clearing organization's application for alternative compliance.

The Commission agrees with Citadel that it should not require a non-U.S. DCO's home country regulatory regime to precisely replicate the U.S. framework. The Commission, however, disagrees with Citadel's suggestion that it should add other Commission regulations to the list of core customer protection and swap data reporting regulations with which all DCOs subject to alternative compliance will be required to comply. To provide a meaningful framework for deference to home country regulators, the Commission has determined to limit the universe of applicable regulations to those that provide critical protections such as those related to customer protection. In all cases, the non-U.S. DCO must still comply with home country requirements that constitute compliance with the DCO Core Principles, which the Commission's regulations were intended to implement. For example, DCO Core Principle C requires all DCOs to establish appropriate admission and continuing eligibility standards for members and participants of the DCO that are objective, publicly disclosed, and permit fair and open access to the DCO. Beyond that, the Commission may require that a given non-U.S. DCO comply with additional Commission regulations as specified in its registration order based on its particular facts and circumstances, most significantly if the Commission finds the DCO's home country requirements lacking, but the Commission does not believe it is appropriate to require compliance with additional Commission regulations as a matter of course.

While a non-U.S. DCO subject to alternative compliance will only be required to certify new and amended rules related to customer protection and swap data reporting pursuant to § 39.4(c), the DCO will still have to publicly disclose its rules and operating and default procedures governing its clearing and settlement systems pursuant to DCO Core Principle L.[61] This will provide transparency for the DCO's rules even if the DCO does not certify all of its rules pursuant to part 40.

The Commission believes that Citadel's reference to the review that the Commission undertook to determine comparability with the European Union's regulations for dually-registered DCOs and CCPs in 2016 is misplaced.[62] That exercise was by its nature a regulation-by-regulation review to determine comparability with respect to Commission regulatory requirements, and the fact that the Commission examined individual regulations in that context is not determinative of the degree of deference that should be extended to a DCO's home jurisdiction in the context at issue here.

The Commission believes that § 39.51(a) establishes clear eligibility standards by which the Commission can determine whether a non-U.S. DCO's home country regulatory regime is consistent with the DCO Core Principles, and also reserves adequate flexibility for the Commission to grant exceptions, in its discretion, as appropriate. If a non-U.S. clearing organization's home country regulatory regime lacks legal requirements that correspond to the DCO Core Principles less related to risk (*e.g.,* Core Principle N on antitrust considerations), or if the Commission determines that other conditions are appropriate to achieve compliance with a specific DCO Core Principle(s), § 39.51(a)(2) and (b)(7) would allow the Commission to, in its discretion, grant registration with alternative compliance subject to conditions that address the specific facts and circumstances at issue.

Better Markets argued that the Commission must consider Part 39 and other applicable regulations when determining whether alternative compliance is appropriate for a non-U.S. clearing organization, as section 5b(c)(2)(A)(i) of the CEA [63] requires all registered DCOs to comply with both the DCO Core Principles and ''any [DCO] requirement that the Commission may impose by rule or regulation.'' Better Markets argued that the alternative compliance framework should be re-proposed as the Commission failed to properly cite to and rely upon its exemptive authority under section 5b(h) of the CEA,[64] which Better Markets believes provides the appropriate basis for exemptions from the statutory requirements in section 5b(c) of the CEA. Better Markets argued that section 5b(h) requires that the Commission must have a reasonable basis to conclude not only that a non-U.S. DCO has satisfied all statutory elements of section 5b(c) of the CEA, but also that the applicable home country regulatory framework is comparable to, and as comprehensive as, the statutory and regulatory requirements for registered DCOs to be able to grant an exemption pursuant to section 5b(h). Better Markets premised this conclusion on Congress' inclusion of the phrase ''supervision and regulation'' within section 5b(h) of the CEA, which Better Markets opined made no distinction between U.S. statutory and U.S. regulatory requirements with respect to the Commission's exemptive authority for DCOs. Better Markets argued that as a result, non-U.S. DCOs could not receive an exemption unless their home country regulatory regime essentially mirrors the statutory and regulatory regime for U.S. DCOs.

The Commission believes that Better Markets' analysis misunderstands the status of DCOs that would be subject to the alternative compliance framework. A non-U.S. DCO subject to alternative compliance will still be a registered DCO pursuant to section 5b(a) of the CEA. In contrast, section 5b(h) of the CEA relates to exempting DCOs from registration, which is not at issue here.

Better Markets correctly notes that section 5b(c)(2)(A)(i) of the CEA requires DCOs to comply with the DCO Core Principles and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA, which provides the Commission with discretionary rulemaking authority to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[65] The Commission exercised that authority in adopting Part 39 and initially applying it to all DCOs. Here, the Commission is further exercising that authority to provide in new § 39.51 that DCOs subject to alternative compliance are subject to the DCO Core Principles and other specified requirements, but not to

[61] 7 U.S.C. 7a–1(c)(2)(L).

[62] *See* Comparability Determination for European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

[63] 7 U.S.C. 7a–1(c)(2)(A)(i).

[64] 7 U.S.C. 7a–1(h).

[65] 7 U.S.C. 12a(5).

all of the provisions that have until now applied to all DCOs.

Three commenters discussed the potential role of the PFMIs in the Commission's approach to registration with alternative compliance. LCH commented that the use of the DCO Core Principles to determine whether an applicant's home country requirements are comparable to the Commission's requirements is appropriate. LCH opined that the DCO Core Principles are consistent with the PFMIs, which have been agreed by the international regulatory community as essential to strengthening and preserving financial stability.

ICE commented that an outcomes-based approach that assesses an applicant's home country regulatory regime as a whole, instead of with a rule-by-rule comparison, would provide appropriate deference to the foreign jurisdiction. However, ICE questioned how the Commission would make an assessment of the home country regulatory regime. ICE cautioned that the Commission should not determine that a jurisdiction is non-comparable or non-equivalent on the basis of ''discrete'' differences from a Part 39 requirement. ICE further argued that an assessment of comparability or equivalence should accept that there will be differences between the manner in which a clearing organization's home country regulator achieves international standards and the Commission's regulations, and these differences should not be disqualifying. Otherwise, ICE warned that the alternative compliance regime would likely be of little benefit, or result in substantial delays in implementation as equivalence is determined. ICE encouraged the Commission to benchmark its comparability assessment with regard to compliance with international standards such as the PFMIs as an alternative to the DCO Core Principles. CCIL also suggested that the Commission should be satisfied with adherence by a non-U.S. DCO to the PFMIs, as certified by its home country regulator.

The Commission notes that a determination of whether compliance with a home country regulatory regime constitutes compliance with the DCO Core Principles is not a comparability or equivalence determination. The Commission nevertheless agrees with the general premise of LCH and ICE's comments, and the alternative compliance framework reflects an outcomes-based approach rather than a regulation-by-regulation comparison between Commission regulations and a non-U.S. DCO's home country regulatory regime, which is suboptimal in this context in which the Commission is showing appropriate deference to the home country regulator. The Commission must however look to the DCO Core Principles, and not the PFMIs, as the basis for determining compliance. As previously noted, all DCOs, including those DCOs subject to alternative compliance, are required by the CEA to comply with each DCO Core Principle in order to be registered and to maintain registration.

The Commission is adopting § 39.51(a) as proposed.

b. Conditions of Alternative Compliance

The Commission proposed new § 39.51(b) to set forth the conditions that a non-U.S. clearing organization must satisfy for the Commission to grant registration with alternative compliance.[66] Proposed § 39.51(b)(1) provides that a DCO subject to alternative compliance must comply with the DCO Core Principles through compliance with applicable legal requirements in its home country, and any other requirements specified in its registration order including, but not limited to, the customer protection requirements of section 4d(f) of the CEA, parts 1 and 22, and § 39.15 of the Commission's regulations; the part 45 swap data reporting requirements; and subpart A of Part 39.

The Commission proposed § 39.51(b)(2) to codify the ''open access'' requirements of section 2(h)(1)(B) of the CEA with respect to swaps cleared by a DCO to which one or more of the counterparties is a U.S. person. Proposed § 39.51(b)(2)(i) would require a DCO to have rules providing that all such swaps with the same terms and conditions (as defined by product specifications established under the DCO's rules) submitted to the DCO for clearing would be economically equivalent and could be offset with each other, to the extent that offsetting is permitted by the DCO's rules. Proposed § 39.51(b)(2)(ii) would require that a DCO have rules providing for non-discriminatory clearing of such a swap executed either bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility, *e.g.,* a swap execution facility.

The Commission proposed § 39.51(b)(3) to require that a DCO: Consent to jurisdiction in the United States; designate, authorize, and identify to the Commission an agent in the United States to accept any notice or service of process, pleadings, or other documents issued by or on behalf of the Commission or the U.S. Department of Justice in connection with any actions or proceedings brought against, or any investigations relating to, the DCO or any of its U.S. clearing members; and promptly inform the Commission of any change of agent to accept such notice or service of process.

The Commission proposed § 39.51(b)(4) to require a DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the DCO's registration order.

The Commission proposed § 39.51(b)(5) to require a DCO to make all documents, books, records, reports, and other information related to its operation as a DCO (hereinafter, ''books and records'') open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them directly to Commission representatives, upon the request of a Commission representative.

The Commission proposed § 39.51(b)(6) to require that a DCO request and the Commission receive an annual written representation from a home country regulator that the DCO is in good regulatory standing within 60 days following the end of the DCO's fiscal year.

Finally, under proposed § 39.51(b)(7), the Commission may condition alternative compliance on any other facts and circumstances it deems relevant.

As discussed below, the Commission received comments on the applicable requirements proposed in § 39.51(b)(1) including customer protection and swap data reporting requirements; the open access condition proposed in § 39.51(b)(2); the inspection of books and records condition proposed in § 39.51(b)(5); and the Commission's ability to grant registration subject to other conditions as proposed in § 39.51(b)(7).

i. Applicable Requirements of the CEA and Commission Regulations

Proposed § 39.51(b)(1) provided that a DCO subject to alternative compliance must comply with the DCO Core Principles through compliance with

[66] In doing so, the Commission explained that the eligibility requirements listed in proposed § 39.51(a)(1) and (a)(2) and the conditions set forth in proposed § 39.51(b) would be pre-conditions to the Commission's issuance of a registration order in this regard. Additional conditions that are unique to the facts and circumstances specific to a particular clearing organization could be imposed upon that clearing organization in the Commission's registration order. Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34824 (July 19, 2019) n.37.

applicable legal requirements in its home country, and any other requirements specified in its registration order including, but not limited to, the customer protection requirements of section 4d(f) of the CEA, parts 1 and 22, and § 39.15 of the Commission's regulations; the part 45 swap data reporting requirements; and subpart A of Part 39. The Commission received comments on customer segregation and customer portability aspects of the proposed customer protection requirements and comments on the proposed part 45 swap data reporting requirements.

(1) Customer Segregation Requirements

ASX, JSCC, KRX, and OTC Clear, all currently exempt DCOs, opined in a joint letter that requiring DCOs subject to alternative compliance to comply with the Commission's customer segregation requirements, including the treatment of U.S. customer collateral under the U.S. Bankruptcy Code, lacked any deference by the Commission to foreign regulators. They indicated that, as a result, none of them plan to register under the alternative compliance framework.

JSCC separately argued that because the alternative compliance framework is limited to DCOs that do not pose substantial risk to the U.S. financial system, the Commission should not impose its own unique customer protection requirements. JSCC recommended that the Commission defer to a home country's customer protection requirements so long as they are consistent with the PFMIs. JSCC reasoned that the direct application of the U.S. Bankruptcy Code for the protection of customer funds would create little benefit while imposing a significant burden on non-U.S. DCOs whose home country regulators have implemented their own customer protection framework in compliance with the PFMIs. JSCC stated that requiring non-U.S. DCOs to comply with both their home country regime and the U.S. regime in this regard could be impractical when those regimes are incompatible with each other.

JSCC explained that it cannot strictly comply with section 4d(f) of the CEA, which requires that customer funds be segregated at all times, as Japanese law and JSCC's rulebook require JSCC to settle customer collateral for a period of a few hours through an account at the Bank of Japan.[67] JSCC argued that, as a result, it would be unable to register under the alternative compliance regime, despite the fact that swaps customers would be protected under regulations and supervision that fully conforms with the relevant PFMIs and provides sufficient safety for customers in all of the jurisdictions where JSCC operates.

Similarly, ASX opined that its client protection model is consistent with the PFMIs and meets Australian financial stability standards, but that because it is not exactly aligned with U.S. customer protection requirements, ASX would not be able to register under the alternative compliance framework.

The Commission is not persuaded by the comments. While the PFMIs are the international standards for FMIs, they are not designed to address all of the Commission's responsibilities in this area.

The focus of the PFMIs is ''to limit systemic risk and foster transparency and financial stability. . . . Other objectives, which include . . . specific types of investor and consumer protections, can play important roles in the design of [FMIs], but these issues are generally beyond the scope of'' the PFMIs.[68] By contrast, the purposes of the CEA and thus the responsibilities of the Commission notably include ''avoidance of systemic risk'' and ''ensur[ing] the financial integrity of all transactions subject to [the CEA],'' but also include ''protect[ing] all market participants from . . . misuses of customer assets.'' [69]

While no FCM customer should suffer a loss of access to their assets for any period of time, customers of clearing members registered as FCMs have fared uniquely well in cases of FCM bankruptcy, both in protecting against loss of customer assets, and particularly in transferring all, or at least most, customer assets to a solvent FCM in the days (rather than months or years) following a bankruptcy. These very positive outcomes are a result of the combination of the customer collateral segregation requirements of section 4d of the CEA and the regulations thereunder, operating in an interlinked and mutually supporting manner with the relevant provisions of the Bankruptcy Code, Subchapter IV of Chapter 7,[70] the Commission's authorities under section 20 of the CEA,[71] and the Commission's bankruptcy regulations under part 190.

The Commission is adopting § 39.51(b)(1) as proposed, including the requirement that the DCO comply with section 4(d)(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15.

(2) Customer Portability in the Event of a Default

ASX and JSCC both commented that they would not be able to register pursuant to the alternative compliance framework as they could not feasibly maintain a sufficient number of FCM clearing members to support U.S. customer clearing. ASX believes that it would be difficult to add multiple FCMs as clearing members of ASX as an FCM may already have a non-U.S. affiliate clearing member of ASX that provides access to exchange-traded futures and options products under the foreign board of trade model. Similarly, JSCC noted that entities active in swaps customer clearing are global banking groups, many of which serve customers for swaps clearing through subsidiaries in the non-U.S. markets, including Japan. JSCC noted that very few non-U.S. entities are registered as FCMs, and the overall number of FCMs has been decreasing. ASX and JSCC commented that the cost of onboarding an FCM, such as an additional foreign affiliate, solely to provide over-the-counter swaps clearing services to U.S. customers would be prohibitively expensive. As a result, ASX and JSCC concluded that non-U.S. DCOs would be unlikely to find enough FCM clearing members, particularly to achieve portability of customer positions in the event of an FCM default, as required by Commission regulations and the PFMIs. JSCC believes the requirement to have swaps customers clear through an FCM at a non-U.S. DCO likely would continue to concentrate U.S. customers at a limited number of DCOs.

The Commission is not persuaded by the commenters' suggestion that a dearth of FCMs clearing at non-U.S. DCOs should negate the requirement that a U.S. swaps customer clear through an FCM at a DCO, including a DCO subject to alternative compliance. There are multiple non-U.S. DCOs that have successfully implemented an FCM customer clearing model. The Commission believes the alternative compliance option will make registration less burdensome for non-

[67] JSCC attempted to register with the Commission as a DCO but, due to the issues JSCC discussed in its comment letter, JSCC ultimately sought and received an exemption from DCO registration. *See* JSCC Order of Exemption from Registration (Oct. 26, 2015), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptorder10-26-15.pdf.* Exempt DCOs are not currently permitted to clear for U.S. customers. *See* Exemption from Derivatives Clearing Organization Registration, 83 FR 39923, 39926 (Aug. 13, 2018).

[68] CPMI–IOSCO, PFMIs, ¶ 1.15 and n. 16.

[69] 7 U.S.C. 5(b).

[70] *See* 11 U.S.C. 761–767.

[71] *See* 7 U.S.C. 24.

U.S. clearing organizations, which may incentivize additional ones to register. As a result, U.S. customers could have more clearing options without sacrificing any of the protections they have come to expect and rely upon.[72] As stated above, the Commission is adopting § 39.51(b)(1) as proposed.

(3) Swap Data Reporting

ICE commented that, if an applicant's home country reporting rules correspond with the Commission's swap data reporting regulations in part 45, the Commission should consider obtaining swap data from the applicant's home country regulator through an MOU. ICE noted that compliance with the Commission's rules in addition to home jurisdiction swap reporting rules could be very costly for DCOs, and provide little additional benefit. The Commission intends for this rule to provide deference to foreign regulators on non-U.S. DCO supervision, depending on the risk the DCO poses to the U.S. financial system, and notes that the part 45 swap data reporting regulations, to which DCOs are already subject, are unrelated to DCO supervision and outside the intended scope of this rule. The Commission believes that issues relating to deference on swaps data reporting by DCOs have broad real and potential cross-border implications and should instead be addressed in a larger, comprehensive review of swaps data reporting by non-U.S. entities that the Commission may undertake through future Commission action. Therefore, the Commission is adopting the requirement that DCOs subject to alternative compliance comply with part 45 as proposed.

ii. Open Access

With respect to proposed § 39.51(b)(2) which the Commission proposed to require a DCO to treat swaps with the same terms and conditions as economically equivalent, allow offset to the extent permitted by the DCO, and provide non-discriminatory clearing for swaps executed bilaterally or on unaffiliated trading platforms, ICE stated that it is not clear why this requirement is necessary if a DCO's home jurisdiction has a comparable requirement. Regulation 39.51(b)(2) would codify for DCOs subject to alternative compliance the requirements of section 2(h)(1)(B) of the CEA, with respect to swaps cleared by a DCO to which one or more of the counterparties is a U.S. person. Even if the Commission did not adopt § 39.51(b)(2), the statutory requirements would still apply. The Commission is codifying these requirements and adopting § 39.51(b)(2) as proposed.

iii. Consent to Jurisdiction; Designation of Agent for Service of Process

The Commission proposed § 39.51(b)(3) to require that a DCO: Consent to U.S. jurisdiction; designate, authorize, and identify an agent in the United States; and promptly inform the Commission of any change of its U.S. agent. The Commission did not receive any comments on this aspect of the proposal. The Commission is adopting § 39.51(b)(3) as proposed.

iv. Compliance

The Commission proposed § 39.51(b)(4) to require a DCO to comply, and demonstrate compliance as requested by the Commission, with any condition of the DCO's registration order. The Commission did not receive any comments on this aspect of the proposal. The Commission is adopting § 39.51(b)(4) as proposed.

v. Inspection of Books and Records

The Commission proposed § 39.51(b)(5) to require a DCO to make all books and records open to inspection and copying by any Commission representative, and to promptly make its books and records available and provide them directly to Commission representatives, upon the request of a Commission representative.

CCIL stated that the proposed approach may create a ''parallel structure of regulatory bodies.'' CCIL also argued that it may undermine and conflict with principles of international comity and the home country laws and regulations of the DCO.

ICE stated that the Commission should state explicitly that it would defer to the home country regulator's examination of the DCO's books and records provided that the home country regulator shares the results of the examination with the Commission. As explained in the proposal, the Commission does not anticipate conducting routine site visits to DCOs subject to alternative compliance. However, the Commission may request a DCO to provide access to its books and records in order for the Commission to ensure that, among other things, the DCO continues to meet the eligibility requirements for alternative compliance as well as the conditions of its registration. The Commission is adopting § 39.51(b)(5) as proposed.

vi. Representation of Good Regulatory Standing

The Commission proposed § 39.51(b)(6) to require that a DCO request and the Commission receive an annual written representation from a home country regulator that the DCO is in good regulatory standing within 60 days following the end of the DCO's fiscal year. The Commission received comments on the definition of ''good regulatory standing'' as discussed above, but did not receive comments on the existence of the condition. The Commission is adopting § 39.51(b)(6) as proposed.

vii. Other Conditions

The Commission proposed § 39.51(b)(7) to provide that the Commission may condition alternative compliance on any other facts and circumstances it deems relevant. ICE supported the Commission's ability to, in its discretion, grant registration subject to conditions, provided that this flexibility is applied consistently for similarly situated DCOs from the same jurisdiction and that sufficient deference is granted to the overall home country regulatory regime. ICE agreed that the Commission should be mindful of the principles of international comity, noting that the proposal stated that the Commission may take into account, in placing conditions on alternative compliance, the extent to which the home country regulator defers to the Commission with respect to the oversight of U.S. DCOs.[73] ICE cautioned that any such approach should not be applied to create uncertainty for a DCO relying on the relief, and that such an approach might result in other regulators taking similar positions, which could have the effect of lessening cross-border cooperation. The Commission appreciates ICE's comments. As noted in the proposal, the Commission intends to use its discretion to ''advance the goal of regulatory harmonization, consistent with the express directive of Congress that the Commission coordinate and cooperate with foreign regulatory authorities on matters related to the regulation of swaps.'' [74] The recognition

[72] Moreover, while both Commission regulations and the PFMIs call for a DCO to have rules (arrangements) that foster portability (*see* 17 CFR 190.06(a); CPMI–IOSCO, PFMIs, Principle 14, Key Consideration 3), neither Commission regulations nor the PFMIs require DCOs to ensure that there are clearing members that are willing and able transferees.

[73] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34825 (July 19, 2019).

[74] In order to promote effective and consistent global regulation of swaps, section 752 of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international

Continued

that market participants and market facilities in a global swap market are subject to multiple regulators and potentially duplicative regulations, and can therefore benefit from regulatory harmonization and mutual deference among regulators, underpins the alternative compliance framework. The framework is intended to encourage collaboration and coordination among U.S. and foreign regulators in establishing comprehensive regulatory standards for swaps clearing. In addition, the framework seeks to promote fair competition and a level playing field for all DCOs. As a result, the Commission will consider the degree of deference that a home country regulator extends to the Commission's oversight of U.S. DCOs in determining whether to extend the benefits of alternative compliance to DCOs in that jurisdiction, both at the point of initially registering a non-U.S. DCO subject to alternative compliance, and in determining whether compliance under that framework should continue. The Commission is adopting § 39.51(b)(7) as proposed.

c. General Reporting Requirement

Proposed § 39.51(c) sets forth general reporting requirements pursuant to which a DCO subject to alternative compliance must provide certain information directly to the Commission (1) on a periodic basis (daily or quarterly); and (2) after the occurrence of a specified event, each in accordance with the submission requirements of § 39.19(b).

Proposed § 39.51(c)(1) requires a DCO to provide to the Commission the information specified in § 39.51(c) (and described below), as well as any other information that the Commission deems necessary, including, but not limited to, information for use in evaluating the continued eligibility of the DCO for alternative compliance, reviewing the DCO's compliance with any conditions of its registration, and conducting oversight of U.S. clearing activity.

Proposed § 39.51(c)(2)(i) requires a DCO to compile a report as of the end of each trading day, and submit the report to the Commission by 10 a.m. U.S. central time on the following business day, containing the following information with respect to swaps: (A) Total initial margin requirements for all clearing members; (B) initial margin requirements and initial margin on deposit for each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account; and (C) daily variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin, and by each individual customer account.

Proposed § 39.51(c)(2)(ii) requires a DCO to compile a report as of the last day of each fiscal quarter, and submit the report to the Commission no later than 17 business days after the end of the fiscal quarter, containing a list of U.S. clearing members, with respect to the clearing of swaps.

Proposed § 39.51(c)(2)(iii) through (vii) requires a DCO to provide information to the Commission upon the occurrence of certain specified events. Proposed § 39.51(c)(2)(iii) requires a DCO to provide prompt notice to the Commission regarding any change in its home country regulatory regime. Proposed § 39.51(c)(2)(iv) requires a DCO to provide to the Commission, to the extent that it is available to the DCO, any examination report or examination findings by a home country regulator, and notify the Commission within five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator. Proposed § 39.51(c)(2)(v) requires a DCO to provide immediate notice to the Commission of any change with respect to its licensure, registration, or other authorization to act as a clearing organization in its home country. Proposed § 39.51(c)(2)(vi) requires a DCO to provide immediate notice to the Commission in the event of a default (as defined by the DCO in its rules) by any clearing member, including the amount of the clearing member's financial obligation. If the defaulting clearing member is a U.S. clearing member, the notice must also include the name of the U.S. clearing member and a list of the positions it held. Proposed § 39.51(c)(2)(vii) requires a DCO to provide notice of any action that it has taken against a U.S. clearing member, no later than two business days after the DCO takes such action.

The Commission requested comment on whether DCOs subject to alternative compliance should be excused from reporting any particular data streams in order to limit duplicative reporting obligations in the cross-border context without jeopardizing U.S. customer protections, particularly given the existence of an MOU between the Commission and the DCO's home country regulator as a requirement for eligibility for alternative compliance.[75]

In response to the Commission's request for comment, CCP12 and Eurex stated that a global harmonization of reporting requirements would eliminate duplicative requirements and enable regulators to share data on the basis of MOUs. Eurex stated that the Commission should eliminate proposed § 39.51(c)(2)(i) and (ii) in order to enhance the benefits of alternative compliance as compared to traditional registration. CCP12 suggested that the Commission limit the daily reporting requirements of proposed § 39.51(c)(2)(i) to information related to FCM clearing members. Without specifying particular provisions, CCP12 also argued that in some cases the proposed reporting requirements would be costly and would overlap with requirements imposed by home country regulators. CCIL generally supported avoiding duplicative reporting through the use of MOUs.

Because none of the commenters identified specific proposed reporting requirements as duplicative of existing obligations, the Commission is declining to modify proposed § 39.51(c). In this rulemaking, the Commission has attempted to limit required reporting to that information it will need to perform its supervisory function. The Commission believes that the reporting requirements in § 39.51(c) are appropriately tailored to accomplish that goal with respect to DCOs subject to alternative compliance. For this reason, the Commission disagrees with Eurex that § 39.51(c)(2)(i) and (ii) should be eliminated, and notes that Eurex did not identify any particular faults with these provisions. The Commission also disagrees that the daily reports required by § 39.51(c)(2)(i) should be limited to information related to FCM clearing members. Limiting daily reports in this way would provide the Commission with incomplete data and would thus frustrate its ability to assess the risk exposure of U.S. persons and the extent of a non-U.S. DCO's U.S. clearing activity.[76]

The Commission also requested comment on the proposed requirement

standards with respect to the regulation of swaps, among other things. Section 752 of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010), codified at 15 U.S.C. 8325.

[75] *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34826 (July 19, 2019).

[76] The Commission noted in the proposal that the goal of § 39.51(c)(2)(i) is to provide the Commission with information regarding the cash flows associated with U.S. persons clearing swaps through DCOs subject to alternative compliance in order for the Commission to assess the risk exposure of U.S. persons and the extent of the DCO's U.S. clearing activity. *See* Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 FR 34825 (July 19, 2019).

in § 39.51(c)(2)(iii) that a DCO provide prompt notice to the Commission regarding any change in its home country regulatory regime. Specifically, the Commission asked whether it should instead require a DCO subject to alternative compliance to provide prompt notice of any *material* change in its home country regulatory regime. The Commission did not receive any comments directly responsive to this question.

The Commission did receive several comments on proposed § 39.51(c)(1) that do not relate to the specific requests for comment. Mr. Kubitz stated that the reporting requirements for DCOs subject to alternative compliance should be at least as comprehensive as the requirements for other DCOs. The Commission believes that the reporting requirements in § 39.51(c) are appropriately tailored to protect its regulatory interests without requiring information on topics on which it intends to defer to the home country regulator, and notes that Mr. Kubitz did not identify why he believes the reporting requirements in § 39.51(c) are insufficient. If the Commission subsequently determines that it needs additional information, § 39.51(c)(1) requires a DCO subject to alternative compliance to provide the Commission with any information that it deems necessary.

In regards to proposed § 39.51(c)(2)(iii), CCIL stated that a DCO subject to alternative compliance should not have to notify the Commission regarding a change in its home country regulatory regime because notification could be addressed through an MOU between the Commission and the home country regulator. The Commission notes than an MOU would not obligate the home country regulator to notify the Commission and believes that it is therefore appropriate to require the DCO, as the Commission's registrant, to be responsible for reporting this information.

With regard to the event-specific reporting requirements of § 39.51(c)(2)(vi) and (vii), ICE noted that events involving U.S. clearing members would be subject to greater reporting requirements than those related to non-U.S. clearing members, and argued that requirements related to U.S. clearing members should be no greater than those related to other clearing members. The Commission has a greater supervisory interest in U.S clearing members and believes that this incremental difference in reporting obligations is justified as a result.

In light of the foregoing, the Commission is adopting § 39.51(c) as proposed.

d. Modification of Registration Upon Commission Initiative

Proposed § 39.51(d) permits the Commission to modify the terms and conditions of a DCO's order of registration, in its discretion and upon its own initiative, based on changes to or omissions in facts or circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met. For example, the Commission could modify the terms of a registration order upon a determination that compliance with the DCO's home country regulatory regime does not satisfy the DCO Core Principles, the DCO is not in good regulatory standing in its home country, or the DCO poses substantial risk to the U.S. financial system.

Proposed § 39.51(d)(2) through (4) set forth the process for modification of registration upon the Commission's initiative. Proposed § 39.51(d)(2) requires the Commission to first provide written notification to a DCO that the Commission is considering modifying the DCO's order of registration and the basis for that consideration. Proposed § 39.51(d)(3) provides up to 30 days for a DCO to respond to the Commission's notification in writing following receipt of the notification, or at such later time as the Commission may permit in writing. Proposed § 39.51(d)(4) provides that, following receipt of a response from the DCO, or after expiration of the time permitted for a response, the Commission may: (i) Issue an order requiring the DCO to comply with all requirements applicable to DCOs registered pursuant to § 39.3(a)(2), effective as of a date to be specified in the order, which is intended to provide the DCO with a reasonable amount of time to come into compliance with the CEA and Commission regulations or request a vacation of registration in accordance with § 39.3(f); (ii) issue an amended order of registration that modifies the terms and conditions of the order; or (iii) provide written notification to the DCO that its order of registration will remain in effect without modification to its terms and conditions.

The Commission received four comments on proposed § 39.51(d). ICE stated that modification should be limited to instances covered by proposed § 39.51(d)(1)(i), where there has been a change in the home country regulatory regime such that it no longer satisfies the DCO Core Principles. ICE argued that the Commission should identify the process by which the Commission will notify the DCO subject to alternative compliance of the basis for a modification and provide the DCO with an opportunity to respond. LCH recommended that, if after registering a DCO subject to alternative compliance the Commission determines that the DCO poses substantial risk to the U.S. financial system, the Commission should clearly indicate the timeframe by which the DCO needs to become fully compliant with Commission regulations. CCP12 and Eurex stated that the Commission should establish a streamlined ''re-application'' process for any DCO registered under the existing framework which later applies for alternative compliance but then is subsequently deemed to pose substantial risk to the U.S. financial system and thus must again become DCOs, including all of subpart B of Part 39.

The Commission disagrees that it should only modify an order of registration granted to a DCO subject to alternative compliance when there has been a change in the DCO's home country regulatory regime such that it no longer satisfies the DCO Core Principles. The Commission must be able to modify an order if there are changes to the facts and circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met.[77]

In response to ICE's suggestion that the Commission identify the process by which the Commission will notify a DCO subject to alternative compliance of the basis for a modification of its order and provide the DCO with an opportunity to respond, the Commission notes that this process is provided in § 39.51(d)(2) and (3). In response to LCH's comment that the Commission should clearly indicate the timeframe within which a DCO determined to pose substantial risk to the U.S. financial system would need to become fully compliant with Commission regulations, the Commission notes that § 39.51(d)(4)(i) requires the Commission to provide the DCO ''with a reasonable amount of time to come into compliance.'' The Commission believes it is inappropriate to set a specific timeframe in the regulation because how much time a DCO would need will depend on how far removed its current practices are from what is required by Commission regulations. In response to

[77] The Commission also notes that it has the authority to suspend or revoke a DCO's registration for the failure to comply with any provision of the CEA, regulations promulgated thereunder, or any order of the Commission, pursuant to section 5e of the CEA. 7 U.S.C. 7b.

CCP12 and Eurex, the Commission notes that a DCO that is no longer eligible for alternative compliance would not have to re-apply for registration because it would already be registered. The DCO would only have to be able to demonstrate that it has come into compliance with the applicable requirements of the CEA and Commission regulations by the date specified by the Commission pursuant to § 39.51(d)(4)(i), which it could do through the annual compliance report required by § 39.10(c)(3) (a requirement which would now apply to the DCO).

For the above stated reasons, the Commission is adopting § 39.51(d) as proposed.

F. Part 140—Organization, Functions, and Procedures of the Commission

The Commission proposed amendments to § 140.94(c) to delegate authority to the Director of the Division of Clearing and Risk for all functions reserved to the Commission in proposed § 39.51, except for the authority to grant registration to a DCO, prescribe conditions to alternative compliance of a DCO, and modify a DCO's registration order. The Commission did not receive any comments on the proposed changes to § 140.94(c) and is adopting them as proposed.

G. Responses to Additional Requests for Comment

In section IV of the proposal, the Commission requested comment on eight specific issues. In the six instances in which these requests related to particular aspects of the proposal, the responses were included in the discussion above. This section addresses the other two requests.

1. Request for Comment No. 1

In the proposal, the Commission asked whether the proposed alternative compliance regime, including both the application process and the ongoing requirements, strikes the right balance between the Commission's regulatory interests and the regulatory interests of non-U.S. DCOs' home country regulators.

Several commenters expressed support for the proposed alternative compliance regime. SIFMA stated that it supports the steps taken by the proposal to provide greater deference to home country regulation of non-U.S. DCOs. SIFMA also supported the proposal's risk-based measures to calibrate the extent of extraterritorial U.S. regulations. LCH stated that the proposal adequately balances the Commission's regulatory interests with the regulatory interests of home country regulators, and noted that the proposal appropriately accounts for both the Commission's risk-related concerns and international comity. CCIL stated that the proposed alternative compliance framework provides a better alternative to the existing structure. Specifically, CCIL supported the definitions of ''good regulatory standing'' and ''substantial risk'' in proposed § 39.2, stating that these definitions and the alternative compliance framework as a whole rightly endorse the primacy of the home country regulator and compliance under home country requirements. CCP12 stated that it welcomes the Commission's alternative compliance approach because it recognizes the importance of regulatory deference and increased cross-border cooperation. Eurex stated that the proposed framework brings welcome relief from the Part 39 rules for non-U.S. DCOs that do not pose systemic risk to the U.S. financial system. WFE advocated for an approach of regulatory deference and international comity, without taking a position on whether the proposed alternative compliance regime is such an approach. WFE added that departing from the international principle of regulatory deference should only be required if there is a clear and truly substantial risk to the financial stability of the host-authority jurisdiction.

Many of the commenters that expressed support for the proposed alternative compliance regime also recommended improvements. CCP12 recommended alleviating some of the requirements of alternative compliance, but it did not identify the requirements to which it objected. Eurex argued that the Commission should reduce the number of reporting requirements applicable to DCOs subject to alternative compliance. CCIL stated that a DCO subject to alternative compliance should not have to comply with the DCO Core Principles because its home country regulator will alternatively assess its compliance with the PFMIs. Furthermore, CCIL argued that if each country requires compliance with its own regulations, it could create a complex web of requirements that could result in a huge compliance burden on clearing organizations and confusion as to how to comply with conflicting regulations.

After reviewing these comments, the Commission continues to believe that the alternative compliance regime strikes the right balance between the Commission's regulatory interests and the regulatory interests of home country regulators. As previously discussed, the Commission does not agree that the level of reporting required of DCOs subject to alternative compliance should be further reduced. In response to CCIL, the Commission notes that the CEA requires a DCO to meet the DCO Core Principles in order to be registered and to maintain its registration, and therefore the Commission must ensure that DCOs, including DCOs subject to alternative compliance, meet the DCO Core Principles, not simply the PFMIs as implemented by each home country regulator. The Commission further notes that a non-U.S. clearing organization that wishes to meet only the PFMIs can apply for an exemption from DCO registration.

2. Request for Comment No. 2

In the proposal, the Commission asked whether there are additional regulatory requirements under the CEA or Commission regulations that should not apply to DCOs subject to alternative compliance in the interest of deference and allowing such DCOs to satisfy the DCO Core Principles through compliance with their home country regulatory regimes while still protecting the Commission's regulatory interests.

CCIL argued that the Commission should be satisfied with a certification by a home country regulator that a DCO subject to alternative compliance complies with the PFMIs. As previously noted, the CEA requires DCOs to comply with the DCO Core Principles. The Commission could not permit a DCO to be registered solely on the basis of a home country regulator's certification that the DCO complies with the PFMIs.

CCP12 stated that DCOs subject to alternative compliance could face a significant challenge complying with section 4d(f) of the CEA and the Commission's customer protection requirements, mainly because these requirements apply customer protections consistent with the U.S. Bankruptcy Code and part 190 of the Commission's regulations irrespective of the home country laws applicable to a non-U.S. DCO and its FCM clearing members. The Commission notes that all DCOs, including non-U.S. DCOs, are currently subject to these customer protection requirements. The proposal would simply leave the requirements in place. Given that CCP12 did not identify how the customer protection requirements would present new challenges for DCOs subject to alternative compliance, the Commission continues to believe that the protections afforded to customers by the requirements outweigh the burdens of compliance for these DCOs, for the reasons previously discussed.

Eurex and CCP12 each identified reporting requirements that they argued should not apply to DCOs subject to alternative compliance. In regards to the reporting requirements of § 39.51(c), CCP12 stated that oversight of U.S. customers' swaps clearing activity could be fulfilled with ''less regular and more relevant data information,'' and suggested that the daily reports required by § 39.51(c)(2)(i) be limited to FCMs. Eurex stated that the reporting requirements of proposed § 39.51(c)(2)(i) and (ii) and the part 45 reporting requirements should not apply to non-U.S. DCOs because these requirements are costly and overlap to a large degree with existing requirements imposed by home country regulators. Eurex recognized that the Commission needs data to evaluate eligibility for and compliance with the alternative compliance framework; however, Eurex would instead prefer a global standardization of reporting and cooperation among data repositories. CCP12 also encouraged international standard-setting bodies to standardize data fields and promote cooperation among repositories to avoid duplicative reporting.

As previously discussed, the Commission disagrees that the reporting required under § 39.51(c) should not apply to DCOs subject to alternative compliance, and that the daily reports required by § 39.51(c)(2)(i) should be limited to FCMs. With respect to the part 45 requirements, the Commission believes that the transparency into the swaps market provided by the swap data recordkeeping and reporting requirements—requirements applicable to all currently registered DCOs, including non-U.S., and exempt DCOs—strongly warrants the burden of requiring non-U.S. DCOs subject to alternative compliance to report such information. In response to Eurex and CCP12's comments about international reporting standards, the Commission agrees that global harmonization of reporting standards and cooperation between international regulators could reduce duplicative reporting. However, such an arrangement is beyond the scope of this rulemaking, and in the absence of such a regime, the Commission must require reporting at a level that will allow it to protect its regulatory interests. The Commission believes that the reporting requirements in proposed § 39.51(c) are appropriately tailored to accomplish that goal with respect to DCOs subject to alternative compliance.

H. Additional Comments

In addition to the comments discussed above, the Commission received several comments that did not directly relate to a specific part of the proposal or respond to a specific request for comment. The Commission appreciates the additional feedback. In the instances where these comments do not address proposed changes and are therefore outside the scope of this rulemaking, the Commission may take the comments under advisement for future rulemakings.

Citadel argued that the proposed alternative compliance framework did not appear to be specifically contemplated in the CEA. Citadel suggested that the Commission should proceed cautiously based on the lack of clear statutory guidance.

As discussed in the proposal, the Commission believes the CEA provides the Commission with the authority to adopt the regulations implementing the alternative compliance framework. The Commission has broad authority under section 8a(5) of the CEA to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[78] Section 5b(c)(2)(A)(i) of the CEA provides that, to be registered and to maintain registration as a DCO, a DCO must comply with each DCO Core Principle and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5). Section 5b(c)(2)(A)(ii) of the CEA further provides that, subject to any rule or regulation prescribed by the Commission, a DCO has reasonable discretion in establishing the manner by which it complies with each DCO Core Principle. The Commission first adopted regulations to implement the DCO Core Principles in subpart B of Part 39, which, until now, have applied to all DCOs. With the adoption of the regulations implementing the alternative compliance framework, the Commission is using its authority under section 8a(5) of the CEA to establish a second, separate path to compliance with the DCO Core Principles for non-U.S. DCOs that do not pose substantial risk to the U.S. financial system.

ICE noted that the proposal does not address the requirement under § 39.5 for DCOs to make certain filings before clearing new swaps or categories of swaps, and asked that the Commission clarify that § 39.5 filings would not be required of DCOs subject to alternative compliance. The Commission notes that because DCOs subject to alternative compliance would still be registered, they, in fact, would be required to comply with subpart A of Part 39, which includes § 39.5.

ICE noted that there are non-U.S. clearing organizations that clear both swaps and futures, and believes that to the extent possible, any relief for swaps clearing (including under the alternative compliance framework) should also apply to swaps cleared at a DCO that clears both futures and swaps, and suggests that the final rules be clarified to make this explicit. As explained in the proposal, the Commission's regulatory framework already distinguishes between clearing of futures executed on a DCM, for which DCO registration is required, and clearing of foreign futures, for which it is not. The Commission had not contemplated permitting a non-U.S. DCO that clears futures listed for trading on a DCM to be eligible for alternative compliance as most non-U.S. DCOs are registered to clear swaps only. The Commission would have to amend the rules being adopted herein to allow non-U.S. DCOs that clear DCM futures to be eligible; for example, the Commission would have to adjust the substantial risk test to account for futures. The Commission will give this idea further consideration.

FIA requested that the Commission confirm that its 2016 EU comparability determination[79] remains in place and is not replaced or amended in any way by this rulemaking such that market participants may continue to rely on it. The EU comparability determination compared Part 39 with EU regulations and identified those instances where the requirements are so similar that compliance with the Part 39 regulation(s) would constitute compliance with the EU regulation(s) as well. Unless any of the regulations included in the determination have been amended or repealed, the Commission's determination stands.

Better Markets argued that providing DCOs with the options of traditional registration, exemption from registration, and registration subject to alternative compliance is unnecessarily complex and over time would create competitive disparities and differences in DCO risk management and other practices. Better Markets further argued that the proposed framework would facilitate forum shopping and regulatory

[78] 7 U.S.C. 12a(5).

[79] *See* Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

arbitrage, deferring to non-U.S. DCOs to determine for themselves how they comply with U.S. requirements.

The Commission does not believe that presenting clearing organizations with the additional option of registration with alternative compliance will result in material disparities in DCO risk management practices because all registered DCOs will still be required to satisfy the DCO Core Principles. Moreover, the Commission does not believe that the alternative compliance framework will result in regulatory arbitrage because it will only be available to an applicant that can demonstrate, among other things, that compliance with its home country requirements would satisfy the DCO Core Principles.

Citadel suggested that the primary beneficiaries of the alternative compliance framework will be non-U.S. DCOs which are already registered with the Commission (and not exempt DCOs or clearing organizations that currently have no status with the Commission). Citadel stated that permitting certain non-U.S. DCOs to use an alternative compliance framework means that these DCOs will be able to provide clearing services to U.S. market participants without complying with as many U.S. regulatory requirements as U.S. DCOs, potentially creating an un-level competitive playing field where lower operational and regulatory costs allow non-U.S. DCOs to increase market share at the expense of U.S. DCOs. Such a concern may be particularly relevant where the home jurisdiction of the non-U.S. DCO has failed to grant similar deference to U.S. DCOs. As a result, Citadel recommends that the Commission assess the foreign jurisdiction's treatment of U.S. DCOs prior to granting a non-U.S. DCO's application for alternative compliance.

The Commission believes that non-U.S. DCOs, exempt DCOs, and non-U.S. clearing organizations that are neither registered nor exempt may benefit from the alternative compliance framework, but notes that each current non-U.S. DCO had to demonstrate compliance with each of the requirements of subpart B of Part 39 during its application process, which will not be required of new applicants for registration subject to alternative compliance. The Commission noted in the proposal that one of the goals of the alternative compliance framework is to ease the regulatory burden on non-U.S. DCOs that do not pose substantial risk to the U.S. financial system, including some current DCOs. The Commission believes that doing so is appropriate because these DCOs are subject to multiple regulators and regulatory regimes, and face duplicative regulations. However, as previously noted here and in the proposal, the Commission may condition alternative compliance on any other facts and circumstances it deems relevant. In doing so, the Commission would be mindful of principles of international comity. The Commission could take into account the extent to which the relevant foreign regulatory authorities defer to the Commission with respect to oversight of U.S. DCOs, in light of international comity.

SIFMA argued that the Commission should use this opportunity to promote the competitiveness of U.S. FCMs and swap dealers by expanding their ability to access non-U.S. clearing organizations. Specifically, SIFMA believes the Commission should (1) permit U.S. FCMs to use an omnibus clearing structure for foreign cleared swaps like they currently use for foreign futures and (2) allow a non-U.S. clearing organization to accept foreign branches of U.S. bank swap dealers as members without requiring the non-U.S. clearing organization to register with the Commission as a DCO or obtain an exemption from DCO registration. SIFMA argues that these changes would also promote customer choice and reduce market concentration. The Commission appreciates this additional feedback and will give it further consideration.

ASX, JSCC, KRX, and OTC Clear argued that the Commission should finalize the exempt DCO rulemaking notwithstanding the outcome of this rulemaking.

ASX, JSCC, KRX, and OTC Clear stated that a clearing member of a non-U.S. DCO should be able to clear swaps for U.S. customers without registering as an FCM. ASX, JSCC, KRX, OTC Clear, and ICE specifically suggested that the Commission adopt an exemption similar to the § 30.10 exemption for foreign futures and foreign options. ASX believes that adopting a part 30-type regime for swaps could achieve cost savings and improved customer experience for some U.S. customers of non-FCM clearing members by allowing them to access both foreign futures markets and exempt DCOs for swaps under an aligned framework. In addition, ASX, JSCC, KRX, and OTC Clear suggested that an exemption could help address their concern that U.S. customers are being forced to concentrate their clearing in a limited number of DCOs and FCM clearing members. They argued that the situation is further exacerbated for those U.S. customers who must clear swaps denominated in foreign currencies subject to the Commission's clearing requirement, as they cannot always access swaps markets in the home country of the relevant currency where, as JSCC observed, the highest liquidity and best prices are available.

The Commission believes that the alternative compliance framework for non-U.S. DCOs registered with the Commission should retain protections available to U.S. customers by clearing through FCMs. The Commission appreciates the several comments on this topic and will give them further consideration in connection with the exempt DCO rulemaking.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[80] The regulations being adopted by the Commission will affect only DCOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[81] The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.[82] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[83] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The regulations adopted herein would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (OMB). The regulations include a collection of information for which the Commission has previously received control numbers from OMB. The title for this collection of information is ''Requirements for Derivatives Clearing

[80] 5 U.S.C. 601 *et seq.*

[81] *See* 47 FR 18618 (Apr. 30, 1982).

[82] *See* 66 FR 45604, 45609 (Aug. 29, 2001).

[83] 44 U.S.C. 3501 *et seq.*

Organizations, OMB control number 3038–0076.''

The Commission did not receive any comments regarding its PRA burden analysis in the preamble to the proposal. The Commission is revising Information Collection 3038–0076 to include the collection of information in revised § 39.3(a)(3) and new § 39.51, as well as changes to the existing information collection requirements for DCOs as a result of these changes. The Commission does not believe the regulations as adopted impose any other new collections of information that require approval of OMB under the PRA.

1. Alternative DCO Application Procedures Under § 39.3(a)(3)

Regulation 39.3(a)(2) sets forth the requirements for filing an application for registration as a DCO. The Commission is adopting new § 39.3(a)(3), which establishes the application procedures for DCOs that wish to be subject to alternative compliance. Currently, Information Collection 3038–0076 reflects that each application for DCO registration takes 421 hours to complete, including all exhibits. Because the alternative application procedures will require substantially fewer documents and exhibits, the Commission is estimating that each such application would require 100 hours to complete.

DCO application for alternative compliance, including all exhibits, supplements and amendments:

Estimated number of respondents: 1.

Estimated number of reports per respondent: 1.

Average number of hours per report: 100.

Estimated gross annual reporting burden: 100.

2. Ongoing Reporting Requirements for DCOs Subject to Alternative Compliance in Accordance With New § 39.51

New § 39.51 includes reporting requirements for DCOs subject to alternative compliance that are substantially similar to those proposed for exempt DCOs.[84] The estimated number of respondents is based on approximately three existing registered DCOs that may choose to convert to alternative compliance and one new registrant per year.

Daily Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 250.

Average number of hours per report: 0.1.

Estimated gross annual reporting burden: 150.

Quarterly Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 4.

Average number of hours per report: 1.

Estimated gross annual reporting burden: 24.

Event-Specific Reporting

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 3.

Annual Certification of Good Regulatory Standing

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1.

Average number of hours per report: 1.

Estimated gross annual reporting burden: 6.

Under § 39.4(c), DCOs subject to alternative compliance will not be required to comply with § 40.6 regarding certification of rules, other than rules relating to customer protection. Although this change could potentially reduce the burden related to rule submissions by registered entities, which is covered in Information Collection 3038–0093, the Commission is not proposing any changes to that information collection burden because its current estimate of 50 responses annually per respondent covers a broad range of the number of annual submissions by registered entities. Therefore, no adjustment to Information Collection 3038–0093 is necessary.

3. Adjustment to Part 39 Reporting and Recordkeeping Requirements

As noted above, the Commission anticipates that approximately three current DCOs may seek registration under the alternative compliance process; accordingly, the information collection burden applicable to DCO applicants and DCOs will be reduced. Currently, collection 3038–0076 reflects that there are two applicants for DCO registration annually and that it takes each applicant 421 hours to complete and submit the form, including all exhibits. The Commission is reducing the number of applicants for traditional DCO registration from two to one based on the expectation that one of the annual DCO applicants will seek registration subject to alternative compliance.

Form DCO—§ 39.3(a)(2)

Estimated number of respondents: 1.

Estimated number of reports per respondent: 1.

Average number of hours per report: 421.

Estimated gross annual reporting burden: 421.

The information collection burden for DCOs, based on the Commission's alternative compliance regime, is estimated to be reduced by three, from 16 to 13. The reduction in the number of respondents is the sole change in the burden estimates previously stated for DCOs.[85] The revised burden estimates are as follows:

CCO Annual Report

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 73.

Estimated gross annual reporting burden: 949.

Annual Financial Reports

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 2,626.

Estimated gross annual reporting burden: 34,138.

Quarterly Financial Reports

Estimated number of respondents: 13.

Estimated number of reports per respondent: 4.

Average number of hours per report: 7.

Estimated gross annual reporting burden: 364.

Daily Reporting

Estimated number of respondents: 13.

Estimated number of reports per respondent: 250.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 1,625.

Event-Specific Reporting

Estimated number of respondents: 13.

[84] *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018).

[85] There are minor differences in the burden estimates for quarterly and annual financial reports and event-specific reporting from the proposal, which was based on the burden estimates stated in the Commission's proposed amendments to Part 39 (84 FR 22226 (May 16, 2019)). The Commission adopted the amendments to Part 39 (85 FR 4800 (Jan. 27, 2020)) with some minor changes, so the corresponding revisions to the burden estimates are reflected in the figures stated herein.

Estimated number of reports per respondent: 14.

Average number of hours per report: 0.5.

Estimated gross annual reporting burden: 91.

Public Information

Estimated number of respondents: 13.

Estimated number of reports per respondent: 4.

Average number of hours per report: 2.

Estimated gross annual reporting burden: 104.

Governance Disclosures

Estimated number of respondents: 13.

Estimated number of reports per respondent: 6.

Average number of hours per report: 3.

Estimated gross annual reporting burden: 234.

DCOs—Recordkeeping

Estimated number of respondents: 13.

Estimated number of reports per respondent: 1.

Average number of hours per report: 150.

Estimated number of respondents-request to vacate: 1.

Estimated number of reports per respondent-request to vacate: 0.33.

Average number of hours per report-request to vacate: 1.

Estimated gross annual recordkeeping burden: 1,951.[86]

New § 39.4(c) exempts DCOs subject to alternative compliance from certifying rules unless the rule relates to the requirements under section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission's regulations, or § 39.15. While this change is likely to reduce the number of rule certification submissions that would otherwise be required for DCOs subject to alternative compliance, the Commission is not expecting that this will affect the overall burden for rule certification filings by all registered entities, covered in Information Collection 3038–0093. The number of rule submissions in that information collection is intended to represent an average number of submissions per registered entity. Because the average number of submissions covers a wide range of variability in the actual numbers of rule certification submissions by registered entities, the Commission believes that the small number of DCOs subject to alternative compliance which will not be required to certify all rules would be covered by the existing burden estimate in Information Collection 3038–0093.

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[87] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

2. Amendments to Part 39

a. Summary and Baseline for the Final Rule

Section 5b(a) of the CEA requires a clearing organization that clears swaps to be registered with the Commission as a DCO. Once registered, a DCO is required to comply with the CEA and all Commission regulations applicable to DCOs, regardless of whether the DCO is subject to regulation and oversight in other legal jurisdictions. The Commission is adopting amendments to Part 39 that allow a non-U.S. DCO that the Commission determines does not pose substantial risk to the U.S. financial system, as defined in an amendment to § 39.2, to be subject to an alternative compliance regime that relies in part on the DCO's home country regulatory regime and will result in reduced regulatory obligations as compared to the existing registration requirements. Specifically, under the final rule, the non-U.S. DCO will comply with the DCO Core Principles established in section 5b(c)(2) of the CEA by complying with its home country's legal requirements rather than the requirements of subpart B of Part 39 (with the exception of § 39.15). The non-U.S. DCO will remain subject to subpart A of Part 39 and the Commission's customer protection and swap data reporting requirements, as well as certain reporting requirements and other conditions in its registration order. Lastly, under the final rule, § 39.4(c) exempts non-U.S. DCOs that are subject to alternative compliance from self-certifying rules pursuant to § 40.6, unless the rule relates to the Commission's customer protection or swap data reporting requirements.

The baseline for these cost and benefit considerations is the current statutory and regulatory requirements applicable to non-U.S. DCOs, including those related to application procedures for registration and self-certification of rules. Under current requirements, a non-U.S. DCO seeking to clear for U.S. participants has two options: (1) It can pursue registration under part 39 as it exists today (and comply with the DCO Core Principles and relevant Commission regulations) and have the same access to U.S. customer business as a registered U.S. DCO; or (2) it can seek exemption from DCO registration pursuant to CEA section 5b(h), but forgo access to U.S. customers (while accepting business from self-clearing U.S. proprietary traders).

Where reasonably feasible, the Commission has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the Commission identifies and describes costs and benefits qualitatively. Additionally, the initial and recurring compliance costs for any particular non-U.S. DCO will depend on its size, existing infrastructure, level of clearing activity, practices, and cost structure. In considering the effects of the final rule and the resulting costs and benefits, the Commission acknowledges that the swaps markets have several types of market participants including DCOs, clearing members, and their clients (who could be professional investors, public and non-public operating firms) and function internationally with: (i) Transactions that involve U.S. firms occurring across different international jurisdictions; (ii) some entities organized outside of the United States that are prospective Commission registrants; and (iii) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the amendments on all relevant swaps activities, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce pursuant to, section 2(i) of the CEA.[88]

[86] The total annual recordkeeping burden estimate reflects the combined figures for 13 DCOs with an annual burden of one response and 150 hours per response ($13 \times 1 \times 150 = 1{,}950$), and one vacated DCO registration every three years with an annual burden of one hour, which is not affected by this rulemaking.

[87] 7 U.S.C. 19(a).

[88] Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the

b. Benefits

The Commission believes that the primary benefit of the alternative compliance framework for non-U.S. DCOs is that it will promote and encourage international comity by showing deference to non-U.S. regulators in the oversight of non-U.S. DCOs that do not pose substantial risk to the U.S. financial system. The second prong of the substantial risk test in particular is directed at comity by making a non-U.S. DCO that satisfies the first prong of the test eligible for registration subject to alternative compliance if the proportion of U.S. activity it clears is not at a level that warrants more active oversight by the Commission. Based on its past, and continued, coordination with non-U.S. regulators, the Commission expects that non-U.S. regulators will, in turn, defer to the Commission in the supervision and regulation of DCOs organized in the United States, thereby reducing the regulatory and compliance burdens of these U.S. DCOs.[89] While the Commission believes that international comity will occur, it acknowledges that the realization of the benefit from international comity is dependent on the actions of non-U.S. regulators and therefore, may not come to fruition.

There are currently 15 DCOs registered with the Commission, five of which are organized outside of the United States and have comparable registration status in their respective home countries. The Commission expects that, in light of the substantial risk test as discussed below, four of these DCOs may be eligible for alternative compliance.

The Commission reviewed quarterly statistics for six registered DCOs, including four non-U.S. DCOs, that account for the vast majority of swaps initial margin (IM) held in the United States. The statistics included the share of total U.S. swaps IM held by each DCO and the U.S. share of total IM held by each DCO. These statistics were calculated by Commission staff for the period from first quarter 2018 through second quarter 2020. Regarding the first prong of the substantial risk test (the DCO's share of U.S. swaps IM), Commission staff found that one non-U.S. DCO consistently accounted for at least 47% of U.S. swaps IM, while none of the other three non-U.S. DCOs ever exceeded 5% of U.S. swaps IM (and thus may be eligible for alternative compliance). Any threshold between 10% and 40% would have yielded the same results, but the 20% level is more likely to result in a stable set of DCOs eligible for alternative compliance than other possible thresholds. This is because the share of the three smaller non-U.S. DCOs would have to at least quadruple to approach 20% while the share of the largest non-U.S. DCO (LCH Limited) would have to be cut in half to approach the threshold. A stable set of eligible DCOs due to large distances from the threshold should benefit DCOs by reducing concerns that a DCO could lose its eligibility for alternative compliance.

Regarding the second prong (U.S. IM as a share of DCO IM), U.S. swaps IM as a share of IM at LCH Limited has consistently been at least 45%, which is more than double the 20% threshold. The Commission notes that the level of the second prong does not matter if a DCO is below the threshold for the first prong.

The adoption of the alternative compliance framework will benefit qualifying non-U.S. DCOs by potentially reducing their regulatory requirements to the extent that the non-U.S. DCOs' home country laws and regulations impose obligations similar to those imposed by the CEA. Furthermore, the option of seeking registration with alternative compliance will also benefit the qualifying non-U.S. DCOs by allowing them to accept U.S. customer business at lower cost.

The Commission also believes that the non-U.S. DCOs that qualify for the alternative compliance framework will benefit from amendments to § 39.4(c), which remove the requirement to certify their rules that do not relate to the Commission's customer protection or swap data reporting requirements, by reducing their ongoing compliance costs. In 2019, the four non-U.S. DCOs potentially eligible for alternative compliance submitted 108 rule certifications to the Commission, ranging from a low of 10 submissions for one DCO to a high of 62 submissions for another DCO. Based on its experience reviewing DCO rule submissions, the Commission expects that a DCO subject to alternative compliance would make few, if any, rule submissions each year. The Commission receives very few rule submissions from DCOs that relate to customer protection or swap data reporting.

Non-U.S. clearing organizations applying for DCO registration with alternative compliance will benefit from new § 39.3(a)(3), which simplifies and reduces the application procedures from the current list of over three dozen exhibits to only a dozen sections of Form DCO, mostly drawn from Exhibits A and F thereto. The Commission has estimated that an applicant must spend 421 hours preparing a complete Form DCO.[90] As noted in the PRA discussion above, the Commission estimates that preparing the sections of Form DCO that would be required under the alternative compliance application procedures would take 100 hours.

Given the lower initial application and ongoing compliance costs, the Commission anticipates that some non-U.S. clearing organizations that are not currently registered as DCOs, including, but not limited to, exempt DCOs, may pursue registration with alternative compliance. Exempt DCOs in particular would receive the additional benefit of being able to accept U.S. customer clearing through FCMs.[91] Because of the reduced requirements under the alternative compliance regime, the Commission believes it may be eliminating barriers to entry for these non-U.S. clearing organizations that are not currently registered with the Commission, which may increase the number of non-U.S. DCOs providing services to U.S. customers over time. To the extent that new non-U.S. DCO entrants decide to compete with existing DCOs to increase their share of the U.S. customer market, U.S. customers and clearing members may benefit from more clearing options, including potentially lower fees and access to cleared products that are not otherwise available.

The Commission received several comments on the proposing release describing the benefits of the alternative compliance framework. SIFMA stated that by enhancing deference to foreign regulation of non-U.S. DCOs and implementing risk-based measures to calibrate the extent of U.S. regulations,

swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either ''have a direct and significant connection with activities in, or effect on, commerce of the United States;'' or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376. 7 U.S.C. 2(i).

[89] As the Commission previously noted, the G20 ''agree[d] that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.'' G20 Leaders' Declaration, St. Petersburg Summit, para. 71 (Sept. 6, 2013).

[90] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4828–4829 (Jan. 27, 2020).

[91] If the Exempt DCO rulemaking is finalized, exempt DCOs would be able to accept U.S. customer clearing through non-FCM intermediaries, which could reduce, but would not eliminate, the relative benefit of registering with alternative compliance. All DCOs would still need to register with (or without) alternative compliance to accept U.S. customer clearing through FCMs.

the alternative compliance framework will help expand opportunities for U.S. customers, promote globally integrated swaps markets, reduce undue regulatory duplication and burdens, responsibly make more effective use of the Commission's resources, and encourage reciprocal deference by foreign regulators. LCH commended the Commission's efforts to enhance regulatory deference and cooperation and stated that it believes that the alternative compliance framework will continue to drive progress towards a more harmonized regulatory approach that supports the global nature of the cleared swaps markets. CCIL stated that the alternative compliance framework provides a better alternative to the existing structure. CCP12 stated that it welcomes the Commission's alternative compliance approach because it recognizes the importance of regulatory deference and increased cross-border cooperation. CCP12 added that the alternative compliance framework will allow local policymakers to adopt legal and regulatory requirements that are appropriate for the markets they oversee, while increasing cross-border cooperation.

c. Costs

One effect of adopting the amendments is that it may increase competition among U.S. and non-U.S. DCOs. Some academic research indicates that competition among DCOs may result in negative effects, such as lower margin or increased counterparty risk.[92]

However, the Commission expects that these potential ill effects will be mitigated because DCOs subject to alternative compliance would still need to comply with the DCO core principles through their home regulators and that these DCOs would be subject to rules that would, for example, prevent them from competing on margin.

The Commission recognizes that DCOs registered under the existing procedures, including non-U.S. DCOs that are ineligible for alternative compliance, may face a competitive disadvantage as a result of this proposal. A DCO subject to full Commission regulation and oversight may have higher ongoing compliance costs than a DCO subject to alternative compliance.[93] However, this competitive disadvantage, based on reduced costs, may be mitigated by the fact that DCOs subject to alternative compliance would, as a precondition of such registration, be subject to a home country regulator that is likely to impose costs similar to those associated with Commission regulation, as the home country regulation would have to meet the same standards as set out in the Commission's DCO Core Principles. This competitive disadvantage also would only arise where DCOs are competing to clear the same or similar products.[94]

The Commission also recognizes that currently unregistered non-U.S. clearing organizations applying for registration under the alternative compliance application procedures would incur costs in preparing the application. This would include preparing and submitting certain parts of Form DCO, including the requirement to provide in Exhibit A–1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements. If a clearing organization were required instead to apply under the existing application process, however, it would need to prepare and submit a complete Form DCO, which is a significantly more costly and burdensome process. Thus, although an applicant will incur costs in preparing the application under § 39.3(a)(3), the alternative compliance application procedures represent a substantial cost savings relative to the existing procedures. As discussed in connection with the PRA above, the Commission estimates that an application for registration with alternative compliance pursuant to § 39.3(a)(3) will take approximately 100 hours to complete, as opposed to an estimated 421 hours for an application pursuant to § 39.3(a)(2).

A currently registered DCO that wishes to be subject to alternative compliance would not need to file a new application but would need to submit a request to amend its order of registration. The initial request would need to include only Exhibits A–1 and A–8 as described in § 39.3(a)(3). The currently registered DCO would typically not need to file the other exhibits required in a new application for registration with alternative compliance, thus reducing costs further.

Furthermore, because a DCO subject to alternative compliance will not be held to many of the Commission's requirements, there may be an increase in the potential for systemic risk. However, the Commission does not believe that the alternative compliance framework will materially increase the risk to the U.S. financial system because DCOs that pose substantial risk to the U.S. financial system as defined in § 39.2 would not be eligible for alternative compliance. Furthermore, a DCO cannot avail itself of this process unless the Commission determines that a DCO's compliance with its home country regulatory regime would satisfy the DCO Core Principles, meaning that the DCO would be subject to regulation comparable to that imposed on DCOs registered under the existing procedure. An MOU or similar arrangement must be in effect between the Commission and the DCO's home country regulator, allowing the Commission to receive information from the home country regulator to help monitor the DCO's continuing compliance with its legal and regulatory obligations. In addition, DCOs subject to alternative compliance remain subject to the Commission's customer protection requirements set forth in section 4d(f) of the CEA, parts 1 and 22 of the Commission's regulations, and § 39.15. The Commission also notes that home country regulators have a strong incentive to ensure the safety and soundness of the clearing organizations that they regulate, and their oversight, combined with the alternative compliance regime, will enable the Commission to more efficiently allocate its own resources in the oversight of traditionally registered DCOs. Finally, the substantial risk test is designed to identify those DCOs that pose substantial risk to the U.S. financial system and will be administered frequently, so in the event that one of these non-U.S. DCOs meets the test, it will be required to comply with all of the Commission's DCO requirements.

The amendments will have no effect on the risks posed by exempt DCOs or by clearing organizations that are neither registered nor exempt from registration.

The Commission believes that determining eligibility for alternative compliance should generally be a simple, low-cost process given that it is in large part based on objective initial margin figures and, as discussed in the benefits section above, eligibility is

[92] *See, e.g.,* Duffie, D., and Zhu, H. (2011). Does a Central Clearing Counterparty Reduce Counterparty Risk. The Review of Asset Pricing Studies, 1, 74–95.

[93] The Commission notes that these costs would include complying with at least two sets of regulations for the non-U.S. DCO and may include additional costs to the U.S. DCO to the extent that they are subject to another jurisdiction's requirements.

[94] It is possible that a DCO subject to alternative compliance could begin clearing the same products as a DCO that is not eligible for alternative compliance and attempt to take advantage of the lower costs associated with alternative compliance by offering a lower clearing fee for these products. It is not certain that the cost savings associated with alternative compliance would be sufficient to cover the cost of lowering fees enough to induce clearing members to change DCOs.

expected to be stable with changes in eligibility for alternative compliance for particular DCOs likely to be very rare in the foreseeable future.

The Commission notes that non-U.S. DCOs that are eligible for alternative compliance because they satisfy the first prong, but not the second prong, of the substantial risk test could potentially impose costs associated with an increase in systemic risk. It is very unlikely, however, that a non-U.S. DCO will meet this profile in the foreseeable future given current initial margin shares. To do so, a non-U.S. DCO would have to hold over 20% of the total initial margin for U.S. clearing members while also having less than 20% of its initial margin provided by those clearing members, a situation that is unlikely to occur unless non-U.S. DCOs were to experience explosive growth in initial margin provided by non-U.S. clearing members. Moreover, there are significant mitigating factors even in the unlikely event that a non-U.S. DCO eventually meets that profile. The DCO would, even when registered with alternative compliance, be required to meet the DCO Core Principles and critical customer protection provisions and would be subject to supervision from its home country regulator. The home country regulator's incentive to provide intensive oversight is likely to be particularly high in this scenario given that the largest share of the DCO's clearing activity would likely have been generated from within the home country jurisdiction. Thus, the Commission believes that the risk associated with this unlikely scenario is low.

Lastly, the Commission does not anticipate any costs to DCOs associated with the exemption in § 39.4(c), as amended.

d. Consideration of Alternatives

The Commission received several comments suggesting alternatives that the commenters believe would further reduce costs of the alternative compliance framework. ICE argued that the Commission should identify the specific factors that it will consider when exercising its discretion to deem a DCO to pose substantial risk to the U.S. financial system. ICE stated that without a list of relevant factors, the Commission could unnecessarily delay its assessment, which would increase compliance costs for the DCO. As discussed above, the Commission reserves the right to consider all factors it believes are relevant, and does not believe that it is helpful to attempt to list every possible factor given that it is impossible to anticipate all possible facts and circumstances. However, the Commission did provide in the discussion above a non-exclusive list of examples to illustrate the factors that it could consider in exercising discretion under the substantial risk test.

Three commenters argued that the Commission could reduce the costs to DCOs by not requiring DCOs to follow certain reporting requirements. CCP12 stated generally that in some cases the alternative compliance reporting requirements would be costly, and believes that oversight of U.S. customers' swaps clearing activity could be fulfilled with less frequent and more relevant data reporting. ICE stated that if an applicant's home country reporting rules correspond with part 45 swap data reporting rules, the Commission should consider obtaining swap data from the applicant's home country regulator through an MOU. ICE claimed that compliance with the Commission's rules in addition to home country rules would be very costly for DCOs, and provide little additional benefit. Eurex similarly stated that the general reporting requirements and part 45 swap data reporting requirements are substantial and costly, and overlap to a large degree with existing requirements from home country regulators.

The Commission notes that the reporting required by the alternative compliance framework is considerably less than that required by the baseline. In particular, as noted in the PRA section, each DCO with alternative compliance is expected to spend about 31 hours per year preparing various reports to the Commission as compared to 2,892 hours for each DCO registered under current procedures. Thus, DCOs will face significantly reduced legal and compliance costs associated with reporting as a result of the amendments.

3. Section 15(a) Factors

a. Protection of Market Participants and the Public

The amendments will not materially reduce the protections available to market participants and the public because they would require, among other things, that a DCO subject to alternative compliance: (i) Must demonstrate to the Commission that compliance with the applicable legal requirements in its home country would constitute compliance with the DCO Core Principles; (ii) must be licensed, registered, or otherwise authorized to act as a clearing organization in its home country and be in good regulatory standing; and (iii) must not pose substantial risk to the U.S. financial system. The regulations also protect market participants and the public by ensuring that FCM customers clearing through a DCO subject to alternative compliance would continue to receive the full benefits of the customer protection regime established in the CEA and Commission regulations.

b. Efficiency, Competitiveness, and Financial Integrity

The amendments promote efficiency in the operations of DCOs subject to alternative compliance by reducing duplicative regulatory requirements. This reduction in duplicative requirements will reduce compliance costs for DCOs, which may promote competitiveness. Furthermore, adopting the amendments might prompt other regulators to adopt similar deference frameworks, which could further reduce compliance costs and increase competitiveness among DCOs.

The Commission expects the amendments to maintain the financial integrity of swap transactions cleared by DCOs because DCOs subject to alternative compliance would be required to comply with a home country regulatory regime that satisfies the DCO Core Principles, and because they would be required to satisfy the Commission's regulations regarding customer protection. In addition, the amendments may contribute to the financial integrity of the broader financial system if they encourage additional non-U.S. clearing organizations to register as DCOs, which could spread the risk of clearing swaps among a greater number of DCOs, thus reducing concentration risk.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. The Commission has not identified any impact that the amendments will have on price discovery. This is because price discovery occurs before a transaction is submitted for clearing through the interaction of bids and offers on a trading system or platform, or in the over-the-counter market. The amendments would not impact requirements under the CEA or Commission regulations regarding price discovery.

d. Sound Risk Management Practices

The amendments continue to encourage sound risk management practices because a DCO would be eligible for alternative compliance only if it is held to risk management requirements in its home country that satisfy the DCO Core Principles, which

include that a DCO: (1) Ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures; (2) measure and monitor its credit exposures to each clearing member daily; (3) through margin requirements and other risk control mechanisms, limit its exposure to potential losses from a clearing member default; (4) require sufficient margin from its clearing members to cover potential exposures in normal market conditions; and (5) use risk-based models and parameters in setting margin requirements and review them on a regular basis.

e. Other Public Interest Considerations

The Commission notes the public interest in access to clearing organizations outside of the United States in light of the international nature of many swap transactions. The amendments might encourage international comity by deferring, under certain conditions, to the regulators of other countries in the oversight of home country clearing organizations. The Commission expects that such regulators will defer to the Commission in the supervision and regulation of DCOs domiciled in the United States, thereby reducing the regulatory and compliance burdens to which such DCOs are subject.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.[95]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requested, but did not receive, any comments on whether the proposed rulemaking implicated any other specific public interest to be protected by the antitrust laws.

The Commission has considered the amendments to determine whether they are anticompetitive. The Commission believes that the amendments may promote greater competition in swap clearing because they would reduce the regulatory burden for non-U.S. clearing organizations, which might encourage them to register to clear the same types of swaps for U.S. persons that are currently cleared by registered DCOs. Unlike non-U.S. DCOs subject to this alternative compliance, U.S. DCOs and non-U.S. DCOs that pose substantial risk to the U.S. financial system would be held to the requirements of the CEA and Commission regulations and subject to the direct oversight of the Commission. While this may appear to create a competitive disadvantage for these DCOs, non-U.S. DCOs subject to alternative compliance would be meeting similar requirements through compliance with their home country regulatory regimes and would be subject to the direct oversight of their home country regulators. Further, to the extent that the U.S. clearing activity of a non-U.S. DCO subject to alternative compliance grows to the point that the DCO poses substantial risk to the U.S. financial system, it would be required to comply with all requirements applicable to DCOs and be subject to the Commission's direct oversight.

The Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requested but did not receive any comments on whether there are less anticompetitive means of achieving the purposes of the CEA that would be served by adopting the amendments.

List of Subjects

17 CFR Part 39

Clearing, Customer protection, Derivatives clearing organization, Procedures, Registration, Swaps.

17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

■ 2. In § 39.2, add definitions of ''Good regulatory standing'' and ''Substantial risk to the U.S. financial system'' in alphabetical order to read as follows:

§ 39.2 Definitions.

* * * * *

Good regulatory standing means, with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization.

* * * * *

Substantial risk to the U.S. financial system means, with respect to a derivatives clearing organization organized outside of the United States, that—

(1) The derivatives clearing organization holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt derivatives clearing organizations; and

(2) Twenty percent or more of the initial margin requirements for swaps at that derivatives clearing organization is attributable to U.S. clearing members; *provided, however,* where one or both of these thresholds are identified as being close to 20%, the Commission may exercise discretion in determining whether an identified threshold is satisfied for the purpose of determining whether the derivatives clearing organization poses substantial risk to the U.S. financial system. For purposes of this definition and § 39.51, *U.S. clearing member* means a clearing member organized in the United States, a clearing member whose ultimate parent company is organized in the United States, or a futures commission merchant.

* * * * *

■ 3. Amend § 39.3 by:
■ a. Redesignating paragraphs (a)(3) through (6) as paragraphs (a)(4) through (7);
■ b. Adding new paragraph (a)(3); and
■ c. Revising newly redesignated paragraphs (a)(5) and (6).

The addition and revisions read as follows:

§ 39.3 Procedures for registration.

(a) * * *

(3) *Alternative application procedures.* An entity that is organized outside of the United States, is seeking to register as a derivatives clearing organization for the clearing of swaps, and does not pose substantial risk to the

[95] 7 U.S.C. 19(b).

U.S. financial system may apply for registration in accordance with the terms of this paragraph in lieu of filing the application described in paragraph (a)(2) of this section. If the application is approved by the Commission, the derivatives clearing organization's compliance with its home country regulatory regime would satisfy the core principles set forth in section 5b(c)(2) of the Act, subject to the requirements of subpart D of this part. The applicant shall submit to the Commission the following sections of Form DCO, as provided in appendix A to this part: Cover sheet, Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–4 (detailed business plan), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), Exhibit A–9 (description of pending legal proceedings or governmental investigations), Exhibit A–10 (agreements with outside service providers with respect to the treatment of customer funds), Exhibits F–1 through F–3 (documents that demonstrate compliance with the treatment of funds requirements with respect to customers of futures commission merchants), and Exhibit R (ring-fencing memorandum). For purposes of this paragraph, the applicant must demonstrate to the Commission, in Exhibit A–1, the extent to which compliance with the applicable legal requirements in its home country would constitute compliance with the core principles set forth in section 5b(c)(2) of the Act. To satisfy this requirement, the applicant shall provide in Exhibit A–1 the citation and full text of each applicable legal requirement in its home country that corresponds with each core principle and an explanation of how the applicant satisfies those requirements. If there is no applicable legal requirement for a particular core principle, the applicant shall provide an explanation of how it would satisfy the core principle.

* * * * *

(5) *Application amendments.* An applicant shall promptly amend its application if it discovers a material omission or error, or if there is a material change in the information provided to the Commission in the application or other information provided in connection with the application. An applicant is only required to submit exhibits and other information that are relevant to the application amendment.

(6) *Public information.* The following sections of an application for registration as a derivatives clearing organization will be public: First page of the Form DCO cover sheet (up to and including the General Information section), Exhibit A–1 (regulatory compliance chart), Exhibit A–2 (proposed rulebook), Exhibit A–3 (narrative summary of proposed clearing activities), Exhibit A–7 (documents setting forth the applicant's corporate organizational structure), Exhibit A–8 (documents establishing the applicant's legal status and certificate(s) of good standing or its equivalent), and any other part of the application not covered by a request for confidential treatment, subject to § 145.9 of this chapter.

* * * * *

■ 4. In § 39.4, redesignate paragraphs (c) through (e) as paragraphs (d) through (f) and add new paragraph (c) to read as follows:

§ 39.4 Procedures for implementing derivatives clearing organization rules and clearing new products.

* * * * *

(c) *Exemption from self-certification of rules.* Notwithstanding the rule certification requirements of section 5c(c)(1) of the Act and § 40.6 of this chapter, a derivatives clearing organization that is subject to subpart D of this part is not required to certify a rule unless the rule relates to the requirements under section 4d(f) of the Act, parts 1, 22, or 45 of this chapter, or § 39.15.

* * * * *

■ 5. Revise § 39.9 to read as follows:

§ 39.9 Scope.

Except as otherwise provided by Commission order, the provisions of this subpart B apply to any derivatives clearing organization, as defined under section 1a(15) of the Act and § 1.3 of this chapter, that is registered with the Commission as a derivatives clearing organization pursuant to section 5b of the Act.

§ § 39.43 through 39.49 [Reserved]

■ 6. Add and reserve §§ 39.43 through 39.49 to subpart C.

■ 7. Add subpart D, consisting of §§ 39.50 and 39.51, to read as follows:

Subpart D—Provisions Applicable to Derivatives Clearing Organizations Subject to Compliance with Core Principles Through Compliance with Home Country Regulatory Regime

§ 39.50 Scope.

The provisions of this subpart D apply to any derivatives clearing organization that is registered through the process described in § 39.3(a)(3) of this part or as otherwise provided by order of the Commission.

§ 39.51 Compliance with the core principles through compliance with home country regulatory regime.

(a) *Eligibility.* (1) A derivatives clearing organization shall be eligible for registration for the clearing of swaps subject to compliance with this subpart if:

(i) The Commission determines that compliance by the derivatives clearing organization with its home country regulatory regime constitutes compliance with the core principles set forth in section 5b(c)(2) of the Act;

(ii) The derivatives clearing organization is in good regulatory standing in its home country;

(iii) The Commission determines the derivatives clearing organization does not pose substantial risk to the U.S. financial system; and

(iv) A memorandum of understanding or similar arrangement satisfactory to the Commission is in effect between the Commission and the derivatives clearing organization's home country regulator, pursuant to which, among other things, the home country regulator agrees to provide to the Commission any information that the Commission deems appropriate to evaluate the initial and continued eligibility of the derivatives clearing organization for registration or to review its compliance with any conditions of such registration.

(2) To the extent that the derivatives clearing organization's home country regulatory regime lacks legal requirements that correspond to those core principles less related to risk, the Commission may, in its discretion, grant registration subject to conditions that would address the relevant core principles.

(b) *Conditions.* A derivatives clearing organization subject to compliance with this subpart shall be subject to any conditions the Commission may prescribe including, but not limited to:

(1) *Applicable requirements under the Act and Commission regulations.* The derivatives clearing organization shall comply with: The core principles set forth in section 5b(c)(2) of the Act through its compliance with applicable

legal requirements in its home country; and other requirements applicable to derivatives clearing organizations as specified in the derivatives clearing organization's registration order including, but not limited to, section 4d(f) of the Act, parts 1, 22, and 45 of this chapter, subpart A of this part and § 39.15.

(2) *Open access.* The derivatives clearing organization shall have rules with respect to swaps to which one or more of the counterparties is a U.S. person that:

(i) Provide that all swaps with the same terms and conditions, as defined by product specifications established under the derivatives clearing organization's rules, submitted to the derivatives clearing organization for clearing are economically equivalent within the derivatives clearing organization and may be offset with each other within the derivatives clearing organization, to the extent offsetting is permitted by the derivatives clearing organization's rules; and

(ii) Provide that there shall be non-discriminatory clearing of a swap executed bilaterally or on or subject to the rules of an unaffiliated electronic matching platform or trade execution facility.

(3) *Consent to jurisdiction; designation of agent for service of process.* The derivatives clearing organization shall:

(i) Consent to jurisdiction in the United States;

(ii) Designate, authorize, and identify to the Commission, an agent in the United States who shall accept any notice or service of process, pleadings, or other documents, including any summons, complaint, order, subpoena, request for information, or any other written or electronic documentation or correspondence issued by or on behalf of the Commission or the United States Department of Justice to the derivatives clearing organization, in connection with any actions or proceedings brought against, or investigations relating to, the derivatives clearing organization or any of its U.S. clearing members; and

(iii) Promptly inform the Commission of any change in its designated and authorized agent.

(4) *Compliance.* The derivatives clearing organization shall comply, and shall demonstrate compliance as requested by the Commission, with any condition of its registration.

(5) *Inspection of books and records.* The derivatives clearing organization shall make all documents, books, records, reports, and other information related to its operation as a derivatives clearing organization open to inspection and copying by any representative of the Commission; and in response to a request by any representative of the Commission, the derivatives clearing organization shall, promptly and in the form specified, make the requested books and records available and provide them directly to Commission representatives.

(6) *Representation of good regulatory standing.* On an annual basis, within 60 days following the end of its fiscal year, a derivatives clearing organization shall request and the Commission must receive from a home country regulator a written representation that the derivatives clearing organization is in good regulatory standing.

(7) *Other conditions.* The Commission may condition compliance with this subpart on any other facts and circumstances it deems relevant.

(c) *General reporting requirements.* (1) A derivatives clearing organization shall provide to the Commission the information specified in this paragraph and any other information that the Commission deems necessary, including, but not limited to, information for the purpose of the Commission evaluating the continued eligibility of the derivatives clearing organization for compliance with this subpart, reviewing compliance by the derivatives clearing organization with any conditions of its registration, or conducting oversight of U.S. clearing members, and the swaps that are cleared by such persons through the derivatives clearing organization. Information provided to the Commission under this paragraph shall be submitted in accordance with § 39.19(b).

(2) Each derivatives clearing organization shall provide to the Commission the following information:

(i) A report compiled as of the end of each trading day and submitted to the Commission by 10 a.m. U.S. central time on the following business day, containing with respect to swaps:

(A) Total initial margin requirements for all clearing members;

(B) Initial margin requirements and initial margin on deposit for each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account; and

(C) Daily variation margin, separately listing the mark-to-market amount collected from or paid to each U.S. clearing member, by house origin and by each customer origin, and by each individual customer account.

(ii) A report compiled as of the last day of each fiscal quarter of the derivatives clearing organization and submitted to the Commission no later than 17 business days after the end of the derivatives clearing organization's fiscal quarter, containing a list of U.S. clearing members, with respect to the clearing of swaps, as of the last day of the fiscal quarter.

(iii) Prompt notice regarding any change in the home country regulatory regime;

(iv) As available to the derivatives clearing organization, any examination report or examination findings by a home country regulator, and notify the Commission within five business days after it becomes aware of the commencement of any enforcement or disciplinary action or investigation by a home country regulator;

(v) Immediate notice of any change with respect to the derivatives clearing organization's licensure, registration, or other authorization to act as a derivatives clearing organization in its home country;

(vi) In the event of a default by a clearing member, with such event of default determined in accordance with the rules of the derivatives clearing organization, immediate notice of the default including the amount of the clearing member's financial obligation; *provided, however,* if the defaulting clearing member is a U.S. clearing member, the notice shall also include the name of the U.S. clearing member and a list of the positions held by the U.S. clearing member; and

(vii) Notice of action taken against a U.S. clearing member by a derivatives clearing organization, no later than two business days after the derivatives clearing organization takes such action against a U.S. clearing member.

(d) *Modification of registration upon Commission initiative.* (1) The Commission may, in its discretion and upon its own initiative, modify the terms and conditions of an order of registration subject to compliance with this subpart if the Commission determines that there are changes to or omissions in facts or circumstances pursuant to which the order was issued, or that any of the terms and conditions of its order have not been met, including, but not limited to, the requirement that:

(i) Compliance with the derivatives clearing organization's home country regulatory regime satisfies the core principles set forth in section 5b(c)(2) of the Act;

(ii) The derivatives clearing organization is in good regulatory standing in its home country; or

(iii) The derivatives clearing organization does not pose substantial risk to the U.S. financial system.

(2) The Commission shall provide written notification to a derivatives

clearing organization that it is considering whether to modify an order of registration pursuant to this paragraph and the basis for that consideration.

(3) The derivatives clearing organization may respond to the notification in writing no later than 30 business days following receipt of the notification, or at such later time as the Commission permits in writing.

(4) Following receipt of a response from the derivatives clearing organization, or after expiration of the time permitted for a response, the Commission may:

(i) Issue an order requiring the derivatives clearing organization to comply with all requirements applicable to derivatives clearing organizations in the Act and this chapter, effective as of a date to be specified therein. The specified date shall be intended to provide the derivatives clearing organization with a reasonable amount of time to come into compliance with the Act and Commission regulations or request a vacation of registration in accordance with § 39.3(f);

(ii) Issue an amended order of registration that modifies the terms and conditions of the order; or

(iii) Provide written notification to the derivatives clearing organization that the order of registration will remain in effect without modification to its terms and conditions.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

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

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

■ 9. Amend § 140.94 as follows:
■ a. Revise paragraph (c) introductory text and paragraph (c)(1);
■ b. Add and reserve paragraph (c)(14); and
■ c. Add paragraph (c)(15).

The revisions and addition read as follows:

§ 140.94 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Clearing and Risk.

* * * * *

(c) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Clearing and Risk and to such members of the Commission's staff acting under his or her direction as he or she may designate from time to time:

(1) The authority to review applications for registration as a derivatives clearing organization filed with the Commission under § 39.3(a)(1) of this chapter, to determine that an application is materially complete pursuant to § 39.3(a)(2) of this chapter, to request additional information in support of an application pursuant to § 39.3(a)(4) of this chapter, to extend the review period for an application pursuant to § 39.3(a)(7) of this chapter, to stay the running of the 180-day review period if an application is incomplete pursuant to § 39.3(b)(1) of this chapter, to review requests for amendments to orders of registration filed with the Commission under § 39.3(d)(1) of this chapter, to request additional information in support of a request for an amendment to an order of registration pursuant to § 39.3(d)(2) of this chapter, and to request additional information in support of a rule submission pursuant to § 39.3(g)(3) of this chapter;

* * * * *

(15) All functions reserved to the Commission in § 39.51 of this chapter, except for the authority to:

(i) Grant registration under § 39.51(a) of this chapter;

(ii) Prescribe conditions to registration under § 39.51(b) of this chapter; and

(iii) Modify registration under § 39.51(d)(4) of this chapter.

* * * * *

Issued in Washington, DC, on September 22, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations—Commission Voting Summary, Chairman's Statement, Commissioners' Statements, and Regulatory Compliance Demonstration for an EU-Based Applicant for Registration Subject to Compliance With the Core Principles Applicable to Derivatives Clearing Organizations in Accordance With Subpart D of Part 39

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Support of Chairman Heath P. Tarbert

Nations have borders, but markets rarely do. That is certainly the case with the global derivatives markets.

For more than a century, U.S. derivatives markets have provided hedging and price discovery opportunities not only for Americans but also to individuals and businesses from abroad. In the 21st century, these markets involve participants domiciled in the Americas, Europe, Asia and elsewhere each and every day. And the clearinghouses that provide the credit risk management services for our exchanges have members and ultimate customers from around the world. The same is true for clearinghouses based in, for example, Europe. So the question that has naturally arisen is how the home regulator of the clearinghouse—which in the United States we refer to as a derivatives clearing organization (DCO)—should work with regulators in home jurisdictions of the DCO's members and customers.

When it comes to international regulatory comity, I find the concept of the ''categorical imperative'' of the great philosopher Immanuel Kant instructive.[1] Basically, Kant asks us to consider what would happen if everyone was bound by the same regulation—that is, we should take a particular obligation (imperative) and make it universal (categorical). If the result is chaos, then it is probably not a good regulation. Therefore, if every jurisdiction mandated that its own detailed, domestic DCO regulations applied to every foreign DCO that accepted its members or customers from that domestic jurisdiction, the result would likely be a mishmash of duplicative or contradictory regulations at best. At worst, the result would be market fragmentation, because DCOs might not accept members or customers from certain jurisdictions.[2] Neither result is good for the integrity, resilience, and vibrancy of global derivatives markets. Consequently, such an approach cannot be considered sound regulation.

Today we are finalizing a rule that meets the categorical imperative—a rule for non-U.S. DCOs that we would hope foreign jurisdictions would impose on U.S.DCOs in return. Specifically, I am pleased to support today's final rule for Registration with Alternative Compliance for Non-U.S. DCOs under Parts 39 and 140 of our regulations. This rule is a significant step in building an effective, efficient and cooperative international regulatory framework for the oversight of DCOs operating in the international derivatives markets. The alternative compliance rule takes a principles-based approach, and also reflects deference in the form of international regulatory cooperation. The rule recognizes that certain foreign regulatory systems can mirror the requirements of the CFTC's Core Principles for DCOs, but not necessarily all our detailed rules implementing those Core

[1] ''Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.'' Immanuel Kant, Grounding for the Metaphysics of Morals (1785) [1993], translated by James W. Ellington (3rd ed.).

[2] *See* CFTC Chairman J. Christopher Giancarlo, Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018), at 34 (noting that ''overlapping regulation and supervision create inefficiencies that limit the ability and increase the costs of U.S. persons accessing non-U.S. CCPs and hamper the growth of the global economy''), available at *https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf*.

Principles. Provided that a foreign regulatory system produces similar outcomes to the CFTC's Core Principles, it makes sense to afford it flexibility in how to do it. The rule acknowledges that, while a foreign jurisdiction may take a different route, it can still reach the same endpoint.

In terms of the particulars, the final rule allows a DCO organized outside the United States to comply with our Core Principles through compliance with its home country's regulatory regime, provided:

1. The CFTC determines that compliance by the DCO with its home country regulatory regime constitutes compliance with the Core Principles set forth in section 5b(c)(2) of the Act;

2. The DCO is in good regulatory standing in its home jurisdiction;

3. The DCO does not pose a substantial risk to the U.S. financial system; and

4. A memorandum of understanding or similar arrangement satisfactory to the CFTC is in effect with the DCO's home country regulator.

As we vote to adopt this rule today, our approach is already bearing fruit. I am pleased to note that the European Union has finalized its Delegated Acts addressing EU oversight of DCOs domiciled abroad. The Delegated Acts take a similar approach as does our final rule,[3] insofar as they allow non-EU clearinghouses to meet EU requirements by following their home jurisdiction's rules if the EU determines those rules are designed to have equivalent outcomes. In short, both the United States and European Union are recognizing our respective national borders without being unduly confined by them.

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

Today's final rule providing for registration with alternative compliance for non-U.S. derivatives clearing organizations (DCOs) is a significant milestone in the CFTC's policy of deferring to foreign regulatory counterparts that have taken a serious and committed approach, similar to the CFTC's, to adopting the swaps reforms called for by the 2009 G20 Summit in Pittsburgh and championed by important international bodies like the International Organization of Securities Commissions (IOSCO) and the Financial Stability Board (FSB). Like the CFTC, several foreign regulatory authorities have issued numerous regulations over the past decade regulating the swaps markets at clearinghouses, exchanges, and dealers.[1] Specific to CCP oversight, numerous jurisdictions, including the CFTC, have implemented the CPMI–IOSCO Principles for Financial Market Infrastructures (PFMIs).[2] Throughout my tenure at the Commission, I have stated that deference to our foreign counterparts is a necessary way to reduce compliance burdens for industry and to conserve the Commission's precious resources.[3] Previous CFTC Chairman Giancarlo promoted a workable deference policy, as evidenced by the publication, during his chairmanship, of the proposed version of the final rule before the Commission today.[4] I am pleased to see Chairman Tarbert continue this policy, exemplified not only with this final rule, but also with the final rule published by this Commission in July, which sets forth the cross-border application of many of the Commission's regulations for swap dealers (SDs).[5]

The alternative registration rule for non-U.S. DCOs will prevent non-U.S. DCOs registered with the CFTC from being subject to unnecessary duplicative regulation by both the CFTC and their home country regulator that has issued comparable rules. The rule will permit a non-U.S. DCOs that does not pose ''substantial risk to the U.S. financial system'' to be registered with the CFTC but comply with regulations issued by its home country regulator instead of with CFTC regulations, with the limited exception of certain CFTC customer protection and swap data reporting requirements. The rule recognizes that non-U.S. regulators have a substantial regulatory interest in supervising the DCOs located in their home jurisdictions and appropriately defers to their oversight when compliance with the home country regulatory regime would constitute compliance with DCO core principles. I note that this rule is consistent with, and an expansion of, the CFTC's 2016 Equivalence Agreement with the European Union (E.U.), pursuant to which the CFTC granted substituted compliance to dually-registered DCOs based in the E.U.[6]

While the alternative DCO registration rule would provide for a deference-based approach for certain clearinghouses organized abroad, it would not be available to a non-U.S. clearinghouse posing ''substantial risk to the U.S. financial system.'' The final rule, like the proposal which I supported, defines this term according to two simple criteria: (i) The foreign DCO holds 20 percent or more of the required initial margin U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at that foreign DCO is attributable to U.S. clearing members.[7] I believe this two-prong test correctly assesses the DCO's focus on U.S. firms and impact on the U.S. marketplace.

In voting to adopt the alternative DCO registration final rule, I recognize that E.U. authorities have recently adopted regulations for clearinghouses located outside of the E.U. that access the E.U. market, which are in the spirit of the 2016 agreement on CCPs between the CFTC and the European Commission.[8] These regulations, issued by the European Commission in July, will only require a U.S. CCP to be generally subject to E.U. regulation and supervision (as a ''tier 2 CCP'') if its E.U. presence exceeds certain clear thresholds.[9] I am pleased that these regulations have now been agreed to by the European Council and by the European Parliament. The adoption of these regulations represents a marked shift in E.U. policy from the one that existed at the beginning of my term as CFTC Commissioner. In March of 2018, I stated that I would neither support the CFTC granting additional equivalence determinations within the E.U., nor would I support any relief requested by E.U. authorities, until the E.U. recommitted to honoring its 2016 agreements with the CFTC on CCP oversight.[10] That agreement had been in jeopardy since the E.U.'s issuance of a revised European Market Infrastructure Regulation (''EMIR 2.2'') in 2017, which raised the possibility of E.U. authorities directly supervising US clearinghouses and requiring them to comply with EMIR. I am very pleased to see this shift in E.U. policy, which I already recognized in July when voting to expand the Commission's exemption registration for E.U.-recognized swap trading platforms for additional platforms in several E.U. member states.[11]

In conclusion, I look forward to the CFTC continuing to work cooperatively with our E.U. counterparts in the crucial area of CCP

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[3] European Commission C(2020)4892: Commission delegated regulation supplementing regulation (EU) No 648/2012 with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third-country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States.

[1] *See, e.g.,* FSB OTC Derivatives Market Reforms: 2019 Progress Report on Implementation (Oct. 15, 2019), *https://www.fsb.org/wp-content/uploads/P280519-2.pdf* and FSB, Implementation and Effects of the G20 Financial Regulatory Reforms: Fifth Annual Report (Oct. 16, 2019), *https://www.fsb.org/2019/10/implementation-and-effects-of-the-g20-financial-regulatory-reforms-fifth-annual-report/.*

[2] PFMI Implementation Database, *https://www.bis.org/pfmi/index.htm.*

[3] *See, e.g.,* Remarks of CFTC Commissioner Brian Quintenz at 2019 ISDA Annual Japan Conference, ''Significant's Significance'' (Oct. 25, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz20.*

[4] Registration with Alternative Compliance for Non-U.S. DCOs, 84 FR 34819 (July 19, 2019).

[5] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and MSPs, 85 FR 56924 (Sept. 14, 2020).

[6] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (March 22, 2016).

[7] Regulation 39.2.

[8] Joint Statement from CFTC Chairman Timothy Massad and European Commissioner Jonathan Hill, CFTC and the European Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), *https://www.cftc.gov/PressRoom/PressReleases/pr7342-16.*

[9] European Commission Delegated Regulation (''Delegated Acts''), dated July 14, 2020, supplementing Regulation (EU) No. 648/2012 of the European Parliament . . . with regard to the criteria that ESMA should take into account to determine whether a CCP established in a third-country is systemically important . . . for the financial stability of the Union. . . . , *https://webgate.ec.europa.eu/regdel/#/delegatedActs/1382.*

[10] Keynote Address of Commissioner Brian Quintenz before FIA Annual Meeting, Boca Raton, Florida (March 14, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz9.*

[11] Supporting Statement of Commissioner Brian Quintenz Regarding the Amendment to the Commission's Order Exempting EU Swap Trading Facilities from SEF Registration (July 23, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement072320b.*

oversight, in a manner that eliminates unnecessary duplicative burdens at both the regulator and registered entity.

Appendix 4—Statement of Support of Commissioner Rostin Behnam

I support today's final rule permitting derivatives clearing organizations (''DCOs'') organized outside of the United States (''non-U.S. DCOs'') that the CFTC determines do not pose substantial risk to the U.S. financial system to register with the Commission and comply with the core principles applicable to DCOs (''Core Principles'') set forth in the Commodity Exchange Act (''CEA'') through compliance with their home country regulatory regime. This registration category establishes a new model for regulatory deference aimed at reducing regulatory burdens and ongoing compliance costs for non-U.S. clearing organizations.

As we move forward in executing this new framework, the Commission's evaluation of the suitability of any particular non-U.S. DCO and the comparability of its home country's regulatory regime to the Core Principles will be closely watched and analyzed by regulatory and supervisory bodies as well as market participants around the world. To the extent the Commission is codifying a definition for ''substantial risk to the U.S. financial system'' that commingles a bright-line test with autonomous agency discretion, its aptitude for exercising a policy rooted in relationships aimed at leveling the global playing field for all, with favoritism towards none will be routinely tested. As demand for U.S. customer swap clearing evolves and risk neither contemplated nor captured by the dual 20 percent criteria of the substantial risk threshold emerges, the CFTC's commitments to transparency, ongoing monitoring and market surveillance, preservation of customer protections, and coordination with home country regulators must not fall by the wayside.

I am encouraged by the Commission's efforts to take a leading role in injecting greater international coordination and mutual respect and deference into the supervision of DCOs, the majority of which operate on a cross-border basis. Inasmuch as the CFTC's registration of non-U.S. DCOs with alternative compliance is an expression of the CFTC's efforts to engage foreign regulators in establishing reciprocity regarding DCO supervision and regulatory oversight, delivering on comity should not overtake fulfilling the core purposes under the CEA, particularly in regard to the avoidance of systemic risk and protection of market participants. The decisions we make as a Commission, whether driven by policy, statute, regulatory agenda—or even budget—impact and alter risk profiles and interdependencies within the markets we oversee directly and in which U.S. persons participate. Our markets facilitate both the creation and management of risks in an interconnected web of systems and operations. It is critical that in all of our undertakings, we consider how our actions alter the landscape and ensure to the greatest extent possible that we build end-to-end resilience into the overall financial system.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support today's final rule permitting derivative clearing organizations (''DCOs'') organized outside of the United States (''non-U.S. DCOs'') to register with the Commission and provide clearing to U.S. customers, yet comply with certain DCO Core Principles through their home country regulatory regime. This final rule maintains the Commission's authority to protect U.S. customers and markets, while also recognizing the interests of foreign regulators in supervising DCOs located in their home jurisdictions. It will foster U.S. market participants' access to foreign clearing organizations while maintaining key customer protections.

This rule is being adopted in furtherance of the Commission's work with our international colleagues to, where appropriate, mutually recognize third-country central counterparties. International comity was a key pillar of the 2009 G20 Pittsburgh Summit and effective cooperation among financial regulators bolsters the safety and utility of our global derivatives markets. Central clearing is critical to managing risk throughout our financial markets, but can only be fully achieved where international regulators work together toward a common goal. This rule is consistent with the spirit of the CFTC–EU Common Approach [1] regarding requirements for central counterparties, and builds upon the EU equivalence determination [2] and the CFTC comparability determination,[3] issued in connection with the Common Approach.

For a non-U.S. DCO that would like to clear only swaps for U.S. persons and does not pose ''substantial risk to the U.S. financial system,'' the final rule would provide two options for CFTC registration. The non-U.S. DCO may apply for DCO registration through the normal course and be subject to all Commission regulations applicable to DCOs. In the alternative, if the non-U.S. DCO is in good regulatory standing with its home country, it may apply for registration by relying in large part on its home country regime, provided it can demonstrate that the regime satisfies certain DCO Core Principles. The non-U.S. DCO will still be required to comply with CFTC regulations that provide critical protections to U.S. customers and markets. The home country regulator must have a memorandum of understanding with the Commission that includes provisions for information sharing and cooperation, so that the Commission may evaluate initial and continued eligibility for registration. The goal is to encourage registration with the Commission, which enhances our oversight and maintains certain important safeguards, while providing greater clearing options for U.S. market participants.

Non-U.S. DCOs subject to registration under this alternative path will still need to clear swaps for U.S. customers through registered futures commission merchants. Accordingly, they will be required to fully comply with the requirements under Commission Regulation 39.15 covering treatment of funds, swap data reporting requirements in part 45 of the Commission's regulations, certain ongoing and event-specific reporting requirements, and the segregation requirements of Commodity Exchange Act (''CEA'') section 4d(f)(2) and related regulations. In addition, a non-U.S. DCO is required to comply with CEA section 39.51(c)(2), which requires it to provide notice to the Commission upon the occurrence of certain important regulatory events. These events include any change in its home country regime or registration status, an examination report or notice of enforcement action issued by a home country regulator, the default of a clearing member, or any action taken by the non-U.S. DCO against any U.S. clearing member.

Only non-U.S. DCOs that do not pose substantial risk to the U.S. financial system will be eligible for registration with alternative compliance. A non-U.S. DCO that poses substantial risk to the U.S. financial system will still be required to comply with the CEA and all Commission regulations applicable to DCOs, including all of subparts A and B of Part 39, in the same manner as a domestic DCO.

The final rule defines ''substantial risk'' to mean that (i) the non-U.S. DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at the non-U.S. DCO is attributable to U.S. clearing members. Despite being characterized as a risk-based test, this is in fact more in the nature of an activity-based test. I believe an activity-based test is appropriate as a proxy in this instance, as it represents a transparent, objective, and relatively easy-to-measure benchmark. The 20/20 test, however, may not always accurately measure when the risk to the U.S. financial system presented by the non-U.S. DCO becomes ''substantial.'' Accordingly, the Commission will retain the discretion to evaluate other factors in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system.

I thank the staff of the Division of Clearing and Risk for their work in finalizing this rule. I also would like to recognize the staff in the Office of International Affairs, the Chairman's office, and the New York regional office for their hard and productive work over the past few years with our international counterparts. These efforts to promote harmonization and mutual recognition have provided the foundation for today's rulemaking.

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[1] The U.S. Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs (Feb. 10, 2016), at *https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016.*

[2] *See* European Commission adopts equivalence decision for CCPs in USA (Mar. 15, 2016), at *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_807.*

[3] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

Appendix 6—Regulatory Compliance Demonstration for an EU-Based Applicant for Registration Subject to Compliance With the Core Principles Applicable to Derivatives Clearing Organizations in Accordance With Subpart D of Part 39

I. Introduction

Section 5b(a) of the Commodity Exchange Act (CEA) provides that a clearing organization may not ''perform the functions of a derivatives clearing organization'' (DCO) with respect to futures or swaps unless the clearing organization is registered with the Commission.[1] The CEA further requires that, to register and maintain registration as a DCO, a DCO must comply with each of the core principles applicable to DCOs set forth in the CEA (DCO Core Principles) and any requirement that the Commission imposes by rule or regulation.[2] The Commission adopted the regulations in subpart B of part 39 of the Commission's regulations (part 39) to implement the DCO Core Principles.[3] Subpart B of part 39 sets forth most of the requirements applicable to DCOs.

The Commission has adopted amendments to its regulations that will permit qualifying DCOs organized outside of the United States to be registered with the Commission yet comply with the DCO Core Principles through compliance with their home country regulatory regime, subject to certain conditions and limitations. Under this regime, an option now available to non-U.S. DCOs that clear only swaps for U.S. persons and meet other qualifying criteria, a non-U.S. DCO may demonstrate compliance with the DCO Core Principles by complying with the applicable legal requirements in its home country in lieu of many of the provisions of part 39.

To provide a meaningful framework for deference to home country regulators, the Commission has determined to limit the universe of applicable regulations that it imposes upon non-U.S. DCOs in this context to those that provide critical protections, such as those related to customer protection. Registered DCOs subject to compliance with the DCO Core Principles in accordance with subpart D of part 39 (subpart D compliance) are required by the CEA to comply with each DCO Core Principle, and other specified requirements—but not to all of the provisions set forth in part 39—in order to be registered and to maintain registration. In all cases, these DCOs must still comply with home country requirements that constitute compliance with the DCO Core Principles, which the Commission's regulations were intended to implement.

A DCO subject to subpart D compliance remains a registered DCO pursuant to section 5b(a) of the CEA. A non-U.S. DCO would be eligible for this subpart D compliance regime if, among other things, the Commission determines that the DCO's compliance with its home country regulatory regime would satisfy the DCO Core Principles.[4] As discussed in the release, an applicant for registration subject to subpart D compliance, or a currently registered DCO seeking to avail itself of this regime, would be required to file only certain exhibits of Form DCO, including a regulatory compliance chart in which the applicant would identify the applicable legal requirements[5] in its home country that correspond with each DCO Core Principle and explain how the applicant satisfies those home country requirements. If the application is approved by the Commission, the DCO would be permitted to comply with its home country regulatory regime rather than part 39, with certain exceptions and subject to potential conditions that the Commission may determine appropriate.[6]

Central counterparties (CCPs) authorized in the European Union (EU) are subject to the legal requirements set forth in the European Market Infrastructure Regulation (EMIR),[7] the Regulatory Technical Standards (RTS), and the Settlement Finality Directive[8] (collectively, the EMIR Framework). The EMIR Framework establishes uniform legal requirements for EU CCPs that, as EU-level legislation, have an immediate, binding, and direct effect in all EU member states without the need for additional action by national authorities.[9] The European Parliament and the European Council passed EMIR on July 4, 2012, and it entered into force on August 16, 2012. The relevant technical standards for CCPs referenced herein include the RTS for CCPs (RTS–CCP), which generally entered into force on March 15, 2013.[10]

In 2016, the Commission undertook a review of the legal requirements applicable to CCPs authorized in the EU as compared with the Commission's regulations (EU Comparability Determination).[11] The EU Comparability Determination compared part 39 regulations with EU regulations and identified those instances where the requirements are so similar that compliance with the part 39 regulation(s) would constitute compliance with the EU regulation(s) as well. Unless any of the regulations included in the determination have been amended or repealed, the Commission's determination stands. Given the Commission's previous review in the EU Comparability Determination, the Commission has further endeavored to identify the legal requirements in the EU that appear to correspond to the DCO Core Principles.[12]

Since the publication of the Commission's EU Comparability Determination covering the EMIR Framework, both the U.S. and EU CCP supervisory frameworks have continued to evolve. On October 23, 2019, the European Parliament and the European Council adopted a substantial set of amendments to EMIR as to the authorization of CCPs in the EU and requirements for the recognition of non-EU (or third country) CCPs to operate in the EU (EMIR 2.2).[13] EMIR 2.2 entered into force on January 1, 2020. In establishing a more deferential framework through the subpart D compliance regime, and in recognition of the decades of supervisory experience the Commission has regarding non-U.S. DCOs (including with respect to compliance with the Commission's regulations and their applicable home country regulations), the Commission sees merit to this demonstration to provide further transparency and clarity to market participants, including DCOs that are dually registered with the Commission and authorized by the European Securities and Markets Authority.

The analysis set forth below presents the DCO Core Principles and the corresponding provisions of the EMIR Framework. The descriptions provided herein of the DCO Core Principles and the corresponding provisions of the EMIR Framework are summaries of the actual provisions. Statements of regulatory objectives are general in nature and provided only for purposes of this Appendix. Likewise, the discussion below identifies provisions of the EMIR Framework that correspond to the DCO Core Principles. There may be aspects that are not cited, including particular features

[1] 7 U.S.C. 7a–1(a).

[2] 7 U.S.C. 7a–1(c)(2)(A)(i).

[3] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011).

[4] The Commission notes that the home country regulatory regime would not need to satisfy the Commission's regulations under part 39.

[5] Home country ''legal requirements'' would include those standards or other requirements that are legally binding in the applicant's home country.

[6] Because a DCO subject to subpart D compliance would clear swaps for customers through registered futures commission merchants, the DCO would be required to fully comply with the Commission's customer protection requirements, including those under § 39.15 covering treatment of funds, as well as the swap data reporting requirements in part 45 of the Commission's regulations.

[7] Regulation (EU) No 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories of 4 July 2012.

[8] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

[9] *See* EMIR (stating that ''[t]his Regulation shall be binding in its entirety and directly applicable in all Member States.'').

[10] Commission Delegated Regulation No. 153/2013 with regard to regulatory technical standards on requirements for central counterparties. For purposes of this Appendix, the Commission considered only those EMIR Framework provisions published as of the date of this Appendix.

[11] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016).

[12] The Commission offers this as a potential aid to guide applicants in completing the regulatory compliance chart as part of an application for registration subject to subpart D compliance. While the charts, provided in this Appendix as non-binding guidance that does not create new rights or obligations, may be used to assist applicants in identifying and citing to EU legal requirements that correspond to specific DCO Core Principles, applicants are nevertheless responsible for completing another compulsory element of the regulatory compliance chart, *i.e.,* explaining how they satisfy each requirement. Applicants may submit the required regulatory compliance chart using a different format.

[13] Regulation (EU) No 2019/2099, 23 Oct. 2019, of the European Parliament and the Council, amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, 2019 O.J. (L322) 1.

that may not be comparable, but that may not affect the overall determination with respect to that provision or set of provisions. Furthermore, the Commission relied on the plain language of the EMIR Framework; the Commission recognizes that there may be interpretations of the EMIR Framework or other applicable laws that could impact the Commission's determination. To the extent that the EMIR Framework lacks legal requirements that correspond to certain DCO Core Principles, as identified herein, the Commission may, in its discretion, grant or amend registration subject to conditions that would address those DCO Core Principles.

II. Regulatory Compliance Demonstration

A. Compliance (DCO Core Principle A)

DCO Core Principle A requires a DCO to comply with each DCO Core Principle and any requirement that the Commission may impose by rule or regulation, provided that a DCO shall have reasonable discretion in establishing the manner by which it complies with each DCO Core Principle. The Commission adopted the requirements in § 39.10 to implement DCO Core Principle A.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle A.

EMIR, Art. 26(2): A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with EMIR, including compliance of its managers and employees with all the provisions of EMIR.

RTS–CCP, Art. 5: A CCP shall establish, implement, and maintain adequate policies and procedures designed to detect any risk of failure by the CCP and its employees to comply with its obligations under this RTS and EMIR, as well as the associated risks, and put in place adequate measures and procedures designed to minimize such risk.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle A.

TABLE A—COMPLIANCE

Subject area	DCO core principle	EMIR framework
Compliance	A	EMIR, Art. 26(2); RTS–CCP, Art. 5.

B. Financial Resources (DCO Core Principle B)

DCO Core Principle B requires a DCO to: (1) Have adequate financial, operational, and managerial resources to discharge each of its responsibilities; and (2) possess financial resources that, at a minimum, exceed the total amount that would: (a) Enable the DCO to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for the DCO in extreme but plausible market conditions; and (b) enable the DCO to cover its operating costs for a period of one year, as calculated on a rolling basis. The Commission adopted the requirements in § 39.11 to implement DCO Core Principle B.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle B.

EMIR, Art. 43: At all times, a CCP shall maintain sufficient prefunded available financial resources to enable the CCP to withstand the default of at least the two clearing members to which it has the largest exposure under extreme but plausible market conditions.

EMIR, Art. 16(2): A CCP's capital, including retained earnings and reserves, shall be proportionate to the risk stemming from the activities of the CCP.

EMIR, Art. 44(1): At all times, a CCP shall have access to adequate liquidity to perform its services and activities and, on a daily basis, shall measure its potential liquidity needs.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle B, as they set standards to ensure that DCOs have adequate financial resources. These standards seek to ensure that DCOs can meet their financial obligations to market participants, thus contributing to the financial integrity of the derivatives market as a whole.

TABLE B—FINANCIAL RESOURCES

Subject area	DCO core principle	EMIR framework
Default financial resources	B	EMIR, Art. 43.
General business risks		EMIR, Art. 16(2).
Liquidity of financial resources		EMIR, Art. 44(1).

C. Participant and Product Eligibility (DCO Core Principle C)

DCO Core Principle C requires a DCO to: (1) Establish appropriate admission and continuing eligibility standards (including sufficient financial resources and operational capacity to meet obligations arising from participation in the DCO) for members of, and participants in, the DCO; (2) establish appropriate standards for determining eligibility of agreements, contracts, or transactions submitted to the DCO for clearing; and (3) establish and implement procedures to verify, on an ongoing basis, compliance with the DCO's participation and membership requirements, which must be objective, be publicly disclosed, and permit fair and open access. The Commission adopted the requirements in § 39.12 to implement DCO Core Principle C.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle C.

EMIR, Art. 37(1): A CCP shall establish, where relevant per type of product cleared, the categories of admissible clearing members and the admission criteria, upon the advice of the risk committee. Such criteria shall be non-discriminatory, transparent, and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligations arising from participation in a CCP. Criteria that restrict access shall be permitted only to the extent that their objective is to control the risk for the CCP.

EMIR, Art. 37(2): A CCP shall ensure that the application of the criteria referred to in Article 37(1) of EMIR is met on an ongoing basis and shall have timely access to the information relevant for such assessment. A CCP shall conduct, at least once a year, a comprehensive review of compliance with this Article by its clearing members.

EMIR, Art. 37(3): Clearing members that clear transactions on behalf of their clients shall have the necessary additional financial resources and operational capacity to perform this activity. The CCP's rules for clearing members shall allow it to gather relevant basic information to identify, monitor, and manage relevant concentrations of risk relating to the provision of services to clients. Clearing members shall, upon request, inform the CCP about the criteria and arrangements they adopt to allow their clients to access the services of the CCP. Responsibility for ensuring that clients comply with their obligations shall remain with clearing members.

EMIR, Art. 37(4): A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the criteria referred to in Article 37(1) of EMIR.

EMIR, Art. 37(5): A CCP may only deny access to clearing members meeting the criteria referred to in Article 37(1) of EMIR where duly justified in writing and based on a comprehensive risk analysis.

EMIR, Art. 7(1): A CCP that has been authorized to clear over-the-counter derivatives contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, including as it relates to collateral requirements and fees related to access, regardless of the trading venue. A CCP may require that a trading venue comply with the operational and technical requirements established by the CCP, including the risk-management requirements.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would substantially satisfy DCO Core Principle C. While EMIR Art. 7(1) sets forth a standard for eligibility of transactions and permits the CCP to require that the trading venue offering the products meet requirements that the CCP has established, the EMIR Framework does not specifically require a CCP to establish standards for determining eligibility of agreements, contracts, or transactions submitted to it for clearing. Therefore, an applicant would be required to explain how it will satisfy this aspect of DCO Core Principle C nevertheless.

TABLE C—PARTICIPANT AND PRODUCT ELIGIBILITY

Subject area	DCO core principle	EMIR framework
Eligibility standards and ongoing requirements for members and participants.	C	EMIR, Art. 37(1)–(5).
Standards for determining eligibility of contracts submitted for clearing.		EMIR, Art. 7(1).

D. Risk Management (DCO Core Principle D)

DCO Core Principle D requires a DCO to: (1) Ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures; (2) measure and monitor its credit exposures to each clearing member daily; (3) through margin requirements and other risk control mechanisms, limit its exposure to potential losses from a clearing member default; (4) require sufficient margin from its clearing members to cover potential exposures in normal market conditions; and (5) use risk-based models and parameters in setting margin requirements and review them on a regular basis. The Commission adopted the requirements in § 39.13 to implement DCO Core Principle D.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle D.

RTS–CCP, Art. 4(1): A CCP shall have a sound framework for the comprehensive management of all material risks to which it is or may be exposed. A CCP shall establish documented policies, procedures, and systems that identify, measure, monitor, and manage such risks. In establishing risk management policies, procedures, and systems, a CCP shall structure them in a way to ensure that clearing members properly manage and contain the risks they pose to the CCP.

RTS–CCP, Art. 4(3): A CCP shall develop appropriate risk management tools to be in a position to manage and report on all relevant risks.

EMIR, Art. 40: A CCP shall measure and assess its liquidity and credit exposures to each clearing member on a near to real-time basis.

RTS–CCP, Art. 4(5): A CCP shall employ robust information and risk-control systems to provide the CCP and, where appropriate, its clearing members and, where possible, clients with the capacity to obtain timely information and to apply risk management policies and procedures appropriately. These systems shall ensure at least that credit and liquidity exposures are monitored continuously at the CCP level as well as at the clearing member level and, to the extent practicable, at the client level.

EMIR, Art. 41(1): A CCP shall impose, call, and collect margins to limit its credit exposures from its clearing members. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions taking into account any potentially procyclical effects of such revisions.

EMIR, Art. 48(2): A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose non-defaulting clearing members to losses that they cannot anticipate or control.

EMIR, Art. 41(4): A CCP shall call and collect margins that are adequate to cover the risk stemming from the positions registered in each account kept in accordance with Article 39 of EMIR with respect to specific financial instruments.

EMIR, Art. 41(2): A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity, and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority.

EMIR, Art. 49(1): A CCP shall regularly review the models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements, and other risk control mechanisms. It shall subject the models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions and shall perform back tests to assess the reliability of the methodology adopted.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle D. Both regimes require that a DCO have a comprehensive framework for risk management, the ability to measure and monitor its credit exposures, mechanisms to limit its potential exposure to clearing member default, sufficient margin coverage, and use of risk-based models that are regularly reviewed.

TABLE D—RISK MANAGEMENT

Subject area	DCO core principle	EMIR framework
Management of risks	D	RTS–CCP, Art. 4(1), 4(3).
Monitoring of credit exposures		EMIR, Art. 40; RTS–CCP, Art. 4(5).
Limiting exposure to clearing member default		EMIR, Art. 41(1), 41(4), 48(2).
Sufficiency of margin requirements		EMIR, Art. 41(4).
Use of risk-based models		EMIR, Art. 41(2), 49(1).

E. Settlement Procedures (DCO Core Principle E)

DCO Core Principle E requires a DCO to: (1) Complete money settlements on a timely basis, but not less frequently than once each business day; (2) employ money settlement arrangements to eliminate or strictly limit the DCO's exposure to settlement bank risks; (3) ensure that money settlements are final when effected; (4) maintain an accurate record of the flow of funds associated with each money settlement; (5) possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other DCO; and (6) regarding physical settlements, establish rules that clearly state the obligations of the DCO with respect to physical deliveries, while ensuring that each risk arising from any such obligation is identified and managed. The Commission adopted the requirements in § 39.14 to implement DCO Core Principle E.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle E.

EMIR, Art. 41(3): A CCP shall call and collect margins on an intraday basis, at least when predefined thresholds are exceeded.

Settlement Finality Directive, Art. 3: Transfer orders used to transfer financial instruments and payments must be finally settled, regardless of whether the sending participant has become insolvent or the transfer orders have been revoked in the meantime.

EMIR, Art. 50(1): A CCP shall, where practical and available, use central bank money to settle its transactions. Where central bank money is not used, steps shall be taken to strictly limit cash settlement risks.

EMIR, Art. 50(3): Where a CCP has an obligation to make or receive deliveries of financial instruments, it shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

RTS–CCP, Art. 4(2): A CCP shall take an integrated and comprehensive view of all relevant risks. These shall include the risks it bears from and poses to settlement banks.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle E. Both regimes require a DCO to have procedures designed to reduce the risk exposure to settlement banks or otherwise attributable to settlement, including through the frequent collection of margin, and require that money settlements are final when effected.

TABLE E—SETTLEMENT PROCEDURES

Subject area	DCO core principle	EMIR framework
Settlement procedures	E	EMIR, Art. 41(3), 50(1), 50(3); RTS–CCP, Art. 4(2).
Settlement finality		Settlement Finality Directive, Art. 3.

F. Treatment of Funds (DCO Core Principle F)

DCO Core Principle F requires a DCO to: (1) Establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets; (2) hold such funds and assets in a manner that would minimize the risk of loss or of delay in the DCO's access to the funds and assets; and (3) hold such funds and assets invested by the DCO in instruments with minimal credit, market, and liquidity risks. The Commission adopted the requirements in § 39.15 to implement DCO Core Principle F.

Unlike other Commission requirements discussed herein, a DCO subject to subpart D compliance would be required to comply with the Commission's customer protection requirements, including DCO Core Principle F and the Commission's regulations thereunder. The EMIR Framework seeks to achieve the same outcome of protecting customers by requiring, for example: That a CCP keep separate records and accounts to enable it to distinguish the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets; [14] that a clearing member keep separate records and accounts that enable it to distinguish its own assets and positions from the assets and positions held for the account of its clients at the CCP; [15] and that a CCP invest its financial resources only in cash or highly liquid financial instruments with minimal market and credit risk.[16] However, because a DCO subject to subpart D compliance would clear swaps for U.S. customers, the DCO would be held to the Commission's customer protection requirements. Therefore, an applicant would not be required to identify the applicable legal requirements in its home country that would satisfy DCO Core Principle F; however, the applicant would be required to explain how it will satisfy DCO Core Principle F and the Commission's regulations thereunder.

G. Default Rules and Procedures (DCO Core Principle G)

DCO Core Principle G requires a DCO to: (1) Have rules and procedures designed to allow for the efficient, fair, and safe management of events when members or participants become insolvent or otherwise default on their obligations to the DCO; (2) clearly state its default procedures; (3) make its default rules publicly available; and (4) ensure that it may take timely action to contain losses and liquidity pressures, and to continue meeting each of its obligations. The Commission adopted the requirements in § 39.16 to implement DCO Core Principle G.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle G.

EMIR, Art. 48(1): A CCP shall have detailed procedures in place to be followed where a clearing member does not comply with the participation requirements of the CCP within the time limit and in accordance with the procedures established by the CCP. The CCP shall set out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP. Those procedures shall be reviewed annually.

EMIR, Art. 48(2): A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses that they cannot anticipate or control.

EMIR, Art. 48(4): A CCP shall verify that its default procedures are enforceable. It shall take all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member.

RTS–CCP, Art. 61(2): A CCP shall make available to the public key aspects of its default procedures, including: (a) The circumstances in which action may be taken; (b) who may take those actions; (c) the scope of the actions which may be taken, including the treatment of both proprietary and client positions, funds and assets; (d) the mechanisms to address a CCP's obligations to non-defaulting clearing members; and (e) the mechanisms to help address the defaulting clearing member's obligations to its clients.

RTS–CCP, Art. 10(1)(b)(i): A CCP shall make its default management procedures available to the public.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle G. Both regimes require a DCO to have procedures to follow in the event of a default and public disclosure of such procedures. These standards seek to ensure that DCOs may take timely action to contain losses and liquidity pressures and to continue meeting their obligations.

[14] EMIR, Art. 39(1).

[15] EMIR, Art. 39(4).

[16] EMIR, Art. 47(1).

TABLE G—DEFAULT RULES AND PROCEDURES

Subject area	DCO core principle	EMIR framework
Default rules and procedures	G	EMIR, Art. 48(1), 48(4); RTS–CCP, Art. 61(2), 10(1)(b)(i).
Ability to contain losses		EMIR, Art. 48(2).

H. Rule Enforcement (DCO Core Principle H)

DCO Core Principle H requires a DCO to: (1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules and for resolution of disputes; (2) have the authority and ability to discipline, limit, suspend, or terminate a clearing member's activities for violations of those rules; and (3) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants. The Commission adopted the requirements in § 39.17 to implement DCO Core Principle H.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle H.

EMIR, Art. 36(2): A CCP shall have accessible, transparent, and fair rules for the prompt handling of complaints.

EMIR, Art. 37(4): A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the CCP's participation requirements.

EMIR, Art. 38(5): A CCP shall publicly disclose any breaches by clearing members of the CCP's participation requirements.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle H. Because participation requirements generally include ongoing compliance with a DCO's rules, both regimes require procedures to discipline clearing members that do not follow the DCO's rules, including through suspension or termination. Both regimes also require a DCO to have adequate dispute resolution mechanisms.

A DCO subject to subpart D compliance would be required to comply with § 39.51(c)(2)(vii), which requires a DCO to provide notice of any action that it has taken against a U.S. clearing member. Therefore, an applicant would not be required to identify the applicable legal requirements in its home country that would satisfy DCO Core Principle H's requirement that a DCO report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants; however, the applicant would be required to explain how it will satisfy § 39.51(c)(2)(vii).

TABLE H—RULE ENFORCEMENT

Subject area	DCO core principle	EMIR framework
Rule enforcement	H	EMIR, Art. 36(2), 37(4), 38(5).

I. System Safeguards (DCO Core Principle I)

DCO Core Principle I requires a DCO to: (1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through appropriate controls, procedures, and automated systems, that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of the DCO's operations and the fulfillment of each of its obligations and responsibilities; and (3) periodically conduct tests to verify that the DCO's backup resources are sufficient to ensure daily processing, clearing, and settlement. The Commission adopted the requirements in § 39.18 to implement DCO Core Principle I.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle I.

EMIR, Art. 26(6): A CCP shall maintain information technology systems adequate to deal with the complexity, variety, and type of services and activities performed so as to ensure high standards of security and the integrity and confidentiality of the information maintained.

RTS–CCP, Art. 9(1): A CCP shall design and ensure that its information technology systems are reliable, secure, and capable of processing the information necessary for the CCP to perform its activities and operations in a safe and efficient manner. The systems shall be designed to deal with the CCP's operational needs and the risks the CCP faces; resilient, including in stressed market conditions; and scalable, if necessary, to process additional information. The CCP shall provide for procedures and capacity planning as well as for sufficient redundant capacity to allow the system to process all remaining transactions before the end of the day in circumstances where a major disruption occurs.

RTS–CCP, Art. 9(2): A CCP must base its information technology systems on internationally recognized technical standards and industry best practices.

RTS–CCP, Art. 9(3): A CCP must maintain a robust information security framework that appropriately manages its information security risk, including policies to protect information from unauthorized disclosure, ensure data accuracy and integrity, and guarantee the availability of the CCP's services.

EMIR, Art. 34(1): A CCP shall establish, implement, and maintain an adequate business continuity policy and disaster recovery plan aimed at ensuring the preservation of its functions, the timely recovery of operations and the fulfillment of the CCP's obligations. Such a plan shall at least allow for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date.

RTS–CCP, Art. 19(1): A CCP shall have in place arrangements to ensure continuity of its critical functions based on disaster scenarios. These arrangements shall at least address the availability of adequate human resources, the maximum downtime of critical functions, and fail over and recovery to a secondary site.

RTS–CCP, Art. 20(1): A CCP shall test and monitor its business continuity policy and disaster recovery plan at regular intervals and after significant modifications or changes to the systems or related functions to ensure the business continuity policy achieves the stated objectives, including the two hour maximum recovery time objective. Tests shall be planned and documented.

RTS–CCP, Art. 20(2): Testing of the business continuity policy and disaster recovery plan shall fulfill the following conditions: (a) Involve scenarios of large scale disasters and switchovers between primary and secondary sites; and (b) include involvement of clearing members, external providers and relevant institutions in the financial infrastructure with which interdependencies have been identified in the business continuity policy.

RTS–CCP, Art. 21(1), (2): A CCP shall regularly review and update its business continuity policy to include all critical functions and the most suitable recovery strategy for them, and shall regularly review and update its disaster recovery plan to include the most suitable recovery strategy for all critical functions.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle I. Requirements under both regimes are intended to ensure that a DCO has appropriate procedures and controls for the reliability, security, and capacity of its automated systems; has a plan for disaster recovery and the ability to resume operations and meet all of its obligations; and conducts tests to verify that the DCO's backup resources are sufficient.

TABLE I—SYSTEM SAFEGUARDS

Subject area	DCO core principle	EMIR framework
Identify and minimize operational risks through appropriate controls, procedures and automated systems.	I	EMIR, Art. 26(6); RTS–CCP, Art. 9(1), 9(2), 9(3).
Emergency procedures, backup facilities, and disaster recovery plan.		EMIR, Art. 34(1); RTS–CCP, Art. 19(1).
Periodic testing of sufficiency of backup resources		RTS–CCP, Art. 20(1), 20(2), 21(1), 21(2).

J. Reporting (DCO Core Principle J)

DCO Core Principle J requires a DCO to provide to the Commission all information necessary for the Commission to conduct oversight of the DCO. The Commission adopted the requirements in § 39.19 to implement DCO Core Principle J.

Relevant EU Laws and Regulations: The following provision of the EMIR Framework appears to correspond to DCO Core Principle J.

RTS–CCP, Para. 16: To carry out its duties effectively, the relevant competent authority should be provided with access to all necessary information to determine whether the CCP is in compliance with its conditions of authorization. Such information should be made available by the CCP without undue delay.

Conclusion: A DCO's compliance with the cited provision of the EMIR Framework would satisfy DCO Core Principle J. Both regimes require a DCO to provide all information necessary to enable the regulator to conduct oversight of the DCO.

TABLE J—REPORTING

Subject area	DCO core principle	EMIR framework
Reporting	J	RTS–CCP, Para. 16.

K. Recordkeeping (DCO Core Principle K)

DCO Core Principle K requires a DCO to maintain records of all activities related to its business as a DCO in a form and manner acceptable to the Commission for a period of not less than five years. The Commission adopted the requirements in § 39.20 to implement DCO Core Principle K.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle K.

EMIR, Art. 29(1): A CCP shall maintain, for a period of at least 10 years, all the records on the services and activity provided so as to enable the competent authority to monitor the CCP's compliance with EMIR, and shall make such records available upon request.

RTS–CCP, Art. 5(2): The rules, procedures and contractual arrangements of the CCP shall be recorded in writing or another durable medium, and shall be accurate, up-to-date, and readily available to the competent authority, clearing members and, where appropriate, clients.

RTS–CCP, Art. 12–16: These provisions set forth general requirements regarding records and specific requirements for transaction records, position records, business records, and records related to reporting to a trade repository.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle K. Both regimes require that the DCO maintain records related to its business activities as a DCO, and the EMIR Framework requires that these records be kept for at least 10 years, which exceeds the minimum period of five years required under DCO Core Principle K.

TABLE K—RECORDKEEPING

Subject area	DCO core principle	EMIR framework
Recordkeeping	K	EMIR, Art. 29(1); RTS–CCP Art. 5(2), 12–16.

L. Public Information (DCO Core Principle L)

DCO Core Principle L requires a DCO to: (1) Provide market participants with sufficient information to enable them to identify and evaluate accurately the risks and costs associated with using the DCO's services; (2) make information concerning the rules and operating and default procedures governing its clearing and settlement systems available to market participants; and (3) disclose publicly and to the Commission information concerning: (a) The terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO; (b) the fees that the DCO charges its members and participants; (c) the DCO's margin-setting methodology, and the size and composition of its financial resource package; (d) daily settlement prices, volume, and open interest for each contract the DCO settles or clears; and (e) any other matter relevant to participation in the DCO's settlement and clearing activities. The Commission adopted the requirements in § 39.21 to implement DCO Core Principle L.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle L.

EMIR, Art. 26(7): A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, publicly available.

EMIR, Art. 38(1): A CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided. They shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions.

EMIR, Art. 38(2): A CCP shall disclose to clearing members and clients the risks associated with the services provided.

EMIR, Art. 38(3): A CCP shall disclose to its clearing members and to its competent authority the price information used to calculate its end-of-day exposures to its clearing members. A CCP shall publicly disclose the volumes of the cleared transactions for each class of instruments cleared by the CCP on an aggregated basis.

EMIR, Art. 38(7): A CCP shall provide its clearing members with information on the initial margin models it uses, which shall: (a) Clearly explain the design of the initial margin model and how it operates; (b) clearly describe the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid; and (c) be documented.

RTS–CCP, Art. 10(1): A CCP must make information relating to the following available to the public: (a) Its governance arrangements; (b) its rules (including default procedures, risk management systems, rights and obligations of clearing members and clients, clearing services and rules governing access to the CCP (including admission, suspension and exit criteria for clearing membership), contracts with clearing

members and clients, interoperability arrangements and use of collateral and default fund contributions); (c) eligible collateral and applicable haircuts; and (d) a list of all current clearing members.

RTS–CCP, Art. 61(1): A CCP shall publicly disclose the general principles underlying its models and their methodologies, the nature of tests performed, with a high level summary of the test results and any corrective actions undertaken.

RTS–CCP, Art. 61(2): A CCP shall make available to the public key aspects of its default procedures, including: (a) The circumstances in which action may be taken; (b) who may take those actions; (c) the scope of the actions which may be taken, including the treatment of both proprietary and client positions, funds and assets; (d) the mechanisms to address a CCP's obligations to non-defaulting clearing members; and (e) the mechanisms to help address the defaulting clearing member's obligations to its clients.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle L. Both regimes require disclosure to clearing members and the public of key information regarding the clearing services provided, the costs and risks of such services, the DCO's margin methodology, its financial resources and default procedures, the volume of contracts cleared, and its rules.

TABLE L—PUBLIC INFORMATION

Subject area	DCO core principle	EMIR framework
Disclosure of costs and risks of DCO's services	L	EMIR, Art. 38(1), 38(2).
Disclosure of rules, and operating and default procedures.		EMIR, Art. 26(7); RTS–CCP, Art. 10(1).
Information on cleared transactions, margin methodology, and financial resources.		EMIR, Art. 38(3), 38(7); RTS–CCP, Art. 10(1), 61(1), 61(2).

M. Information Sharing (DCO Core Principle M)

DCO Core Principle M requires a DCO to enter into and abide by the terms of each appropriate and applicable domestic and international information-sharing agreement, and use relevant information obtained from each agreement in carrying out the DCO's risk management program. As set out in § 39.22, the Commission has not adopted specific requirements to further implement DCO Core Principle M; rather, the Commission provides DCOs with discretion in how they meet this DCO Core Principle. Therefore, an applicant for DCO registration subject to subpart D compliance would not need to demonstrate that compliance with its home country requirements would satisfy DCO Core Principle M; however, the applicant would be required to explain how it will satisfy DCO Core Principle M nevertheless.

N. Antitrust Considerations (DCO Core Principle N)

DCO Core Principle N requires a DCO to avoid, unless necessary or appropriate to achieve the purposes of the CEA, adopting any rule or taking any action that results in any unreasonable restraint of trade, or imposing any material anticompetitive burden. As set out in § 39.23, the Commission has not adopted specific requirements to further implement DCO Core Principle N; rather, the Commission provides DCOs with discretion in how they meet this DCO Core Principle. Therefore, an applicant for DCO registration subject to subpart D compliance would not need to demonstrate that compliance with its home country requirements would satisfy DCO Core Principle N; however, the applicant would be required to explain how it will satisfy DCO Core Principle N nevertheless.

O. Governance Fitness Standards (DCO Core Principle O)

DCO Core Principle O requires a DCO to establish governance arrangements that are transparent to fulfill public interest requirements and to permit the consideration of the views of owners and participants. A DCO must also establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the DCO, any other individual or entity with direct access to the settlement or clearing activities of the DCO, and any party affiliated with any of the foregoing individuals or entities. The Commission adopted the requirements in § 39.24 to implement DCO Core Principle O.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle O.

EMIR, Art. 26(1): A CCP shall have robust governance arrangements, which include a clear organizational structure with well-defined, transparent, and consistent lines of responsibility, effective processes to identify, manage, monitor, and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures.

EMIR, Art. 26(7): A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, publicly available.

EMIR, Art. 27(1): The senior management of a CCP shall be of sufficiently good repute and shall have sufficient experience so as to ensure the sound and prudent management of the CCP.

EMIR, Art. 27(2): The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management, and clearing services.

EMIR, Art. 27(3): A CCP shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority and auditors.

EMIR, Art. 36(1): When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.

EMIR, Art. 36(2): A CCP shall have accessible, transparent, and fair rules for the prompt handling of complaints.

RTS–CCP, Art. 3(1): The key components of a CCP's governance arrangements that define its organizational structure as well as clearly specified and well-documented policies, procedures, and processes by which its board and senior management operate shall include the roles and responsibilities of the management, the reporting lines between the senior management and the board, and the processes for ensuring accountability to stakeholders.

RTS–CCP, Art. 3(3): A CCP shall establish lines of responsibility that are clear, consistent, and well-documented.

RTS–CCP, Art. 4(4): The governance arrangements shall ensure that the CCP's board assumes final responsibility and accountability for managing the CCP's risks.

RTS–CCP, Art. 7(1): A CCP shall define the composition, role, and responsibilities of the board and senior management and any board committees. These arrangements shall be clearly specified and well-documented.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle O. Both regimes require fitness standards for directors and others, and both require transparent governance arrangements.

TABLE O—GOVERNANCE FITNESS STANDARDS

Subject area	DCO core principle	EMIR framework
Governance arrangements	O	EMIR, Art. 26(1), 26(7), 27(3), 36(1), 36(2); RTS–CCP, Art. 3(1), 3(3), 4(4), 7(1).
Governance fitness standards		EMIR, Art. 27(1), 27(2).

P. Conflicts of Interest (DCO Core Principle P)

DCO Core Principle P requires a DCO to establish and enforce rules to minimize conflicts of interest in the decision-making process of the DCO, and establish a process for resolving such conflicts of interest. The Commission adopted the requirements in § 39.25 to implement DCO Core Principle P.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle P.

EMIR, Art. 26(5): A CCP shall adopt, implement, and maintain a remuneration policy that promotes sound and effective risk management and does not create incentives to relax risk standards.

EMIR, Art. 27(2): The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

EMIR, Art. 33(1): A CCP shall maintain and operate effective written organizational and administrative arrangements to identify and manage any potential conflicts of interest between itself, including its managers, employees, or any person with direct or indirect control or close links, and its clearing members or their clients known to the CCP. It shall maintain and implement adequate procedures aimed at resolving possible conflicts of interest.

RTS–CCP, Art. 7(5): The arrangements by which the board and senior management operate shall include processes to identify, address, and manage potential conflicts of interest of members of the board and senior management.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle P. Both regimes require a DCO to manage or minimize conflicts of interest and to establish or maintain a process for resolving conflicts of interest.

TABLE P—CONFLICTS OF INTEREST

Subject area	DCO core principle	EMIR framework
Conflicts of interest	P	EMIR, Art. 26(5), 27(2), 33(1); RTS–CCP, Art. 7(5).

Q. Composition of Governing Boards (DCO Core Principle Q)

DCO Core Principle Q requires a DCO to ensure that the composition of its governing board or committee includes market participants, as set out in § 39.26.

Relevant EU Laws and Regulations: The following provision of the EMIR Framework appears to correspond to DCO Core Principle Q.

EMIR, Art. 27(2): A CCP shall have a board. At least one third, but no less than two, of the members of that board shall be independent. Representatives of the clients of clearing members shall be invited to board meetings for certain matters. The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management, and clearing services.

Conclusion: A DCO's compliance with the cited provision of the EMIR Framework would satisfy DCO Core Principle Q. Both regimes require a DCO to ensure that its board of directors includes members that are independent of the DCO and have market expertise, and that the board receives input from market participants.

TABLE Q—COMPOSITION OF GOVERNING BOARDS

Subject area	DCO core principle	EMIR framework
Composition of governing boards	Q	EMIR, Art. 27(2).

R. Legal Risk (DCO Core Principle R)

DCO Core Principle R requires a DCO to have a well-founded, transparent, and enforceable legal framework for each aspect of its activities. The Commission adopted the requirements in § 39.27 to implement DCO Core Principle R.

Relevant EU Laws and Regulations: The following provisions of the EMIR Framework appear to correspond to DCO Core Principle R.

EMIR, Art. 26(2): A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with EMIR, including compliance of its managers and employees with all the provisions of EMIR.

EMIR, Art. 36(1): When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.

RTS–CCP, Art. 5(2): A CCP shall ensure that its rules, procedures, and contractual arrangements are clear and comprehensive and they ensure compliance with relevant EU requirements as well as all other applicable regulatory and supervisory requirements. A CCP shall identify and analyze the soundness of the rules, procedures, and contractual arrangements of the CCP.

RTS–CCP, Art. 5(4): A CCP's rules and procedures shall clearly indicate the law that is intended to apply to each aspect of the CCP's activities and operations.

Conclusion: A DCO's compliance with the cited provisions of the EMIR Framework together would satisfy DCO Core Principle R. Both regimes require a DCO to have a clear legal framework grounded in the applicable legal and regulatory regime.

TABLE R—LEGAL RISK

Subject area	DCO core principle	EMIR framework
Legal risk	R	EMIR, Art. 26(2), 36(1); RTS–CCP, Art. 5(2), 5(4).

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Part IV

Department of Homeland Security

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 208 and 1208

Procedures for Asylum and Bars to Asylum Eligibility; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC41

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[EOIR Docket No. 18–0002; A.G. Order No. 4873–2020]

RIN 1125–AA87

Procedures for Asylum and Bars to Asylum Eligibility

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: On December 19, 2019, the Department of Justice (''DOJ'') and the Department of Homeland Security (''DHS'') (collectively, ''the Departments'') published a notice of proposed rulemaking (''NPRM'') that would amend their respective regulations governing the bars to asylum eligibility. The Departments also proposed to clarify the effect of criminal convictions and to remove their respective regulations governing the automatic reconsideration of discretionary denials of asylum applications. This final rule (''final rule'' or ''rule'') responds to comments received and adopts the provisions of the NPRM with technical corrections to ensure clarity and internal consistency.

DATES: This rule is effective on November 20, 2020.

FOR FURTHER INFORMATION CONTACT:

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Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services (''USCIS''), DHS, 20 Massachusetts Avenue NW, Washington, DC 20529–2140; telephone (202) 272–8377 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

On December 19, 2019, the Departments published an NPRM that would amend their respective regulations governing the bars to asylum eligibility, clarify the effect of criminal convictions, and remove their respective regulations governing the automatic reconsideration of discretionary denials of asylum applications. Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec. 19, 2019).

A. Authority and Legal Framework

The Departments published the proposed rule pursuant to their respective authorities regarding the adjudication of asylum applications. 84 FR at 69641–42, 69644–45.

Regarding the DOJ, the Attorney General, through himself and the Executive Office for Immigration Review (''EOIR''), has authority over immigration adjudications. *See* 6 U.S.C. 521; section 103(g) of the Immigration and Nationality Act (''INA'' or ''the Act'') (8 U.S.C. 1103(g)). Immigration judges within DOJ adjudicate defensive asylum applications filed during removal proceedings [1] and affirmative asylum applications referred to the immigration courts by USCIS within DHS. INA 101(b)(4) (8 U.S.C. 1101(b)(4)); 8 CFR 1003.10(b), 1208.2. The Board of Immigration Appeals (''BIA'' or ''the Board'') hears appeals from immigration judges' decisions, including decisions related to the relief of asylum. 8 CFR 1003.1.

The immigration laws further provide the Attorney General with authority regarding immigration adjudications and determinations. For example, the Attorney General's determination with respect to all questions of law is ''controlling.'' INA 103(a)(1) (8 U.S.C. 1103(a)(1)). The Attorney General possesses a general authority to ''establish such regulations * * * as the Attorney General determines to be necessary for carrying out'' his authorities under the INA. INA 103(g)(2) (8 U.S.C. 1103(g)(2)). In addition, the INA authorizes the Attorney General to (1) ''by regulation establish additional limitations and conditions, consistent with [INA 208 (8 U.S.C. 1158)], under which an alien shall be ineligible for asylum under,'' INA 208(b)(1) (8 U.S.C. 1158(b)(1)); and (2) ''provide by regulation for * * * conditions or limitations on the consideration of an application for asylum not inconsistent with the Act.'' INA 208(b)(2)(C) and (d)(5)(B) (8 U.S.C. 1158(b)(2)(C) and (d)(5)(B)).

Regarding the Department of Homeland Security, the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA charges the Secretary of Homeland Security (''the Secretary'') ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' INA 103(a)(1) (8 U.S.C. 1103(a)(1)), and grants the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws, INA 103(a)(3) (8 U.S.C. 1103(a)(3)). The HSA also transferred to USCIS responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). If an alien is not in removal proceedings, USCIS asylum officers determine in the first instance whether an alien's asylum application should be granted. *See* 8 CFR 208.2.

B. Provisions of the Proposed Rule

The NPRM proposed to amend 8 CFR 208.13 and 1208.13 by adding new paragraphs (c)(6)–(9) and amending 8 CFR 208.16 and 1208.16 by removing and reserving paragraphs (e) in each section.

1. Bars to Asylum Eligibility

Pursuant to the authorities outlined above, the Departments proposed to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(6) in each section to add the following bars on eligibility for asylum for the following aliens:

- Aliens who have been convicted of an offense arising under INA 274(a)(1)(A) or (a)(2) or INA 276 (8 U.S.C. 1324(a)(1)(A) or (a)(2) or 1326) (convictions related to alien harboring, alien smuggling, and illegal reentry). *See* 8 CFR 208.13(c)(6)(i) and 1208.13(c)(6)(i) (proposed); 84 FR at 69647–49.
- Aliens who have been convicted of a Federal, State, tribal, or local crime that the Attorney General or Secretary knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined under the law of the jurisdiction where the conviction occurred or as in 18 U.S.C. 521(a). *See* 8 CFR 208.13(c)(6)(ii) and 1208.13(c)(6)(ii) (proposed); 84 FR at 69649–50.
- Aliens who have been convicted of an offense for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where

[1] One exception is that asylum officers in DHS have initial jurisdiction to adjudicate asylum applications filed by unaccompanied alien children (''UAC'') in removal proceedings. INA 208(b)(3)(C) (8 U.S.C. 1158(b)(3)(C)); *see also* 6 U.S.C. 279(g)(2) (UAC defined).

the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person. *See* 8 CFR 208.13(c)(6)(iii) and 1208.13(c)(6)(iii) (proposed); 84 FR at 69650–51.

- Aliens who have been convicted of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(iv)(A) and 1208.13(c)(6)(iv)(A) (proposed); 84 FR at 69650–51.[2]
- Aliens who have been convicted of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by (a) the person's current or former spouse, (b) an alien with whom the person shares a child in common, (c) an alien who is cohabitating with or who has cohabitated with the person as a spouse, (d) an alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction, or (e) any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government. *See* 8 CFR 208.13(c)(6)(v)(A), 1208.13(c)(6)(v)(A) (proposed); 84 FR at 69651–53. The NPRM also provided that an alien's conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act (8 U.S.C. 1227(a)(2)(E)(i)–(ii)) would not disqualify him or her from asylum under this provision if a determination was made that the alien satisfies the criteria in section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)). *See* 8 CFR 208.13(c)(6)(v)(C), 1208.13(c)(6)(v)(C) (proposed); 84 FR at 69651–53.
- Aliens who have been convicted of any felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed); 84 FR at 69645–47.
- Aliens who have been convicted of any misdemeanor offense under Federal, State, tribal, or local law that involves (1) possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry; (2) the receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or (3) possession or trafficking of a controlled substance or controlled substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana. *See* 8 CFR 208.13(c)(6)(vi)(B), 1208.13(c)(6)(vi)(B) (proposed); 84 FR at 69653–54.
- Aliens for whom there are serious reasons to believe have engaged in acts of battery or extreme cruelty, as defined in 8 CFR 204.2(c)(1)(vi), upon a person and committed by the same list of aliens as set forth above regarding domestic-violence convictions. *See* 8 CFR 208.13(c)(6)(vii)(A)–(E), 1208.13(c)(6)(vii)(A)–(E) (proposed); 84 FR at 69651–53. The NPRM further provided that an alien's offense would not disqualify him or her from asylum under this provision for crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) and (ii) of the Act if a determination was made that the alien satisfies the criteria in section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)) (8 U.S.C. 1227(a)(2)(E)(i)–(ii)). *See* 8 CFR 208.13(c)(6)(vii)(F), 1208.13(c)(6)(vii)(F) (proposed); 84 FR at 69651–53.

2. Additional Instruction and Definitions for Analyzing the New Bars to Eligibility

The Departments proposed to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(7) through (9), which would have provided relevant definitions and other procedural instructions for the implementation of the proposed bars to eligibility discussed above.

First, this proposed revision would have defined the terms ''felony'' (''any crime defined as a felony by the relevant jurisdiction * * * of conviction, or any crime punishable by more than one year of imprisonment'') and ''misdemeanor'' (''any crime defined as a misdemeanor by the relevant jurisdiction * * * of conviction, or any crime not punishable by more than one year of imprisonment''). 8 CFR 208.13(c)(7)(i)–(ii), 1208.13(c)(7)(i)–(ii) (proposed); 84 FR at 69646, 69653.

The proposed rule further would have provided instructions that whether an activity would constitute a basis for removability is irrelevant to determining whether the activity would make an alien ineligible for asylum and that all criminal convictions referenced in the proposed bars to eligibility would include inchoate offenses. 8 CFR 208.13(c)(7)(iii)–(iv), 1208.13(c)(7)(iii)–(iv) (proposed).

Regarding convictions that have been modified, vacated, clarified, or otherwise altered, the proposed rule would have instructed that such modifications, vacaturs, clarifications, or alterations do not have any effect on the alien's eligibility for asylum unless the court issuing the order had jurisdiction and authority to do so, and the court did not do so for rehabilitative purposes or to alleviate possible immigration-related consequences of the conviction. 8 CFR 208.13(c)(7)(v), 1208.13(c)(7)(v) (proposed); 84 FR at 69654–56. The rule would have further provided that the modification, vacatur, clarification, or other alteration is presumed to be for the purpose of ameliorating the immigration

[2] When determining whether an alien's offense qualifies under this provision, the NPRM further provided that the adjudicator would not be required to find the initial conviction as a predicate offense. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B) (proposed). Further, the NPRM provided that the adjudicator would be permitted to consider the underlying conduct of the crime and would not be limited to those facts found by the criminal court or otherwise contained in the record of conviction. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B) (proposed). Instead, the adjudicator would be required only to make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where the convictions occurred. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B).

consequences of a conviction if it was entered subsequent to the initiation of removal proceedings or if the alien moved for the order more than one year following the original order of conviction or sentencing. 8 CFR 208.13(c)(8), 1208.13(c)(8) (proposed); 84 FR at 69654–56. Finally, the proposed rule would have specifically allowed the asylum officer or immigration judge to ''look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence'' to determine what effect such order should be given under proposed 8 CFR 208.13(c)(7)(v) and 1208.13(c)(7)(v). 8 CFR 208.13(c)(9),1208.13(c)(9) (proposed); 84 FR at 69654–56.

3. Reconsideration of Discretionary Denials

Lastly, the proposed rule would have removed and reserved 8 CFR 208.16(e) and 1208.16(e), which provide for the automatic review of a discretionary denial of an alien's asylum application if the alien is subsequently granted withholding of removal. 84 FR at 69656–57.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM closed on January 21, 2020, with 581 comments received.[3] Individual commenters submitted 503 comments, and 78 comments were submitted by organizations, including non-government organizations, legal advocacy groups, non-profit organizations, religious organizations, congressional committees, and groups of members of Congress. Most individual commenters opposed the NPRM. All organizations opposed the NPRM.

B. Comments Expressing Support for the Proposed Rule

Comment: One commenter supported the final rule to ensure that individuals who qualify for asylum are granted that status only when merited in the exercise of discretion and to provide a uniform and fair standard to prevent criminal aliens from ''gaining a foothold in the United States.''

One commenter stated that the NPRM was an appropriate exercise of discretionary authority. The commenter stated that asylum is an extraordinary benefit that offers a path to lawful permanent residence and United States citizenship and, thus, should be discretionary. The commenter stated that asylees are protected from removal, authorized to work in the United States, and may travel under certain circumstances, and that asylees' spouses and children are eligible for derivative status in the United States. The commenter stated that the United States asylum system is generous, asserting that, in fiscal year 2018, 38,687 individuals were granted asylum, including 25,439 affirmative grants and 13,248 defensive grants. The commenter stated that this was the highest number of grants since fiscal year 2002.

The commenter cited the BIA: ''The ultimate consideration when balancing factors in the exercise of discretion is to determine whether a grant of relief, or in this case protection, appears to be in the best interest of the United States.'' *Matter of D–A–C–,* 27 I&N Dec. 575, 578 (BIA 2019) (citing *Matter of C–V–T–,* 22 I&N Dec. 7, 11 (BIA 1998) and *Matter of Mendez,* 21 I&N Dec. 296, 305 (BIA 1996)). The commenter stated that criminal aliens, as described in the NPRM, should not be granted the benefit of asylum because their admission would not be in the best interest of the United States.

The commenter emphasized that the NPRM would not bar individuals from all forms of fear-based protection and that individuals who were barred from asylum under the NPRM could still apply for withholding of removal under the INA or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'' and ''CAT regulations'').[4] The commenter opined that the NPRM would improve the integrity of the asylum system.

The commenter stated that the crimes and conduct listed in the NPRM should constitute a ''conclusive determination that an applicant does not merit asylum in the exercise of discretion.'' The commenter stated that the NPRM would ensure fair and uniform application of the immigration laws because aliens who have been convicted of similar crimes would not receive different outcomes depending on their adjudicator.

The commenter stated that the NPRM was authorized by the Act, which the commenter stated provides for regulations establishing additional conditions or limitations on asylum. The commenter stated that the NPRM was consistent with existing limitations on asylum eligibility in the statute because several statutory provisions exclude individuals from asylum eligibility on the basis of criminal conduct or other conduct indicating that the applicant does not merit asylum. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (particularly serious crime); INA 208(b)(2)(A)(iii) (8 U.S.C. 1158(b)(2)(A)(iii)) (serious nonpolitical crime outside the United States); INA 208(b)(2)(B)(i) (8 U.S.C. 1158(b)(2)(B)(i)) (conviction for aggravated felony); INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)) (offenses designated as particularly serious crimes or serious nonpolitical crimes by regulation); INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (alien engaged in persecution of another on account of a protected ground); INA 208(b)(2)(A)(iv) (8 U.S.C. 1158(b)(2)(A)(iv)) (reasonable grounds to regard alien as a danger to the security of the United States); INA 208(b)(2)(A)(v) (8 U.S.C. 1158(b)(2)(A)(v)) (alien presents national security concerns or engaged in terrorist activity).

The commenter supported the NPRM's proposed limitation on asylum eligibility for those who have been convicted of a felony, stating that felonies are categorized as such because they present more serious criminal conduct, which has a higher social cost. The commenter asserted that a felony conviction should be such a heavily weighted negative factor that it should conclusively establish that an alien does not merit asylum. The commenter supported defining a crime by the maximum possible sentence, as opposed to the actual sentence imposed, because of the variability of sentences that can be imposed on individuals who commit the same crime yet appear before different judges or are charged in different jurisdictions. The commenter asserted that immigration consequences should not vary based on the jurisdiction or a judge's ''individual personality'' and instead should be standardized in the interest of fairness, uniformity, and efficiency.

Commenters also supported the NPRM's proposed limitation on eligibility for individuals convicted of alien harboring in violation of section 274(a)(1)(A) of the Act (8 U.S.C. 1324(a)(1)(A)). Specifically, the

[3] The Departments reviewed all 581 comments submitted in response to the rule; however, the Departments did not post 5 of the comments to regulations.gov for public inspection. Of these comments, three were duplicates of another comment written by the same commenter, and two were written in Spanish. Accordingly, the Departments posted 576 comments.

[4] Adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the immigration context in principal part at 8 CFR 208.16(c) through 208.18 and 8 CFR 1208.16(c) through 1208.18). *See* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, div. G, sec. 2242, 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note).

commenters stated that smuggling involves a business where people are routinely treated not as human beings, but as chattel. The commenters stated that individuals who participate in smuggling, or who place others into the hands of smugglers, should not be eligible for asylum because the conduct required for such a conviction demonstrates contempt for U.S. immigration law and a disregard for the value of human life. Commenters similarly supported the NPRM's proposed limitation on eligibility for asylum for aliens who have been convicted of illegal reentry in violation of section 276 of the Act (8 U.S.C. 1326). Commenters stated that such individuals have demonstrated contempt for U.S immigration law and should not be granted asylum. Commenters stated that a conviction under section 276 of the Act (8 U.S.C. 1326) requires that an alien repeatedly violated the immigration laws because such a conviction requires that the alien illegally reentered after a prior removal and intentionally chose not to present himself or herself at a port of entry. The commenters stated that whether or not the final rule includes the felony bar to asylum, it should incorporate a mandatory bar for those convicted of illegal reentry.

Commenters also expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who have committed criminal acts on behalf of or in furtherance of a criminal street gang. The commenters stated that such activity is an indicator of ongoing danger to the community. The commenters noted that, although widespread criminal activity is not a sufficient legal basis to receive asylum protection, adjudicators routinely hear testimony about the harm suffered by people subjected to extortion threats, murders, kidnappings, and sexual assaults by organized criminal groups. The commenters stated that the United States immigration system should not award a discretionary benefit to those who would destabilize communities at home and abroad through violence.

Commenters supported the NPRM's approach authorizing adjudicators to determine—on the basis of sufficient evidence—whether a particular criminal act was committed ''in support, promotion, or furtherance of a criminal street gang.'' Specifically, the commenters stated that the range of crimes committed by street gangs is broad and that not all gang members are convicted of a gang participation offense even when they commit a crime on behalf of the gang. The commenters noted that such a determination would not be based on ''mere suspicion'' but would only occur where the adjudicator knows or has reason to believe that the crime was committed in furtherance of gang activity on the basis of competent evidence. The commenters stated that ''[g]ang violence is a scourge on our communities, and those who further the goals of criminal street gangs should not be put on a path to citizenship.''

Commenters expressed support for the NPRM's proposed limitation on asylum eligibility where an individual has been convicted of multiple driving-under-the-influence (''DUI'') offenses or a single offense resulting in death or serious bodily injury. The commenters stated that drunk and impaired driving is a dangerous activity that kills more than 10,000 people in the United States each year and injures many more. The commenters stated that individuals with recidivist DUI records, or who have already caused injury or death, should not be rewarded with asylum. The commenters expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who have been convicted of certain misdemeanors. The commenters encouraged the Departments to consider including misdemeanor offenses involving sexual abuse or offenses reflecting a danger to children, asserting that such offenses are indicative of an ongoing danger to the community.

The commenters expressed support for the NPRM's approach to treating vacated, expunged, or modified convictions and sentences. The commenter stated that the approach is consistent with the Attorney General's decision in *Matter of Thomas and Thompson,* 27 I&N Dec. 674 (A.G. 2019). The commenters also stated that such an approach would be appropriate in the interests of uniform application of the law across jurisdictions by helping to ensure that aliens convicted of the same or similar conduct receive the same consequence with respect to asylum eligibility.

The commenters expressed support for the NPRM's proposed removal of 8 CFR 208.16(e) and 1208.16(e), stating that these provisions are unnecessary. Specifically, the commenters stated that the current regulations require an adjudicator who denies an asylum application in the exercise of discretion to revisit and reconsider that denial by weighing factors that would already have been considered in the original discretionary analysis. The commenters stated that there should not be a presumption that the adjudicator did not properly weigh discretionary factors in the first instance. The commenters stated that, as noted by the NPRM, such a requirement is inefficient, requiring additional adjudicatory resources to re-evaluate a decision that was only just decided by the same adjudicator. The commenters also stated that an alien already has opportunities to seek review of that discretionary decision through motions or an appeal.

Other commenters expressed general support for the NPRM. Some commenters stated that such a rule would make America safer. One commenter stated that further restrictions on asylum were necessary because individuals who have no basis to remain in the United States ''routinely ask to use political asylum as a last ditch effort to remain.'' At least one commenter stated that the NPRM would not adversely affect ''innocent asylum seeker[s] truly escaping political persecution.'' Other commenters stated that all applications for relief should require at least a minimum of good character and behavior. One commenter stated that the NPRM ''is a direct result of state and local governments working to nullify undocumented criminal activity by dropping charges, expunging records or pardoning crimes, including serious crimes like armed robbery * * * sex assault, domestic abuse, wire fraud, identity theft etc.''

One commenter expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who are convicted of offenses related to controlled substances, stating that the United States must bar those who engage in drug trafficking into the United States. Another commenter expressed support for the proposed limitations on asylum eligibility for individuals who are convicted of domestic violence offenses or who engage in identity theft, stating that such individuals should not have the opportunity to be lawfully present in the United States.

Response: The Departments note the commenters' support for the rule. The Departments have taken the commenters' recommendations under advisement.

C. Comments Expressing Opposition to the Proposed Rule

1. General Opposition

Comment: Many commenters expressed general opposition to the NPRM. Some provided no reasoning, simply stating, ''I oppose this proposed rule'' with varying degrees of severity. Many commenters also asked the Departments to withdraw the NPRM. Others, as explained in the following sections, provided specific points of

opposition or their reasoning underlying their opposition.

Response: The Departments are unable to provide a detailed response to comments that express only general opposition without providing reasoning for their opposition. The following sections of this final rule provide the Departments' responses to comments that offered specific points of opposition or reasoning underlying their opposition.

2. Violation of Law

a. Violation of Domestic Law

Commenters asserted that the proposed rule violated United States law in three main ways: First, it violated law regarding particularly serious crimes; second, it improperly disposed of the categorical approach to determine immigration consequences of criminal offenses; and third, it violated law regarding the validity of convictions for immigration purposes. Overall, commenters were concerned that the NPRM's provisions contradicting case law would result in the ''wrongful exclusion'' of immigrants from asylum eligibility.

i. Law Regarding ''Particularly Serious Crime'' Bar

Comment: Commenters opposed the NPRM, stating that it violates domestic law and contravenes existing case law from the BIA, the circuit courts of appeals, and the Supreme Court of the United States regarding the particularly serious crime bar to asylum for multiple reasons. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)). In general, commenters alleged that the NPRM was untethered to the approach set out by Congress regarding particularly serious crimes and that if Congress had sought to sweepingly bar individuals from asylum eligibility based on their conduct or felony convictions, as outlined in the NPRM, it would have done so in the Act. Commenters stated that adding seven new categories of barred conduct rendered the language of section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)) essentially meaningless and drained the term ''particularly serious crime'' of any sensible meaning because the Departments were effectively considering all offenses, regardless of seriousness, as falling under the particularly serious crime bar to asylum. One organization asserted that this violated the Supreme Court's requirements for statutory interpretation, citing *Corley* v. *United States,* 556 U.S. 303, 314 (2009) (''[O]ne of the most basic interpretive canons[ ] [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'' (alterations and quotation marks omitted)).

At the same time, commenters also asserted that the additional crimes to be considered particularly serious by the proposed rule have been repeatedly recognized as not particularly serious. For example, commenters cited *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987), and noted the BIA's conclusion that, ''in light of the unusually harsh consequences which may befall a [noncitizen] who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors.'' Paraphrasing *Delgado* v. *Holder,* 648 F.3d 1095, 1110 (9th Cir. 2010) (Reinhardt, J., concurring in part and concurring in the judgment), commenters stated that, outside of the aggravated felony context, ''it has generally been well understood by the Board of Immigration Appeals and the Courts of Appeals that low-level, 'run-of-the-mill' offenses do not constitute particularly serious crimes.''

Commenters asserted that low-level offenses like misdemeanor DUI with no injury or simple possession of a controlled substance cannot constitute a particularly serious crime. In support of this proposition, commenters cited *Mellouli* v. *Lynch,* 575 U.S. 798 (2015) (possession of drug paraphernalia was not a controlled substances offense); *Carachuri-Rosendo* v. *Holder,* 560 U.S. 563 (2010) (subsequent marijuana possession offense is not an aggravated felony); and *Leocal* v. *Ashcroft,* 543 U.S. 1 (2004) (conviction for DUI was not an aggravated felony crime of violence). Commenters asserted that if the Departments wished to abrogate the Supreme Court's interpretation of the statute, they should do so by passing new legislation, not by proposing what the commenters consider to be unlawful rules.

Moreover, commenters asserted that the ''essential key to determining whether a crime is particularly serious * * * is whether the nature of the crime is one which indicates that the alien poses a danger to the community.'' *Matter of G–G–S–,* 26 I&N Dec. 339 (BIA 2014) (quotation marks omitted). Commenters argued that despite this analytical requirement, the proposed rule arbitrarily re-categorizes many offenses as particularly serious without consideration of whether the nature of the crime indicates that the alien poses a danger to the community. Commenters expressed additional concern that this categorization removes all discretion from the adjudicator to determine whether an individual's circumstances merit such a harsh penalty.

Commenters further asserted that, because Congress made commission of a ''particularly serious crime'' a bar to asylum but did not make commission of other categories of crimes such a bar, Congress intended to preclude that result. Commenters alleged that the NPRM violated the canon of construction articulated in *United States* v. *Vonn,* 535 U.S. 55, 65 (2002), *expressio unius est exclusio alterius,* which means that ''expressing one item of a commonly associated group or series excludes another left unmentioned,'' because it attempted to create additional categories of crime bars to asylum eligibility in a manner inconsistent with the statute and congressional intent. Commenters analogized these NPRM provisions to another rule that had categorically barred ''arriving aliens'' from applying for adjustment of status in removal proceedings. *See* 8 CFR 245.1(c)(8) (1997). The Federal courts of appeals were split over whether that now-rescinded rule circumvented the Act and congressional intent because adjustment of status was ordinarily a discretionary determination.[5]

Commenters further alleged that the NPRM unlawfully categorically exempted a wide range of offenses from a positive discretionary adjudication of asylum. Commenters acknowledged that the Attorney General can provide for ''additional limitations and conditions'' on asylum applications consistent with the asylum statute by designating offenses as per se particularly serious, *see* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), but commenters emphasized that crimes that are not particularly serious are still subject to a discretionary determination. Commenters stated that Congress did not intend to authorize the Attorney General to categorically bar ''large swaths of asylum seekers from protection.'' Commenters alleged that the Departments purposefully wrote the NPRM in this way (designating the bars as both particularly serious crimes and categorical exceptions to positive

[5] *Compare Scheerer* v. *U.S. Att'y Gen.,* 445 F.3d 1311, 1321–22 (11th Cir. 2006) (holding that the regulation was unlawful); *Bona* v. *Gonzales,* 425 F.3d 663, 668–71 (9th Cir. 2005) (same); *Zheng* v. *Gonzales,* 422 F.3d 98, 116–20 (3d Cir. 2005) (same), *and Succar* v. *Ashcroft,* 394 F.3d 8, 29 (1st Cir. 2005) (same), *with Akhtar* v. *Gonzales,* 450 F.3d 587, 593–95 (5th Cir. 2006) (upholding validity of the regulation), *rehearing en banc granted and remanded on other grounds,* 461 F.3d 584 (2006) (en banc), *and Mouelle* v. *Gonzales,* 416 F.3d 923, 928–30 (8th Cir. 2005) (same), *vacated on other grounds,* 126 S. Ct. 2964 (2006).

discretionary adjudication) to ''insulate the Proposed Rules from review.''

Response: The Departments disagree with comments asserting that the rule violates domestic law. Commenters asserted that Congress did not intend for the Attorney General to categorically bar ''large swaths of asylum seekers from protection.'' However, Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), vested the Attorney General with broad authority to establish conditions or limitations on asylum. Public Law 104–208, div. C, 110 Stat. 3009, 3009–546.

At that time, Congress created three categories of aliens who are barred from applying for asylum and adopted six other mandatory bars to asylum eligibility. IIRIRA, sec. 604(a), 110 Stat. at 3009–690 through 3009–694 (codified at INA 208(a)(2)(A)–(C), (b)(2)(A)(i)–(vi) (8 U.S.C. 1158(a)(2)(A)–(C), (b)(2)(A)(i)–(vi))). Congress further expressly authorized the Attorney General to expand upon two bars to asylum eligibility—the bars for ''particularly serious crimes'' and ''serious nonpolitical crimes.'' INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)). Congress also vested the Attorney General with the ability to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Significantly, ''[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1),'' as ''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on eligibility to apply for or receive asylum. *R–S–C* v. *Sessions,* 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017). In authorizing ''additional limitations and conditions'' by regulation, the statute gives the Attorney General and the Secretary broad authority in determining what the ''limitations and conditions'' should be. The Act instructs only that additional limitations on eligibility are to be established ''by regulation,'' and must be ''consistent with'' the rest of section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)); *see also* INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Moreover, a long-held principle of administrative law is that an agency, within its congressionally delegated policymaking responsibilities, may ''properly rely upon the incumbent administration's view of wise policy to inform its judgments.'' *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 865 (1984). Accordingly, an agency may make policy choices that Congress either inadvertently or intentionally left to be resolved by the agency charged with administration of the statute, given the current realities faced by the agency. *See id.* at 865–66. Through the publication of the NPRM, the Departments have properly exercised this congressionally delegated authority. Such policymaking is well within the confines of permissible agency action. Additionally, despite commenters' assertions that the Departments should pursue these changes through legislative channels, the Departments, as part of the Executive Branch, do not pursue legislative changes but instead rely on regulatory authority to interpret and enforce legislation as enacted by Congress.

As explained in the NPRM, Congress granted the Attorney General and the Secretary broad authority to determine additional ''limitations and conditions'' on asylum. For example, the Attorney General and the Secretary have authority to impose procedural requirements for asylum seekers and to designate by regulation additional crimes that could be considered particularly serious crimes or serious nonpolitical crimes. *See* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)); *see also* INA 208(2)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Based on the comments received, the Departments realize that the preamble to the NPRM resulted in confusion regarding which authority the Departments relied on in promulgating this rule. Specifically, commenters raised concerns regarding the Departments' reliance on section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) in support of some of the new bars to asylum eligibility. In response to these concerns and confusion, the Departments emphasize that, as in the proposed rule, the regulatory text itself does not designate any offenses covered in 8 CFR 208.13(c)(6) or 1208.13(c)(6) as specific particularly serious crimes.[6] Instead, this rule, like the proposed rule, sets out seven new ''additional limitations,'' consistent with the Departments' authority at INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) to establish ''additional limitations and conditions'' on asylum eligibility. *See* 8 CFR 208.13(c)(6), 1208.13(c)(6).

This reliance on the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) is consistent with the proposed rule. There, although the Departments cited the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes, the Departments also cited the authority at section 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) in support of each category of bars included in the rule. *See generally* 84 FR at 69645–54. The references throughout the preamble in the NPRM to the Attorney General's and the Secretary's authorities to designate additional particularly serious crimes accordingly highlighted one of two alternative bases for the inclusion of most of the new bars to asylum eligibility and sought to elucidate the serious nature of these crimes and the Departments' reasoning for including these offenses in the new provisions. In other words, although the Departments are not specifically designating any categories of offenses as ''particularly serious crimes,'' the authority of the Attorney General and the Secretary to deny eligibility to aliens convicted of such offenses helps demonstrate that the new bars are ''consistent with'' the INA because the offenses to which the new bars apply—similar to ''particularly serious crimes''—indicate that the aliens who commit them may be dangerous to the community of the United States or otherwise may not merit eligibility for asylum. As a result, the Departments need not address in detail commenters' concerns about whether discrete categories of offenses should constitute ''particularly serious crimes'' because (1) the new rule does not actually designate any specific offense as such crimes; and (2) section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)), as already discussed and as recognized by the Departments, independently authorizes the Attorney General and the Secretary to establish additional limitations and conditions on asylum eligibility.

Commenters asserted that Congress intended for the only criminal bars to asylum to be those contemplated by the particularly serious crime and serious nonpolitical crime bars. The Departments, however, disagree. Although the INA explicitly permits the Attorney General and the Secretary to designate additional crimes as particularly serious crimes or serious nonpolitical crimes, this does not mean that any time the Attorney General and the Secretary decide to limit eligibility for asylum based on criminal activity,

[6] The Departments do not intend, however, to imply that an immigration adjudicator could not or should not find these offenses to be particularly serious crimes in the context of adjudicating individual asylum applications on a case-by-case basis.

the limit must be based on either a particularly serious crime or a serious nonpolitical crime. Rather, the Attorney General and the Secretary may choose to designate certain criminal activity as a limitation or condition on asylum eligibility separate and apart from the scope of crimes considered particularly serious. These additional limitations must simply be established by regulation and must be consistent with the rest of section 208 of the Act (8 U.S.C. 1158).

Nothing in the Act suggests that Congress intended for the particularly serious crime bar at section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(A)(ii)) or the serious nonpolitical crime bar at section 208(b)(2)(A)(iii) of the Act (8 U.S.C. 1158(b)(2)(A)(iii)) to be the sole bars to asylum based on criminal activity. The Departments disagree with comments suggesting that existing exceptions to asylum eligibility occupy the entire field of existing exceptions. The Attorney General and the Secretary have the authority to impose additional limitations on asylum eligibility that are otherwise consistent with the limitations contained section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)). Those existing limitations include limitations on eligibility because of criminal conduct. *See, e.g.,* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime)) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Deciding to impose additional limitations on asylum eligibility that are also based on criminal conduct, as the Departments are doing in this rulemaking, is accordingly consistent with the statute. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).

Of note, in *Trump* v. *Hawaii,* the Supreme Court determined that the INA's provisions regarding the entry of aliens ''did not implicitly foreclose the Executive from imposing tighter restrictions,'' even in circumstances in which those restrictions concerned a subject ''similar'' to the one that Congress ''already touch[ed] on in the INA.'' 138 S. Ct. 2392, 2411–12 (2018). Thus, by the same reasoning, Congress's statutory command that certain aliens are ineligible for asylum based on a conviction for a particularly serious crime or serious nonpolitical crime does not deprive the Attorney General and Secretary of authority, by regulation, to deny asylum eligibility for certain other aliens whose circumstances may—in a general sense—be ''similar.''

Commenters' references to the proposed rule revising 8 CFR 245.1(c)(8) (1997) (limitations on eligibility for adjustment of status) and subsequent case law striking down that proposed rule are inapposite. The First Circuit explained that the adjustment of status statute grants the Attorney General discretion to grant applications, but that this authority does not extend to grant the Attorney General authority to define eligibility for that relief. *Succar,* 394 F.3d at 10. However, unlike the adjustment of status statute, INA 245(a) (8 U.S.C. 1255(a)), the asylum statute explicitly grants the Attorney General authority to define additional limitations on eligibility for relief that are ''consistent with this section.'' [7] INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). This express grant of authority contradicts any implied limitation on the Attorney General's authority that might otherwise be inferred from Congress's delineation of certain statutory bars.

ii. Law Regarding the Categorical Approach

Comment: Commenters asserted that the proposed rule violated the Supreme Court's longstanding categorical approach. Commenters stated that ''federal courts have repeatedly embraced the 'categorical approach' to determine the immigration consequence(s) of a criminal offense, wherein the immigration adjudicator relies on the statute of conviction as adjudicated by the criminal court system, without relitigating the nature or circumstances of the offense in immigration court.'' Additionally, commenters noted that the Supreme Court has ''long deemed undesirable'' a ''*post hoc* investigation into the facts of the predicate offenses.'' *Moncrieffe* v. *Holder,* 569 U.S. 184, 200 (2013). Commenters argued that the proposed rule directly contravenes this directive to avoid post hoc investigations.

Commenters emphasized that the categorical approach promotes fairness and due process, as well as judicial and administrative efficiency by avoiding ''pseudo-criminal trials.'' Citing *Moncrieffe,* commenters noted concern that if an immigration adjudicator were required to determine the nature and amount of remuneration involved in, for example, a marijuana-related conviction, the ''overburdened immigration courts'' would end up weighing evidence ''from, for example, the friend of a noncitizen'' or the ''local police officer who recalls to the contrary.'' *Id.* at 201. Commenters noted that this would result in a disparity of outcomes based on the presiding immigration judge and would further burden the immigration court system. Moreover, commenters noted that the Supreme Court has repeatedly applied the categorical approach and found that its virtues outweigh its shortcomings. Citing *Mathis* v. *United States,* 136 S. Ct. 2243, 2252–53 (2016), commenters noted that the Supreme Court articulated basic reasons for adhering to the elements-only inquiry of the categorical approach, including ''serious Sixth Amendment concerns'' and ''unfairness to defendants'' created by alternative approaches.

Commenters asserted that the Departments' concern regarding the unpredictable results of the categorical approach is misleading because immigration adjudicators may already utilize a facts-based analysis to determine whether an offense is a ''particularly serious crime'' that would bar asylum. Commenters further alleged that the Departments recognized that this was a red herring by noting that the BIA has rectified some anomalies by determining that certain crimes, although not aggravated felonies, nonetheless constitute particularly serious crimes. *See* 84 FR at 69646.

Commenters further noted that, even if an offense does not rise to the level of a particularly serious crime, immigration adjudicators may deny asylum as a matter of discretion. In addition, commenters averred that for gang-related and domestic violence offenses, the proposed rule undermined criminal judgments and violated due process because the proposed rule disregarded the established framework for determining whether a conviction is an aggravated felony. Rather than looking to the elements of the offense, as currently required by the categorical approach, commenters noted that the proposed rule required adjudicators to consider ''gang-related'' or ''domestic violence'' conduct that may not have been one of the required elements for a

[7] Moreover, at least two Federal courts of appeals rejected the reasoning in *Succar. See supra* note 5; *see also Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (''We also reject [the] argument * * * that the agency must not make categorical exclusions, but may rely only on case-by-case assessments. Even if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. The approach pressed by [the petitioner]—case-by-case decisionmaking in thousands of cases each year—could invite favoritism, disunity, and inconsistency. The [agency] is not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding.'' (citations, footnote, and quotation marks omitted)); *Fook Hong Mak* v. *INS,* 435 F.2d 728, 730 (2d Cir. 1970) (''We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis * * *.'').

conviction and therefore not objected to by the asylum applicant or his or her attorney during the criminal proceeding.

Response: The Departments first note that the traditional elements-to-elements categorical approach extolled by the commenters and as set out in *Mathis* by the Supreme Court is an interpretive tool frequently applied by the courts to determine the immigration-related or penal consequences of criminal convictions. *Cf. Mathis,* 136 S. Ct. at 2248 (''To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach * * * .''). However, this traditional categorical approach is not the only analytical tool blessed by the Supreme Court, and the exact analysis depends on the language of the statute at issue. For example, in *Nijhawan* v. *Holder,* 557 U.S. 29, 38 (2009), the Court held that the aggravated felony statute at section 101(a)(43) of the Act (8 U.S.C. 1101(a)(43)) ''contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.'' Based on the language of section 101(a)(43)(M)(i) of the Act (8 U.S.C. 1101(a)(43)(M)(i)), the Supreme Court held that the INA required a ''circumstance-specific'' analysis to determine whether an aggravated felony conviction for a fraud or deceit offense involved $10,000 or more under INA 101(a)(43)(M)(i) (8 U.S.C. 1101(a)(43)(M)(i)). *Id.* at 40. And in *Mathis* itself, the Supreme Court observed that the categorical approach is not the only permissible approach: Again relying on the language as written in a statute by Congress, the Supreme Court explained that ''Congress well knows how to instruct sentencing judges to look into the facts of prior crimes: In other statutes, using different language, it has done just that.'' *Mathis,* 136 S. Ct. at 2252 (noting the determination in *Nijhawan* that a circumstance-specific approach applies when called for by Congress).

Nevertheless, the Departments did not purport to end the use of the traditional categorical approach for determining asylum eligibility through the proposed rule. Instead, the Departments explained that the use of the categorical approach has created inconsistent adjudications and created inefficiencies through the required complexities of the analysis in immigration adjudications. *See* 84 FR at 69646–47. The Departments' concerns with the categorical approach are in line with those of an increasing number of Federal judges and others who are required to work within its confines. *See, e.g., Lopez-Aguilar* v. *Barr,* 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring) (''I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach. * * * The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results.''); *see also Lowe* v. *United States,* 920 F.3d 414, 420 (6th Cir. 2019) (Thapar, J., concurring) (''[I]n the categorical-approach world, we cannot call rape what it is. * * * [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent.'').

As a result, the Departments proposed, for example, that an alien who has been convicted of ''[a]ny felony under Federal, State, tribal, or local law'' would be ineligible for asylum. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed). This provision would not require an adjudicator to conduct a categorical analysis and compare the elements of the alien's statute of conviction with a generic offense. As explained in the NPRM, the Departments believe this will create a more streamlined and predictable approach that will increase efficiency in immigration adjudications. 84 FR at 69647. It will also increase predictability because it will be clear and straightforward which offenses will bar an individual from asylum.

The Attorney General and the Secretary have the authority to place additional limitations on eligibility for asylum, provided that they are consistent with the rest of section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). There is no obligation that any criminal-based limitation implemented pursuant to this authority must correspond with a particular generic offense to which an adjudicator would compare the elements of the alien's offense using the categorical approach, particularly when not every criminal provision implemented by Congress itself requires such an analysis. *See Nijhawan,* 557 U.S. at 36; *see also United States* v. *Keene,* 955 F.3d 391, 393 (4th Cir. 2020) (holding that Congress did not intend for the violent crimes in aid of racketeering activity statute (18 U.S.C. 1959) to require a categorical analysis because ''the statutory language * * * requires only that a defendant's *conduct,* presently before the court, constitute one of the enumerated federal offenses as well as the charged state crime'' (emphasis in original)). Additionally, prior case law interpreting and applying the categorical approach to determine whether a crime is particularly serious does not apply where, like here, the Departments are designating additional limitations on eligibility for asylum under the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).[8]

Finally, the Departments expect immigration adjudicators to determine whether an alien is barred from asylum eligibility under the other provisions of the proposed rule due to the alien's conviction or conduct in keeping with case law. For example, in order to determine whether an alien's misdemeanor conviction is a conviction for an offense ''involving * * * the possession or trafficking of a controlled substance or controlled substance paraphernalia,'' the adjudicator would be required to review the specific elements of the underlying offense as required by the categorical approach. On the other hand, the inquiry into whether conduct is related to street-gang activity or domestic violence as promulgated by the rule is similar to statutory provisions that already require an inquiry into conduct-based allegations that may bar asylum but that do not require a categorical approach analysis. *See* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (bar to asylum based on persecution of others); INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) (immigration benefits for aliens who are battered or subjected to extreme cruelty).

iii. Law Regarding the Validity of Convictions

Comment: Commenters also asserted that the proposed rule's establishment of criteria for determining whether a conviction or sentence is valid for immigration purposes exceeded the Act's statutory grant of authority, violated case law, and violated the Constitution. Broadly speaking,

[8] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the inclusion of the new categories of bars in the proposed rule. *See* 84 FR at 69645–54. The regulatory text, however, does not actually designate any additional offenses as ''particularly serious crimes.'' The text instead aligns with section 208(b)(2)(C) by setting out ''[a]dditional limitations on asylum eligibility.'' *See id.* at 65659. Section 208(b)(2)(B)(ii) remains relevant to the current rule in that the new bars are ''consistent with'' the INA partly because they deny eligibility as a result of crimes or conduct that share certain characteristics with ''particularly serious crimes,'' but the Departments clarify that they are promulgating this rule under section 208(b)(2)(C). Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

commenters asserted that the NPRM is contrary to the intent of Congress because it attempts to ''rewrite immigration law.'' First, commenters asserted that the proposed rule violated the full faith and credit owed to State court decisions. Second, commenters asserted that the Departments misread and misinterpreted applicable case law in justifying the presumption against the validity of post-conviction relief. Third, commenters expressed concern with the rebuttable presumption against the validity of post-conviction relief in certain circumstances created by the proposed rule.

Commenters expressed opposition to the NPRM's rebuttable presumption that an order vacating a conviction or modifying, clarifying, or otherwise altering a sentence is for the purpose of ameliorating the conviction's immigration consequences in certain circumstances, *see* 8 CFR 208.13(c)(8), 1208.13(c)(8) (proposed), because they alleged that it could violate principles of federalism under the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, sec. 1, as codified by the Full Faith and Credit Act, 28 U.S.C. 1738. Commenters asserted that the proposed rule abandoned the presumption of regularity that should accompany State court orders. By precluding an adjudicator from considering a post-conviction order entered to cure substantive or procedural constitutional deficiencies, adjudicators are effectively given permission to second-guess State court decisions, which would undermine the authority of and attribute improper motives to State and Federal tribunals. Commenters alleged that, in this way, immigration judges would become fact-finders who look beyond State court records. Further, one commenter contended that the NPRM undermined local authority to ''evaluate the impact and consequences certain conduct should have on its residents by adding broad misdemeanor offenses as a bar to asylum relief,'' which the commenter asserted would interfere with a local authority's ''sovereign prerogative to shape its law enforcement policies to best account for its complex social and political realities.''

Commenters averred that the Departments cited ''a misleading quote'' from *Matter of F–,* 8 I&N Dec. 251, 253 (BIA 1959), which would allow asylum adjudicators to look beyond the face of the State court order. *See* 84 FR at 69656. Commenters asserted that the Departments failed to read *Matter of F-* in its entirety and that, if they had, they would have noted that the BIA instead offered support in favor of presuming the validity of a State court order unless there is a reason to doubt it. *Matter of F–,* 8 I&N Dec. at 253 (''Not only the full faith and credit clause of the Federal Constitution, but familiar principles of law require the acceptance at face value of a judgment regularly granted by a competent court, unless a fatal defect is evident upon the judgment's face. However, the presumption of regularity and of jurisdiction may be overcome by extrinsic evidence or by the record itself.'').

Additionally, commenters stated the proposed rule violates circuit courts of appeals case law holding that the BIA may not consider outside motives. Commenters cited *Pickering* v. *Gonzales,* 465 F.3d 263, 267–70 (6th Cir. 2006), which held that the BIA was limited to reviewing the authority of the court issuing a vacatur and was not permitted to review outside motives, such as avoiding negative immigration consequences. Commenters also cited *Reyes-Torres* v. *Holder,* 645 F.3d 1073, 1077–78 (9th Cir. 2011), and noted that the court held that the respondent's motive was not relevant to the immigration court's inquiry into whether the decision vacating his conviction was valid. Finally, commenters cited *Rodriguez* v. *U.S. Attorney General,* 844 F.3d 392, 397 (3d Cir. 2006), which held that the immigration judge may rely only on ''reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.'' Commenters asserted that, in direct contravention of these cases, the proposed rule grants ''vague and indefinite authority to look beyond a facially valid vacatur,'' which violates asylum seekers' rights to a full and fair proceeding.

Commenters also asserted that the Departments improperly extended the decision in *Matter of Thomas and Thompson,* 27 I&N Dec. 674, to all forms of post-conviction relief. By extending this decision, commenters stated that the proposed rule imposes an ultra vires and unnecessary burden on asylum seekers. Commenters first asserted that the Attorney General's decision in *Matter of Thomas and Thompson* had no justification in the text or history of the Act. Specifically, commenters stated that the Act does not limit the authority of immigration judges by requiring them to consider only State court sentence modifications that are based on substantive or procedural defects in the underlying criminal proceedings. Rather, commenters asserted, the Act requires a ''convict[ion] by a final judgment.'' Commenters argued that, because a vacated judgment is neither ''final'' nor a ''judgment,'' it would have no effect on immigration proceedings. Commenters argued therefore that the Act does not permit immigration judges to treat a vacated judgment as valid and effective based on when, how, or why it was vacated. Moreover, commenters asserted that ''[c]ourt orders are presumptively valid, not the other way around.''

Commenters asserted that the BIA, in *Matter of Cota-Vargas,* 23 I&N Dec. 849, 852 (BIA 2005), *overruled by Matter of Thomas and Thompson,* 27 I&N Dec. 674, relied on the text of the Act and the legislative history behind Congress's definition of ''conviction'' and ''sentence'' in section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)) to hold that proper admissions or findings of guilt were treated as convictions for immigration purposes, even if the conviction itself was later vacated. Commenters argued that, as a result, neither the text of the Act nor the legislative history supports the conclusion reached in *Matter of Thomas and Thompson,* and hence that the decision should not be extended to the proposed rule. Commenters stated that the same is true of orders modifying, clarifying, or altering a judgment or sentence, as recognized by the BIA in *Matter of Cota-Vargas,* 23 I&N Dec. at 852. Specifically, commenters quoted *Matter of Cota-Vargas* in noting that the NPRM's approach to ''sentence modifications has no discernible basis in the language of the Act.''

Commenters also objected to the two situations in which the rebuttable presumption against the validity of an order modifying, clarifying, or altering a judgment or sentence arises: When a court enters a judgment or sentencing order after the asylum seeker is already in removal proceedings; or when the asylum seeker moves the court to modify, clarify, or alter a judgment or sentencing order more than one year after it was entered. Commenters cited the holding in *Padilla* v. *Kentucky,* 559 U.S. 356, 374 (2010), that noncitizen defendants have a Sixth Amendment right to be competently advised of immigration consequences before agreeing to a guilty plea. Commenters alleged that the presumption is unlawful under *Padilla* because it holds asylum applicants whose rights were violated under *Padilla* to a different standard. Commenters similarly asserted that the presumption would prejudice asylum seekers who have not had an opportunity to seek review of their criminal proceedings until applying for asylum. Commenters stated that asylum applicants would be forced to rebut the presumption that an order, entered after the asylum seeker was

placed in removal proceedings or requested more than one year after the date of conviction or sentence was entered, is invalid. In this way, commenters alleged, the NPRM would ''compound the harm to immigrants who * * * have been denied constitutionally compliant process in the United States criminal legal system.''

One commenter asserted that some orders changing a sentence or conviction are entered after removal proceedings began because the alien had not received the constitutionally required advice regarding immigration consequences stemming from his or her criminal convictions. Other commenters explained that because criminal defendants oftentimes lack legal representation in post-conviction proceedings, they may have lacked knowledge of their constitutional rights or resources to challenge their convictions or related issues. Commenters also explained that asylum applicants may not have had reason to suspect defects in their criminal proceedings until they applied for asylum and met with an attorney. Commenters asserted that the NPRM would also harm those people if they realized these defects more than one year after their convictions were entered.

Another commenter explained that ''state and federal sentencing courts should have more discretion to ameliorate the consequences of criminal convictions for a non-citizen's immigration proceedings. Collateral sanctions imposed on persons convicted of crimes—such as ineligibility to apply for relief from removal and other immigration consequences—should be subject to waiver, modification, or another form of relief if the sanctions are inappropriate or unfair in a particular case.''

Response: The Attorney General and the Secretary are granted general authority to ''establish such regulations [as each determines to be] necessary for carrying out'' their authorities under the INA. INA 103(a)(1), (a)(3), and (g)(2) (8 U.S.C. 1103(a)(1), (a)(3), and (g)(2)); *see also Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (describing INA 103(g)(2) (8 U.S.C. 1103(g)(2)) as ''a general grant of regulatory authority''); *cf. Narenji* v. *Civiletti,* 617 F.2d 745, 747 (DC Cir. 1979) (''The [INA] need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him.''). As stated above, the Attorney General and the Secretary also have the congressionally provided authority to place additional limitations and conditions on eligibility for asylum, provided that they are consistent with section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Prescribing the effect to be given to vacated, expunged, or modified convictions or sentences is an ancillary aspect of prescribing additional limitations or conditions on asylum eligibility.

As explained in the NPRM, the rule codifies the principle set forth in *Matter of Thomas and Thompson,* 27 I&N Dec. at 680, that, if the underlying reasons for the vacatur, expungement, or modification were for ''rehabilitation or immigration hardship,'' the conviction remains effective for immigration purposes. *See* 84 FR at 69655. Even before *Matter of Thomas and Thompson* was decided, courts of appeals repeatedly accepted the result reached in that case. *See id.; see also Saleh* v. *Gonzales,* 495 F.3d 17, 24 (2d Cir. 2007); *Pinho* v. *Gonzales,* 432 F.3d 193, 215 (3d Cir. 2005). Therefore, the Departments reject commenters' assertions that the rule improperly relies on or extends *Matter of Thomas and Thompson.*[9] In addition, the Departments note that agencies may decide whether to announce reinterpretations of a statute through rulemaking or through adjudication. *Matter of Thomas and Thompson,* 27 I&N Dec. at 688 (citing, *inter alia, NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974)). In *Matter of Thomas and Thompson,* the Attorney General elected to address prior BIA precedent regarding the validity of modifications, clarifications, or other alterations through administrative adjudication. *Id.* at 689. That the Attorney General declined to consider additional issues on this topic through the administrative adjudication does not foreclose him from later promulgating additional interpretations or reinterpretations of the Act through rulemaking, as is being done in this final rule. *See Bell Aerospace Co.,* 416 U.S. at 294.

The Departments also reject commenters' claims that the approach set forth by the rule violates the Full Faith and Credit Clause, U.S. Const. art. IV, sec. 1, or the Full Faith and Credit Act, 28 U.S.C. 1738. The Full Faith and Credit provisions of 28 U.S.C. 1738 apply to courts and not administrative agencies. *See NLRB* v. *Yellow Freight Sys., Inc.,* 930 F.2d 316, 320 (3d Cir. 1991) (federal administrative agencies are not bound by section 1738 because they are not ''courts''); *see also Am. Airlines* v. *Dep't. of Transp.,* 202 F.3d 788, 799 (5th Cir. 2000) (28 U.S.C. 1738 did not apply to the Department of Transportation because it is ''an agency, not a 'court'''').

Moreover, as explained by the Second Circuit, and as reiterated by the Attorney General in *Matter of Thomas and Thompson,* when an immigration judge reviews a State conviction for an offense, the immigration judge is merely comparing the State conviction to the Federal definition of an offense under the Act. *Saleh,* 495 F.3d at 26 (''[T]he BIA is simply interpreting how to apply Saleh's vacated State conviction for receiving stolen property to the INA and is not refusing to recognize or relitigating the validity of Saleh's California state conviction.''); *Matter of Thomas and Thompson,* 27 I&N Dec. at 688 (''[T]he immigration judge in such a case simply determines the effect of that order for the purposes of federal immigration law.''). As a result, because the State court order remains effective and unchallenged for all other purposes, there is no intrusion on State law and no violation of the principles of federalism and comity. *Matter of Thomas and Thompson,* 27 I&N Dec. at 688.

The Departments reject commenters' assertions that the NPRM improperly quotes *Matter of F–,* 8 I&N Dec. 251. The NPRM cites *Matter of F-* only to support the proposition that the alien must establish that a court issuing an order vacating or expunging a conviction or modifying a sentence had jurisdiction and authority to do so. 84 FR at 69656. No law compels the Departments to accept State court orders entered without jurisdiction, and there is no sound public policy reason for doing so. Further, adopting such a policy would also potentially raise difficulties for the faithful and consistent administration of the immigration laws, as the Departments could be required to accept a State court judgment declaring an alien to be a United States citizen, even though a State court cannot confer or establish United States citizenship. Both

[9] To the extent the commenters disagree with the substance of the Attorney General's decision in *Matter of Thomas and Thompson,* the Departments note that this rulemaking is not the mechanism for expressing such criticisms. The Attorney General has the authority to review administrative determinations in immigration proceedings, which includes the power to refer cases for review. INA 103(a)(1), (g) (8 U.S.C. 1103(a)(1), (g)); 8 CFR 1003.1(h)(1); *see also Xian Tong Dong* v. *Holder,* 696 F.3d 121, 124 (1st Cir. 2012) (the Attorney General is authorized to direct the BIA to refer cases to him for review and, given this authority, his decisions are entitled to *Chevron* deference). When the Attorney General certifies a case to himself, he has broad discretion to review the issues before him. *See Matter of J–F–F–,* 23 I&N Dec. 912, 913 (A.G. 2006).

Matter of F- and the regulatory language simply restate the longstanding proposition that adjudicators in the Departments are not bound by judgments rendered by courts without jurisdiction, and even the full language noted by commenters from *Matter of F-* adheres to that proposition. *Matter of F–,* 8 I&N Dec. at 253 (explaining that, although ''familiar principles of law require the acceptance at face value of a judgment regularly granted by a competent court,'' the ''presumption of regularity and of jurisdiction may be overcome by extrinsic evidence or by the record itself'').

Commenters' statements that the Departments' interpretation of ''conviction'' runs contrary to Congress's intent in defining the term are similarly misplaced. As explained by the Attorney General, in enacting section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)), Congress made clear that immigration consequences should flow from the original determination of guilt. *Matter of Thomas and Thompson,* 27 I&N Dec. at 682 (describing subsequent case law analyzing Congress's intent in enacting a definition for conviction). To the extent that commenters relied on *Matter of Cota-Vargas,* 23 I&N Dec. 849, the Attorney General expressly overruled that decision and explained that Congress did intend to clarify the definition of ''conviction'' for immigration purposes. *Matter of Thomas and Thompson,* 27 I&N Dec. at 679, 682.

Regarding commenters' concerns about the creation of a rebuttable presumption against the validity of an order modifying, clarifying, or altering a judgment or sentence, the Departments reiterate that this is merely a presumption. Individuals will be able to overcome the presumption by providing evidence that the modification, clarification, or vacatur was sought for genuine substantive or procedural reasons. As noted in the NPRM, the purpose of this presumption is to promote finality in immigration proceedings by encouraging individuals to pursue legitimate concerns regarding the validity of prior convictions. 84 FR at 69656.

The Departments disagree that creating a rebuttable presumption is unlawful under *Padilla* v. *Kentucky,* 559 U.S. 356. In *Padilla,* the Supreme Court held that noncitizen defendants have a Sixth Amendment right to be competently advised of immigration consequences before agreeing to a guilty plea. *Id.* at 374. The rule does not affect this right, and noncitizen defendants continue to retain this right in criminal proceedings. Moreover, if a noncitizen defendant is not properly apprised of the immigration consequences of a guilty plea, that individual continues to have the right to pursue the necessary action to address that error through the criminal justice system. Similarly, an individual whose Sixth Amendment rights were determined to have been violated in contravention of *Padilla* would be able to present this evidence in immigration proceedings and, if the evidence is sufficient, overcome the presumption that the individual was seeking a modification, clarification, or vacatur for immigration purposes.

Regarding commenters' assertions that State and Federal sentencing courts should have more discretion to ameliorate the consequences of criminal convictions for a non-citizen's immigration proceedings, the Departments disagree. Administration and enforcement of the nation's immigration laws as written by Congress are entirely within the purview of the Executive Branch, specifically the Attorney General and the Secretary. *See* INA 103 (8 U.S.C. 1103). The Attorney General and the Secretary are granted discretion and authority to determine the manner in which to administer and enforce the immigration laws. *Id.* At the same time, this rule will not have any bearing on how States or other jurisdictions implement their criminal justice system because, as explained, any post-conviction relief remains valid for all other purposes.

b. Violation of International Law

Comment: Numerous commenters alleged that the proposed rule violates the United States' obligations to protect refugees and asylum seekers under international law, including obligations flowing from the Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (''the Protocol'' or ''the 1967 Protocol''), which incorporates Articles 2 to 34 of the 1951 Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6233, 6259–76 (''the Refugee Convention''). Commenters stated that, by virtue of signing the Protocol, the United States is bound to create refugee laws that comply with the Protocol. Commenters asserted that the current laws, regulations, and processes governing asylum adjudications are already exceedingly harsh and are not compliant with international obligations. Commenters claimed that, rather than working to better align the United States with international obligations, the proposed rule's new categorical bars to asylum violate both the language and spirit of the Refugee Convention.

Commenters speculated that the proposed rule will violate the principle of non-refoulement, as described in Article 33(1) of the Refugee Convention, which requires that ''[n]o contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'' Commenters noted that, in considering non-refoulement, the United States is obligated to ensure a heightened consideration to children. Commenters also claimed that the exception to refugee protection contained in Article 33(2) of the Refugee Convention [10] does not affect non-refoulement obligations. Commenters also outlined the United States' obligations to protect migrants, irrespective of migration status, as outlined in the Universal Declaration of Human Rights and other human rights instruments. Commenters stated that to comply with these protection obligations, the United States must respond to the protection needs of migrants, with a particular duty of care for migrants in vulnerable situations.

Commenters also asserted that the proposed rule violates the United States' obligations under customary international law. These commenters cited Article III of the U.S. Constitution and *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 729 (2004), in asserting that customary international law is recognized as and must be applied as U.S. law. Commenters stated that, unlike treaty law, customary international law cannot be derogated by later legislation and remains in full force at all times. Commenters claimed that even good faith efforts by States to change a rule are violations of customary international law until the rule has been changed by a consensus of States through *opinio juris* and state practice. Despite this summary of customary international law, these commenters did not specify how the proposed rule violates customary international law.

Other commenters averred that the proposed rule violates international law by expanding the definition of a ''particularly serious crime'' beyond the parameters of the term as defined by the United Nations High Commissioner for

[10] Article 33(2) of the Refugee Conviction provides: ''The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''

Refugees (''UNHCR'') by rendering nearly all criminal convictions bars to asylum. Commenters recognized that Article 33(2) of the Refugee Convention allows states to exclude or expel individuals from refugee protection if they have been ''convicted by a final judgment of a particularly serious crime'' and ''constitute[] a danger to the community of that country.'' However, commenters asserted that this clause is intended only for ''extreme cases,'' in which the particularly serious crime is a ''capital crime or a very grave punishable act.'' Commenters cited UNHCR's statement that the crime ''must belong to the gravest category'' and that the individual must ''become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum.'' Again citing UNHCR, commenters further asserted that this exception does not include less extreme crimes such as ''petty theft or the possession for personal use of illicit narcotic substances.''

Commenters also expressed concern that the proposed rule's categorical bars do not allow for an individualized analysis as to whether an individual who has been convicted of a particularly serious crime also presents a danger to the community. Commenters noted that, in the proposed rule, the Departments cited the need for increased efficiency as a justification for creating these additional bars. However, commenters responded that an individualized determination is exactly what is required by the Refugee Convention. Specifically, commenters claimed that the Departments ignored UNHCR guidelines,[11] which require not only a conviction for a particularly serious crime but also a determination that the individual constitutes a danger to the community of the country of refuge. Commenters averred that a conviction, without more, does not make an individual a present or future danger to the community. Commenters accordingly asserted that the Refugee Convention's ''particularly serious crime'' bar should apply only after a determination that an individual was convicted of a particularly serious crime and a separate assessment demonstrates that he or she is a present or future danger.

In addition, commenters alleged that the Act, in combination with subsequent agency interpretations, have already expanded the term ''particularly serious crime'' far beyond its contemplated definition by creating the categorical ''particularly serious crime'' bar that incorporates the aggravated felony definition. Similarly, commenters stated that adjudicators already have overly broad discretion to deny asylum based on alleged criminal conduct. These commenters claimed that the proposed rule would cause the United States to further depart from its international obligations by creating additional bars without consideration of other factors, such as dangerousness. Commenters alleged that, in justifying the proposed rule, the Departments improperly cited the ''serious non-political crime'' bar that applies only to conduct that occurred outside the United States.

In addition to these alleged violations of international law, commenters also asserted that the Departments' emphasis on the discretionary nature of asylum violates U.S. treaty obligations, congressional intent, and case law. Commenters noted that, although a refugee seeking protection in the United States does not always have a claim to mandatory protection, Congress's intent, in enacting the Refugee Act of 1980, Public Law 96–212, 94 Stat. 102 (''the Refugee Act''), was to expand the availability of refugee protection and bring the United States into compliance with its obligations under the 1967 Protocol. Commenters alleged that the proposed rule does the opposite by providing seven categorical bars to asylum and, as a result, violates the spirit and intent of the Refugee Act.

Commenters alleged that the Departments' reliance on the Attorney General's discretion to enact the proposed changes is ultra vires because the Attorney General, even in his discretion, may not violate domestic law, international treaties, or fundamental human rights. Specifically, commenters averred that the Attorney General's discretion is limited by the criteria in sections 208(b) and (d) of the Act (8 U.S.C. 1158(b) and (d)) as well as the legislative history regarding these sections, which, according to the commenters, clearly incorporate international law and legal norms. Commenters stated, moreover, that where the United States is a party to a treaty, any decision to abrogate the treaty must be clearly expressed by Congress.

One commenter expressed concern with the Departments' interpretation and reliance on Article 34 of the Refugee Convention, which provides that parties ''shall as far as possible facilitate the assimilation and naturalization of refugees.'' This commenter criticized the Departments' analysis regarding the availability of alternative relief for individuals barred from asylum under the proposed rule. Specifically, the commenter noted that, although Article 34 requires the United States only to make efforts to naturalize refugees, not to naturalize all refugees, this does not mean that the United States then has the discretion to limit access to the asylum system in the first place.

Response: As explained in the NPRM, this rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention.[12] This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation.

As an initial matter, the rule affects eligibility for asylum but does not place any additional limitations on statutory withholding of removal or protection under the CAT regulations. The United States implemented the non-refoulement provision of Article 33(1) of the Refugee Convention through the withholding of removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the non-refoulement provision of Article 3 of the CAT through the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429, 440–41 (1987); *Matter of C-T-L–,* 25 I&N Dec. 341 (BIA 2010) (applying section 241(b)(3)); *see also* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, div. G, sec. 2242, 112 Stat. 2681, 2631–822; 8 CFR 208.16 through 208.18; 1208.16 through 1208.18. The Supreme Court has explained that asylum ''does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,'' which provides that contracting States '''shall as far as possible facilitate the assimilation and naturalization of refugees.' '' *Cardoza-Fonseca,* 480 U.S. at 441. Article 34 ''is

[11] Commenters cited paragraph 154 the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

[12] The Departments also note that neither of these treaties is self-executing, and that they are therefore not directly enforceable in U.S. law except to the extent that they have been implemented by domestic legislation. *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (CAT ''was not self-executing''); *see also INS* v. *Stevic,* 467 U.S. 407, 428 n.22 (1984) (''Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.'').

precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Id.*

Because the rule does not affect statutory withholding of removal or CAT protection, the proposed rule is consistent with the non-refoulement provisions of the 1951 Refugee Convention, the 1967 Protocol, and the CAT. *See Matter of R-S-C–,* 869 F.3d at 1188 & n.11 (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado* v. *Lynch,* 786 F.3d 1155, 1162 (9th Cir. 2015) (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by FARRA and its implementing regulations).

The rule does not affect the withholding of removal process or standards. INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 208.16, 1208.16. An alien who can demonstrate that he or she would more likely than not face persecution on account of a protected ground or torture may qualify for statutory withholding of removal or CAT protection. Therefore, because individuals who may be barred from asylum by the rule remain eligible to seek statutory withholding of removal and CAT protection, the rule does not violate the principle of non-refoulement. *Cf. Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (discussing the distinction between asylum and withholding of removal and explaining that ''withholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood'').

Commenters asserted, without support, that the United States must respond to the needs of migrants to comply with the 1948 Universal Declaration of Human Rights. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (''UDHR''). The UDHR is a non-binding human rights instrument, not an international agreement, and thus it does not impose legal obligations on the United States. *Alvarez-Machain,* 542 U.S. at 728, 734–35 (citing John P. Humphrey, The U.N. Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (Evan Luard ed., 1967) (quoting Eleanor Roosevelt as stating that the Declaration is '''a statement of principles * * * setting up a common standard of achievement for all peoples and all nations' and 'not a treaty or international agreement * * * impos[ing] legal obligations.' '')). In any case, although the UDHR proclaims the right of ''[e]veryone'' to ''seek and to enjoy'' asylum, UDHR Art. 14(1), it does not purport to state specific standards for establishing asylum eligibility, and it certainly cannot be read to impose an obligation on the United States to grant asylum to ''everyone,'' *see id.,* or to prevent the Attorney General and the Secretary from exercising their discretion granted by the INA, consistent with U.S. obligations under international law as implemented in domestic law. *See* UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* 3 (Jan. 26, 2007), *https://www.unhcr.org/4d9486929.pdf* (''The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.''). The United States' overall response to the needs of migrants extends beyond the scope of this rulemaking.

To the extent that commenters made blanket assertions that the rule violates customary international law or other international documents and statements of principles, the commenters ignore the fact that the rule leaves the requirements for an ultimate grant of statutory withholding of removal or CAT withholding or deferral of removal unchanged.

As explained in additional detail in section II.C.2.a.i of this preamble, the rule did not designate additional particularly serious crimes in the regulatory text. Because the Departments have the independent authority for these changes under INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)), the Departments need not further respond to comments regarding the current ''particularly serious crime'' bar, as those comments extend beyond the scope of this rulemaking. Nevertheless, commenters' assertions that the proposed rule improperly and unlawfully expands the definition of ''particularly serious crime'' beyond the definition provided by UNHCR are misguided. UNHCR's interpretations of or recommendations regarding the Refugee Convention and the Protocol, such as set forth in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1992) (reissued Feb. 2019), are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427 (1999). ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28. To the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply to statutory withholding of removal—which is the protection that implements Article 33 of the Convention—and which, as discussed above, this rule does not affect.

Commenters also relied on the advisory UNHCR Handbook to assert that an adjudicator must make an individualized assessment as to whether an asylum applicant presents or will present a danger to the community. Again, as noted above, the Departments clarify in section II.C.2.a.i that the rule did not designate additional particularly serious crimes in the regulatory text. Regardless, the Departments have longstanding authority under U.S. law to create asylum-related conditions without an individualized consideration of present or future danger to the community.[13] For example, in 2000, Attorney General Janet Reno limited asylum eligibility pursuant to the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) based on ''a fundamental change in circumstances'' or the ability of an alien to reasonably relocate within the alien's country of nationality or last habitual residence, even where that alien had established he or she had suffered past persecution. *See* Asylum Procedures, 65 FR 76121, 76133–36 (Dec. 6, 2000) (adding 8 CFR 208.13(b)(1)(i)–(ii)). As outlined in the NPRM, the Attorney General and Congress have previously established several mandatory bars to asylum eligibility. 84 FR at 69641. The Departments note that the adjudicator must still make an individualized determination as to whether a given offense falls into the category of conduct

[13] In addition, even if this rulemaking did enact regulatory provisions requiring an interpretation of particularly serious crimes, U.S. law has long held that, once an alien is found to have been convicted of a particularly serious crime, there is no need for a separate determination whether he or she is a danger to the community. *See Matter of N-A-M–,* 24 I&N Dec. 336, 343 (BIA 2007), *aff'd, N-A-M-* v. *Holder,* 587 F.3d 1052 (10th Cir. 2009), *cert. denied,* 562 U.S. 1141 (2011); *Matter of Q-T-M-T–,* 21 I&N Dec. 639, 646–47 (BIA 1996); *Matter of K–,* 20 I&N Dec. 418, 423–24 (BIA 1991); *Matter of Carballe,* 19 I&N Dec. 357, 360 (BIA 1986).

contemplated by an individual bar. *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994) (upholding particularly serious crime bar), *abrogated on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009). In addition, as explained above, the UNHCR Handbook is not binding on the Attorney General, the BIA, or United States courts, although it ''may be a useful interpretative aid.'' *Aguirre-Aguirre,* 526 U.S. at 427.

The Departments disagree with commenters' assertions that, by relying on the discretionary nature of asylum, the rule violates U.S. treaty obligations, congressional intent, and case law. As explained above, because the rule does not alter eligibility for withholding of removal or CAT protection, the rule does not violate U.S. treaty obligations and ensures continued compliance with U.S. non-refoulement obligations. Additionally, Congress's intent in enacting the Refugee Act was ''a desire to revise and regularize the procedures governing the admission of refugees into the United States.'' *Stevic,* 467 U.S. at 425. Rather than expanding the availability of refugee protection, as asserted by commenters, the Refugee Act's definition of refugee does ''not create a new and expanded means of entry, but instead regularizes and formalizes the policies and practices that have been followed in recent years.'' *Id.* at 426 (quoting H.R. Rep. No. 96–608, at 10 (1979)). Moreover, case law supports the Attorney General's authority under U.S. law to limit asylum. *See Yang* v. *INS,* 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding regulatory implementation of the firm resettlement bar); *see also Komarenko,* 35 F.3d at 436 (upholding regulatory implementation of the ''particularly serious crime'' bar).

Regarding the Attorney General's and the Secretary's discretion to enact the rule, the Departments disagree that the rule is ultra vires because, as explained above, Congress has granted the Attorney General and the Secretary the authority to limit eligibility for asylum. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Moreover, the rule does not violate applicable obligations under domestic law or international treaties for the reasons discussed above.

3. Concerns With Categorical Bars

In addition to comments generally opposing the seven bars proposed by the NPRM, commenters also raised concerns related to specific bars.

a. Felonies

Comment: Commenters opposed the proposed limitation on asylum eligibility for individuals who have been convicted of any felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed). Commenters generally stated that the proposed limitation was overbroad and that the Departments failed to support their stated position that offenses carrying potential sentences of more than one year correlate to recidivism and dangerousness. Commenters asserted that the proposed limitation would ''sweep in'' minor conduct, including some State misdemeanors.

Commenters also opposed the Departments' proposed definition of the term ''felony,'' *see* 8 CFR 208.13(c)(7)(i), 1208.13(c)(7)(i) (proposed), as any crime defined as a felony by the relevant jurisdiction of conviction, or any crime punishable by more than one year imprisonment. Commenters objected to both portions of the proposed definition.

Specifically, commenters opposed the definition's reliance on the maximum possible sentence of an offense over the actual sentence imposed. Commenters opposed the Departments' reasoning for that determination. *See* 84 FR at 69646 (''[T]he sentence actually imposed often depends on factors such as offender characteristics that may operate to reduce a sentence but do not diminish the gravity of the crime.'' (alteration and quotation marks omitted)). Commenters stated that imposing a sentence requires careful consideration of numerous factors, including any mitigating circumstances, and that the proposed definition dismissed careful sentencing considerations by prosecutors and criminal sentencing courts, which are charged with considering public safety. Commenters stated that the actual sentence imposed is a more faithful and accurate measure of whether an individual's conduct was ''particularly serious'' and that not every offense that would be a felony under the proposed definition is or should be considered a ''particularly serious crime.'' Commenters also stated that not every alien convicted of a crime that is punishable by more than one year of imprisonment is a danger to the community who should be barred from asylum eligibility.

Commenters also opposed the proposal that the definition of felony include any offense that is labeled as a felony in its respective jurisdiction, regardless of the maximum term of imprisonment or other factors. Commenters stated that, with certain types of offenses, the difference between misdemeanors and felonies does not necessarily involve aggravated conduct or heightened risk to the public but rather factual elements, such as the alleged dollar value of a stolen good. Accordingly, commenters stated, it would be inappropriate to categorically bar eligibility for asylum on this basis.

Commenters asserted that a categorical bar against all felonies, as defined by the NPRM, would result in drastic inconsistencies and unfair results and would undermine the Departments' stated goal of uniformity and consistency. Commenters stated that the proposed definition would improperly treat a broad range of offenses as equally severe. Additionally, commenters stated, a broad range of criminal conduct encompassing varying degrees of severity or dangerousness could be charged under the same disqualifying offense.

At the same time, commenters suggested that identical conduct in different States (or other jurisdictions) would have different consequences on eligibility for asylum, depending on whether the jurisdiction labeled the crime as a felony or set a maximum penalty of over one year of imprisonment. As an example, one commenter asserted that felony theft threshold amounts among the States vary considerably, ranging from $200 to $2,500 or more, but noted that the proposed rule would treat these varying offenses equally under the proposed definition. The commenter stated that the definition was overbroad and did not exercise the ''special caution'' that should be taken with asylum cases given the high stakes involved. Other commenters stated that the desire for consistency should not be elevated over ''legitimate concerns of fairness and accurate assessments of dangerousness.''

One commenter opined that the proposed limitation would ignore the federalist nature of the U.S. criminal justice system, where each State has its own criminal code and makes individual determinations about which conduct should be criminalized, and how.

Commenters stated that the ''harsh inequities'' created by the rule would dissuade aliens who are fleeing persecution to plead guilty to misdemeanor charges that could carry a one-year sentence, even if the plea agreement would not include any incarceration, which could in turn have a host of unintended collateral consequences in the criminal justice system. Numerous commenters offered specific examples of State laws that they asserted would improperly be considered disqualifying offenses under the proposed limitation and accompanying definition. For example,

commenters stated that some States, such as Massachusetts, define misdemeanors, which may carry a sentence of one year or more in a ''house of correction,'' much more broadly than many other States. Commenters also listed statutes from New York,[14] Maryland,[15] and several other States that they believed should not qualify as a basis for limiting eligibility to asylum.

Response: The Departments disagree with commenters' opposition to the inclusion of any felony conviction as a bar to asylum eligibility and to the corresponding proposed definition of ''felony'' for the purposes of determining whether the bar applies. As an initial matter, to the extent commenters expressed concern that the inclusion of any felony is an inaccurate measure of whether an individual's conduct was ''particularly serious'' or that not every offense that would be a felony under the proposed definition is or should be considered a ''particularly serious crime,'' the Departments need not address these concerns in detail because this rule, like the proposed rule, designates these offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[16] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6).

As explained above, the Departments reiterate the explanation in the NPRM that the inclusion of any felony conviction as a bar to asylum eligibility is intended to avoid inconsistencies, inefficiencies, and anomalous results that often follow from the application of the categorical approach. 84 FR at 69645–46. In addition, the felony limitation on eligibility for asylum is consistent with other losses of benefits for felony convictions. *See* 84 FR at 69647 (explaining that treating a felony conviction as disqualifying for purposes of obtaining the discretionary benefit of asylum would be consistent with the disabilities arising from felony convictions in other contexts and would reflect the ''serious social costs of such crimes'').

The Departments disagree with commenters' concerns that the felony limitation and related definition of ''felony'' would result in drastic inconsistencies and unfair results, undermining the stated purpose of the rule. As described in the NPRM, the existing reliance on the categorical approach to determine the immigration consequences of convictions has far too often resulted in seemingly inconsistent or anomalous results. 84 FR at 69645–46.[17] The rule will significantly help to curtail inconsistencies and confusion over what offenses may be disqualifying for purposes of asylum, as all aliens who have been convicted of the same level of offense will receive the same treatment during asylum proceedings.

The Departments understand that the States have different criminal codes with different definitions of crimes, levels of offense, and other differences. With respect to commenters' federalism concerns, Congress has plenary authority over aliens, and that authority has been delegated the Departments. *See Zadvydas* v. *Davis,* 533 U.S. 678, 695 (2001) (citing *INS* v. *Chadha,* 462 U.S. 919, 941–42 (1983), for the proposition that Congress must choose ''a constitutionally permissible means of implementing'' that power); INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Additionally, as stated in the NPRM and above in section II.C.2.A.ii, the categorical approach is overly complex, leads to inconsistent treatment of aliens who have been convicted of serious criminal offenses, and presents a strain on judicial and administrative resources. Although some aliens who have been convicted of serious criminal offenses are appropriately barred from discretionary benefits under the Act, such as asylum, others are not. *See, e.g., Lowe,* 920 F.3d at 420 (Thapar, J., concurring) (''[I]n the categorical-approach world, we cannot call rape what it is. * * * [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent.''). This rule will provide certainty by establishing a bright-line rule that is both easy to understand and will apply uniformly to all applicants who have been convicted of felonies, which the Departments believe to be significant offenses. Aliens are being given advance notice through the NPRM, which was published on December 19, 2019, 84 FR at 69646, and by this publication of the final rule, that any felony conviction will be a bar to eligibility for the discretionary benefit of asylum. *Cf.* 8 CFR 208.3(c)(6)(vi)(A), 8 CFR 1208.3(c)(6)(vi)(A) (proposed) (barring aliens who have been convicted of felonies ''on or after [the effective] date'').

The Departments disagree that the proposed definition of ''felony'' implicates federalism concerns by defining the term ''felony,'' as it is to be used in this context, differently from States' (or other jurisdictions') definitions of felonies. In fact, the Departments believe that the felony definition is consistent with principles of federalism by primarily deferring to each State's choice of what offenses to define as felonies. Similarly, the alternative definition capturing any crime punishable by more than one year of imprisonment is consistent with the Federal definition and many States' definitions of ''felony.'' *See, e.g.,* 18 U.S.C. 3559 (defining ''felonies'' as offenses with a maximum term of imprisonment of more than one year); 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying State laws).

Congress has delegated to the Departments, not the States or other jurisdictions, the authority to set additional limitations on eligibility for

[14] *See* N.Y.P.L. 145.05. (criminalizing the causing of $250 worth of property damage); N.Y.P.L. 275.34 (criminalizing the recording of a movie in a theater two times); N.Y.P.L. 220.06 (criminalizing simple possession of more than half an ounce of a narcotic).

[15] *See* MD. CODE, ALCO. BEV. 6–307; MD. CODE, ALCO. BEV. 6–402 (criminalizing the sale of alcohol to a visibly intoxicated person with a sentence of up to two years); MD. CODE, CRIM. LAW 3–804 (criminalizing the use of a telephone to make a single anonymous phone call to annoy or embarrass another person with a sentence of up to three years); MD. CODE, CRIM. LAW 4–101 (criminalizing the simple possession of a ''dangerous weapon,'' including a utility knife, on one's person, with a sentence of up to three years); MD. CODE, CRIM. LAW 6–105 (criminalizing the burning of property under $1,000 with a sentence of up to 18 months); MD. CODE, CRIM. LAW 6–205 (criminalizing the unauthorized entry into a dwelling with a sentence of up to three years); MD. CODE, CRIM. LAW 7–203 (criminalizing the temporary use of another person's vehicle without his or her consent (*i.e.,* ''joyriding'') with a sentence of up to four years); MD. CODE, TAX–GEN. 13–1015 (criminalizing the import, sale or transportation of unstamped cigarettes within the state of Maryland with a sentence of up to two years).

[16] The proposed rule's preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of all felonies as bars to asylum eligibility. *Compare* 84 FR at 69645 (explaining that the Attorney General and the Secretary could reasonably exercise their discretion to ''classify felony offenses as particularly serious crimes for purposes of 8 U.S.C. 1158(b)(2)(B)(ii)''), *with id.* at 69647 (explaining that, in addition to their authority under section 208(b)(2)(C), ''the Attorney General and the Secretary ''further propose relying on their respective authorities under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to make all felony convictions disqualifying for purposes of asylum eligibility''). The regulatory text, however, does not actually designate any additional offenses as ''particularly serious crimes.'' Instead, the discussion of particularly serious crimes helps illustrate how issuing the new bars pursuant to section 208(b)(2)(C) is ''consistent with'' the rest of the INA because the new bars—similar to the ''particularly serious crime'' bar—exclude from eligibility those aliens whose conduct demonstrates that they are dangerous to the United States or otherwise do not merit eligibility for asylum. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

[17] Further discussion of the problems with the categorical approach is set out above in section II.C.2.a.ii.

asylum, and the Departments have reasonably determined that the offenses encompassed within the definition should be disqualifying offenses. This rule will not have any direct bearing on how States or other jurisdictions implement their criminal justice system.

With respect to commenters' concerns that the rule will affect how and when aliens enter into plea deals for criminal offenses, such pleadings take place during criminal proceedings, not immigration proceedings. Although asylum adjudications may rely on the information derived from criminal proceedings, the Departments believe that any effects that the rule might have outside of the immigration context are beyond the context of this rulemaking. *Cf. San Francisco* v. *USCIS,* 944 F.3d 773, 804 (9th Cir. 2019) (''Any effects [of a DHS rule] on [healthcare] entities are indirect and well beyond DHS's charge and expertise.''). Additionally, the Departments believe that this rule would actually provide more clarity in the pleading process because the rule sets forth straightforward guidelines about what offenses would and would not be disqualifying offenses for purposes of asylum. In turn, criminal defense attorneys will be better able to advise their clients on the predictable immigration consequences of a conviction. *Cf. Padilla,* 559 U.S. at 357 (''There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear.'').

Second, regarding the commenters' concerns with the definition for the term ''felony,'' *see* 8 CFR 208.13(c)(7)(i), 1208.13(c)(7)(i) (proposed), the Departments disagree that the definition should look to the actual sentence imposed instead of the maximum possible sentence. As noted in the NPRM, consideration of an offense's maximum possible sentence is generally consistent with the way other Federal laws define felonies. *See* 84 FR at 69646; *see also, e.g.,* 5 U.S.C. 7313(b) (''For the purposes of this section, 'felony' means any offense for which imprisonment is authorized for a term exceeding one year.''); *cf.* U.S.S.G. 2L1.2 cmt. n.2 ('''Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.''). The Model Penal Code and most States likewise define a felony as a crime with a possible sentence in ''excess of one year.'' Model Penal Code § 1.04(2); *see also* 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying State laws).

In addition, as recognized by the commenters, sentencing courts and prosecutors consider a number of factors when imposing a sentence, many of which have no bearing on the seriousness of the crime committed. Specifically, in *Matter of N-A-M–,* 24 I&N Dec. 336 (BIA 2007), the BIA explained that the sentence imposed might be based on conduct ''subsequent and unrelated to the commission of the offense, such as cooperation with law enforcement authorities,'' or ''offender characteristics.'' *Id.* at 343 (determining that the respondent had been convicted of a particularly serious crime even where no term of imprisonment was imposed); *see also Holloway* v. *Att'y Gen. U.S.,* 948 F.3d 164, 175 (3d Cir. 2020) (''[T]he maximum penalty that may be imposed often reveals how the legislature views an offense. Put succinctly, the maximum possible punishment is certainly probative of a misdemeanor's seriousness.'' (footnote and internal quotation marks omitted)). Such considerations are necessarily unrelated to the seriousness of the actual crime, and the sentence imposed is ''not the most accurate or salient factor to consider in determining the seriousness of an offense.'' *Matter of N-A-M–,* 24 I&N Dec. at 343; *see also Holloway,* 948 F.3d at 175 n.12 (stating that the penalty imposed may be more reflective of how a sentencing judge viewed an offender than the offense itself).

The Departments therefore reject recommendations to consider the sentence imposed when determining whether a conviction is a felony, as opposed to the NPRM's proposal to consider the maximum possible sentence associated with a given offense. The Departments are persuaded by the reasoning of the U.S. Court of Appeals for the Third Circuit, which recognized that, in cases where the analysis centers around an offense, and not the offender (as in the ''particularly serious crime'' analysis), ''the maximum punishment is a more appropriate data point because it provides insight into how a state legislature views a crime—not how a sentencing judge views an individual.'' *Holloway,* 948 F.3d at 175 n.12. Thus, the Departments continue to believe that lengthier maximum sentences are associated with more serious offenses that appropriately should have consequences when determining asylum eligibility. 84 FR at 69646.

Furthermore, as noted above, the Departments are acting within their designated authority pursuant to section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) (authority to establish additional limitations and conditions on eligibility for asylum) to designate felonies, as defined in the rule, as disqualifying offenses for purposes of asylum eligibility. *See* section II.C.2.a.i. Assuming, arguendo, that the commenters are correct that felonies as defined by the final rule do not necessarily reflect an alien's dangerousness, the Departments' authority to set forth additional limitations and conditions on asylum eligibility under this provision requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to these additional conditions or limitations first meet a particular dangerousness threshold. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of felonies as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars on eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Indeed, by expressly including ''serious nonpolitical crimes'' as a statutory basis for ineligibility, Congress indicated that ''particularly serious crimes'' need not be the only crime-based bar on asylum

eligibility. And by further excluding from eligibility aliens who engage in certain harmful conduct, regardless of whether those aliens pose a danger to the United States, *see* INA 208(b)(2)(A)(i) (persecutor bar) (8 U.S.C. 1158(b)(2)(A)(i)), Congress indicated that ''dangerousness'' need not be the only criterion by which eligibility for asylum is to be determined.

b. Alien Smuggling or Harboring

Comment: Commenters raised several concerns with respect to the NPRM's proposed bar to asylum eligibility for aliens convicted of harboring or smuggling offenses under sections 274(a)(1)(A) and (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A), (a)(2)). *See* 8 CFR 208.13(c)(6)(i), 1208.13(c)(6)(i) (proposed).

First, commenters asserted that the NPRM improperly broadened the existing statutory bar to asylum for many individuals who have been convicted of alien smuggling or harboring under sections 274(a)(1)(A) and (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A), (a)(2)). Specifically, commenters noted that such convictions already constitute aggravated felonies under the Act that would bar an alien from eligibility for asylum,[18] ''except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual).'' *See* INA 101(a)(43)(N) (8 U.S.C. 1101(a)(43)(N)). Commenters opposed the NPRM, asserting that it improperly proposed removing the limited exception to this bar and imposing a blanket bar against anybody convicted of such an offense. Commenters asserted that adjudicators should have the discretion to decide whether individuals convicted of such offenses, who are not already statutorily precluded because their convictions are not considered aggravated felonies, should be barred from asylum.

Commenters also asserted that the proposed limitation undermined congressional intent. Specifically, commenters stated that Congress intended to make asylum available to those present in the United States, without regard to how they entered, and would not have intended to bar from asylum first-time offenders who were convicted for helping their family members escape persecution. *See* INA 208(a)(1) (8 U.S.C. 1158(a)(1)) (providing that an alien ''who arrives in the United States (whether or not at a designated port of arrival * * *)'' may apply for asylum in accordance with the rest of the section). Commenters stated that this congressional intent is demonstrated by the fact that Congress did not consider such offenses to be aggravated felonies and thus, in turn, particularly serious crimes that would bar asylum eligibility.

Commenters also asserted that the proposed limitation undermined UNHCR's recognition that aliens must sometimes commit crimes ''as a means of, or concomitant with, escape from the country where persecution was feared,'' and that the fear of persecution should be considered a mitigating factor when considering such convictions. However, the commenters did not elaborate on how this assertion pertains to aliens who commit crimes concomitant with another person's escape from a country where persecution may be feared.

Commenters asserted that the Departments failed to properly explain how all smuggling and harboring convictions under section 274 of the Act (8 U.S.C. 1324) reflected a danger to the community that should result in a categorical bar to asylum.

Numerous commenters stated that they opposed the proposed limitation because it unfairly penalized asylum seekers for helping their family members, such as minor children and spouses, to come to the United States for any reason, including to escape from persecutors, traffickers, or abusers. Commenters stated that the proposed bar would force family members to choose between their loved ones remaining in danger in their countries of origin and themselves or their family being barred from asylum and returned to their persecutors. At least one commenter stated that the Departments illogically concluded that the hazard posed to a child or spouse being smuggled is greater than the harm the same child or spouse would face in the country of origin.

At least one commenter suggested that children in particular would be harmed by the proposed bar because children are often derivatives on their parents' asylum application and may have nobody else to care for them in the United States if their parents are deported. Commenters also stated that asylum seekers often travel to the United States in family units and that some types of persecution are ''familial by nature, culture, and law.'' Commenters suggested that the proposed limitation would undermine the sanctity of the family and eliminate family reunification options, which would result in permanent separation of families.

Commenters asserted that survivors of domestic violence who are forced to flee to the United States without their children should not be barred from asylum for trying to later reunite the family.

Commenters also objected to the Departments' assertion that families could present themselves at the United States border, stating that this may not be possible due to recently implemented policies and regulations. Some commenters asserted that the proposed bar ''is particularly insidious'' in light of documents[19] that they claimed revealed efforts to utilize smuggling prosecutions against parents and caregivers as part of a strategy to deter families from seeking asylum in the United States and that the NPRM proposed an expansion of those efforts.

At least one commenter stated that the proposed bar, in addition to the above-described policies, would harm good Samaritans who provide humanitarian aid to migrants traversing deserts with harsh conditions. At least one commenter expressed concerns that existing prohibitions against harboring, which include ''transportation,'' could be applied to punish those who engage in routine conduct like driving someone to work or to a doctor's appointment. *See* INA 274(a)(1)(A)(iii) (8 U.S.C. 1324(a)(1)(A)(iii)) (establishing criminal penalties for an individual who ''conceals, harbors, or shields from detection [or attempts to do so], [an] alien in any place, including * * * any means of transportation'').

Commenters also generally asserted that the proposed limitation would multiply the harms that asylum seekers face in coming to the United States.

Response: The Departments disagree with comments suggesting that the additional limitation on eligibility for asylum for aliens who have been convicted of bringing in or harboring certain aliens pursuant to sections 274(a)(1)(A), (2) of the Act (8 U.S.C. 1324(a)(1)(A), (2)) is inappropriate or unlawful.

The Departments reject commenters' concerns that the additional limitation is an unlawful expansion of existing bars to asylum eligibility set forth at

[18] A conviction for an aggravated felony is automatically considered a conviction for a particularly serious crime that would bar an alien from asylum eligibility under section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(A)(ii)). INA 208(b)(2)(B)(i) (8 U.S.C. 1158(b)(2)(B)(i)).

[19] Commenters cited Ryan Devereaux, *Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers,* The Intercept (Apr. 29, 2019), *https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/* (describing how, in May 2017, DHS allegedly set out to target parents and family members of unaccompanied minors for prosecution).

section 101(a)(43)(N) of the Act (8 U.S.C. 1101(a)(43)(N)). It is within the Departments' delegated authority to set forth additional limitations on asylum eligibility. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). In other words, the Departments may expand upon the existing grounds for ineligibility and the disqualifying offenses, even when those or similar grounds have already been assigned immigration consequences, and the Departments have done so in this rulemaking. *Cf. Hawaii,* 138 S. Ct. 2411–12 (holding that Congress ''did not implicitly foreclose * * * tighter restrictions,'' even in circumstances in which those restrictions concerned a subject ''similar'' to the one that Congress ''already touch[ed] on in the INA'').

The Departments disagree with commenters that adjudicators should have the discretion to determine whether aliens who have been convicted of offenses under sections 274(a)(1)(A), (2) of the Act (8 U.S.C. 1324(a)(1)(A), (2)) should be eligible for asylum. Convictions for such offenses are serious and harmful. As noted in the NPRM, even first-time alien smuggling offenses display a serious disregard for U.S. immigration law and pose a potential hazard to smuggled family members, which often include a vulnerable child or spouse. 84 FR at 69648. And as also noted in the NPRM, the Act already bars most individuals who have been convicted of this offense from asylum eligibility, thus demonstrating congressional recognition of the seriousness of such offenses. *Id.* at 69647. Accordingly, the Departments have concluded that no aliens who have been convicted of such offenses should merit the discretionary benefit of asylum.

The Departments disagree with commenters that an additional limitation on eligibility for aliens who have been convicted of alien smuggling or harboring offenses contravenes the ''whether or not at a designated port of arrival'' language in the asylum statute at section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)). The Departments stress that this additional limitation has no bearing on the asylum applicant's manner of entry; rather it involves the asylum applicant's conduct with respect to unlawful entry of others. Thus, the Departments do not further address these comments.

Comments concerning statements or guidance from UNHCR are misplaced. UNHCR's interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol ''may be a useful interpretative aid,'' but they are ''not binding on the Attorney General, the BIA, or United States courts.'' *Aguirre-Aguirre,* 526 U.S. at 427. Indeed, as noted already, ''the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28.

The Departments disagree with commenters who stated that the Departments failed to explain how all smuggling and harboring convictions reflected a danger to the community that should result in a categorical bar to asylum.[20] The Departments believe that they adequately explained their reasoning in the NPRM that such offenses place others, including children, in potentially hazardous situations that could result in injury or death, and that they reflect a flagrant disregard for immigration laws. As a result, those people who commit these offenses present a danger to the community. 84 FR at 69648.

Additionally, as stated above, the Departments have designated such alien smuggling or harboring offenses as discrete bases for ineligibility pursuant to the authority provided by section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) (authority to establish additional limitations and conditions on eligibility for asylum). Assuming, arguendo, that commenters are correct that the offenses designated by the rule do not accurately reflect an alien's dangerousness, the Departments' authority to set forth additional limitations and conditions on asylum eligibility under this provision requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to the conditions or limitations meet a threshold of dangerousness. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of the alien smuggling and harboring offenses included in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). And, as explained previously, Congress's inclusion of statutory bars on eligibility for aliens who engage in certain harmful conduct or commit certain types of crimes that are not ''particularly serious,'' *see* INA 208(b)(2)(A)(i), (iii) (8 U.S.C. 1158(b)(2)(A)(i), (iii)), demonstrates that the ''dangerousness'' associated with the conduct is not the sole criterion by which the Departments may consider whether an alien should be eligible for asylum.

The Departments disagree that this rule would undermine family values or particularly harm children. The Departments believe that the rule helps families and children by discouraging the dangerous practices of alien smuggling and harboring. The Departments disagree with commenters' assertions that current administrative policies or practices prevent families from presenting themselves at the border. In any event, commenters' concerns referencing such policies or practices are outside the scope of this rulemaking.

Finally, regarding commenters' concerns for good Samaritans, the Departments note again that the bar requires a conviction for it to apply in a particular case. As a result, an individual who leaves provisions or other assistance for individuals traversing the harsh terrain at the southern border would not be ineligible for asylum under this bar unless he or she is in fact prosecuted and convicted. As with the other bars, the Departments understand that the individual circumstances surrounding each offense will vary and that some cases may involve mitigating circumstances, but

[20] In addition, the Departments note that some commenters agreed with the Departments' determination regarding the dangerousness of these offenses. For example, one organization stated that ''the conduct required for such a conviction demonstrates contempt for U.S. immigration law and a disregard for the value of human life.''

the Departments find that in the context of asylum eligibility, adjudicators should not look behind a conviction to readjudicate an alien's criminal culpability. Although the individual circumstances behind an alien's prosecution may vary, the Departments have concluded that, to promote adjudicative efficiency, it is appropriate to provide a clear standard that defers to the original prosecutor's determination to pursue a conviction of the alien for his or her conduct, as well as the criminal court's existing determination of proof beyond a reasonable doubt that the alien engaged in the conduct.

c. Illegal Reentry

Comment: Commenters specified several reasons for opposing the NPRM's proposed limitation on eligibility for asylum for aliens convicted of illegal reentry under section 276 of the Act (8 U.S.C. 1326). *See* 8 CFR 208.13(c)(6)(i), 1208.13(c)(6)(i) (proposed). Under section 276(a) of the Act (8 U.S.C. 1326(a)), aliens who unlawfully reenter the United States after having been previously removed are subject to fines and to a term of imprisonment of two years or less. Section 276(b) of the Act (8 U.S.C. 1326(b)) describes certain aliens, such as those who have been removed after commission of an aggravated felony, who face significantly higher penalties for unlawfully reentering the United States after previously having been removed and authorizes sentences of imprisonment up to 20 years as possible penalties.

Some commenters asserted that the Departments improperly concluded that aliens who have been convicted of such offenses are per se dangers to the community, as recidivist offenders of the law, because the NPRM did not consider whether an alien's prior offenses were serious. *See* 84 FR at 69648.

Commenters asserted that the proposed limitation would violate Article 31(1) of the Refugee Convention, which generally prohibits imposing penalties based on a refugee's manner of entry or presence in the country. Commenters stated that this is a critical principle of the Convention because ''it recognizes that refugees often have little control over the place and manner in which they enter the country where they are seeking refuge.'' Commenters stated that the NPRM did not sufficiently explain how the proposed limitation was consistent with the Convention.

Commenters also asserted that the proposed limitation undermined congressional intent and was not consistent with other provisions in the Act. Specifically, commenters stated that Congress, in accordance with international treaty obligations, has ''clearly supported the right to claim asylum anywhere on the U.S. border or at a land, sea, or air port of entry'' for almost 40 years. The commenters cited the Refugee Act, where, they stated, Congress authorized asylum claims by any foreign national ''physically present in the United States or at a land border or port of entry.'' The commenters stated that Congress later expressly reaffirmed this position in enacting section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)), which states that ''[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival * * *)'' may apply for asylum. Commenters believed that this provision ''reflected Congress's ongoing intent to comply with international law, as well as its recognition that allowing an applicant for refugee status to assert a claim for asylum at any point along a land border is a necessary component of essential refugee protections.''

Commenters also asserted that the proposed limitation was inconsistent with the Act because it would treat all immigration violations as just as serious as those violations that should fall under the particularly serious crime bar, thus rendering meaningless the limiting language of ''particularly serious crimes'' in the statute. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)).

Commenters asserted that the proposed limitation was inconsistent with any of the other bars previously recognized by the BIA or the circuit courts because the crime of illegal reentry under section 276 of the Act (8 U.S.C. 1326) has no element of danger or violence to others and has no victim.

Commenters stated that the BIA and the circuit courts have also recognized that an alien's manner of entry should have little effect on eligibility for asylum. *See, e.g., Hussam F.* v. *Sessions,* 897 F.3d 707, 718 (6th Cir. 2018) (holding that it was an abuse of discretion to deny asylum as a matter of discretion when the only negative factor was the alien's ''intentional failure to disclose that his passport was obtained in a non-traditional manner''); *Zuh* v. *Mukasey,* 547 F.3d 504, 511 n.4 (4th Cir. 2008) (''When an alien uses fraudulent documents to escape imminent capture or further persecution, courts and [immigration judges] may give this factor little to no weight.''); *Huang* v. *INS,* 436 F.3d 89, 100 (2d Cir. 2006) (''As with peripheral embellishments, if illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum. It follows that Wu's manner of entry, on the facts in this record, could not bear the weight given to it by the [immigration judge].''); *Mamouzian* v. *Ashcroft,* 390 F.3d 1129, 1138 (9th Cir. 2004) (''[I]n order to secure entry to the United States and to escape their persecutors, genuine refugees may lie to immigration officials and use false documentation.''); *Matter of Pula,* 19 I&N Dec. at 473–74 (holding that the circumvention of the immigration laws is one factor for consideration).

Commenters stated that asylum seekers are often motivated to illegally reenter the United States after having been deported to seek protection from harm rather than for criminal purposes, and that individuals who legitimately fear returning to their countries of origin have been criminally prosecuted under section 276 of the Act (8 U.S.C. 1326). Commenters were concerned that the proposed bar would further criminalize vulnerable individuals fleeing persecution and would result in denial of meritorious claims for asylum. Commenters opined that such individuals should not be barred from asylum.

Commenters stated that the Departments did not take into consideration that trafficking victims may have reentered the United States without authorization ''either because they were smuggled in by [a] trafficker, or because they were removed by the U.S., and then returned to find safety.''

Commenters stated that ''racial and ethnic disparity in the number of sentenced offenders is even more pronounced in the context of illegal reentry'' and that ''latinx immigrants are disproportionately impacted by over-prosecution of illegal reentry offenses and harsh sentencing of illegal reentry convictions.''

Some commenters described anecdotes of ''clients who have had to enter the United States without inspection due to cartel kidnappings, fears of being separated at the border, or misinformation by coyotes.'' One commenter stated that juveniles who were apprehended at the border and placed in Department of Health and Human Services (''HHS'') Office of Refugee Resettlement (''ORR'') custody might request to return to their country

of origin due to ''detention fatigue.'' The commenter stated that, upon return, these juveniles might face the same or new persecution, forcing them to flee once again.

One commenter stated that this proposed limitation was unnecessary because many convictions under section 276 of the Act (8 U.S.C. 1326) already qualify as aggravated felonies. INA 101(a)(43)(O) (8 U.S.C. 1101(a)(43)(O)) (providing that ''an offense described in section 1325(a) [illegal entry] or 1326 of this title [illegal reentry] committed by an alien who was previously deported on the basis of an [aggravated felony as defined by section 101(a)(43) of the Act (8 U.S.C. 1101(a)(43))]'' is an aggravated felony). Additionally, commenters stated that the proposed limitation was unnecessary because individuals who are convicted under section 276 of the Act (8 U.S.C. 1326) are also subject to reinstatement of a prior order of removal under section 241(a)(5) of the Act (8 U.S.C. 1231(a)(5)), and, thus, are barred from applying for asylum if the prior order is reinstated. *See* INA 241(a)(5) (8 U.S.C. 1231(a)(5)) (stating that an alien whose ''prior order of removal is reinstated * * * is not eligible and may not apply'' for any relief under the INA); 8 CFR 1208.31(e), (g)(2), 1241.8(e). The commenters suggested that the Departments inappropriately expanded the bar to categorically exclude anyone convicted of illegal reentry.

Some commenters stated that the proposed limitation was improper because underlying removal orders that are the basis for an illegal reentry conviction are often incorrectly issued and do not withstand legal scrutiny.

Commenters expressed concern that individuals who attempt illegal reentry into the United States to flee persecution may have been previously removed from the United States without being aware of their right to apply for asylum. Commenters opined that such individuals ''would not have knowingly abandoned their right.'' Commenters also stated that some individuals may have been prevented from seeking asylum during prior entries.

Commenters asserted that asylum seekers who illegally reenter could have been incorrectly found to lack a credible fear in prior credible fear interviews. Some commenters stated that asylum seekers with legitimate claims may have been previously removed because they were unable to establish eligibility for relief without adequate access to legal representation. Some commenters asserted that there are credible reports that DHS officers do not comply with requirements to inform individuals subject to expedited removal of their rights or to refer those with a fear of return to asylum officers for credible fear screenings, even when requested, and that DHS officers have engaged in harassment or the spread of misinformation that interferes with individuals' abilities to pursue asylum. One commenter stated that there is a higher risk that credible fear interviews may result in erroneous denial because border patrol officers, not asylum officers, have been conducting asylum interviews. Commenters proposed that the illegal reentry bar to asylum eligibility would ''essentially punish asylum seekers for the failure of DHS officers to follow the agency's own rules.'' Commenters stated that preserving discretion, rather than implementing a categorical bar, would ensure that meritorious asylum claims are heard and correct previous errors.

Some commenters stated that the Departments did not take into account that illegal reentry ''may be the only possible option'' for asylum applicants. Commenters asserted that ''current U.S. violations of international and domestic law regarding access to territory'' further intensified this proposition. Commenters stated that they believed that a number of the Executive Branch's administrative policies—such as (1) ''metering'' at the border; (2) the Migrant Protection Protocols (''MPP''), *see* DHS, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf;* (3) the ''third-country transit bar,'' *see* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019); and (4) international asylum cooperative agreements, *see* Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019)—drive asylum seekers to enter illegally rather than wait to present themselves at a port of entry, which in turn subjects them to the illegal reentry bar. Commenters suggested that, given these policies, the Departments incorrectly asserted that aliens who have previously been removed from the United States may present themselves at a port of entry. *See* 84 FR at 69648. One commenter suggested that many individuals who are driven to enter the United States unlawfully due to these policies do so with the intention of turning themselves in to U.S. Border Patrol authorities. Commenters also raised concerns that the proposed limitation would ''condemn to persecution those who are simply trying to enter the [United States] to reunite with their family and community.'' Commenters were also concerned that individuals with convictions under section 276 of the Act (8 U.S.C. 1326) would be punished twice for the same crime by also being barred from asylum.

Some commenters stated that the NPRM unfairly punished individuals who have fled persecution multiple times or who have faced persecution arising after they had been removed, resulting in multiple unlawful entries. Commenters stated that refugee protection principles upon which asylum law is based require newly arising claims to be examined. Commenters specifically stated that, in proposing the illegal reentry bar, the Departments did not consider that immigrant survivors of violence who are removed to their countries of nationality may face violent retaliation and possibly death at the hands of their abusers or perpetrators and may flee the same perpetrators of domestic and sexual violence multiple times. Commenters asserted that a discretionary assessment was necessary to ensure that meritorious claims are heard.

Response: The Departments disagree with commenters who oppose the rule's additional limitation on asylum eligibility for those who have been convicted of illegal reentry under section 276 of the Act (8 U.S.C. 1326). The Departments have appropriately exercised their delegated authority to impose additional limitations on asylum eligibility per section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).

First, the Departments clarify that this rule, like the proposed rule, designates these offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[21] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6). Regardless of commenters' concerns regarding the dangerousness of these crimes, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) offers a discrete basis

[21] Although the Departments at times cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of a subset of the included bars in the proposed rule, *see* 84 FR at 69645–54, the references to the authority to designate additional particularly serious crimes highlighted an alternative basis for the inclusion of most of the new bars to asylum eligibility and sought to elucidate the serious nature of these crimes and the Departments' reasoning for including these offenses in the new provisions. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

under which the Departments may designate these offenses as bases for ineligibility. Although the ''particularly serious crime'' designation would justify the conclusion that an alien is dangerous, *see* section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(a)(ii)) (''the alien, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the United States''), the Attorney General's and the Secretary's authorities to set forth additional limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) require only that such limitations or conditions be ''consistent with [section 208 of the Act (8 U.S.C. 1158)].'' Thus, even assuming, arguendo, that the offenses designated by the final rule do not necessarily reflect an alien's dangerousness, the Attorney General and the Secretary retain the authority to promulgate the new bar. Accordingly, the Departments are unpersuaded by commenters' concerns regarding whether these offenses may not pose a danger to the community because such a finding is not required under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).

With respect to commenters who expressed concern that the proposed limitation would violate Article 31 of the Refugee Convention, as well as undermine congressional intent and established case law, the Departments note that the rule's limitations on eligibility for asylum are consistent with Article 31 of the Refugee Convention. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to receive asylum does not constitute a prohibited ''penalty'' under Article 31(1) of the Refugee Convention.[22] *Cazun,* 856 F.3d at 257 & n.16; *Mejia,* 866 F.3d at 588.

The proposed rule is also consistent with Article 34 of the Refugee Convention, concerning assimilation of refugees, as implemented by section 208 of the INA, 8 U.S.C. 1158. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See Cardoza-Fonseca,* 480 U.S. at 441; *Garcia,* 856 F.3d at 42; *Cazun,* 856 F.3d at 257 & n.16; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *R–S–C,* 869 F.3d at 1188; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has long recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation. Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing issuance of international travel documents for refugees ''lawfully staying'' in a country's territory, mandates that every person who might qualify for withholding must also be granted asylum. *Garcia,* 856 F.3d at 42; *R–S–C,* 869 F.3d at 1188. Additionally, as noted above, the United States implemented the non-refoulement obligation of Article 33(1) of the Refugee Convention through the withholding-of-removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the non-refoulement obligation of the CAT under the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41. Individuals who may be barred from asylum by the rule remain eligible to seek withholding of removal and protection under CAT in accordance with non-refoulement obligations.

Additionally, as noted in the NPRM, the statutory bar on applying for asylum and other forms of relief when an order of removal is reinstated has been upheld by every circuit to consider the question. 84 FR at 69648; *see Garcia* v. *Sessions,* 873 F.3d 553, 557 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 2648 (2018); *R–S–C,* 869 F.3d at 1189; *Mejia,* 866 F.3d at 587; *Garcia,* 856 F.3d at 30; *Cazun,* 856 F.3d at 260; *Perez-Guzman* v. *Lynch,* 835 F.3d 1066, 1082 (9th Cir. 2016); *Jimenez-Morales* v. *U.S. Att'y Gen.,* 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia* v. *Lynch,* 794 F.3d 485, 489–90 (5th Cir. 2015); *Herrera-Molina* v. *Holder,* 597 F.3d 128, 137–38 (2d Cir. 2010). This reflects a broad understanding that individuals who repeatedly enter the United States unlawfully should not be eligible for the discretionary benefit of asylum and that limiting such eligibility does not conflict with section 208(a) of the Act (8 U.S.C. 1158(a)).

The Departments disagree with commenters' assertions that current administrative practices prevent asylum seekers from lawfully presenting themselves at the border. In any event, commenters' concerns referencing such policies or practices are outside the scope of this rulemaking.

With respect to commenters' concerns that the rule should not apply to those who unlawfully reentered the United States because of their desire to be reunited with family members living in the United States or to individuals who have been victims of trafficking or smuggling, the Departments believe that evaluations of mitigating factors or criminal culpability based on motives are more appropriately reserved for criminal proceedings. As stated in the NPRM, the Departments believe it is reasonable to limit eligibility for asylum to exclude aliens convicted of illegal reentry because this type of offense demonstrates that an alien has repeatedly flouted the immigration laws. *See* 84 FR at 69648. The Departments have a legitimate interest in maintaining the orderly and lawful admission of aliens into the United States. Aliens convicted of illegal reentry have engaged in conduct that undermines that goal.

In response to commenters who suggested that the rule would result in denial of meritorious claims, the Departments note that those with a legitimate fear of persecution or torture may still apply for statutory withholding of removal or CAT withholding and deferral, forms of protection that this final rule does not affect. Additionally, these commenters misapprehend the purpose of this rulemaking. Awarding the discretionary benefit of asylum to individuals described in this rule would, among other things, encourage lawless behavior and subject the United States and its communities to the dangers associated with the crimes or conduct in which such persons have engaged. The Departments have appropriately exercised their authority to impose additional limitations on asylum eligibility to bar such individuals from that relief. Accordingly, those persons do not have meritorious asylum claims. By definition, if an applicant is ineligible for the discretionary benefit of asylum because of this rule, or any other statutory or regulatory limitation, he or she does not have a meritorious claim for asylum.

The Departments disagree with commenters' concerns that individuals with convictions under section 276 of the INA (8 U.S.C. 1326) would be punished twice for the same crime by

[22] The Ninth Circuit recently indicated—erroneously, in the view of the Departments—that removal can be considered a ''penalty'' under Article 31(1) of the Refugee Convention. *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242, 1276 (9th Cir. 2020). In doing so, however, the Ninth Circuit cited the Supreme Court's decision in *Padilla,* 559 U.S. at 364, which discussed immigration penalties in terms of criminal proceedings, not Article 31(1) of the Refugee Convention. Further, the Ninth Circuit noted its observation solely in the context of limiting asylum eligibility based on manner of entry, and the court did not reach other asylum restrictions such as this rule.

being barred from asylum. The Departments emphasize that immigration proceedings are civil in nature, and thus denial of relief from removal is not a punishment, particularly with respect to a discretionary benefit such as asylum. *Cf. Mejia,* 866 F.3d at 588 (''We therefore perceive no basis for concluding that depriving aliens, upon illegal re-entry, additional opportunities to apply for discretionary relief constitutes a 'penalty.'''). In addition, commenters' logic would have far-reaching implications that would undermine the entire statutory scheme that imposes any immigration consequences on account of an alien's criminal convictions, including eligibility for forms of relief or removability from the United States, *see, e.g.,* INA 212(a)(2) (8 U.S.C. 1182(a)(2)) (criminal grounds of inadmissibility); 237(a)(2) (8 U.S.C. 1227(a)(2)) (criminal grounds of deportability), but there has never been any reason to question the framework in such a manner, *see, e.g., Nijhawan,* 557 U.S. at 36 (analyzing whether convictions for certain crimes constituted aggravated felonies for purposes of the INA without questioning whether immigration penalties could be imposed for those convictions).

d. Criminal Street Gang Activity

Comment: Several commenters opposed the imposition of a bar to asylum eligibility based on the furtherance of criminal street gang activity.

As an initial matter, commenters noted that, under the current asylum system, a conviction for an offense categorized as a gang-related crime would bar an individual from asylum in most cases. However, commenters expressed concern that the NPRM extends culpability for gang-related crime beyond offenses categorized as gang-related crimes and would also bar individuals from asylum if an adjudicator ''knows or has reason to believe the crime was committed in furtherance of criminal street gang activity.'' Commenters asserted that the standard for this bar is so broad that individuals not associated with gangs could be included in this category and barred from asylum.

At the same time, commenters argued that the proposed rule does not sufficiently detail how an individual qualifies as a street gang member or how an activity is to be categorized as gang-related. As a result, commenters expressed concern that the proposed rule granted immigration adjudicators too much latitude to determine whether a crime fits into the vague category of supporting, promoting, or furthering the activity of a criminal street gang. Commenters were concerned that information in databases of gang-related crimes or factors such as where the criminal activity occurred may lead to improper categorization of gang-related activity. Commenters were similarly concerned that the bar does not account for the circumstances of the offense, such as whether coercion or threats forced the asylum applicant to undertake the criminal activity. Commenters asserted that immigration adjudicators should, at a minimum, be permitted to consider such factors as coercion or duress prior to granting or denying asylum.

Commenters asserted that the ''reason to believe'' standard is ultra vires and unconscionably limits asylum eligibility for those most in need of protection. Commenters asserted that the ''reason to believe'' standard grandly expands the number of convictions for which an eligibility analysis is required and would ''sweep[] in even petty offenses that would otherwise not trigger immigration consequences.'' Commenters asserted, moreover, that the ''reason to believe'' standard for determining whether there is a sufficient link between the underlying conviction and the gang-related activity is ''overly broad and alarmingly vague.''

Additionally, commenters argued that the ''reason to believe'' standard places the adjudicator in the role of a second prosecutor and requires the adjudicator to decide, without the benefit of a criminal trial and attendant due process of law, whether a crime could have been potentially gang-related. At the same time, commenters stated that immigration adjudicators, who are not criminologists, sociologists, or criminal law experts, would be required to analyze past misdemeanor convictions to determine whether there is a link to gang activity, regardless of whether the individual was also charged or convicted of a street gang offense.

Commenters cited concerns regarding the admission of ''all reliable evidence'' to determine whether there was ''reason to believe'' that the conduct implicated gang-related matters. They averred that this phrase was potentially limitless and that its scope required both parties to present fulsome arguments regarding an offense's possible gang connections. Moreover, commenters asserted that the proposed rule fails to articulate what type of evidence or non-adjudicated conduct may be considered by an adjudicator when determining whether a bar to asylum applies.

In addition, commenters expressed concern that permitting adjudicators to rely on ''all reliable evidence'' will result in immigration adjudicators relying on any type of evidence, including police reports, unsubstantiated or subsequently recanted hearsay statements, and discredited methods of gang identification, such as gang databases. Commenters asserted that this will result in a compounded disparate racial impact based on over-inclusion of young people of color in those gang databases. Commenters asserted that gang databases are ''notoriously inaccurate, outdated, and infected by racial bias.'' Additionally, commenters stated that gang databases are unregulated and that an individual may be included in a database simply based on ''living in a building or even neighborhood where there are gang members, wearing certain colors or articles of clothing, or speaking to people law enforcement believe to be gang members.''

One commenter referenced a decision of the Supreme Judicial Court of Massachusetts holding that the information contained in gang databases is hearsay, not independently admissible, and raises serious Confrontation Clause concerns. *Commonwealth* v. *Wardsworth,* 124 NE3d 662, 678–79 & nn.24–25 (Mass. 2019). That commenter also asserted that, despite the concern expressed by the Supreme Judicial Court of Massachusetts regarding the use of gang databases, immigration judges continue to regularly rely on such reports. By relying on such unreliable evidence, commenters averred, the proposed rule will exacerbate due process violations already occurring as a result of unsubstantiated gang ties.

Commenters further noted that, because these databases disparately affect young people of color, relying on these databases would multiply the harm already caused by racially disparate policing and racially disparate rates of guilty pleas to minor offenses. Commenters claimed that asylum seekers of color are subject to racially disparate policing, which results in racially disparate rates of guilty pleas to minor offense, and which also results in this population being erroneously entered and overrepresented in gang databases. In support of the inaccuracy of these databases, one commenter cited concerns that police departments falsify gang affiliations of youth encountered by police officers. As a result, commenters asserted, the proposed rule would ''invite extended inquiry into the character of young men of color'' who

may otherwise have meritorious asylum claims and who are already subject to racially suspect policing practices.

Commenters noted that police reports are inherently unreliable in the absence of the protections offered by the Confrontation Clause of the Sixth Amendment and the Federal Rules of Evidence, neither of which apply in immigration court. Regarding the unreliability of evidence, one commenter provided an example where neither the police officers nor the alleged victims were required to testify. Without this testimony, the commenter alleged, the immigration adjudicator would be unable to determine whether a victim had a motive to lie to the police, whether the victim later recanted his or her statements, or whether the police officer misunderstood some critical fact. Moreover, commenters asserted that, although immigration adjudicators would be unable to rely on uncorroborated allegations such as those contained in arrest reports, adjudicators could nevertheless shield denials based on such information by relying on discretion.

Commenters stated that the proposed rule would exacerbate due process violations that already occur as a result of unsubstantiated information about gang ties. Commenters claimed that asylum applicants are already subjected to wrongful denials of asylum based on allegations of gang activity made by DHS. Commenters alleged that DHS relies on unreliable foreign databases and ''fusion'' intelligence-gathering centers outside of the United States. For example, one commenter alleged that information regarding gang affiliations gathered from the fusion intelligence-gathering center in El Salvador has already been used against asylum seekers, despite having been found to be inaccurate. At the same time, commenters asserted that immigration adjudicators routinely premise enforcement, detention, and discretionary denials of relief on purported gang membership and often grant deference to gang allegations made by Immigration and Customs Enforcement (''ICE'') personnel. Commenters asserted that the already expanded use of gang databases to apprehend and remove foreign nationals has been widely criticized as an overbroad, unreliable, and often biased measure of gang membership and involvement.

Additionally, commenters expressed disagreement with the Departments' position that all gang-related offenses could be considered as particularly serious crimes. Commenters criticized the Departments' reliance on statistics from up to 16 years ago to demonstrate that gang members commit violent crimes and drug crimes. Commenters disagreed with the Departments' conclusion that all crimes that may be construed as connected to gang activity are particularly serious. Commenters asserted instead that it is illogical to argue that, because gang members may commit some violent crimes and drug crimes, all crimes committed by anyone remotely connected with a gang are particularly serious.

Commenters also asserted that the proposed rule will result in asylum seekers who live in economically distressed areas but who have a minor criminal conviction, for example for a property crime, being excluded from protection. Commenters asserted that including even minor crimes construed as gang-related in the ''particularly serious crime'' bar and preventing those individuals from accessing asylum is ''disingenuous at best, and tinged with racial animus at worst.'' Commenters asserted that this bar would perpetuate racial bias within the immigration court system.

Commenters asserted that the gang-related-crimes bar should not be introduced at all due to the complex nature of gang ties and the frequency with which individuals are mislabeled as being part of a gang. These commenters argued that the risk of erroneously barring legitimate asylum seekers from eligibility is too high. Another commenter noted that it was ''particularly cruel'' to create a bar related to gang offenses ''in the wake of this Administration's refusal to countenance gang violence as a ground to asylum.'' Moreover, commenters asserted that the INA and existing regulations already permit immigration adjudicators to deny asylum as a matter of discretion. Adding this new bar based on gang-related activity, according to these commenters, risks excluding bona fide asylum seekers from protection without adding any useful adjudicatory tool to the process.

Commenters noted that previous attempts to expand the grounds of removal and inadmissibility to include gang membership failed to pass both houses of Congress. One commenter noted concern that an individual could be erroneously convicted of a gang-related crime because of the widespread nature of gang activity in Central America. This commenter also expressed concern that, because gangs in Central America may act with impunity and ''often control a corrupt judiciary,'' an individual could be erroneously convicted of a crime for refusing to acquiesce to a gang's demands.

Response: As explained further in section II.C.2.a.i, the bar based on activity related to criminal street gangs is enacted pursuant to the Attorney General's and the Secretary's designated authorities to establish additional limitations and conditions on asylum. INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[23] This authority requires such conditions and limitations to be consistent with section 208 of the Act (8 U.S.C. 1158) and does not require that the offenses meet a threshold of dangerousness or seriousness. *Compare* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)''), *with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)) *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered a ''danger to the community of the United States'' by virtue of ''having been convicted by a final judgment of a particularly serious crime''). Although the Departments have determined that the included offenses involving criminal street gangs represent dangerous offenses and that the offenders represent particular dangers to society, *see* 84 FR at 69649–50, the Departments would nevertheless be acting within the authority of section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) if commenters are correct that some offenses included are not connected to dangerousness. Section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of criminal street gang-

[23] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of gang-related crimes as bars to asylum eligibility. *Compare* 84 FR at 69650 (''Regardless, criminal street gangs-related offenses—whether felonies or misdemeanors—could reasonably be designated as 'particularly serious crimes' pursuant to 8 U.S.C. 1158(b)(2)(B)(ii).''), *with id.* (''Moreover, even if 8 U.S.C. 1158(b)(2)(B)(ii) did not authorize the proposed bar, the Attorney General and the Secretary would propose designating criminal gang-related offenses as disqualifying under 8 U.S.C. 1158(b)(2)(C).''). Nevertheless, the authority at section 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) aligns with the regulatory text and was used to support all of the categories of bars set out in the rule.

related offenses as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and the Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Moreover, Congress has expressly excluded from eligibility certain aliens who engage in conduct or commit crimes of a certain character or gravity, regardless of whether those aliens are ''dangerous'' to the United States, and regardless of whether those crimes have been formally designated as ''particularly serious.'' *See* INA 208(b)(2)(A)(i), (iii) (8 U.S.C. 1158(b)(2)(A)(i), (iii)). The Departments have concluded that criminal street gang-related offenses are sufficiently similar to such conduct and crimes that aliens who commit such offenses should not be rewarded with asylum and the many benefits that asylum confers.

Further, the Departments disagree with comments asserting the criminal street gang-related offenses are not necessarily indicative of a danger to the United States. *See* 84 FR at 69650. Specifically, the Departments believe that such offenses are strong indicators of recidivism and ongoing, organized criminality. *Id.* Based on the data and research articulated in the NPRM, the Departments believe that individuals who enter the United States and are then convicted of a crime related to criminal street gang activity present an ongoing danger to the community and should therefore be ineligible for asylum. Significantly, the Departments reject commenters' assertions that the Departments relied on data that was over 16 years old. Although one of the reports relied upon in the NPRM was published in 2004, additional studies and information were cited ranging from 2010 to 2015. *See* 84 FR at 69650. Additionally, the White House recently issued a fact sheet observing that ''[a]pproximately 38 percent of all murders in Suffolk County, New York, between January 2016 and June 2017'' were linked to a single criminal gang—MS–13—alone. The White House, *Protecting American Communities from the Violence of MS–13* (Feb. 6, 2020), *https://www.whitehouse.gov/briefings-statements/protecting-american-communities-violence-ms-13/; see also* Alan Feuer, *MS–13 Gang: 96 Charged in Sweeping Crackdown on Long Island,* N.Y. Times (Dec. 20, 2019), *https://www.nytimes.com/2019/12/20/nyregion/ms-13-long-island.html;* Proc. No. 9928, 84 FR 49187, 49187 (Sept. 13, 2019) (explaining that the DOJ is working with law enforcement in El Salvador, Guatemala, and Honduras to ''help coordinate the fight against MS–13, the 18th Street Gang, and other dangerous criminal organizations that try to enter the United States in an effort to ravage our communities,'' and that this partnership ''targets gangs at the source and works to ensure that these criminals never reach our borders''); *id.* (observing that, in 2017 and 2018, ICE officers ''made 266,000 arrests of aliens with criminal records, including those charged or convicted of 100,000 assaults, nearly 30,000 sex crimes, and 4,000 violent killings''). These more recent examples demonstrate the continued threat posed by gang-related crime.

The Departments disagree with commenters' assertions that the rule fails to sufficiently detail how an individual qualifies as a street gang member or how an activity is to be categorized as a gang-related event. As an initial matter, the rule does not purport to categorize individuals as street gang members. Rather, the inquiry is limited into whether an adjudicator knows or has reason to believe that a prior conviction for a Federal, State, tribal, or local crime was committed in support, promotion, or furtherance of criminal street gang activity. 84 FR at 69649. This rule defines ''criminal street gang'' by referencing how that term is defined in the convicting jurisdiction or, alternatively, as the term is defined in 18 U.S.C. 521(a). The Departments believe that the language of the Federal statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, as do the definitions in the convicting jurisdictions. This rule leaves the determination of whether a crime was in fact committed ''in furtherance'' of gang-related activity to adjudicators in the first instance. As noted in the NPRM, to the extent that this type of inquiry may lead to concerns regarding inconsistent application of the bar, the Departments reiterate that the BIA is capable of ensuring a uniform approach. *See* 8 CFR 1003.1(e)(6)(i).

In response to commenters who suggested that the rule would result in denial of meritorious claims, the Departments note that those with legitimate fear of persecution or torture may still apply for statutory withholding of removal or protection under the CAT regulations, as discussed in section II.C.5. In addition, and as explained previously, these commenters misapprehend the purpose of this rulemaking. The Departments have concluded that persons subject to the new bars do not warrant asylum because awarding the discretionary benefit of asylum to such individuals would encourage lawless behavior, subject the United States to certain dangers, and otherwise undermine the policies underlying the statutory framework for asylum. These persons accordingly do not have meritorious asylum claims. And, because nothing in the INA precludes the imposition of these new bars, the fact that these persons' claims might otherwise be meritorious is irrelevant.

Regarding commenters' concerns with the ''reason to believe'' standard articulated in the rule, the Departments note that this standard is used elsewhere in the INA. For example, when considering admissibility, immigration judges consider whether there is reason to believe that the individual ''is or has been an illicit trafficker in any controlled substance.'' INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C)). In accordance with this provision, courts have upheld findings of inadmissibility in the absence of a conviction. *See Cuevas* v. *Holder,* 737 F.3d 972, 975 (5th Cir. 2013) (holding ''that an alien can be inadmissible under [INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C))] even when not convicted of a crime''); *Garces* v. *U.S. Att'y Gen.,* 611 F.3d 1337, 1345 (11th Cir. 2010) (stating that section 1182(a)(2)(C) of the Act (8 U.S.C. 1182(a)(2)(C)) renders an alien inadmissible based on a ''reason to believe'' standard, which does not require a conviction); *Lopez–Umanzor* v. *Gonzales,* 405 F.3d 1049, 1053 (9th Cir. 2005) (''Section 1182(a)(2)(C) does not require a conviction, but only a 'reason to believe' that the alien is or has been involved in drug trafficking.''). The bar on criminal street gang-related activity is narrower in scope than the inadmissibility charge based on illicit trafficking in that the bar in this rule still requires a conviction. As such, the Departments believe that the ''reason to believe'' standard is appropriately applied to the final rule.

Similarly, the ''all reliable evidence'' standard is not a new standard in immigration proceedings. Immigration judges routinely consider any relevant evidence provided in removal hearings by either party. 8 CFR 1240.1(c). Additionally, the BIA held, in the context of evaluating whether a crime constitutes a particularly serious crime,

that, once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, the adjudicator may consider all reliable information in making a ''particularly serious crime'' determination, including but not limited to the record of conviction and sentencing information. *Matter of N-A-M–,* 24 I&N Dec. at 337–38. The Ninth Circuit has held that the BIA's interpretation in *Matter of N-A-M-* is reasonable. *Anaya-Ortiz* v. *Holder,* 594 F.3d 673, 678 (9th Cir. 2010). Additionally, various circuit courts have applied the ''all reliable information'' standard articulated in *Matter of N-A-M-* in considering whether crimes are particularly serious. *See, e.g., Luziga* v. *Att'y Gen. U.S.,* 937 F.3d 244, 253 (3d Cir. 2019); *Marambo* v. *Barr,* 932 F.3d 650, 655 (8th Cir. 2019).

The Departments disagree with commenters' concerns about adjudicators' reliance on arrest reports and uncorroborated information. As an initial point, most asylum claims are based significantly on hearsay evidence that is uncorroborated by non-hearsay evidence. Such evidence, however, does not necessarily make an asylum claim unreliable or insusceptible to proper adjudication. Adjudicators assessing asylum applications are well versed in separating reliable from unreliable information, assigning appropriate evidentiary weight to the evidence submitted by the applicant and DHS, and determining whether corroborative evidence needs to be provided. *See* INA 208(b)(1)(B) (8 U.S.C. 1158(b)(1)(B)). Moreover, this rule does not provide adjudicators with unfettered discretion; instead, adjudicators must consider such evidence in the context of making a criminal street gang determination under the ''reason to believe'' standard. An asylum officer's assessment of eligibility necessarily must explain the consideration of the evidence of record as it applies to the evaluation of bars to asylum and the burden of proof, and it must also explain the exercise of discretion. Similarly, immigration judges are already charged with considering material and relevant evidence. 8 CFR 1240.1(c). To make this determination, immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna* v. *Ashcroft,* 325 F.3d 396, 405 (3d Cir. 2003) (quoting *Bustos-Torres* v. *INS,* 898 F.2d 1053, 1055 (5th Cir. 1990)). Nothing in this rule undermines or withdraws from this standard. Moreover, the Departments would not purport to impinge on an adjudicator's evidentiary determination or direct the result of such a determination. If aliens have concerns about the reliability of any evidence, aliens may challenge the reliability of that evidence as part of their arguments to the adjudicator. As a result, the Departments have concluded that concerns regarding the reliability of gang databases or other evidence are more properly addressed in front of the immigration judge or asylum officer in individual cases.

The Departments disagree with comments that adjudicators should have the discretion to determine whether factors such as coercion or duress affected an individual's involvement in criminal street gang-related activity. The Departments believe that criminal street gang-related activity is serious and harmful in all circumstances. As stated in the NPRM, ''[c]riminal gangs of all types * * * are a significant threat to the security and safety of the American public.'' 84 FR at 69650. Accordingly, the Departments have concluded that aliens who have been convicted of such offenses do not merit the discretionary benefit of asylum, even if their gang involvement was potentially the result of coercion or some other unique circumstance. In addition, the Departments believe that considerations regarding criminal culpability for criminal street gang-related offenses would be best addressed during the individual's underlying criminal proceedings.

Commenters' assertions that the rule will exacerbate harms caused by racially disparate policing practices or that the result of this rule will disproportionately affect people of color are outside the scope of this rulemaking. *Cf. San Francisco,* 944 F.3d at 803–04 (''Any effects [of the public charge rule] on [healthcare] entities are indirect and well beyond DHS's charge and expertise.''). The rulemaking does not address actual or alleged injustices of the criminal justice system, as referenced by the commenters. Moreover, the rule was not racially motivated, nor did racial animus or a legacy of bias play any role in the publication of the rule. Rather, this final rule is being published to categorically preclude from asylum eligibility certain aliens with various criminal convictions because the Departments determined that individuals engaging in criminal activity that is related to criminal street gangs present a sufficient danger to the United States to warrant exclusion from the discretionary benefit of asylum. To the extent that the rule disproportionately affects any group referenced by the commenters, any such impact is beyond the scope of this rule, as this rule was not drafted with discriminatory intent towards any group, and the provisions of the rule apply equally to all applicants for asylum.

e. Driving Under the Influence of an Intoxicant

Comment: Commenters opposed the proposed categorical bar to asylum based on a DUI conviction. Commenters stated that the proposed categorical bars encompass crimes with a wide range of severity, and commenters asserted that DUI does not rise to a comparable level of severity as a particularly serious crime warranting its promulgation as a categorical bar to asylum. Other commenters similarly stated that, because DUI does not involve conduct that is necessarily dangerous on its own, the offense is not serious enough to support a categorical bar to asylum. Commenters provided examples of allegedly low-level convictions for DUI, based on examples such as a court concluding that, when ''the key is in the ignition and the engine is running, a person 'operates' a vehicle, even if that person is sleeping or unconscious,'' *State* v. *Barac,* 558 SW3d 126, 130 (Mo. Ct. App. 2018), or when a person operates a vehicle while under the influence but no injury to another person results. Accordingly, commenters asserted that DUI is not necessarily serious or sufficiently dangerous to warrant a categorical bar. One commenter summarized the concern by stating that offenses related to DUI are ''excessively overbroad in the convictions and conduct covered[ ] and are not tailored to identify conduct that is 'serious' or identify individuals who pose a danger to the community.''

Commenters also asserted that creating a blanket categorical bar to asylum based on a DUI conviction would eliminate the opportunity for adjudicators to consider the facts before them in exercising discretion. Commenters stated that adjudicators should consider the severity of the DUI offense given relevant facts, such as the applicant's criminal history, the underlying cause of the applicant's criminal record involving DUI, the applicant's efforts towards rehabilitation, the length of time passed since the conviction, the applicant's potential danger to the community, and the applicant's risk of persecution if returned to his or her home country.

Commenters noted that multiple DUI convictions are not an absolute bar to cancellation of removal under INA 240A(b) (8 U.S.C. 1229b(b)) and cited the Attorney General's opinion that

such offenses were inconclusive of an individual's character, thus allowing individuals to rebut the presumption with evidence of good character and rehabilitation. *Matter of Castillo-Perez,* 27 I&N Dec. 664 (A.G. 2019). Commenters stated that, ''if individuals seeking discretionary cancellation of removal are afforded the opportunity to show that they merit permanent residence in spite of their prior convictions for driving under the influence, it is nonsensical to promulgate a rule denying asylum seekers that same opportunity.''

Finally, commenters noted that low-income people and people of color are more likely to be pulled over and charged with DUI. These commenters alleged that the proposed rule accordingly exacerbates the unjust criminal justice system by including these provisions as a bar to asylum eligibility.

Response: The Departments disagree that DUI does not warrant a categorical bar to asylum eligibility.

Although commenters provided limited examples of times where an individual convicted of a DUI offense fortunately may not have caused actual harm to others, these sorts of DUI convictions alone would not render an alien ineligible for asylum under this rule. The final rule bars aliens with DUI convictions from asylum eligibility under two grounds in 8 CFR 208.13(c)(6)(iii), (c)(6)(iv) and 1208.18(c)(6)(iii), (c)(6)(iv). First, under 8 CFR 208.13(c)(6)(iii) and 1208.13(c)(6)(iii), a single DUI offense would only be disqualifying if it ''was a cause of serious bodily injury or death of another person.'' Second, under 8 CFR 208.13(c)(6)(iv)(A) and 1208.13(c)(6)(iv)(A), any second or subsequent DUI offense would be disqualifying. Accordingly, a single conviction that does not cause bodily injury or death to another would not be a bar to asylum, but would continue to be considered by adjudicators in determining whether an alien should receive asylum as a matter of discretion.

The Departments maintain that DUI convictions, particularly those covered by this rule (based on actions that cause serious bodily injury or death or that indicate recidivism, along with the risk of harm from such recurrent dangerous behavior), constitute serious, dangerous activity that threatens community safety. First, the Departments reiterate that DUI laws exist, in part, to protect unknowing persons from the dangerous people who ''choose to willingly disregard common knowledge that their criminal acts endanger others.'' 84 FR at 69651. Second, the Supreme Court and other Federal courts have repeatedly echoed the gravity of such acts. *See Begay* v. *United States,* 553 U.S. 137, 141 (2008) (''Drunk driving is an extremely dangerous crime.''), *abrogated on other grounds by Johnson* v. *United States,* 576 U.S. 591 (2015); *United States* v. *DeSantiago-Gonzalez,* 207 F.3d 261, 264 (5th Cir. 2000) (''[T]he very nature of the crime * * * presents a 'serious risk of physical injury' to others[.]''); *Marmolejo-Campos* v. *Holder,* 558 F.3d 903, 913 (9th Cir. 2009) (''[T]he dangers of drunk driving are well established * * * .''); *see also Holloway,* 948 F.3d at 173–74 (''A crime that presents a potential for danger and risk of harm to self and others is 'serious.' * * * 'There is no question that drunk driving is a serious and potentially deadly crime * * * . The imminence of the danger posed by drunk drivers exceeds that at issue in other types of cases.' '' (quoting *Virginia* v. *Harris,* 558 U.S. 978, 979–80 (2009) (Roberts, C.J., dissenting from denial of writ of certiorari))).

It is well within the Departments' authority to condition asylum eligibility based on a DUI conviction. The INA authorizes the Attorney General and the Secretary to establish by regulation additional limitations and conditions on asylum eligibility, INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)), and Federal courts have upheld BIA discretionary denials of asylum based on DUI convictions, even in circumstances where a DUI conviction does not constitute a particularly serious crime. *See, e.g., Kouljinski* v. *Keisler,* 505 F.3d 534, 543 (6th Cir. 2007). For the reasons above, DUI is a serious crime that represents a blatant disregard for the laws and societal values of the United States; accordingly, the final rule limits asylum eligibility by considering a DUI conviction to be a categorical bar to asylum.

For these reasons, the Departments decline to tailor the bar to precisely identify serious conduct, evaluate severity of conduct, identify individuals who pose a danger to communities, or provide discretion to adjudicators, as suggested by commenters. The Departments will no longer afford discretion to adjudicators considering DUI convictions in the circumstances defined by this rule; elimination of such discretion is, again, well within the Departments' authority. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)).

Regarding DUI convictions in the context of cancellation of removal under INA 240A(b) (8 U.S.C. 1229b(b)), the Departments note that cancellation of removal is separate from asylum, and this rule contemplates asylum only. *See* 84 FR at 69640 (stating that the Departments propose to amend their respective regulations governing the bars to ''asylum eligibility''). Although both forms of relief may eventually lead to lawful permanent resident status in the United States, cancellation of removal generally applies to a different class of aliens, and its conditions and requirements are different from asylum relief.[24] *Compare* INA 240A(b) (8 U.S.C. 1229b(b)), *with* INA 208 (8 U.S.C. 1158)). Cancellation of removal requires ''good moral character,'' which asylum relief neither requires nor mentions. Thus, references to DUI convictions and their relative effect on the good moral character requirement for cancellation of removal are irrelevant to asylum eligibility. Commenters conflate two separate forms of relief from removal intended for separate populations with separate eligibility provisions.

Likewise, the Attorney General's statement in *Matter of Castillo-Perez,* 27 I&N Dec. at 671—that multiple DUI convictions were not necessarily conclusive evidence of an individual's character—was made in regards to eligibility for cancellation of removal, not asylum.[25] Accordingly, that case has no bearing on this rulemaking.

[24] Generally, cancellation of removal is a discretionary form of relief in which the Attorney General may cancel removal and adjust status to lawful permanent residence (''LPR'') of an otherwise inadmissible or deportable alien who has been physically present in the United States for a continuous period of not less than 10 years preceding the date of the application; has been a person of good moral character during such period; has not been convicted of an offense under INA 212(a)(2), 237(a)(2), or 237(a)(3) (8 U.S.C. 1182(a)(2), 1226(a)(2), or 1226(a)(3)); and establishes that removal would result in exceptional and extremely unusual hardship to the applicant's U.S. citizen or LPR spouse, parent, or child. *See* INA 240A(b) (8 U.S.C. 1229b(b)). In contrast, asylum is a discretionary benefit that precludes an alien from removal, creates a pathway to LPR status and citizenship, and affords various ancillary benefits such as work authorization, opportunity for certain family members to obtain derivative asylee and LPR status, and authorization, in some cases, to receive certain financial assistance from the government. *See* INA 208 (8 U.S.C. 1158). Asylum eligibility includes the following factors: The alien must be physically present or arrive in the United States, the alien must meet the definition of ''refugee'' under INA 101(a)(42)(A) (8 U.S.C. 1101(a)(42)(A)), and the alien must otherwise be eligible for asylum in that no statutory bars or limitations apply. *See* INA 208(a)(1) (8 U.S.C. 1158(a)(1)), INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)), INA 208(b)(2) (8 U.S.C. 1158(b)(2)) and 8 CFR 1240.8(d); *see also* 84 FR at 69642.

[25] Nevertheless, the Attorney General in the context of discussing eligibility for cancellation of removal as a matter of discretion made clear that ''[m]ultiple DUI convictions are a serious blemish on a person's record and reflect disregard for the safety of others and for the law.'' *Castillo-Perez,* 27 I&N Dec. at 670. This reasoning as to the

Continued

In sum, the rulemaking categorically bars asylum eligibility for those with one or more DUI convictions in order to protect communities from the dangers of driving under the influence. *See* 84 FR at 69650–51; *see also* 84 FR at 69640. It does not consider other factors of apparent concern to commenters, such as financial status, race, or nationality. The rulemaking also does not address actual or alleged injustices of the criminal justice system, as referenced by the commenters. Such considerations are outside the scope of this rulemaking.

f. Battery or Domestic Violence

Comment: Commenters opposed the proposed bar to asylum based on domestic assault or battery, stalking, or child abuse. Broadly, commenters opposed a bar to asylum based on ''mere allegations of conduct without any adjudication of guilt'' for several reasons. First, commenters stated that a bar based on conduct, not convictions, violates INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)), which bars noncitizens who, ''having been convicted by a final judgment of a particularly serious crime, constitute[ ] a danger to the community of the United States.'' In accordance with the plain text and judicial interpretation of this section of the Act, commenters asserted, the statute prohibits application of the ''particularly serious crime'' bar based only on non-adjudicated facts, thereby precluding separation of ''the seriousness determination from the conviction.'' Accordingly, commenters stated that the proposed application of the ''particularly serious crime'' bar based on conduct involving domestic assault or battery directly contradicts the statute, which requires a final judgment of conviction. Commenters also alleged that the proposed rule violates the Supreme Court's holding that ''conviction'' refers to the ''crime as generally committed,'' rather than the actual conduct. *See Sessions* v. *Dimaya,* 138 S. Ct. 1204, 1217 (2018); *see also Delgado,* 648 F.3d at 1109 n.1 (Reinhardt, J., concurring in part and concurring in the judgment). One commenter asserted that the statute ''only bars asylum seekers for alleged conduct in exceptional circumstances like potential terrorist activity or persecution of others. * * * [C]onduct-based asylum bars should be used only in very limited circumstances, and in this case should not be expanded.''

Relatedly, commenters raised constitutional concerns. Commenters cited constitutional principles that ''individuals have a right to defend themselves against criminal charges and are presumed innocent until proven guilty. Individuals should not be excluded from asylum eligibility based on allegations of criminal misconduct that have not been proven in a court of law.'' Accordingly, commenters opposed the NPRM because it ''deprives the individual the opportunity to challenge the alleged behavior and does away with the presumption of innocence.'' More specifically, a commenter claimed that, under the NPRM, an incident and subsequent arrest related to domestic assault or battery would trigger an inquiry into the alien's conduct, thereby undermining the criminal justice system and constitutional due process protections for criminal defendants who may not have access to counsel. The commenter alleged that, regardless of whether the alien was convicted of the offense, the alien may still be barred from asylum relief following an adjudicator's independent inquiry into the incident.

Commenters also stated that a bar based on conduct alone, especially in the context of domestic assault or battery, could disproportionately penalize innocent individuals and victims, and subsequently their spouses and children, who may be denied immigration status or be left with an abuser. First, commenters explained that specific barriers—including discrimination, community ostracism, community or religious norms, or lack of eligibility for certain services—deter aliens from even initially contacting law enforcement. Second, if law enforcement was involved, commenters expressed concern about cross arrests in which both the perpetrator of abuse and the victim are arrested but no clear determinations of fault are made. Commenters stated that ''authorizing asylum adjudicators to determine the primary perpetrator of domestic assault, in the absence of a judicial determination, unfairly prejudices survivors who are wrongly arrested in the course of police intervention to domestic disturbances.'' Further, commenters alleged that ''identifying the primary aggressor is not always consistently nor correctly conducted,'' especially if survivors acted in self-defense. Commenters also expressed concern that survivors of domestic assault or battery are oftentimes vulnerable, with the result that a bar based on conduct alone could affect populations with overlapping vulnerabilities. For example, commenters specifically referenced lesbian, gay, bisexual, transgender, and queer or questioning (''LGBTQ'') survivors, who are already allegedly prone to experience inaction by law enforcement in response to domestic violence, and limited English proficiency individuals, who may be unable to fully describe the abuse to police officers, prompting officers to then use the offenses' perpetrators for interpretation.

One commenter expressed concern that the NPRM establishes a lower standard by which admission may be denied because other forms of admission require an actual conviction or factual admission to form the basis of denial. Accordingly, the commenter stated that similarly situated persons would be treated inconsistently based upon the mechanism for admission that they choose. This commenter also asserted that U nonimmigrant status and Violence Against Women Act of 1994, Public Law 103–322, 108 Stat. 1902 (''VAWA'') relief are insufficient alternative forms of relief because they generally require acknowledgement from a local authority, negating the need for a fact-finding hearing. Presumably then, most individuals affected by the NPRM would be ineligible for these alternative forms of relief. In addition, the commenter noted that granting those benefits is entirely different from making an asylum applicant overcome an asylum bar.

Commenters also identified unintended consequences of the proposed rule, explaining that individuals may act maliciously. One commenter suggested that individuals may file for baseless temporary restraining orders or protective orders to try to block domestic violence victims' applications for employment authorization documents following an asylum application. Another commenter speculated that abusers may falsely accuse or frame survivors of domestic violence to terrorize or control them. One commenter asserted that survivors may be hesitant to report abuse or request a restraining order if it could negatively impact the immigration status of the perpetrator, especially in situations where they share a child. Another commenter stated that it would ''undoubtedly embolden[ ] perpetrators more and len[d] more strength to otherwise weak accusations.''

Some commenters generally stated that the NPRM too broadly categorized domestic violence offenses as particularly serious crimes. Relatedly, another commenter stated that the bar is too vague and requires adjudicators to

seriousness of DUI offenses supports the type of categorical bar at issue here and does not conflict with the Departments' determination that DUI offenses should categorically bar asylum eligibility.

become experts in domestic criminal law jurisdictions of every State to determine whether, for example, conduct ''amounts to'' domestic assault or battery, stalking, or child abuse. Further, the commenter noted that the NPRM's definition of battery and extreme cruelty is different from the various States' criminal laws, which creates inconsistent application. That commenter also alleged that the proposed exceptions for individuals who have been battered or subjected to extreme cruelty are ''insufficient, vague, and place[d] a high burden on victims.'' Another commenter asserted that it is ''unclear how 'serious' will be defined, and whether and how detrimental and potentially false information provided by abusers will be considered in decision-making.'' One commenter suggested that ''the presentation of evidence under oath by adverse parties is a more appropriate forum for adjudications as to whether or not domestic violence took place, and will likely lead to fewer determinations that will cruelly strip immigrant survivors of their right to seek asylum.'' Another commenter asserted that the NPRM does not include a framework or limits to guide an adjudicator's inquiry, especially in the context of false accusations. For these reasons, commenters opposed the NPRM because it allegedly would cause inconsistent and unjust results.

Some commenters claimed that the proposed bar is unnecessary because the current bars for those with domestic violence convictions or aggravated felony convictions allow for ''the denial of asylum protection for these types of crimes when appropriate,'' whereas the proposed bar denies asylum protection for vulnerable individuals. Accordingly, commenters believed that ''immigration judges should retain discretion in these situations and be permitted to grant relief in situations where the asylum seeker is not at fault.''

Many commenters alleged that the proposed bar conflicts with VAWA. One commenter alleged that the NPRM ''distorts language contained in VAWA * * * in order to create barriers for asylum seekers.'' Commenters stated that VAWA gives discretion to adjudicators ''based on a number of factors and circumstances.'' Accordingly, commenters stated that the proposed ''blunt approach'' conflicts with VAWA and lacks ''evidence-based justification for treating asylum seekers differently.'' Commenters were also concerned with the lack of ''analogous protections in the asylum context to protect a survivor from the devastating effects of a vindictive abuser's unfounded allegations.''

Commenters also disagreed with the proposed approach towards the burden of proof as compared to VAWA. Because of the ''vastly different interests at stake,'' commenters stated that VAWA's low burden of proof is necessary for several reasons: More harm results from erroneously denying relief than erroneously granting relief, a lower standard maximizes the self-petitioner's confidentiality and safety, certain evidence may be inaccessible to a victim because the abuser blocked access, and no liberty interests are implicated for alleged perpetrators. By contrast, commenters asserted, a ''rigorous burden of proof is appropriate when potentially barring applicants from asylum,'' as the NPRM did, because ''[t]he consequences of invoking the bar are dire, with the applicant's life and safety hanging in the balance.''

Commenters also disagreed that the exception for asylum applicants who demonstrate eligibility for a waiver under INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) sufficiently protects survivors deemed not to be the primary aggressors. Commenters noted that survivors may be unaware of their eligibility for a waiver, unaware that such a waiver exists, or too fearful to apply.

Commenters also claimed that the waiver application process turns an otherwise non-adversarial inquiry into a ''multi-factor, highly specific inquiry into culpability based on circumstances that may be very difficult for an asylum seeker to prove—especially if proceeding without counsel and with limited English proficiency.'' Commenters also questioned whether adjudicators could conduct such an inquiry and correctly apply the exception because they are removed from the immediate circumstances surrounding an incident. Accordingly, commenters alleged that the waiver fails to adequately protect survivors and, in some cases, inflicts harm.

Response: First, commenters are incorrect that the rule's conditioning of asylum eligibility on conduct violated INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)) because that section requires a final judgment of conviction. As discussed above, this rule, like the proposed rule, designates the listed offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[26] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6). This section provides authority to the Attorney General and the Secretary to condition or limit asylum eligibility, consistent with the statute, but does not require any sort of conviction. Accordingly, the bar is consistent with the plain text of that section, and the Supreme Court cases cited by commenters are not specifically relevant.

The Departments disagree with the comment that conduct-based bars should be used only in ''very limited circumstances,'' not including domestic assault or battery, stalking, or child abuse. As explained in the NPRM, the Departments believe that domestic violence is ''particularly reprehensible because the perpetrator takes advantage of an 'especially vulnerable' victim.'' 84 FR at 69652 (quoting *Carillo* v. *Holder,* 781 F.3d 1155, 1159 (9th Cir. 2015)). Accordingly, the Departments emphasize that such conduct must not be tolerated in the United States, and the discretionary benefit of asylum, along with the numerous ancillary benefits that follow, will not be granted to aliens who engage in such acts. *See id.* Further, the statute already contemplates conduct-based bars in sections 208(b)(2)(A)(i), (iii)–(iv) of the Act (8 U.S.C. 1158(b)(2)(A)(i), (iii)–(iv)),[27] and the Departments believe it is

[26] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the inclusion of these domestic violence-related bars at 8 CFR 208.13(c)(6)(v), (vii), 1208.13(c)(6)(v), (vii). *See* 84 FR at 69651–53. However, as stated in the proposed rule, the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) provides underlying authority for all these provisions. 84 FR at 69652 (noting that, even if all of the proposed domestic violence offenses would not qualify as particularly serious crimes, convictions for such offenses—as well as engaging in conduct involving domestic violence that does not result in a conviction—''should be a basis for ineligibility for asylum under section 208(b)(2)(C) of the INA''). The Departments acknowledge that the proposed rule stated that the Attorney General and the Secretary were, in part, ''[r]elying on the authority under section 208(b)(2)(B)(ii) of the INA.'' *Id.* at 69651. But the regulatory text of the new bar does not actually designate any additional offense as ''particularly serious.'' The Departments thus clarify that the current bars are an exercise of the authority granted by section 208(b)(2)(C), and that the discussion of the ''particularly serious crime'' bar merely helps illustrate how the new bars are ''consistent with'' the statutory asylum scheme. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

[27] These provisions provide as follows: (1) INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (''the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion''); (2) INA 208(b)(2)(A)(iii) (8 U.S.C. 1158(b)(2)(A)(iii)) (''there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the

Continued

appropriate to also enforce an asylum bar based on conduct involving domestic battery or extreme cruelty.

The rule does not violate the constitutional rights of aliens, nor does it offend constitutional principles referenced by the commenters. First, commenters incorrectly equated denial of a discretionary benefit to ''criminal charges.'' The Departments will not bring ''criminal charges'' against aliens in this context; rather, the Departments will deny asylum based on certain convictions and conduct, in some limited instances, as stated in the NPRM and authorized by statute. *See* 84 FR at 69640.

The Departments disagree that the rule undermines the criminal justice system and constitutional due process protections in either the civil or criminal context. As an initial matter, aliens have no liberty interest in the discretionary benefit of asylum. *See Yuen Jin* v. *Mukasey,* 538 F.3d 143, 156–57 (2d Cir. 2008); *see also Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta* v. *Gonzales,* 449 F.3d 45, 49–50 (1st Cir. 2006)); *cf. Hernandez* v. *Sessions,* 884 F.3d 107, 112 (2d Cir. 2018) (stating, in the context of duress waivers to the material support bar, that ''aliens have no constitutionally-protected 'liberty or property interest' in such a discretionary grant of relief for which they are otherwise statutorily ineligible''); *Obleshchenko* v. *Ashcroft,* 392 F.3d 970, 971 (8th Cir. 2004) (finding that there is no right to effective assistance of counsel with regard to an asylum claim because an alien does not have a liberty interest in a statutorily created, discretionary form of relief, but distinguishing withholding of removal). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric* v. *Mukasey,* 469 F.3d 94, 98 (3d Cir. 2006). Further, although aliens may choose to be represented by counsel, the government is not required to appoint counsel. INA 292 (8 U.S.C. 1362).

Second, the Departments reiterate that Congress authorized the Attorney General and the Secretary to, by regulation, limit and condition asylum eligibility under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). The Departments exercise such authority in promulgating the provisions of the rule, 84 FR at 69652, that allow adjudicators to inquire into allegations of conduct to determine whether the conduct constitutes battery or extreme cruelty barring asylum, similar to current statutory provisions requiring inquiry into other conduct-based allegations that may bar asylum. *See* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)); *see also Meng* v. *Holder,* 770 F.3d 1071, 1076 (2d Cir. 2014) (considering evidence in the record to determine whether it supported the agency finding that an alien's conduct amounted to persecution, thus triggering the persecutor bar under INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i))). A similar inquiry is also conducted under INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) to determine immigration benefits for aliens who are battered or subjected to extreme cruelty. Hence, promulgating an additional conduct-based bar to asylum eligibility, even without a conviction, is consistent with and therefore not necessarily precluded by the INA.

The Departments disagree that the rule disproportionately penalizes innocent individuals, victims, and their spouses or children. First, the Departments emphasize the exceptions for aliens who have been battered or subjected to extreme cruelty and aliens who were not the primary perpetrators of violence in the relationship. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). This exception protects qualified innocent individuals and their spouses or children from asylum ineligibility by providing that individuals whose crimes or conduct were based on ''grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act [8 U.S.C. 1227(a)(2)(E)(i)–(ii)]'' would nevertheless not be rendered ineligible for asylum if such individuals ''would be described in section 237(a)(7)(A) of the Act [8 U.S.C. 1227(a)(7)(A)].'' *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). Section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)), in turn, describes individuals who: (1) Were battered or subject to extreme cruelty; (2) were not the primary perpetrator of violence in the relationship; and (3) whose convictions were predicated upon conduct where the individual acted in self-defense, violated a protection order intended to protect that individual, or where the crime either did not result in serious bodily injury or was connected to the individual having been battered or subjected to extreme cruelty.

The Departments disagree with commenters' concerns that the provided exceptions are insufficient. To the extent that the commenters are concerned that individuals might not be able to avail themselves of the exception because of a lack of awareness of the waiver or their eligibility for it, such concerns are unfounded. Just as aliens are currently informed of eligibility and other asylum requirements through the Act and regulations; the instructions to the I–589 application and the form itself; representatives or other legal assistance projects; or other sources, aliens will similarly be informed of the existence of this exception. The Departments encourage individuals to contact law enforcement if they experience domestic violence; however, potential resolutions to the sort of specific barriers referenced by the commenters are outside the scope of this rulemaking. It is the Departments' aim, however, that the exception to the bar would reduce such barriers.

In regard to commenters' concerns about cross arrests with no definite determinations made, the Departments note that the adjudicatory inquiry into whether acts constitute battery or extreme cruelty is in no way novel. *See, e.g.,* INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) (providing for similar adjudicatory inquiry in the context of cancellation of removal). The Departments are confident in adjudicators' continued ability to conduct such inquiries, which include properly applying exceptions for innocent individuals. The Departments acknowledge that survivors are oftentimes vulnerable individuals. The bar and related exception are specifically promulgated to ensure that aliens with convictions for or who engage in conduct involving domestic assault or battery are ineligible for asylum, thereby reducing subsequent effects on vulnerable individuals.

The Departments may predicate asylum eligibility based on certain convictions or conduct under the statutory authority that allows them to limit or condition asylum eligibility. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Aliens may apply for immigration benefits for which they are eligible, and the INA affords various ancillary benefits in accordance with the specific relief granted. In other words, aliens are generally free to apply (or not to apply) for benefits, and then the relevant provisions of the statute are consistently applied. *See* 8 CFR 208.1(a)(1), 1208.1(a)(1). Accordingly, aliens may be ''similarly situated,'' as phrased by the commenters, but whether ''similarly situated'' aliens choose to apply for the same benefits under the INA is not a decision for the Departments to make.

The Departments emphasize that the sufficiency of alternative forms of protection or relief, such as U

United States prior to the arrival of the alien in the United States''); and (3) INA 208(b)(2)(A)(iv) (8 U.S.C. 1158(b)(2)(A)(iv)) (''there are reasonable grounds for regarding the alien as a danger to the security of the United States'').

nonimmigrant status and VAWA relief referenced by the commenters, varies in accordance with the unique facts in each case. For example, although some aliens may be unable to obtain the necessary law enforcement certification, many others are able to successfully meet all the necessary requirements. *See* 8 CFR 214.14. The Departments, however, reiterate that the new bar for convictions or conduct involving domestic assault or battery, stalking, or child abuse, contains an exception that is intended to ensure that innocent victims of violence are not rendered ineligible for asylum relief. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). This exception demonstrates both the Departments' concern for domestic violence victims and their consideration of how best to address those victims' circumstances, and the Departments have concluded that—especially in light of countervailing considerations such as the need to protect the United States from the harms associated with domestic abusers—this exception is sufficient.

The Departments acknowledge the commenters' concerns regarding unintended consequences stemming from the rule. The Departments, however, reiterate that mere allegations alone would not automatically bar asylum eligibility. Rather, an adjudicator will consider the alleged conduct and make a determination on whether it amounts to battery or extreme cruelty, thereby triggering the bar to asylum eligibility. *See* 8 CFR 208.13(c)(6)(vii),1208.13(c)(6)(vii) (proposed); *see also* 84 FR at 69652. Similar considerations are currently utilized in other immigration contexts, including other asylum provisions (INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) and removability (INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)). In conjunction with the exception at 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) (proposed), the Departments believe this inquiry is properly used in this context as well.

Commenters' allegations that the bar is too vague or broad to cover only offenses that constitute ''particularly serious crimes'' are irrelevant because, although the Departments possess statutory authority under section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii) to designate a ''particularly serious crime,'' the Departments are also authorized to establish additional limitations or conditions on asylum. INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). The only requirement is that these limitations or conditions must be consistent with section 208 of the Act (8 U.S.C. 1158). Nothing in section 208 of the Act (8 U.S.C. 1158) conflicts with this rule.

The Departments also disagree with commenters who alleged that the rule requires adjudicators to have expertise in all State jurisdictions. The rule requires adjudicators to engage in a fact-based inquiry, and that inquiry accounts for the differences in State law regarding criminal convictions for offenses related to domestic violence. *See* 84 FR at 69652. Further, even if adjudicators must interpret and apply law from various jurisdictions, the Departments are confident that adjudicators will properly do so, as they currently do in other immigration contexts. *See, e.g.,* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (other asylum provisions); INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)) (removability).

The Departments disagree that the exception is ''insufficient'' or ''vague'' or ''place[s] a high burden on victims.'' The exception directly references and adapts the statutory requirements in INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)). In the interest of consistency and protection afforded to victims since its enactment, the exceptions to this categorical bar align with those enacted by Congress.

The Departments decline to evaluate the commenters' various examples. A proper inquiry is fact-based in nature; absent the entirety of facts for each unique case, various examples cannot be adequately addressed. The BIA has deemed some domestic violence offenses as ''particularly serious crimes.'' *See* 84 FR at 69652 (providing such examples of BIA decisions). As explained in the proposed rule, that case-by-case approach fails to include all of the offenses enumerated in the rule, and it does not include conduct related to domestic violence. *Id.* Accordingly, the Departments believe this rule-based approach is preferable because it will facilitate fair and just adjudicatory results.

In addition, the Departments disagree with commenters that the bar is unnecessary. The Departments believe the bar and its exception establish important protections for vulnerable individuals, including those not at fault, and clarify the Departments' views on such reprehensible conduct. *See id.*

The rule does not conflict with or distort language in VAWA. The rule is solely applicable to eligibility for the discretionary benefit of asylum. The rule does not expound upon or specifically supplement VAWA. Rather, the rule adds categorical bars to asylum eligibility, clarifies the effect of certain criminal convictions—and, in one instance, abusive conduct that may not necessarily involve a criminal conviction—on asylum eligibility, and eliminates automatic reconsideration of discretionary denials of asylum. *See generally* 84 FR at 69640. The rule excludes from a grant of asylum and its many ancillary benefits aliens who have been convicted of certain offenses or engaged in certain conduct. Contrary to the commenters' remarks, the rule is not intended to exclude survivors of domestic violence; in fact, the preamble to the rule, 84 FR at 69652, provided an extensive explanation of the Departments' opposition to domestic violence, including an overview of various legislative and regulatory actions that seek to protect victims and to convey strong opposition to domestic violence. Moreover, the rule is fully consonant with other regulations, *see, e.g.,* 8 CFR 204.2(c)(1)(i)(E), designed to ensure that those who commit acts of domestic violence, even if they are not convicted, do not distort or undermine the immigration laws of the United States. Accordingly, although VAWA and the rule may not use the same approach, both are instrumental in the government's efforts to protect victims from domestic violence in the United States.

In that vein, the rule provides protection to victims of domestic violence by way of the exceptions to the bar in 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). The rule also conveys the Departments' opposition to domestic violence by denying asylum eligibility to aliens convicted of or who have engaged in such conduct so that abusers may not stay in the United States. *See* 84 FR at 69652.

Addressing commenters' concerns that the ''life and safety'' of aliens were ''hanging in the balance,'' the Departments reiterate the alternative forms of relief or protection that may be available to applicants who are ineligible for asylum under the rulemaking—applicants may still apply for statutory withholding of removal or CAT protection. *See* 84 FR at 69642. Accordingly, the Departments disagree that a ''vigorous burden of proof'' is necessary in this context. On the contrary, asylum is a discretionary benefit in which the alien bears the burden of proof to demonstrate eligibility under the conditions and limitations Congress authorized the Departments to establish. *See* INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)).

To clarify the exception in 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) (proposed),

applicants need not be granted a waiver under INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) to qualify for the exception. Rather, applicants must only satisfy one of the following criteria contained in the Act to the satisfaction of an adjudicator: (1) The applicant was acting in self-defense; (2) the applicant was found to have violated a protection order intended to protect the applicant; or (3) the applicant committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the applicant's having been battered or subjected to extreme cruelty. 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed); *see also* 84 FR at 69653. Together, the proposed rule and this final rule serve, in part, as notice to the public that such provisions exist—including the exception for applicants who are themselves victims. *See* 84 FR at 69640 (stating that this section of the **Federal Register** contains notices to the public of the proposed issuance of rules and regulations). Accordingly, just like other immigration benefits and relevant exceptions, aliens are on notice upon publication in the **Federal Register**.

Finally, the exceptions provided by 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) do not create an adversarial process. These provisions mirror the text of the statute except that aliens only need to satisfy the criteria, not be actually granted an exception. In this way, the exceptions as stated in the rule are arguably less stringent than the statutory exception. Further, the Departments remain confident that adjudicators will continue to properly apply the exceptions, regardless of commenters' concerns of how far removed adjudicators may be from the immediate circumstances of the conduct at issue. The exceptions are not intended to mitigate harm already suffered by survivors; rather, it is the Departments' hope that the exceptions ensure that the conduct of applicants who are actually victims of domestic violence does not bar their asylum eligibility. Accordingly, the Departments strongly disagree that the exceptions will inflict harm on survivors, as commenters alleged.

g. Document Fraud Misdemeanors

Comment: Numerous commenters opposed implementing a categorical limitation on eligibility for asylum for individuals convicted of Federal, State, tribal, or local misdemeanor offenses related to document fraud, stating that it would result in denial of meritorious asylum claims. *See* 8 CFR 208.13(c)(6)(vi)(B)(1), 1208.13(c)(6)(vi)(B)(1) (proposed). Commenters stated that some asylum applicants have necessarily and justifiably used false documents to escape persecution. Commenters stated that the NPRM ignored common circumstances related to convictions involving document fraud, such as when individuals flee their countries of origin with no belongings and ''must rely on informal networks to navigate their new circumstances.'' Some commenters suggested that applicants' use of fraudulent documents in entering the United States can be linked to their financial means but did not offer further detail on that position. Commenters stated that it was ''arbitrary and irrational'' for the Departments to suggest that such conduct would render somebody unfit to remain in the United States or a threat to public safety.

Commenters also suggested that the proposed limitation contravened long-standing case law establishing that violations of the law arising from an asylum applicants' manner of flight should be just one of many factors to be considered in the exercise of discretion. *Matter of Pula,* 19 I&N Dec. at 474. Some commenters objected to the proposed limitation because it allegedly did not provide a sufficient exception for those who have unknowingly engaged in such conduct, such as those who have unknowingly obtained false documents from bad actors like unscrupulous notarios. Other commenters opposed the proposed limitation because it did not provide a sufficient exception for those who must use false documentation to flee persecution.

Some commenters recognized the NPRM's proposed exception to this limitation on asylum eligibility.[28] Commenters opined that the proposed exception was not sufficient, given the consequences for those who do not fit within the exception. Commenters stated that asylum seekers who obtain false documents when passing through a third country or who may be unable to prove that they fall within an exception would be adversely affected by the proposed limitation.

Some commenters stated that the proposed exception was unrealistic given circumstances that could prevent asylum seekers from immediately claiming a fear of persecution, such as mistrust of government officials, language barriers, or trauma-induced barriers.

At least one commenter noted that traffickers routinely provide victims with false documents for crossing borders and that trafficking victims may be unable to explain the circumstances of their documentation to law enforcement. The commenter also noted that traffickers regularly confiscate, hide, or destroy their victims' documents to exert control over their victims and that trafficking victims often lack documentation. The commenter opined that trafficking victims were thus particularly vulnerable to bad actors who falsely claim that they can prepare legal documentation.

Commenters stated that the NPRM did not properly consider that some asylum seekers would be required to, or inadvertently, use false documents in the United States while their proceedings were pending, for example, in order to drive or work. Commenters suggested that continued availability of asylum protection to low-wage immigrant workers could encourage them to ''step out of the shadows'' when faced with workplace exploitation, dangers, and discrimination. By contrast, commenters stated, a categorical limitation would further incentivize some employers to hire and exploit undocumented workers where employers use aliens' immigration status against them and force asylum seekers ''deeper into the dangerous informal economy.'' At least one commenter stated that DHS recently made it harder for asylum seekers with pending applications to survive without using fraudulent documents by proposing a rule that would extend the waiting period for asylum seekers to apply for work authorization from 180 days to one year.

At least one commenter suggested that the proposed limitation related to document-fraud offenses undermined an important policy objective to encourage truthful testimony by asylum seekers.

At least one commenter stated that there was a discrepancy between the Departments' reasoning that the use of fraudulent documents ''so strongly undermines government integrity that it would be inappropriate to allow an individual convicted of such an offense

[28] *See* 8 CFR 208.13(c)(6)(vi)(B)(1) and 1208.13(c)(6)(vi)(B)(1), which provide that a misdemeanor offense related to document fraud would bar eligibility for asylum unless the alien can establish (1) that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, (2) that the document related to the alien's eligibility to enter the United States, (3) that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and (4) that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry.

to obtain the discretionary benefit of asylum'' and possible availability of adjustment of status for a document-fraud-related conviction if the conviction qualified as a petty offense or if the individual obtained a waiver of inadmissibility.

Response: The Departments have considered all comments and recommendations submitted regarding the bar to asylum eligibility for aliens with misdemeanor document fraud convictions. Despite commenters' concerns, the Departments continue to believe this exception is consistent with distinctions regarding certain document-related offenses as recognized by the BIA, *Matter of Pula,* 19 I&N Dec. at 474–75; existing statutes, *see* INA 274C(a)(6) and (d)(7) (8 U.S.C. 1324c(a)(6) and (d)(7)); and existing regulations, *see* 8 CFR 270.2(j) and 1270.2(j), as noted in the NPRM. *See* 84 FR at 69653; *cf. Matter of Kasinga,* 21 I&N Dec. 357, 368 (BIA 1996) (concluding that possession of a fraudulent passport was not a significant adverse factor where the applicant ''did not attempt to use the false passport to enter'' the United States, but instead ''told the immigration inspector the truth''). The Departments will not amend the bar as laid out in the proposed rule and will continue to rely on the justifications provided in the NPRM. *See* 84 FR at 69653.[29]

Further, offenses related to fraudulent documents that carry a potential sentence of at least one year are already aggravated felonies, and thus are disqualifying offenses for purposes of asylum. INA 101(a)(43)(P) (8 U.S.C. 1101(a)(43)(P)). Courts have recognized that proper identity documents are essential to the functioning of immigration proceedings. *See Noriega-Perez* v. *United States,* 179 F.3d 1166, 1173–74 (9th Cir. 1999). Furthermore, in passing the REAL ID Act of 2005, Public Law 109–13, 119 Stat. 231, Congress acknowledged the critical role that identity documents play in protecting national security and public safety.

Regarding the commenters' concerns for aliens who may use fraudulent documents as a means to flee persecution or other harms, the Departments reiterate the exception for this bar in the rule for aliens who can establish (1) that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, (2) that the document related to the alien's eligibility to enter the United States, (3) that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and (4) that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry. 8 CFR 208.13(c)(6)(vi)(B)(1), 1208.13(c)(6)(vi)(B)(1).

The Departments agree with commenters that there are certain, limited circumstances under which an individual with a legitimate asylum claim might need to utilize fraudulent documents during his or her flight to the United States, and the Departments provided this exception to the bar to account for such circumstances. The Departments believe that the exception, as proposed in the NPRM, is sufficient to allow individuals who may have committed document-fraud offenses directly related to their legitimate claims of fear to apply for asylum. The Departments believe that this exception, which is consistent with the exception in INA 274C(d)(7), 8 U.S.C. 1324c(d)(7), allowing the Attorney General to waive civil money penalties for document fraud to an alien granted asylum or statutory withholding of removal, strikes the appropriate balance between recognizing the seriousness of document-fraud-related offenses, including the threat they pose to a functioning asylum system, and the very limited instances where a conviction for such an offense should not bar an applicant from eligibility for asylum.

The Departments disagree with concerns that aliens with viable asylum claims might not be able to either immediately disclose their fear of return at a port-of-entry or prove that they fall within an exception to the bar. DHS has, by regulation, established procedures for determining whether individuals who present themselves at the border have a credible fear of persecution or torture, 8 CFR 208.30, and officers who conduct the interviews are required by regulation to undergo ''special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles,'' 8 CFR 208.1(b). Asylum officers are required to determine that the alien is able to participate effectively in his or her interview before proceeding, 8 CFR 208.30(d)(1), (5), and verify that the alien has received information about the credible fear process, 8 CFR 208.30(d)(2). The alien may consult with others prior to his or her interview. 8 CFR 208.30(d)(4). Such regulations are intended to recognize and accommodate the sensitive nature of fear-based claims and to foster an environment in which aliens may express their claims to an immigration officer.

The Departments disagree with the commenters that this bar to asylum is inconsistent with case law, particularly *Matter of Pula. See* 19 I&N Dec. at 474–75. The Departments first note that *Matter of Pula* pertains to how adjudicators should weigh discretionary factors in asylum applications. *Id.* This rule, by contrast, sets forth additional limitations on eligibility for asylum, which are separate from the discretionary determination. Additionally, *Matter of Pula* stated that whether a fraudulent document offense should preclude a favorable finding of discretion depends on ''the seriousness of the fraud.'' *Id.* at 474. The Departments in this rule are clarifying that the disqualifying offenses, which as provided by the rule must have resulted in a misdemeanor conviction, are serious enough to preclude eligibility for asylum, and have provided an exception for those situations that the Departments have determined should not preclude eligibility.

The Departments further reject some comments as unjustified within the context of a law-abiding society. For example, criticizing the rule because it may discourage participation in criminal activity—*e.g.,* driving without a license—or other activity in violation of the law—*e.g.,* working without employment authorization—is tantamount to saying the Departments should encourage and reward unlawful behavior. The Departments decline to adopt such suggestions. More specifically, the Departments reject commenters' suggestions that the additional limitation should not apply to document-fraud-related offenses that stem from fraudulent driver's licenses or employment authorization. The Departments' position on this matter is both reasonable and justified. As explained in the NPRM, such offenses are serious, ''pos[ing] * * * a significant affront to government integrity'' and are particularly pernicious in the context of immigration law, where the use of fraudulent documents, ''especially involving the appropriation of someone else's identity, * * * strongly undermines government integrity.'' 84 FR at 69653. Commenters' concerns about how the rule might affect working conditions of aliens are beyond the scope of this rulemaking.

[29] The Departments also reject some comments as wholly unfounded. For example, there is no logical or factual indication that the rule, combined with a criminal conviction for document fraud necessary for the bar to apply, would subsequently cause an alien to commit another crime—*i.e.,* perjury—by testifying untruthfully while in immigration proceedings.

Congress has delegated its authority to the Departments to propose additional, *i.e.,* broader, limitations on the existing bars to asylum eligibility, so long as the additional limitations are consistent with the Act. INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). The Departments are acting pursuant to their authority to create additional limitations on asylum eligibility and are not designating additional offenses as particularly serious crimes pursuant to INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), as discussed above. Accordingly, the Departments do not address commenters' concerns that the disqualifying offenses are not or should not be particularly serious crimes.

The Departments disagree with commenters' assertions that the rule would unfairly affect trafficking victims because traffickers force them to use fraudulent documents when they are crossing the border. The Departments recognize the serious nature of such circumstances, but they believe that considerations regarding criminal culpability for document-fraud-related offenses would be best addressed during criminal proceedings.

Finally, regarding commenters' points about the effect of document-fraud-related convictions in the context of adjustment of status under INA 245(a) (8 U.S.C. 1255(a)), the Departments note that adjustment of status is separate from asylum, and the rule contemplates asylum only. *See* 84 FR at 69640 (stating that the Departments propose to amend their respective regulations governing the bars to ''asylum'' eligibility). The adjustment of status conditions and consequent benefits are different from asylum. *See Mahmood* v. *Sessions,* 849 F.3d 187, 195 (4th Cir. 2017) (observing that, although ''strong policies underlie'' both asylum and adjustment of status, ''[t]hese policies serve different purposes''). *Compare* INA 209(b) (8 U.S.C. 1159(b)) *and* 245(a) (8 U.S.C. 1255(a)), *with* INA 208 (8 U.S.C. 1158)). The Departments do note, however, that, because adjustment of status is a discretionary form of relief, an alien's document-fraud-related conviction that would bar the alien from asylum eligibility under this rule could also separately be the basis for a denial of adjustment of status. *See, e.g., Matter of Hashmi,* 24 I&N Dec. 785, 790 (BIA 2009) (instructing immigration judges to consider ''whether the respondent's application for adjustment merits a favorable exercise of discretion'' when considering whether to continue proceedings).

h. Unlawful Public Benefits Misdemeanors

Comment: Commenters opposed the NPRM's proposed limitation on asylum eligibility based on convictions for misdemeanor offenses involving the ''unlawful receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority.'' *See* 8 CFR 208.13(c)(6)(vi)(B)(2), 1208.13(c)(6)(vi)(B)(2). Commenters stated that this proposed limitation would disproportionately impact low-income individuals and people of color. Commenters stated that complex evaluations involving assets, income, household composition, and changing circumstances, such as employment or housing, could easily result in overpayments and miscalculations of benefits by both case workers for recipients and recipients themselves. Commenters asserted that these calculations could be especially confusing and difficult for low-income persons who may have literacy challenges, low education levels, or limited English proficiency.

One commenter stated that this proposed limitation was overbroad because there is no requirement that any convictions related to the unlawful receipt of public benefits be linked to fraud or require intentionality.

Commenters asserted that unlawful receipt of public benefits is not a ''particularly serious crime.'' The commenters stated that the proposed limitation fails to differentiate between dangerous offenses and those committed out of desperation and observed that such offenses do not involve an element of intentional or threatened use of force. One commenter stated that the Departments' assertions that such offenses burden taxpayers and drain resources from lawful beneficiaries was not sufficient to render these offenses ''particularly serious crimes.'' Specifically, the commenter stated that this was inconsistent with the intent of the Act and the 1967 Protocol, as well as BIA precedent, citing the following: United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.1.A.S. No. 6577, 606 U.N.T.S. 268 (''The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''); *Delgado,* 648 F.3d at 1110 (Reinhardt, J., concurring in part and concurring in the judgment) (''The agency's past precedential decisions also help to illuminate the definition of a 'particularly serious crime.' Crimes that the Attorney General has determined to be 'particularly serious' as a categorical matter, regardless of the circumstances of an individual conviction, include felony menacing (by threatening with a deadly weapon), armed robbery, and burglary of a dwelling (during which the offender is armed with a deadly weapon or causes injury to another). Common to these crimes is the intentional use or threatened use of force, the implication being that the perpetrator is a violent person.'' (footnotes omitted)).

Commenters stated that the Departments greatly overstated the scope of this issue and failed to support their assertions that such crimes are of an ''inherently pernicious nature.'' *See* 84 FR at 69653. Commenters stated that, by contrast, ''data demonstrates that the incidents of these types of fraud crimes are minimal. For example, the incidence of fraud in the Supplemental Nutrition Assistance Program is estimated at 1.5% for all incidents of fraud, including individuals of all citizenship categories and including both fraud committed by agencies, retailers/shops and individuals.'' *See* Randy Alison Aussenberg, Cong. Research Serv., R45147, *Errors and Fraud in the Supplemental Nutrition Assistance Program (SNAP)* (2018), *https://fas.org/sgp/crs/misc/R45147.pdf.*

Response: The Departments have considered all of the comments received, and have chosen not to make any changes to the NPRM's regulatory language establishing an additional limitation on asylum eligibility for individuals who have been convicted of an offense related to public benefits. *See* 8 CFR 208.13(c)(6)(vi)(B)(2), 1208.13(c)(6)(vi)(B)(2).

The Departments disagree with commenters who believe that the rule would unfairly impact low-income individuals. By contrast, the rule is designed to limit asylum eligibility for those who criminally take advantage of benefits designed to assist low-income individuals. The Departments recognize commenters' concerns that individuals might be unaware of the complex systems that might result in miscalculation and overpayment of benefits; however, the Departments believe that it would be more appropriate for criminal culpability for such offenses to be determined during criminal proceedings.

In response to comments that such offenses are not particularly serious crimes, the Departments again note that the Departments' authority to set forth additional limitations and conditions on asylum eligibility requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158) and does not require that the offenses be particularly serious crimes or involve any calculation of dangerousness. *Compare* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''), *with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). As discussed in the NPRM, limiting asylum eligibility for those who have been convicted of such offenses, which are of an ''inherently pernicious nature,'' is consistent with previous Government actions to prioritize enforcement of the immigration laws against such offenders. 84 FR at 69653.

Regardless of the relative frequency of public benefits fraud, the Departments have concluded that convictions for such crimes, however often they occur, should be disqualifying for eligibility for the discretionary benefit of asylum. For example, the Departments are encouraged by the data cited by commenters indicating that the rate of fraud in certain programs may be low, but low rates of fraud do not support countenancing the abuse of public benefits by the remainder of the programs' participants.

i. Controlled Substance Possession or Trafficking Misdemeanors [30]

Comment: Commenters also opposed the designation of misdemeanor possession or trafficking of a controlled substance or controlled-substance paraphernalia as categorical bars to asylum eligibility. *See* 8 CFR 208.13(c)(6)(vi)(B)(3), 1208.13(c)(6)(vi)(B)(3) (proposed). Commenters asserted that the proposed limitation would be unnecessary, overbroad, and racially discriminatory.

Commenters remarked that the proposed limitation was overbroad with respect to the convictions and conduct covered and was not tailored to bar only those who have engaged in ''serious'' conduct or otherwise posed a danger to the community. Commenters also stated that the proposed limitation was overbroad because it did not account for jurisdictions that had decriminalized certain drugs, like cannabis.

Commenters said that, given the stakes at issue in asylum claims, protection should not be predicated on an applicant's abstinence from drugs. Commenters also stated that this proposed limitation was particularly inappropriate ''at a time of such inconsistency in federal laws surrounding drug legalization.'' Commenters generally expressed concern about the Federal government's perpetuation of the ''war on drugs.''

Commenters stated that the proposed limitation would not make anybody safer but rather result in the denial of bona fide asylum claims. Commenters stated that the proposed limitation would ''go beyond any common sense meaning'' of the term ''particularly serious crime.'' Commenters were particularly concerned with the implications of this proposed limitation because it would eliminate the opportunity for applicants to present mitigating circumstances that, commenters stated, are commonly associated with such convictions, such as addiction, self-medication, and any subsequent treatment or rehabilitation. Commenters asserted that the proposed limitation would improperly expand bars to asylum eligibility based on laws where enforcement decisions are ''heavily tainted'' by racial profiling.

Commenters also expressed concern that the proposed limitation would unfairly punish asylum seekers who might be vulnerable to struggles with addiction as a coping mechanism after facing significant trauma, particularly in light of obstacles to accessing medical or psychological treatment. Commenters stated that the proposed limitation eliminated any possibility of a treatment- and compassion-based approach to addiction. Commenters stated that the Departments' position on this matter was at odds with national trends to ''move toward a harm reduction approach to combating drug and alcohol addiction.'' Some commenters noted that treatment of misdemeanor offenses relating to controlled substances, particularly with respect to offenses involving possession of marijuana or prescription drugs, was ''wildly disproportionate to the severity of these offenses.'' One commenter asserted that these offenses do not have an element of violence or dangerousness and stated that the ''only victims are the offenders themselves.''

One commenter remarked that the Departments relied on ''misleading evidence that does not create a link between dangerousness'' and the disqualifying offense. The commenter stated that widespread opioid abuse is ''rooted in over-prescription by healthcare providers based on the assurances of pharmaceutical companies'' and does not serve as a relevant justification for the additional limitation.

One commenter stated that courts and statutes, including the Supreme Court, have treated varying simple possession drug offenses differently. For example, the commenter read the Supreme Court's decision in *Lopez* v. *Gonzales,* 549 U.S. 47 (2006), to mean that simple possession of a controlled substance is not a ''drug trafficking crime unless it would be treated as a felony if prosecuted under federal law.'' The commenter also remarked that a single incident of simple possession of any controlled substance except for Flunitrazepam is not treated as a felony and is thus not considered an aggravated felony, *see* 21 U.S.C. 844; and that some second convictions for possession have been recognized as drug trafficking aggravated felonies, but not all, *see Carachuri-Rosendo* v. *Holder,* 560 U.S. 563, 566 (2010); *Berhe* v. *Gonzales,* 464 F.3d 74, 85–86 (1st Cir. 2006). The commenter asserted that the nuanced and varying assessments related to such offenses suggest ''they do not merit blanket treatment of the same severity.''

Some commenters objected to existing aggravated felony bars with respect to drug-related offenses in addition to the proposed limitation. Commenters stated that immigration judges should continue to be able to exercise discretion over those controlled-substance-related offenses that are not already subject to an existing bar to asylum. Commenters also generally objected to criminalizing possession of drugs for personal use, given the medical value and current inconsistent treatment among states, but no analysis was provided connecting these comments to the NPRM, specifically.

[30] In addition to the comments regarding the bar to asylum discussed in this section, multiple commenters shared their opinion that marijuana should be legalized, without reference to a particular provision of the proposed rule. The Departments note that broad questions of national drug policy, including the legalization of marijuana at the national or State level, are outside the scope of this rulemaking. Marijuana remains a controlled substance, with the resulting penalties that may flow from its possession, trafficking, or other activities involving it. *See* 21 CFR 1308.11 (Schedule I controlled substances).

Response: The Departments have considered all comments and recommendations submitted regarding the NPRM. The final rule does not alter the regulatory language set forth in the NPRM with respect to the limitation on misdemeanor offenses involving possession or trafficking of a controlled substance or controlled-substance paraphernalia. *See* 8 CFR 208.13(c)(6)(vi)(B)(3), 1208.13(c)(6)(vi)(B)(3).

Consistent with the INA's approach toward controlled substance offenses, for example in the removability context under INA 237(a)(2)(B)(i) (8 U.S.C. 1227(a)(2)(B)(i)), this rule does not penalize a single offense of marijuana possession for personal use of 30 grams or less. *See* 84 FR at 69654. However, as discussed in the NPRM, the Departments have determined that possessors and traffickers of controlled substances ''pose a direct threat to the public health and safety interests of the United States.'' *Id.* Accordingly, the Departments made a policy decision to protect against such threats by barring asylum to such possessors and traffickers, and Federal courts have agreed with such treatment in the past. *See Ayala-Chavez* v. *U.S. INS,* 944 F.2d 638, 641 (9th Cir. 1991) (''[T]he immigration laws clearly reflect strong Congressional policy against lenient treatment of drug offenders.'' (quoting *Blackwood* v. *INS,* 803 F.2d 1165, 1167 (11th Cir. 1988))).

The Departments note that aliens barred from asylum eligibility as a result of this provision may still be eligible for withholding of removal under the Act or CAT protection, provisions that would preclude return to a country where they experienced or fear torture or persecution. *See* 84 FR at 69642.

The Departments disagree with comments suggesting that the bar is overbroad and not appropriately tailored only to aliens who have engaged in serious conduct or pose a danger to the community. Similarly, the Departments strongly disagree with commenters who asserted that this additional limitation will not make communities safer. Despite commenters' arguments, the Departments reiterate that controlled substance offenses represent significant and dangerous offenses that are damaging to society as a whole. *See Matter of Y–L–,* 23 I&N Dec. 270, 275 (A.G. 2002) (noting that ''[t]he harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes''). The illicit use of controlled substances imposes substantial costs on society from loss of life, familial disruption, the costs of treatment or incarceration, lost economic productivity, and more. *Id.* at 275–76 (citing *Matter of U–M–,* 20 I&N Dec. 327, 330–31 (BIA 1991) (''This unfortunate situation has reached epidemic proportions and it tears the very fabric of American society.'')); 84 FR at 69654; *see also* Office of Nat'l Drug Control Policy, *National Drug Control Strategy* 11 (Feb. 2020), *https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-NDCS.pdf* (explaining, in support of the national drug control strategy, the devastating effects of drug use and the necessity for treatment that includes ''continuing services and support structures over an extended period of time''). Increased controlled substance prevalence is often correlated with increased rates of violent crime and other criminal activities. *See* 84 FR at 69650 (explaining that perpetrators of crimes such as drug trafficking are ''displaying a disregard for basic societal structures in preference of criminal activities that place other members of the community * * * in danger'').

Even assuming, arguendo, the commenters are correct that such offenses do not reflect an alien's dangerousness to the same extent as those offenses that are formally designated ''particularly serious crimes,'' the Departments' authority to set forth additional limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to these additional conditions or limitations first meet a particular level of dangerousness. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of certain drug-related offenses as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Further, as discussed at length in the NPRM, this additional limitation on asylum eligibility is consistent with the Act's treatment of controlled-substance offenses as offenses that may render aliens removable from or inadmissible to the United States. 84 FR at 69654.

4. Due Process and Fairness Considerations

Comment: The Departments received numerous comments asserting that the rule violates basic notions of fairness and due process. One commenter asserted that anything that makes the asylum process harder, which the NPRM does according to the commenter, is a denial of due process. Commenters claimed that the Departments' true goal in promulgating these rules is to reduce the protections offered by existing asylum laws and to erode ''any semblance of due process and justice for those seeking safety and refuge in this country.''

In addition to general objections regarding due process, commenters asserted various constitutional problems with the proposed rule. Citing *United States* v. *Davis,* 139 S. Ct. 2319, 2323 (2019), commenters specified that due process requires laws and regulations to ''give ordinary people fair warning about what the law demands of them.'' These commenters argued that the proposed rule fails to give affected individuals fair notice of which offenses will bar asylum. Commenters also noted that equal protection principles require the government to treat similarly situated people in the same manner but averred that the proposed rule, as applied, would result in similarly situated applicants being treated differently.

Commenters stated that requiring immigration adjudicators to deny a legal benefit, even a discretionary one, based on alleged and uncharged conduct is a clear violation of the presumption of innocence, which the commenters

argued is a fundamental tenet of our democracy.

Commenters alleged that immigration proceedings are not the proper venue for the sort of evidentiary considerations required by the rule. Commenters argued that asylum applicants will not have the opportunity to be confronted by evidence or to contest such evidence in a criminal court. These commenters noted that criminal courts afford defendants additional due process protections not found in immigration court, such as the right to counsel, the right to discovery of the evidence that will be presented, and robust evidentiary rules protecting against the use of unreliable evidence.

Similarly, commenters alleged that, due to the ''lack of robust evidentiary rules in immigration proceedings,'' many applicants would be unable to rebut negative evidence submitted against them, even if the evidence submitted is false. One commenter claimed, without more, that there is a high likelihood that such evidence is false. Commenters were concerned that unreliable evidence would be submitted in support of the application of the additional bars. Alternatively, commenters stated that immigration adjudicators might rely on evidence where a judicial court had already evaluated reliability and not credited the evidence based on a lack of reliability. In addition, commenters were concerned that the rule authorizes adjudicators to seek out unreliable evidence obtained in violation of due process to determine whether an applicant's conduct triggers the particularly serious crime bar.

Commenters were concerned that requiring applicants to disprove allegations of gang-related activity or domestic violence would result in re-litigation of convictions or litigation of conduct that fell outside the scope of prior convictions. Similarly, commenters were concerned that the rule violates due process because it requires adjudicators to consider an applicant's conduct, separate and apart from any criminal court decision, that may trigger a categorical bar to asylum. One commenter asserted that ''people seeking asylum should have the right to be considered innocent until proven guilty, and should not be denied asylum based on an accusation.'' Moreover, commenters alleged that this consideration extends to whether a vacated or modified conviction or sentence still constitutes a conviction or sentence triggering the bar to asylum.

Commenters alleged that adjudicators might improperly rely on uncorroborated allegations in arrest reports and shield the ensuing decision from judicial review by claiming discretion. Commenters stated that the rule lacks safeguards to prevent such erroneous decisions.

Commenters expressed concern that asylum applicants, especially detained applicants, would struggle to find evidence related to events that may have occurred years prior to the asylum application. One organization noted that the rule would be particularly challenging for detained respondents because they often lack representation and would be required to rebut circumstantial allegations with limited access to witnesses and evidence.

The Departments also received numerous comments stating that asylum hearings, which typically last three or fewer hours, provide insufficient time to permit both parties to present full arguments on these complex issues, as effectively required by the rule, thereby resulting in due process violations.

One commenter raised due process and constitutional concerns if the rule fails to provide proper notice to the alien. In that case, commenters alleged that the Sixth Amendment right to ''be accurately apprised by defense counsel of the immigration consequences of his guilty plea to criminal charges'' applies but that the rule fails to account for those consequences.

Response: The rule does not violate notions of fairness or due process. As an initial matter, asylum is a discretionary benefit, as demonstrated by the text of the statute, which states the Departments ''may'' grant asylum, INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)), and which provides authority to the Attorney General and the Secretary to limit and condition, by regulation, asylum eligibility under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric,* 469 F.3d at 98. Thus, how the Departments choose to exercise their authority to limit or condition asylum eligibility and an adjudicator's consideration of an applicant's conduct in relation to asylum eligibility do not implicate due process claims.

The rule does not ''reduce the protections offered by the asylum laws.'' In fact, the rule makes no changes to asylum benefits at all; rather, it changes who is eligible for such benefits. *See* 84 FR at 69640. Further, the rule is not intended to ''erode'' due process and justice for aliens seeking protection; instead, the rule revises asylum eligibility by adding categorical bars to asylum eligibility, clarifying the effect of certain criminal convictions and conduct on asylum eligibility, and removing automatic reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. Although some of these changes may affect aliens seeking protection in the United States, these effects do not constitute a deprivation of due process or justice, and alternative forms of protection—withholding of removal under the Act along with withholding of removal or deferral of removal under the CAT regulations—remain available for qualifying aliens. *See* 84 FR at 69642.

Regarding commenters' concerns that the rule does not sufficiently provide notice to aliens regarding which offenses would bar asylum eligibility, the Departments first note that the publication of the NPRM and this final rule serves, in part, as notice to the public regarding which offenses bar asylum eligibility. *See* 5 U.S.C. 552. Courts have held that an agency's informal rulemaking pursuant to 5 U.S.C. 553 constitutes sufficient notice to the public if it ''fairly apprise[s] interested persons of the 'subjects and issues' involved in the rulemaking[.]'' *Air Transport Ass'n of America* v. *FAA,* 169 F.3d 1, 6 (D.C. Cir. 1999) (quoting *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 547 (D.C. Cir. 1983)).

To the extent that commenters argued that the rule is insufficiently clear with regards to the substance of what offenses are disqualifying,[31] the Departments disagree. This rule clearly establishes which offenses bar asylum by listing such offenses in detail in the regulatory text at 8 CFR 208.13(c)(6)–(9) and 1208.13(c)(6)–(9). Unlike other statutory provisions that have been found unconstitutionally vague,[32] this rule clearly establishes grounds for mandatory denial of request for asylum. 8 CFR 208.13(c)(6)–(9), 1208.13(c)(6)–(9). The regulatory text adds paragraph (c)(7) to specifically define terms used

[31] *Cf. Dimaya,* 138 S. Ct. at 1225 (''Perhaps the most basic of due process's customary protections is the demand of fair notice.'').

[32] For example, the Court in *Dimaya,* 138 S. Ct. at 1222–23, held that the Federal criminal code provision at issue was unconstitutionally vague in part because it failed to provide definitions for or explain such terms as ''ordinary case'' and ''violent.'' On the other hand, the term ''crime involving moral turpitude'' has continuously been upheld as not unconstitutionally vague, despite repeated judicial criticism. *See, e.g., Islas-Veloz* v. *Whitaker,* 914 F.3d 1249, 1250 (9th Cir. 2019) (''the phrase 'crime involving moral turpitude' [is] not unconstitutionally vague'').

in 8 CFR 208.13 and 1208.13, and the regulatory text otherwise references applicable definitions for terms not found in paragraph (c)(7). *See, e.g.,* 8 CFR 1208.13(c)(6)(iv)(A) (defining driving while intoxicated or impaired ''as those terms are defined under the jurisdiction where the conviction occurred''). Further, just as the INA contains various criminal grounds for ineligibility without specified elements, *see generally* INA 101(a)(43) (8 U.S.C. 1101(a)(43)), here, the Departments have provided a detailed list of particular criminal offenses or related activities that would render an alien ineligible for asylum. Accordingly, despite the commenter's argument that the regulatory text fails to give ''fair warning'' of which offenses would bar asylum eligibility, the regulatory text is sufficiently clear to provide the public with the requisite notice. *See Davis,* 139 S. Ct. at 2323.

The Departments acknowledge the commenters' general equal protection concerns; however, without more detailed comments providing for the specific concerns of commenters, the Departments are unable to provide a complete response to these comments. The Departments note, however, that categorical bars to asylum apply equally to all asylum applicants and do not classify applicants on the basis of any protected characteristic, such as race or religion.

Immigration proceedings are civil in nature; thus constitutional protections for criminal defendants, including evidentiary rules, do not apply. *See INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984); *Dallo* v. *INS,* 765 F.2d 581, 586 (6th Cir. 1985); *Baliza* v. *INS,* 709 F.2d 1231, 1233 (9th Cir. 1983); *Longoria-Castaneda* v. *INS,* 548 F.2d 233 (8th Cir. 1977). In addition, any determinations regarding evidence or other related procedural issues by a criminal court do not automatically apply in a subsequent immigration proceeding or asylum interview. The Departments emphasize that the NRPM did not propose and the final rule does not enact any changes to the immigration court or asylum interview rules of procedure or evidentiary consideration processes. Accordingly, adjudicators will continue to receive and consider ''material and relevant evidence,'' and it is the adjudicator who determines what evidence so qualifies. 8 CFR 1240.1(c). Immigration adjudicators regularly consider and receive evidence regarding criminal offenses or conduct in the context of immigration adjudications, including asylum applications, where such evidence has been frequently considered as part of the ''particularly serious crime'' determination or as part of the ultimate discretionary decision. *Cf. Matter of Jean,* 23 I&N Dec. 373, 385 (A.G. 2002) (holding that aliens convicted of violent or dangerous offenses generally do not merit asylum as a matter of discretion).

Many of the commenters' concerns rely on circumstances that are purely speculative or that are only indirectly implicated by the rule. For example, commenters' concerns regarding an alien's hypothetical inability to confront evidence require first that concerning evidence is at issue, that such evidence is false, and finally that the alien is unable (for reasons unspecified by commenters) to rebut such evidence. Likewise, commenters' concerns regarding evidence supporting the bars rest on the premise that such specific evidence is submitted in the future, that such evidence has not been tested, and that such evidence is thus unreliable. Regarding these concerns, the Departments are unable to comment on speculative examples.

In regard to commenters' concerns about the reliability determinations of evidence already made by judicial courts, the regulations require that immigration judges consider material and relevant evidence. *See* 8 CFR 1240.1(c). Immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna,* 325 F.3d at 405 (quoting *Bustos-Torres,* 898 F.2d at 1055). The rule does not undermine or revise that standard; thus, commenters' concerns are unwarranted.

In general, commenters' concerns are no different than existing concerns regarding the reliability of evidence submitted by aliens in asylum cases, which is generally rooted in hearsay, frequently cannot be confronted or rebutted, and is typically uncorroborated except by other hearsay evidence. *See, e.g., Angov* v. *Lynch,* 788 F.3d 893, 901 (9th Cir. 2015) (''The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for [DHS] to present evidence 'refuting or in any way contradicting' petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.'' (quoting *Abovian* v. *INS,* 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from denial of petition for rehearing en banc))); *Mitondo* v. *Mukasey,* 523 F.3d 784, 788 (7th Cir. 2008) (''Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials.''). Asylum adjudicators are well experienced at separating reliable from unreliable evidence, regardless of its provenance, and this rule neither inhibits their ability to do so nor changes the process for assessing evidence.

Further, as discussed in the preamble to the proposed rule, the rule contemplates the consideration of all ''reliable'' evidence and authorizes adjudicators to assess all ''reliable'' evidence. 84 FR at 69649 and 69652. The rule does not encourage adjudicators to ''seek out unreliable evidence,'' as commenters alleged. Accordingly, the Departments disagree with commenters that adjudicators will improperly rely on information in arrest reports that the adjudicators have determined is unreliable, and the Departments further disagree that adjudicators would seek to protect such decisions by claiming discretion.

As explained in section II.C.2.a.i, the rule establishes limits and conditions on asylum eligibility; it does not add offenses to the ''particularly serious crime'' bar. *See* 8 CFR 208.13(c)(6), 1208.13(c)(6) (both using prefatory language that reads ''[a]dditional limitations on eligibility for asylum''). To the extent that commenters' concerns relate specifically to the ''particularly serious crime'' bar, the Departments decline to respond because those concerns are outside the scope of this rulemaking.

Regarding commenters' concerns that the domestic violence and gang-related bars to asylum eligibility would violate due process due to the requirement that the adjudication re-litigate the offense or consider conduct separate and apart from a criminal conviction, the Departments first note that there has never been a prohibition on the consideration of conduct when determining the immigration consequences of an offense or action.[33]

[33] To the extent the issues raised by commenters relate to the domestic violence provision of the rule that is not based on a criminal conviction, the Departments note that regulations have considered

Further, the consideration of conduct in this manner matches certain bars to admissibility or bases of deportability under the INA. *See, e.g.,* INA 212(a)(2)(C)(i) (8 U.S.C. 1182(a)(2)(C)(i)) (instructing that an alien who the relevant official ''knows or has reason to believe * * * is or has been an illicit trafficker in any controlled substance'' is inadmissible); INA 212(a)(2)(H) (8 U.S.C. 1182(a)(2)(H)) (instructing that an alien who the relevant official ''knows or has reason to believe is or has been * * * a trafficker in severe forms of trafficking in persons'' is inadmissible); INA 237(a)(2)(F) (8 U.S.C. 1227(a)(2)(F)) (instructing that an alien described in section 212(a)(2)(H) of the Act (8 U.S.C. 1182(a)(2)(H)) is deportable); *see also, e.g., Lopez-Molina* v. *Ashcroft,* 368 F.3d 1206, 1207–08 & n.1 (9th Cir. 2004) (explaining that the immigration judge found the respondent removable due to a reason to believe he was a controlled substance trafficker on account of a prior arrest report and information surrounding his conviction for misprision of a felony). In addition, the consideration of the alien's conduct in these circumstances is consistent with the consideration of conduct when reviewing a circumstance-specific ground of removability or deportability. *See Nijhawan,* 55 U.S. at 38.

Further, as discussed above, the rule does not violate due process because asylum is a discretionary benefit that does not implicate a liberty interest. *See Yuen Jin,* 538 F.3d at 156–57 (collecting cases); *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50); *cf. Hernandez,* 884 F.3d at 112 (stating, in the context of duress waivers to the material support bar, that ''aliens have no constitutionally-protected 'liberty or property interest' in such a discretionary grant of relief for which they are otherwise statutorily ineligible''); *Obleshchenko,* 392 F.3d at 971 (finding that an alien has no right to effective assistance of counsel with regard to an asylum claim because there is no liberty interest in a statutorily created, discretionary form of relief, but distinguishing withholding of removal). In addition, aliens may provide argument and evidence that they are not subject to an asylum bar. *See* 8 CFR 1240.8(d) (providing that the alien bears the burden of proof to show that a basis for mandatory denial does not apply); *see also* 84 FR at 69642.

Finally, commenters' Sixth Amendment concerns, including the presumption that a person is ''innocent until proven guilty'' are inapposite. The protections afforded by that amendment apply to criminal defendants, and asylum applicants in immigration proceedings are not criminal defendants. *See, e.g., Ambati* v. *Reno,* 233 F.3d 1054, 1061 (7th Cir. 2000) (''Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.''); *Lavoie* v. *Immigration and Naturalization Service,* 418 F.2d 732, 734 (9th Cir. 1969) (''[D]eportation proceedings are civil and not criminal, in nature, and [] the rules * * * requiring the presence of counsel during interrogation, and other Sixth Amendment safeguards, are not applicable to such proceedings.''); *Lyon* v. *U.S. Immigr. and Customs Enf't,* 171 F. Supp. 3d 961, 975 (N.D. Cal 2016) (''[T]he Ninth Circuit has never so held, and the Court is reluctant to so interpret the INA absent any indication that Congress intended to import full Sixth Amendment standards into the INA.'').

The Departments maintain that they have correctly concluded that convictions pursuant to expunged or vacated orders or modified sentences remain effective for immigration purposes if the underlying reason for expungement, vacatur, or modification was for ''rehabilitation or immigration hardship.'' *Matter of Thomas and Thompson,* 27 I&N Dec. at 680; *see also* 84 FR at 69655. Courts also support this principle, stating that it is ''entirely consistent with Congress's intent * * * [to] focus[ ] on the original attachment of guilt (which only a vacatur based on some procedural or substantive defect would call into question)'' and to ''impose[ ] uniformity on the enforcement of immigration laws.'' *Saleh,* 495 F.3d at 24.

Next, contrary to commenters' concerns, this rule does not violate principles such as being ''innocent until proven guilty.'' Convictions and sentences are not re-litigated during immigration proceedings. Rather, convictions and sentences at issue in immigration proceedings have already been determined in a separate hearing, consistent with due process, and ''[l]ater alterations to that sentence that do not correct legal defects[ ] do not change the underlying gravity of the alien's action.'' *Matter of Thomas and Thompson,* 27 I&N Dec. at 683. Congress determined that immigration consequences should attach to an alien's original conviction and sentencing, pursuant to section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)). *See id.* Thus, the Departments do not deprive an alien of due process or presume guilt when an alien's conviction or sentence, if expunged, vacated or modified for rehabilitation or immigration purposes, remains effective for immigration proceedings, including asylum adjudications, because such an expungement, vacatur, or modification does not call into question whether the underlying criminal proceedings themselves complied with due process.

The Departments once again reiterate their statutory authority to limit and condition asylum eligibility consistent with the statute. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). In accordance with that authority, the Departments promulgated the NPRM and believe that the provisions of this final rule are sufficient without commenters' recommended safeguards.

Finally, issues involving evidence gathering are beyond the scope of this rulemaking. For issues regarding representation, *see* section II.C.6.h. The Departments disagree that hearings lack sufficient time for both parties to present arguments. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual,* 68–69 (Mar. 17, 2020), *https://www.justice.gov/eoir/page/file/1258536/download* (noting that, at a master calendar hearing, a respondent should be prepared ''to estimate (in hours) the amount of time needed to present the case at the individual calendar hearing''). Moreover, if parties believe additional time is needed, the regulations provide a mechanism for them to seek additional time through a motion for continuance. *See* 8 CFR 1003.29.

5. Insufficient Alternative Protection From Removal

Comment: The Departments received numerous comments alleging that withholding of removal under the Act and protection under the CAT regulations are insufficient alternative forms of protection for individuals barred from asylum pursuant to the proposed rule. Overall, commenters believed that refugees ''should not be required to settle for these lesser forms of relief.'' Commenters averred that the availability of these forms of protection does not justify the serious harm caused by the proposed rule's ''overly harsh and broad limits on asylum.'' Specifically, statutory withholding of removal and protection under the CAT regulations are much narrower in scope and duration than asylum and require applicants to establish a higher burden of proof. One commenter noted that, even if an applicant was able to meet the higher burden of proof for statutory withholding of removal or protection

similar conduct in the context of immigration law for nearly 25 years with no recorded challenges to the provisions of 8 CFR 204.2(c)(1)(i)(E) as a violation of due process.

under the CAT regulations, the individual would not then be accorded the benefits required by the Refugee Convention.

Commenters cited a number of limitations imposed on recipients of these forms of protection to demonstrate why they are insufficient alternatives to asylum. For example, commenters expressed concern regarding the prohibition on international travel for recipients of statutory withholding of removal and CAT protection. Commenters noted that, unlike recipients of asylum, these individuals are not provided travel documents. At the same time, because these individuals have been ordered removed but that removal has been withheld or deferred, any international travel would be considered a ''self-deportation,'' foreclosing any future return to the United States. Commenters stated that this conflicts with the Refugee Convention, which requires that contracting states issue travel documents for international travel to refugees lawfully staying in their territory.

Commenters also claimed the proposed rule contravenes the Refugee Convention by failing to ensure ''that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.'' Commenters alleged that individuals who are granted statutory withholding of removal or protection under the CAT regulations would be unable to reunite with family in the United States because these forms of relief do not allow the recipient to petition for derivative beneficiaries. Due to this, commenters stated that the proposed rule instituted another formal policy of family separation that permanently separate spouses and children from their family members.

Commenters also stated that the proposed rule would lead to additional forms of family separation because spouses and minor children who traveled with the primary asylum seeker would still need to establish individual eligibility for statutory withholding of removal or protection under the CAT regulations because there is no derivative application available in such circumstances. Also, commenters expressed concern that, without the ability to petition for additional family members, the proposed rule would force family members who remain in danger abroad to make the journey to the United States alone, likely endangering children who might be forced to make the journey as unaccompanied minors.

As another example of the lesser benefits of statutory withholding of removal and protection under the CAT regulations, commenters noted that recipients of withholding of removal must apply annually for work authorization. Commenters explained that individuals not only have to pay for these work authorization applications, but also face delays in adjudication of work authorization applications, which often results in the loss of legal authorization to work.

Similarly, commenters noted that recipients of statutory withholding of removal or protection under the CAT regulations may lose access to Federal public benefits, including ''supplemental security income, food stamps, Medicaid, and cash assistance.'' Commenters expressed concern that, although recipients of withholding of removal may be eligible for a period of seven years to receive Federal means-tested public benefits, after seven years, the presumption is that the alien would have adjusted status. However, because recipients of withholding of removal are not provided a pathway to lawful permanent residency, commenters expressed concern that vulnerable individuals such as those who are disabled or elderly would be at risk of losing those public benefits.

Commenters also noted that recipients of statutory withholding of removal and protection under the CAT regulations remain in a tenuous position because they are not granted lawful status to remain in the United States indefinitely. Commenters averred that this contravenes the Refugee Convention by failing to ''as far as possible facilitate the assimilation and naturalization of refugees.'' Recipients of statutory withholding of removal or protection under the CAT regulations may have their status terminated at any time based on a change in the conditions of their home country. Commenters explained that, because these individuals have no access to permanent residence or citizenship, they may be required to check in with immigration officials periodically. Commenters claimed that, at these check-ins, individuals may be required to undergo removal to a third country to which the individual has no connection.

Because of the constant prospect of deportation or removal, commenters stated that recipients of withholding or CAT protection are in a constant state of uncertainty. This uncertainty, commenters alleged, is particularly harmful to asylum seekers who have experienced severe human rights abuses. Commenters argued that certainty of a safe place to live forever is one of the most important aspects of the treaties establishing the refugee system. Commenters claimed that uncertainty and limbo discourage recipients from establishing connections to the United States, which in turn generates community instability. Commenters alleged that a lack of community stability will result in increased criminal activity as individuals are less incentivized to invest in the community or keep the community safe. Additionally, this uncertainty may reduce the incentive for individuals to invest in their community by, for example, opening businesses, hiring others, or paying taxes.

Commenters were concerned that increasing the population of people who are ineligible to receive asylum may create a cohort of individuals who will later need a ''legislative fix'' to adjust their status and grant them full rights as citizens.

Finally, commenters noted that both statutory withholding of removal and protection under the CAT regulations require a higher burden of proof than asylum. Commenters explained that asylum requires only that the applicant demonstrate at least a 10 percent chance of being persecuted if removed. Withholding of removal, either under the Act or under the CAT regulations, however, requires the applicant to demonstrate that it is more likely than not that he or she would be persecuted or tortured if returned—*i.e.,* he or she must show a more than fifty percent chance of being persecuted or tortured if removed. Commenters noted that, because of this higher burden of proof, an applicant may have a valid and strong asylum claim but be unable to meet the burden for statutory withholding of removal or protection under the CAT regulations. As a result, commenters alleged that an individual may be returned to a country where he or she would face persecution or even death.

Commenters averred that the Departments failed to provide an assessment of how many individuals subject to the new categorical bars could meet the higher burdens required for statutory withholding of removal and protection under the CAT regulations.

Response: The Departments maintain that statutory withholding of removal under the Act and protection under the CAT regulations are sufficient alternatives for individuals who are barred from asylum by one of the new bars. As stated, asylum is a discretionary form of relief subject to regulation and limitations by the Attorney General and the Secretary. *See*

INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Significantly, the United States implemented the non-refoulement provisions of Article 33(1) of the Refugee Convention and Article 3 of the CAT through the withholding of removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41; *see also* 8 CFR 208.16 through 208.1; 1208.16 through 1208.18.

As recognized by commenters, asylum recipients are granted additional benefits not granted to recipients of statutory withholding of removal or CAT protection. Although the Attorney General and the Secretary are authorized to place limitations on those who receive asylum, it is Congress that delineates the attendant benefits to receiving relief or protection under the INA. *See, e.g.,* INA 208(c)(1)(A), (C) (8 U.S.C. 1158(c)(1)(A), (C)) (asylees cannot be removed and can travel abroad without prior consent); INA 208(b)(3) (8 U.S.C. 1158(b)(3)) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b) (8 U.S.C. 1159(b)) (allowing the Attorney General or the Secretary to adjust the status of an asylee to that of a lawful permanent resident). Commenters identified various benefits that would be denied to individuals who receive statutory withholding of removal or protection under the CAT regulations as opposed to asylum. Congress chose not to provide the identified immigration benefits to recipients of statutory withholding of removal under the Act or protection under the CAT regulations. Congress, of course, may always revisit its decision; however, that is not the proper role of the Executive Branch.

Moreover, the United States is not required under U.S. law to provide the benefits identified by commenters to all individuals who seek asylum. For example, the valuable benefit of permanent legal status is not required under the United States' international treaty obligations.

In addition, recipients of statutory withholding of removal are eligible for numerous public benefits. Specifically, recipients of statutory withholding are eligible for Supplemental Security Income (''SSI''), the Supplemental Nutrition Assistance Program (''SNAP,'' also known as food stamps), and Medicaid for the first seven years after their applications are granted,[34] and for Temporary Assistance to Needy Families (''TANF'') during the first five years after their applications are granted.[35] Although asylees are eligible for additional benefits administered by HHS and ORR, the Departments believe that it is reasonable to exercise their discretion under U.S. law to limit these benefits to asylum recipients who do not have or who have not been found to have engaged in the sort of conduct identified in the bars to asylum eligibility being implemented in this rule because doing so incentivizes lawful behavior.

Commenters' assertions that statutory withholding of removal and protection under the CAT regulations essentially trap individuals in the United States is misplaced. Although an individual who has been granted these forms of protection is not guaranteed return to the United States if he or she leaves the country, these forms of protection do not prevent individuals from traveling outside the United States. *See Cazun,* 856 F.3d at 257 n.16.

To the extent commenters raised concerns that recipients of statutory withholding and CAT protection must apply annually for work authorization, the United States is permitted to place restrictions on work authorization. As required by Article 17 of the Refugee Convention, the United States must accord refugees ''the most favourable treatment accorded to nationals of a foreign country in the same circumstances.'' Individuals who have received a grant of withholding of removal or protection under the CAT regulations are not in the same position as an individual who has been granted lawful permanent resident status. Rather, these individuals have been ordered removed and had their removal withheld or deferred pursuant to a grant of withholding of removal or protection under the CAT regulations. The United States has opted to grant these individuals work authorization, despite their lack of permanent lawful status. However, because these individuals are not accorded permanent lawful status, the United States has determined that they must submit a yearly renewal for that work authorization.

Significantly, although the burden of proof to establish statutory withholding of removal or protection under the CAT regulations is higher than to establish asylum, this burden remains in compliance with the Protocol and Refugee Convention, which require that ''[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,'' and Article 3 of the CAT, which similarly requires that ''[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'' As explained by the Supreme Court with respect to statutory withholding of removal, the use of the term ''would'' be threatened as opposed to ''might'' or ''could'' indicates that a likelihood of persecution is required. *Stevic,* 467 U.S. at 422. Citing congressional intent to bring the laws of the United States into compliance with the Protocol, the Court concluded that Congress intended withholding of removal to require a higher burden of proof and that the higher burden complied with Article 33 of the Refugee Convention. *Id.* at 425–30. Similarly, the ''burden of proof for an alien seeking CAT protection is higher than the burden for showing eligibility for asylum.'' *Lapaix* v. *U.S. Att'y Gen.,* 605 F.3d 1138, 1145 (11th Cir. 2010). As with statutory withholding of removal and the risk of persecution, the burden of proof for CAT protection and the risk of torture is ''more likely than not.'' *Compare* 8 CFR 1208.16(b)(2) (statutory withholding), *with* 1208.16(c)(2) (CAT protection).[36]

In response to commenters who asserted that the Departments failed to provide an assessment of how many individuals subject to the new categorical bars could meet the higher burdens required for statutory withholding of removal and protection under the CAT regulations, the Departments note that such an assessment would not be feasible. The Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions or pertinent criminal conduct that would be subject to the bars added by this rule. Without this data, the

[34] 8 U.S.C. 1612(a)(1), (a)(2)(A)(iii), (a)(3) (SSI & SNAP); 8 U.S.C. 1612(b)(1), (b)(2)(A)(i)(III), (b)(3)(C) (Medicaid).

[35] 8 U.S.C. 1612(b)(1), (b)(2)(A)(ii)(III), (b)(3)(A)–(B) (TANF and Social Security Block Grant); 8 U.S.C. 1622(a), (b)(1)(C); 8 U.S.C. 1621(c) (state public assistance).

[36] The burden associated with the CAT regulations is consistent with congressional intent. As the Third Circuit has noted, the U.S. Senate gave its advice and consent to ratification of the CAT subject to several reservations, understandings, and declarations, including that the ''United States understands the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.' '' *Auguste,* 395 F.3d at 132.

Departments cannot reliably estimate the population affected by this rule. In addition, even with these statistics, it is impossible to accurately predict in advance whether immigration judges would grant these individuals statutory withholding of removal or protection under the CAT regulations due to the fact-bound nature of such claims, the various factors that must be established for each claim (*e.g.,* credibility), independent nuances regarding the claim, evidence submitted, and myriad other factors.

6. Policy Concerns

a. Unfair, Cruel Effects on Asylum Seekers

Comment: Commenters opposed the rule because, among many reasons, they alleged that it imposes unfair, cruel effects on aliens who would otherwise be eligible for asylum. Commenters alleged that the rule constitutes an ''unnecessary, harsh, and unlawful gutting of [ ] asylum protections.'' Commenters also alleged that the rule disadvantages asylum seekers because, in comparison to other forms of relief, no waiver of inadmissibility is available to waive misdemeanor convictions, rendering asylum ''disproportionately and counterintuitively more difficult to obtain for some of the most vulnerable people.'' Many commenters were also concerned that the rule denies protection to people who most need it and whom the asylum system was designed to protect. For those people, commenters stated, asylum is their ''only pathway to safety and protection.''

Many commenters expressed opposition to the rule by claiming that the rule will exclude bona fide refugees from asylum eligibility. Relatedly, commenters also opposed the rule because they alleged that it prevents aliens from presenting meritorious, legitimate claims. Overall, most commenters asserted that the consequence of asylum ineligibility was ''disproportionately harsh.'' In support, commenters provided various examples of offenses that would, in their view, unjustly render an alien ineligible for asylum under the rule: An alien in Florida who stole $301 worth of groceries; an alien with two convictions for DUI, regardless of whether the alien seeks treatment for alcohol addiction or the circumstances of the convictions; an alien defensively seeking asylum who has been convicted of a document fraud offense related to his or her immigration status; or a mother convicted for bringing her own child across the southern border seeking safety. Commenters alleged that aliens seeking asylum are typically fleeing persecution or death, so ineligibility based on such minor infractions constitutes ''punishment that clearly does not fit the crime.'' As stated by one commenter, ''Congress designed our current laws to provide a safe haven for asylum seekers and their immediate family members who are still in danger abroad. If an asylum claim is denied, those individuals may be killed, tortured, or subjected to grave harm after being deported.''

Commenters also opposed the rule by claiming that it bars asylum for aliens ''simply accused'' of engaging in battery or extreme cruelty; commenters believed it to be unfair that the rule could bar asylum based on conduct without a conviction.[37] Commenters opposed barring asylum relief based on ''mere allegations'' without any ''adjudication of guilt.'' One commenter stated that the rule exceeds the scope of the Act because, the commenter claimed, the INA allows asylum bars to be based only on convictions for particularly serious crimes.

Many commenters expressed opposition to a wide range of issues related to asylum seekers. One commenter expressed concern with the treatment of immigrants, stating that mistreatment ''increases blood pressure, diabetes, and risks for acute crises like heart attacks[,] which harm immigrant communities and negatively impact our healthcare system.'' Another commenter expressed opposition to the United States' allocation of resources, stating that the redirection of tax cuts and expanded military budgets could help to assist asylum seekers. Others more broadly expressed general opposition to family separation without relating that concern to this rule.

Response: The Departments disagree that the rule ''guts'' asylum protections or that the rule affects otherwise eligible asylum applicants in an unfair or otherwise cruel manner. First, as discussed elsewhere, asylum is a discretionary form of relief. *See* INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)). Accordingly, aliens who apply for asylum must establish that they are statutorily eligible for asylum and merit a favorable exercise of discretion. *See id.;* INA 240(c)(4)(A) (8 U.S.C. 8 U.S.C. 1229a(c)(4)(A)); *see also Matter of A-B–,* 27 I&N Dec. 316, 345 n.12 (A.G. 2018), *abrogated on other grounds by Grace* v. *Whitaker,* 344 F. Supp. 3d 96, 140 (D.D.C. 2018), *aff'd in part, Grace* v. *Barr,* 965 F.3d 883 (D.C. Cir. 2020). Over time, Congress, the Attorney General, and the Secretary have established various categories of aliens who are barred from asylum and have established additional limitations and conditions on asylum eligibility in keeping with the Departments' congressionally provided authority. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)); *see also* 84 FR at 69641.

Rather than ''gut'' asylum protections, the rule narrows asylum eligibility by adding categorical bars for aliens who have engaged in certain criminal conduct that the Departments have determined constitutes a disregard for the societal values of the United States; clarifies the effect of criminal convictions on asylum eligibility; and removes reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. The Departments establish these changes as additional limitations and conditions on asylum eligibility, pursuant to their statutory authority in sections 208(b)(2)(C) and (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)).

Further, the Departments promulgate this rule to streamline determinations for asylum eligibility so that those who qualify for and demonstrate that they warrant a favorable exercise of discretion might be granted asylum and enjoy its ancillary benefits in a more timely fashion. Given the rule's clarified conditions and limitations on asylum eligibility, the Departments anticipate more timely adjudications for two reasons. First, non-meritorious claims will more quickly be resolved because the rule eliminates the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies, thereby freeing up time and resources that can be subsequently allocated towards adjudication of meritorious asylum claims. Second, the Departments believe that, because fewer people would be eligible for asylum, fewer applications may be filed overall, thereby reducing the total number of asylum applications requiring adjudication. As a result, the Departments could allocate their time and resources to asylum applications that are more likely to be meritorious. In this way, the rule does not eliminate protection for those who need it most or the benefits available to asylees; instead, it may actually allow for those people to more quickly receive protection.

In response to commenters who claim that the rule prevents aliens from seeking asylum who otherwise have meritorious claims, the Departments

[37] Further discussions of comments specifically regarding allegations of gang-related activity and domestic violence are contained in sections II.C.3.d and II.C.3.f, respectively.

emphasize that the rule changes asylum eligibility. Accordingly, despite commenters' assertions, an alien who is ineligible under the provisions of this rule would not, in fact, have a meritorious claim.

The Departments do not believe that the examples of misdemeanors that commenters provided in response to the request for public feedback about whether the proposed rule was over-inclusive warrant altering the scope of the proposed rule. Regarding certain referenced examples, the Departments strongly disagree that the rule employs too harsh a consequence or that the ''punishment does not fit the crime.'' The bars articulated in this rule indicate the Departments' refusal to harbor individuals who have committed conduct that the Departments have determined is undesirable. This is not a punishment. For example, the Departments strongly oppose driving under the influence and disagree that two DUI convictions, regardless of the circumstances or harm caused to others, do not warrant ineligibility for asylum. As previously stated, driving under the influence represents a blatant disregard for the laws of the United States. Further, the Departments disagree that document fraud does not warrant ineligibility for asylum, as it undermines the integrity of our national security and the rule of law. Overall, the Departments disagree that such examples demonstrate that revision of the rule is warranted.

The Departments further disagree that the rule disadvantages asylum seekers by failing to provide a waiver of inadmissibility for misdemeanor convictions. No such waiver is required by statute in the asylum eligibility context. Further, the Departments reiterate that alternative forms of relief or protection may still be available for aliens who are ineligible for asylum under the rule. *See* 84 FR at 69658 (explaining that an alien will still be eligible to apply for statutory withholding of removal or protection under regulations implementing U.S. obligations under Article 3 of the CAT); *see also* INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 208.16 through 208.18; 1208.16 through 1208.18; *cf. Negusie* v. *Holder,* 555 U.S. 511, 527–28 (2009) (Scalia, J. and Alito, J., concurring) (noting that, if asylum is denied under the persecutor bar to an alien who was subject to coercion, that alien ''might anyway be entitled to protection under the Convention Against Torture''). Accordingly, aliens who are ineligible for asylum under the rule will not ''automatically'' be returned to countries where they fear persecution or torture, contrary to commenters' assertions.

The Departments emphasize that the rule changes the asylum eligibility regulations, but it does not affect the regulatory provisions for refugee processing under 8 CFR parts 207, 209, 1207, and 1209. Further, it does not categorically exclude ''bona fide refugees'' from the United States.

The INA does not preclude conduct-based bars. In fact, the statute already contemplates conduct-based bars in sections 208(b)(2)(A)(i), (iii)–(v) of the Act (8 U.S.C. 1158(b)(2)(A)(i), (iii)–(v)). Thus, commenters' concerns that the rule exceeds the scope of the statute are unwarranted, and the Departments choose, pursuant to statutory authority, to condition and limit asylum eligibility using conduct-based bars.

Relating to commenters' general humanitarian concerns for asylum seekers, such concerns are outside of the scope of this rulemaking, and the Departments decline to address them. Whether the current statutory framework appropriately addresses all aspects of the problems faced by aliens seeking asylum is a matter for Congress; here, the Departments merely exercise their authority under the discretion afforded to them by the existing statutes.

b. Incorrect Assumptions Regarding Criminal Convictions

Comment: Commenters alleged that the Departments promulgated the proposed rule based on incorrect assumptions regarding criminal convictions. Generally, commenters asserted that a conviction, without more, is both an unreliable predictor of future danger and an unreliable indicator of past criminal conduct. As an example, commenters stated that an alien may plead guilty to certain crimes to avoid the threat of a more severe sentence.

Commenters also asserted that not every noncitizen convicted of a crime punishable by more than one year in prison constitutes a danger to the community, which relates to the more general proposition advanced by commenters that the length of a sentence does not necessarily correlate with the consequential nature of the crime. One commenter mentioned that innocence and biased enforcement concerns underlie convictions and that there is a ''growing understanding domestically that a criminal conviction is a poor metric for assessing current public safety risk.'' Another commenter disagreed with the Departments' use of ''public safety'' as a justified reason for restricting liberty—in this case, liberty of asylum seekers.

Commenters claimed that the Departments provided no evidence underlying these assumptions. Further, commenters alleged that the proposed rule is arbitrary and capricious in violation of the Administrative Procedure Act (''APA'') because of these faulty assumptions.

Response: The Departments disagree that this rule was based on incorrect assumptions. The Departments have concluded that convictions with longer sentences tend to be associated with more consequential crimes and that offenders who commit such crimes are generally more likely to be dangerous to the community, and less deserving of the benefit of asylum, than offenders who commit crimes punishable by shorter sentences. *See* 84 FR at 69646. This determination is supported throughout the nation's criminal law framework. For example, for sentencing for Federal crimes, criminal history serves as a ''proxy'' for the need to protect the public from the defendant's future crimes. *See United States* v. *Hayes,* 762 F.3d 1300, 1314 n.8 (11th Cir. 2008); *see also* U.S. Sentencing Guidelines Manual § 4A1.2 cmt. Background (U.S. Sentencing Comm'n 2018). Further, in numerous Federal statutes and the Model Penal Code, crimes with a possible sentence exceeding one year constitute ''felonies'' regardless of the assumptions and implications referenced by the commenters. *See, e.g.,* 84 FR at 69646 (providing 5 U.S.C. 7313(b); Model Penal Code § 1.04(2); and 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) as exemplary authorities that define ''felony,'' in part, by considering whether the sentence may exceed one year). Accordingly, and pursuant to their statutory authority, the Departments have determined that similarly conditioning asylum eligibility on criminal convictions with possible sentences of more than one year is proper and reasonable because such convictions are general indicators of social harm and conduct that the Departments have deemed undesirable.

Regarding commenters' claims that the proposed rule is arbitrary and capricious because it is based on faulty assumptions, the Departments respond in section II.D.1, which addresses comments related to the APA and other regulatory requirements.

c. Disregards Criminal Activity Linked to Trauma

Comment: Many commenters expressed opposition to the rule by alleging that it disregards the reality that criminal activity is oftentimes linked to trauma experienced by asylum seekers

in their countries of origin or on their journey to safety. Citing statistics and evidence regarding the vulnerability of asylum seekers and the high likelihood that they have experienced various forms of trauma related to the circumstances from which they are trying to escape and a lack of affordable healthcare, commenters asserted that asylum seekers are at a higher risk of self-medicating with drugs or alcohol, which in turn would increase the likelihood for asylum seekers to be involved in the criminal justice system and, as a result of the rule, ineligible for asylum. Commenters stated that aliens with substance use disorders, drug-related convictions, and other related addictions should be provided with ''treatment and compassion'' and not barred from asylum eligibility. A commenter stated that the rule renders aliens who have experienced persecution and subsequent trauma ''at greater risk of being returned to a country where they will only be further tortured and harmed.''

Commenters claimed that denying aliens who have experienced such trauma the opportunity to present countervailing factors regarding their subsequent or associated criminal activity was ''simply cruel.'' Commenters alleged that the rule ignores the fact that these aliens likely struggle with post-traumatic stress disorder, other untreated mental health problems such as anxiety or depression, substance use disorders or addictions, self-medication, poverty, and over-policing. Accordingly, commenters stated that the rule would ''further marginalize asylum seekers already struggling with trauma and discrimination'' and exclude ''those convicted of offenses that are coincident to their flight from persecution.''

Some commenters emphasized the trauma experienced by children prior to arriving in the United States and in ORR custody. Those commenters also emphasized that many children are then convicted and tried as adults for crimes stemming from that trauma, which, under the NPRM, would bar them from asylum. The commenters stated that such children, if given appropriate treatment, support, and services, are able to recover rather than remain in the juvenile or criminal justice systems. Accordingly, commenters disagreed with the NPRM's approach of categorically barring such individuals and preventing them from presenting context and mitigating evidence for their crimes.

Response: The Departments acknowledge the trauma aliens may face but note that aliens barred from asylum eligibility may still be eligible for alternative measures of protection precluding their return to a country where they experienced torture or persecution resulting in trauma. *See* 84 FR at 69642. The Departments, however, disagree that the possibility of personal trauma or other strife is sufficient to overcome the dangerousness or harms to society posed by the offenders subject to the sorts of bars to asylum implemented by the rule because, as discussed in the proposed rule, possessors and traffickers of controlled substances ''pose a direct threat to the public health and safety interests of the United States.'' 84 FR at 69654; *accord Ayala-Chavez,* 944 F.2d at 641 (''[T]he immigration laws clearly reflect strong Congressional policy against lenient treatment of drug offenders.'' (quoting *Blackwood,* 803 F.2d at 1167)). Also, commenters' suggestions regarding treatment, support, and services for children who have experienced trauma are outside the scope of this rulemaking.

Finally, the Departments note that, consistent with the INA's approach to controlled substance offenses, for example in the removability context under INA 237(a)(2)(B)(i) (8 U.S.C. 1227(a)(2)(B)(i)), the rule does not penalize a single offense of marijuana possession for personal use of 30 grams or less. *See* 84 FR at 69654. The Departments have concluded that allowing this limited exception to application of the new bar appropriately balances the competing policy objectives of protecting the United States from the harms associated with drug trafficking and possession, on the one hand, and the goal of not imposing unduly harsh penalties on persons subject to the new bars, on the other.

d. Problems With Existing Asylum System

Comment: Commenters opposed the NPRM because they alleged that the current overall asylum system is too harsh. Specifically, commenters stated that the current bars to asylum are too harsh and overly broad, given that all serious crimes are already considered as part of the discretionary analysis and that asylum seekers are already heavily vetted and scrutinized. Accordingly, commenters stated that the asylum restrictions should be narrowed rather than expanded.

Specifically, commenters asserted that the current ''harsh system'' places a high evidentiary burden on applicants to establish eligibility and disregards the danger they may face if they are sent back to their countries.[38] Commenters claimed that conditions in Mexico, where many asylum seekers are sent, are dangerous, and that asylum seekers are killed or experience other harms. In addition, commenters referenced numerous other barriers to asylum—the complex ''web'' of laws and regulations that asylum seekers must navigate, sometimes from jail or without counsel, and other recent policies such as the MPP, *see* DHS, *Policy Guidance for Implementation for the Migrant Protection Protocols* (Jan. 25, 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf,* and the ''third-country transit bar,'' *see* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).

Further, commenters asserted that the current criminal bars to asylum eligibility are too broad, emphasizing, for example, that the term ''aggravated felony,'' which is a ''particularly serious crime'' that renders the applicant ineligible for asylum, has come to encompass ''hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses and misdemeanors * * *. A single one of these past offenses eliminates an individual's eligibility for asylum, with no regard to the danger that person will face if sent back to their country.''

Commenters also explained that immigration judges currently have full discretion to deny asylum to any alien who is not categorically barred from relief but who has been convicted of criminal conduct. Accordingly, commenters asserted that the existing system is sufficient to ensure that relief is denied to those who may be dangerous to a community, while at the same time providing latitude for adjudicators to consider unique challenges that asylum seekers face resulting from the harm they have faced. In light of these facts, commenters opposed adding more bars and encouraged the Departments to instead narrow the bars.

Response: Commenters' concerns regarding the entire asylum system, including the asserted complex ''web'' of asylum laws and regulations, are outside the scope of this rulemaking. The rule adds categorical bars to asylum

[38] Commenters also mentioned numerous other alleged barriers to asylum unrelated to the NPRM, including the required time between an application's submission and the attached photo's taking, English-only application forms, and additional concerns. The Departments acknowledge the general concerns with the asylum system, but because these concerns do not relate to particular provisions of the NPRM, the Departments do not address them further.

eligibility; clarifies the effect of criminal convictions and, in one instance, criminal conduct, on asylum eligibility; and removes automatic reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. The Departments do not otherwise propose to amend the asylum system established by Congress and implemented by the Departments through rulemaking and policy over the years.

The Departments note here, and the proposed rule acknowledged, in part, *see, e.g.,* 84 FR at 69645–46, that, although immigration judge discretion, BIA review, and scrutiny of asylum applicants could achieve results similar to some of the proposed provisions, the rule streamlines the system to increase efficiency. By eliminating the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies, the Departments anticipate that adjudication of asylum claims will be a much quicker process. In addition, the Departments believe that, given the clarified conditions and limitations on asylum eligibility, fewer non-meritorious or frivolous asylum claims may be filed overall, with the result that the Departments' adjudication resources would be allocated, from the beginning, to claims that are more likely to have merit. Overall, the Departments maintain that a rule-based approach to accomplish that goal is preferable. *See* 84 FR at 69646.

The Departments reiterate that asylum is a discretionary benefit; the Departments work in coordination to establish requirements, limits, and conditions, which may include evidentiary burdens. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Contrary to the commenters' assertions that the rule disregards the dangers faced by aliens, the rule noted alternative forms of protection for which aliens may apply, even if they are subject to an asylum bar. *See* 84 FR at 69642. Nevertheless, many commenters' concerns referencing allegedly dangerous conditions in Mexico, the effects of the MPP, and the third-country transit bar are also outside the scope of this rulemaking.

The Departments disagree with commenters' assertions that the asylum bars should be narrowed. Given efficiency interests, the Departments posit that expanded categorical bars will streamline the asylum system, with the result that asylum benefits may be granted more quickly to eligible aliens.

e. Inefficiencies in Immigration Proceedings

Comment: Commenters opposed the rule because they alleged that various provisions would result in inefficiencies and exacerbate an already inefficient, backlogged, and under-staffed immigration system.

First, commenters stated that requiring adjudicators to make ''complex determinations regarding the nature and scope of a particular conviction or, in the case of the domestic violence bar, conduct,'' would lead to inefficiencies. Many commenters stated that the rule effectively requires adjudicators to ''engage in mini-trials into issues already adjudicated by the criminal law system based on evidence that may not have been properly tested for its veracity in the criminal process,'' thereby decreasing efficiency. Further, commenters stated that adjudicators will have to ''conduct a separate factual inquiry into the basis for a criminal conviction or allegations of criminal conduct to determine whether the individual is eligible for asylum,'' instead of relying on adjudications from the criminal legal system.

Other commenters stated that the rule is especially inefficient in the case of family members' asylum eligibility. Commenters alleged that, under the proposed rule, family members' claims will be adjudicated separately and potentially before different adjudicators. Given that family members' claims are oftentimes interrelated and children are less able to sufficiently explain asylum claims, commenters concluded that the rule, especially as it relates to family claims, further increases inefficiencies in the system.

Commenters also stated that these ramifications directly contradict one of the rule's stated justifications of increased efficiency and alleged that the rule increased the time and expense necessary to process asylum claims. One commenter alleged that this will decrease the ability of asylum seekers to access healthcare, food, and housing. That commenter also averred that asylum seekers will likely have to request to reschedule interviews, which will introduce further delay, because the rule's filing deadlines restrict applicants' ability to provide supplementary evidence. Further, commenters alleged that the Departments failed to provide information or research to explain how the rule would increase efficiencies in the system.

Many commenters asserted that the rule will require a highly nuanced, resource-intensive inquiry that will prolong asylum proceedings and ''invariably lead to erroneous determinations'' or disparate results, with the consequence that appeals will increase and consume further Departmental resources.

Response: The Departments disagree with the commenters' assertions regarding inefficiencies.

First, adjudicators currently conduct a factual inquiry similar to the inquiry contemplated by the new bars in other immigration contexts. *See* 84 FR at 69652 (providing, as examples, the removability context in INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)) and consideration of the persecutor bar in INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i))). Thus, adjudicators are adequately trained and equipped to conduct such analyses.

Second, the Departments emphasize that this rule is just one tool for increasing efficiencies in the immigration adjudications process and for correcting what the Departments view as problematic rules regarding asylum eligibility. This rule is not intended to correct all inefficiencies or to be a complete panacea, and DOJ has implemented numerous initiatives recently to address inefficiencies where appropriate. *See, e.g.,* EOIR, *Policy Memorandum 20–07: Case Management and Docketing Practices* (Jan. 31, 2020), *https://www.justice.gov/eoir/page/file/1242501/download* (implementing efficient docketing practices); EOIR, *Policy Memorandum 19–11: ''No Dark Courtrooms''* (Mar. 31, 2019), *https://www.justice.gov/eoir/file/1149286/download* (providing policies to reduce and minimize the impact of unused courtrooms and docket times to address the caseload and backlog); EOIR, *Policy Memorandum 19–05: Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), *https://www.justice.gov/eoir/page/file/1112581/download* (providing policy guidance to effectuate the statutory directive to complete asylum adjudications within 180 days of filing, absent extraordinary circumstances); *see also* DOJ, *Memorandum for the Executive Office for Immigration Review: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), *https://www.justice.gov/opa/press-release/file/1015996/download* (reiterating EOIR's commitment to efficient adjudication).

Although the Departments agree that the current system for adjudicating asylum applications frequently fails to meet the statutory deadline of completing such cases within 180 days

absent exceptional circumstances, INA 208(d)(5)(A)(iii) (8 U.S.C. 1158(d)(5)(A)(iii)) the Departments believe this rulemaking will improve efficiency. The Departments direct commenters to the proposed rule at 84 FR at 69645–46 for an extensive explanation of inefficiencies addressed through this rulemaking, which provides adequate ''information and research'' describing how the rule will increase efficiencies. Notably, courts have often recognized that rule-based approaches promote more efficient administration than wholly discretionary, case-by-case determinations. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)); *Marin-Rodriguez* v. *Holder,* 612 F.3d 591, 593 (7th Cir. 2010) (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.''); *cf. Baylor Cty. Hosp. Dist.* v. *Price,* 850 F.3d 257, 263 (5th Cir. 2017) (''DHHS opted for a bright-line rule after considering its lack of agency resources to make case-by-case judgments'' because ''the statutory text had to be articulated properly and in an administratively efficient way.''). The Departments acknowledge the backlog in asylum applications, *see* EOIR, *Adjudication Statistics: Total Asylum Applications* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1106366/download,* and the Departments, as a matter of policy, choose to address this backlog and resulting inefficiencies in part through this rulemaking.

The backlogged asylum system presents challenges; however, the Departments disagree with commenters regarding how best to address the backlog. The Departments disagree that the rule will prolong proceedings and lead to erroneous determinations, thus allegedly prompting more appeals. On the contrary, the Departments have concluded that the rule will increase efficiencies by eliminating the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies as they apply to asylum adjudications. *See* 84 FR at 69646–47. The Departments have determined that this rule-based approach is preferable, partly because, given the specific context of asylum eligibility, it will result in consistent treatment of asylum seekers with respect to criminal convictions. *See id.*

Finally, concerns regarding access to healthcare, food, and housing, are outside the scope of this rulemaking.

f. Disparate Impact on Certain Persons

Comment: Many commenters opposed the rule because they claimed it will harm or disparately affect asylum applicants whom commenters deem the most vulnerable people in society. Commenters explained that, although asylum seekers and refugees are generally vulnerable, the rule further implicates other vulnerable groups, such as LGBTQ individuals; victims of trafficking; communities of color, especially youth, and other minority ethnic groups; individuals who have experienced trauma, coercion, abuse, or assault; people with mental illness, especially those lacking adequate mental health services, such as children in ORR custody; people struggling with addictions and related convictions, regardless of whether they have sought treatment; parents who cross the border with children to seek safety; individuals convicted of document fraud who unknowingly use fraudulent documents or unscrupulous services to procure immigration documents; victims of domestic or intimate violence; people from Central America and the ''Global South''; and low-income people. Commenters were concerned that the rule categorically bars these populations without consideration of mitigating factors, thereby potentially resulting in the return of such people to countries and communities where they initially experienced discrimination, bias, trauma, and violence. In a related vein, commenters were concerned that these populations are more prone to be convicted of minor offenses that will, under the rule, preclude them from asylum relief. For example, one commenter speculated that a trafficking victim who leaves a child alone at home while on a brief trip to a store could be convicted of ''endangering the welfare of a child'' and then barred from asylum.

Commenters especially emphasized concerns regarding the effect of the rule on two groups: LGBTQ individuals, especially transgender women; and trafficking victims.[39] Regarding LGBTQ individuals, multiple commenters asserted that the rule constitutes a ''unique threat'' because those individuals have likely faced:

> a high degree of violence and disenfranchisement from economic and political life in their home countries. * * * Members of these communities also experience isolation from their kinship and national networks following their migration. This isolation, compounded by the continuing discrimination towards the LGBTQ population at large, leave[s] many in the LGBTQ immigrant community vulnerable to trafficking, domestic violence, and substance abuse, in addition to discriminatory policing practices.

One commenter explained that some LGBTQ individuals are charged with a variety of crimes in connection with their private, consensual conduct because of differences in discriminatory laws regarding this population around the world.

For trafficking victims, commenters explained that the rule bars them from asylum when they are only involuntarily part of a trafficking scheme and will likely face subsequent retaliation and other harms from their traffickers. Commenters were especially concerned that the rule denies asylum benefits to people who desperately need and will greatly benefit from them. Further, commenters asserted that alternative forms of relief are oftentimes insufficient for trafficking victims. For example, commenters explained that trafficking victims who have been removed are not eligible for T nonimmigrant status. Similarly, commenters explained that trafficking victims who are forced by their traffickers to commit other crimes may then be ineligible for other forms of relief under certain crime bars. Commenters also explained that trafficking victims typically receive intervention and other support services only after coming into contact with law enforcement; thus, this rule would preclude them from such resources.

Commenters explained that, not only are these people more prone to experiencing harms if they are barred from asylum, but also these people are more prone to initially experience harms that subsequently result in their involvement in the criminal justice system, which would, under this rule, bar them from asylum. For these reasons, commenters opposed the rule.

Response: To the extent that commenters ask the Departments to establish unique protections for these referenced groups, such protections are outside the scope of this particular rulemaking. Congress has chosen to provide special protections for certain groups, such as unaccompanied alien children, and Congress could choose to

[39] Commenters also expressed concerns for communities of color. These concerns, however, are addressed in section II.C.3.d because commenters' concerns on this point were primarily connected to concerns regarding the gang-related offenses included in the rule.

similarly extend protections to LGBTQ persons or other groups. Without such congressional action, however, the Departments are merely implementing the statutory framework as it currently exists. Further, to the extent that the commenters posit that the noted groups are more prone to engage in criminal conduct implicated by the rule—*e.g.,* fraud, DUI, human smuggling, gang activity, drug-related crimes—the Departments have no evidence that such groups are more likely to commit such crimes than any other groups of asylum applicants, and commenters did not provide evidence that would suggest otherwise. Thus, the Departments reject the assertion that the rule would have a disparate impact on discrete groups, absent evidence such groups are more likely to engage in criminal behavior addressed by the rule.

The rule includes several provisions that act, in part, to preclude returning vulnerable persons, including LGBTQ individuals and trafficking victims, to countries where they may have experienced or fear, as referenced by the commenters, discrimination, bias, trauma, and violence. As an initial matter, regardless of asylum eligibility, vulnerable persons may be eligible for statutory withholding of removal and protection under the CAT regulations. *See* 84 FR at 69642. Next, the rule includes an exception to the bar based on domestic assault or battery, stalking, or child abuse. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F). The exception mirrors the provisions in the statute at INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) (removability context), but has one significant difference. In the removability context, applicants claiming this exception must satisfy the statutory criteria and be granted a discretionary waiver. Under the rule, however, applicants claiming the exception must only satisfy the criteria; no waiver is required. *See* 84 FR at 69653. This exception exists so that proper considerations can be taken of the vulnerability of domestic violence victims. The Departments believe this exception strikes the proper balance between providing protections for domestic violence victims while advancing the goals of reducing the incidence of domestic violence and protecting the United States from the sorts of conduct that would subject offenders to the new bars.

Commenters' concerns regarding vulnerable individuals' increased likelihood of convictions for minor offenses for certain vulnerable groups relate to the larger criminal justice system and accordingly fall outside the scope of this rulemaking. *See* section II.C.6.k for further discussion. Moreover, as noted above, the Departments have no evidence—and commenters provided none—that the groups identified by commenters are more prone to engage in criminal conduct implicated by the rule that would increase the likelihood of a conviction for, *e.g.,* fraud, DUI, human smuggling, gang activity, or drug-related crimes.

Next, this rule expands asylum ineligibility based on offenses committed in the United States, not abroad. *See* 84 FR at 69647 n.5. Thus, the rule does not expand asylum ineligibility for trafficking victims forced to commit crimes abroad or LGBTQ individuals whose private, consensual acts are criminalized abroad. Indeed, case law has long recognized that some criminal prosecutions abroad, if pretextual, can, for example, form the basis of a protection claim. *See, e.g., Fisher* v. *INS,* 79 F.3d 955, 962 (9th Cir. 1996) (noting ''two exceptions to the general rule that prosecution does not amount to persecution—disproportionately severe punishment and pretextual prosecution''); *Matter of S–P–,* 21 I&N Dec. 486, 492 (BIA 1996) (noting that ''prosecution for an offense may be a pretext for punishing an individual'' on account of a protected ground). The rule does not alter such case law.

g. Adjudicator Discretion

Comment: Many commenters opposed the rule out of concern that it strips adjudicators of discretion. First, commenters stated that it is crucial that adjudicators consider countervailing factors ''to determine whether the circumstances merit such a harsh penalty.'' Another commenter explained that ''[d]iscretion allows an adjudicator to consider a person's entire experience, including those factors that led to criminal behavior as well as the steps towards rehabilitation that individuals have taken.'' Commenters claimed that effective use of discretion is crucial in these circumstances: ''The existing framework for determining if an offense falls within the particularly serious crime bar already provides the latitude for asylum adjudicators to deny relief to anyone found to pose a danger to the community.'' Thus, commenters alleged that the rule's removal of that discretion is punitive and unnecessary. One commenter stated that the purpose of the NPRM seems to be to remove all discretion from adjudicators to consider each case on a case-by-case basis. Another commenter underscored the importance of adjudicators retaining discretion to make individualized determinations because Congress established asylum as a discretionary form of relief.

One commenter alleged that the rule diminishes due process protections, stating that, ''by preventing the use of discretion in such cases[,] the proposed rules have a chilling effect on due process. Ensuring adjudicators have discretion to grant asylum under such circumstances allows asylum seekers to have a fair day in court and guards against further injustice resulting from errors that might have occurred in the criminal legal system.''

Commenters also alleged that the proposed rule incorrectly raises the burden of proof to establish that a favorable grant of discretion is warranted so that it is equivalent to the burden required to establish a well-founded fear of persecution. These commenters averred that this is problematic in the face of contrary case law that requires a more cautious, restrained view of the Attorney General's and the Secretary's discretion and that cautions against permitting the Departments unchecked power and unrestrained discretion in making asylum determinations. Commenters first cited *Matter of Pula,* 19 I&N Dec. at 474, arguing that it encouraged a restrained view of discretion because the Board asserted that ''the danger of persecution should generally outweigh all but the most egregious of adverse factors.'' Commenters averred that the Supreme Court cautioned against unlimited discretion in *Moncrieffe,* 569 U.S. at 200–01, by holding that the government must follow the categorical approach. Similarly, commenters cited *Delgado,* 648 F.3d at 1097, to support this proposition because the Ninth Circuit ''first assert[ed] its jurisdiction to review the Attorney General's discretionary authority'' and overruled an earlier decision that the jurisdiction-stripping provision at 8 U.S.C. 1252 barred the court's judicial review.

On the other hand, in the context of convictions or conduct related to domestic violence, battery, or extreme cruelty, commenters also opposed the amount of discretion afforded to adjudicators because the rule allegedly provides no clear guidance for the adjudicator's inquiry, analysis, and resulting determination. For example, commenters asserted that it is unclear what constitutes ''reliable evidence'' under the rule. Commenters were concerned that this would result in inconsistent decisions or diminished due process. Further, commenters were also concerned because determinations under the rule would be discretionary

and therefore non-appealable in most cases.

Response: Congress has authorized the Attorney General and the Secretary to, by regulation, limit and condition asylum eligibility consistent with the statute. INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Through this rule, the Departments exercise such authority by establishing categorical bars to asylum that constitute such limits and conditions. The Departments disagree that adjudicators must be afforded discretion to consider mitigating factors in determining asylum eligibility in all circumstances. Given the challenges faced by the agencies and the operative functioning of current categorical bars, *see* INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)), the Departments add the new categorical bars, in part, to improve the efficient processing of asylum claims. The regulatory changes are not punitive or intended to revoke all discretion from adjudicators, as commenters alleged; rather, the Departments promulgate this rule to facilitate and streamline processing of asylum claims. *See e.g.,* 84 FR at 69646–47, 69657.

The rule does not diminish due process. As discussed above, the discretionary benefit of asylum is not a liberty or property interest subject to due process protections. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric,* 469 F.3d at 98. The Departments disagree that affording discretion to adjudicators in lieu of promulgating the additional bars is a preferable way to process asylum applications. Moreover, nothing in this rule prevents individuals from appealing the immigration judge's determination. *See* 8 CFR 1003.38 (appeals with the BIA). Further, as explained in section II.C.6.k, resolving errors in the criminal justice system is beyond the scope of this rulemaking.

The Departments reiterate their authority to limit and condition asylum eligibility consistent with the statute. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Accordingly, the Departments may promulgate bars that govern determinations regarding asylum eligibility. In light of this authority, the Departments also disagree with commenters that the rule provides adjudicators with insufficient guidance for the sound exercise of their judgment in determining eligibility for asylum. For example, the proposed rule provides clarity surrounding determinations whether a conviction is a felony by applying the relevant jurisdiction's definition; also, it provides detailed guidance on vacated or expunged convictions, and modified convictions and sentences. 84 FR at 69646, 69654–55. Immigration judges and asylum officers currently exercise discretion to determine whether an asylum seeker merits relief for a wide range of reasons, many of which are not similarly set out or defined in the Act or by regulation. *See, e.g., Matter of A–B–,* 27 I&N Dec. 316 at 345 n.12 (outlining factors for consideration in discretionary asylum determinations). The Departments accordingly do not believe that the new bars require immigration judges or asylum officers to exercise significantly more discretion than those judges or officers already do.

Further, the Departments note that providing more exacting guidance, as some commenters suggested, would impede the very nature of legal discretion, as demonstrated by its definition: ''[f]reedom in the exercise of judgment,'' or ''the power of free decision-making.'' Black's Law Dictionary (11th ed. 2019); *see also* ''Discretion,'' Merriam-Webster, *https://www.merriam-webster.com/dictionary/discretion* (last updated Feb. 15, 2020) (defining ''discretion'' as the ''power of free decision or latitude of choice within certain legal bounds''). Doing so would thus aggravate the problems that some commenters perceived in the rule's alleged lack of sufficient flexibility.

Next, nothing in the final rule changes the standard of proof as regards an individual's ability to demonstrate that he or she warrants a positive grant of discretion. As an initial matter, citing a standard of proof for discretion is a misnomer. Rather, the determination of whether an alien warrants a discretionary grant of asylum is an analysis that requires reviewing the circumstances of the case. In determining whether the alien warrants a discretionary grant of asylum, the immigration judge considers a number of factors and considerations. *See Matter of Pula,* 19 I&N Dec. at 473–74 (outlining how adjudicators should weigh discretionary factors in applications for asylum). By contrast, the final rule sets forth additional limitations on eligibility for asylum, which are separate from the discretionary determination. As a result, the final rule does not create a standard of proof for establishing that an alien warrants a discretionary grant of asylum.

Similarly, the Departments disagree with commenters' assertions that the final rule violates Supreme Court and court of appeals precedent regarding the amount of discretion granted to the Attorney General and the Secretary. As explained, Congress, in IIRIRA, vested the Attorney General with broad authority to establish conditions or limitations on asylum. *See* 110 Stat. at 3009–692. Congress also vested the Attorney General with the authority to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)). This broad authority is not undercut by the cases cited by commenters. Neither *Moncrieffe* nor *Delgado* presumes to limit the Attorney General's discretion to place limits on asylum. Rather, *Moncrieffe* addressed whether a conviction for possession of a small amount of marijuana with intent to distribute qualified as an aggravated felony. 569 U.S. at 206. Similarly, the *Delgado* court held that it had authority to review certain discretionary determinations made by the Attorney General when not explicitly identified in the INA. 648 F.3d at 1100. However, this inquiry was based on statutory interpretation to determine whether the court had jurisdiction to review a BIA decision. Apart from disagreeing with the Department's legal arguments on appeal, neither of these two decisions purported, even in dicta, to place additional limitations on the Attorney General's ability to consider whether to grant asylum as a matter of discretion.

h. Issues With Representation

Comment: Commenters opposed the NPRM because they alleged that it made the asylum system more arduous for asylum seekers, especially children, to navigate alone. One commenter claimed that 86 percent of detainees lack access to counsel. Overall, commenters were concerned that the rule's changes disadvantage asylum seekers by making it more difficult for them to proceed without representation and for organizations, in turn, to provide representation and assistance to aliens.

Commenters pointed out that asylum seekers lack the benefit of appointed counsel, which is especially significant for pro se aliens affected by the rule, particularly in regard to gathering evidence and developing responses to refute the ''extremely broad grounds'' for the denial of asylum.

Commenters also alleged that it will be more difficult for organizations to represent and assist aliens in accordance with the rule's provisions. Commenters stated that backlogs at USCIS are detrimental to organizations and the aliens they represent because

aliens may wait years for a decision on their applications, while organizations have limited resources to assist immigrants and must seek to prioritize spending for emergency situations.

Commenters also stated that the system is already complicated; further complicating it with additional barriers will require much time, funding, and effort by immigration advocates. Finally, commenters stated that an asserted ''lack of predictability'' in application of the rule would ''create a substantial burden on immigration legal services providers, who [would] be unable to advise their clients as to their asylum eligibility, a long-term and stable form of protection from persecution.''

Response: The commenters' particular concerns regarding representation in immigration proceedings or during asylum adjudications are outside the scope of this rulemaking. The rule does not involve securing or facilitating representation, and Congress has already directed that aliens have a right to counsel in removal proceedings but at no expense to the government. INA 292 (8 U.S.C. 1362). Moreover, 87 percent of asylum applicants in pending asylum cases have representation, and there is nothing in the rule that would cause a reduction in that representation rate. *See* EOIR, *Adjudication Statistics: Representation Rate* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.*

In addition, the Departments continue to maintain resources designed to assist aliens in proceedings find representation or otherwise help themselves in their proceedings. *See* EOIR, *Find Legal Representation, https://www.justice.gov/eoir/find-legal-representation* (last updated Nov. 29, 2016). Further, the Office of Legal Access Programs within EOIR works to increase access to information and raise the level of representation for individuals in immigration proceedings. *See* EOIR, *Office of Legal Access Programs, https://www.justice.gov/eoir/office-of-legal-access-programs* (last updated Feb. 19, 2020).

In regard to commenters' concerns regarding the backlog at USCIS, the rule facilitates a more streamlined approach by eliminating inefficiencies. *See, e.g.,* 84 FR at 69647, 69656–57. For example, the rule's established definition for ''felony'' will create greater uniformity by accounting for ''possible variations in how different jurisdictions may label the same offense'' and avoid anomalies in the asylum context ''that arise from the definition of 'aggravated felonies.''' *Id.* at 69647. Significantly, that definition eliminates the need for adjudicators and courts alike to engage in the categorical approach for aggravated felonies. *See id.* These improvements to the asylum system will increase predictability, therefore rendering representation less complicated and potentially requiring less funding by immigration advocates.

The Departments emphasize that the rule does not create an entirely new system. As with any other change to the regulations, the Departments anticipate that immigration advocates and organizations will adjust and adapt their strategies to continue to provide effective representation for their selected clients.

i. Against American Ideals

Comment: Commenters opposed the rule because they alleged that it conflicts with American ideals. Commenters remarked that the rule conflicts with the United States' tradition and moral obligation of providing a ''haven for persons fleeing oppression'' and a ''beacon of hope'' for vulnerable people, and that it violates principles that people should have freedom and equal rights under the law ''regardless of skin color or birthplace.'' Many commenters characterized these concerns as humanitarian, religious, and American ideals of showing compassion, fairness, and respect for human rights. Another commenter claimed that the rule ''eviscerated the spirit and overall purpose of the U.S. asylum system by categorically refusing protection to large groups of vulnerable people who are neither a danger to the public nor a threat to U.S. national security interests, and who have no other safe and reasonable option for protection.''

Other commenters expressed opposition by claiming that the rule would diminish the United States' role as a world leader, hurt the country's international reputation, and undermine foreign policy interests abroad. One commenter stated that the rule would diminish the ''country's historical role as a defender of human rights.''

Response: The rule does not conflict with American traditions or moral obligations related to caring for vulnerable people. On the contrary, the rule streamlines the asylum system to improve the consistency and predictability of the adjudication of claims, thereby enabling applicants who qualify for asylum eligibility to swiftly access the benefits that follow a grant of asylum. Those benefits include, among many, preclusion from removal, a path to lawful permanent resident status and citizenship, work authorization, the possibility of derivative lawful status for certain family members, and access to certain financial assistance from the Federal government. *See R–S–C,* 869 F.3d at 1180; INA 208(c)(1)(A), (C) (8 U.S.C. 1158(c)(1)(A), (C)); INA 208(c)(1)(B), (d)(2) (8 U.S.C. 1158(c)(1)(B), (d)(2)); *see also* 84 FR at 69641. The availability of these benefits demonstrates American ideals of compassion realized through the asylum system.

Aliens with certain criminal convictions demonstrate a disregard for the societal values of the United States and may constitute a danger to the community or threaten national security. The Departments have concluded that limiting asylum eligibility for these aliens furthers American ideals of the rule of law and a commitment to public safety. Although such aliens are not eligible for asylum under the rule, they may still be eligible for withholding of removal under the Act (INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 1208.16(b)), or protection under the CAT regulations (8 CFR 1208.16(c)). These forms of protection limit removal to a country where the alien is more likely than not to be persecuted based on protected grounds or tortured, thereby affording protection to aliens, even if they are ineligible for asylum.

The Departments do not agree that the rule diminishes the United States' international reputation for caring for the less fortunate. On the contrary, the Departments believe the rule strengthens the United States' ability to care for those who truly deserve the discretionary benefit of asylum and may take full advantage of the numerous benefits that follow.

j. Bad Motives

Comment: Commenters opposed the NPRM because they alleged that the Departments published it with racist motives. Commenters stated that the rule was published ''out of animus to asylum seekers and [with] a desire to undermine the asylum system through an end-run around Congress'' because the rule would ''necessarily ensnare asylum seekers of color who have experienced racial profiling and a criminal legal system fraught with structural challenges and incentives to plead guilty to some crimes, particularly misdemeanors.'' One commenter specifically stated the rule was based upon a ''dark legacy'' of bias against Latin American countries and violated the Equal Protection Clause of the Fourteenth Amendment.

One commenter stated that ''the [A]dministration has targeted low-income, immigrant communities of color to further their white supremacist

agenda of maintaining a white majority in the United States.'' Other commenters alleged that DHS and ICE have relied on racist policing techniques to identify gang activity, which rarely result in criminal convictions.

Commenters also opposed the rule because they alleged that it is an attempt to ''drastically limit asylum eligibility,'' ''exclude refugees from stability and security,'' and make the United States more ''hostile'' towards immigrants. In other words, commenters alleged that the rule ''represent[ed] a thinly veiled attempt to prevent otherwise eligible asylum seekers from lawfully seeking refuge in the United States.'' Commenters referenced public documents allegedly revealing the Administration's efforts to utilize smuggling prosecutions against parents and caregivers as part of its overall strategy to deter families from seeking asylum. Commenters were concerned that the rule threatens to ''magnify the harm caused by these reckless policies by further compromising the ability of those seeking safety on the southern border to access the asylum system.''

Response: The rule is not racially motivated, nor did racial animus or a ''legacy of bias'' play a role in the rule. Rather, the rule categorically precludes from asylum eligibility certain aliens based on the aliens' various criminal convictions and, in one limited instance, criminal conduct, because the Departments believe that the current case-by-case adjudicatory approach yields inconsistent results that are both ineffective to protect communities from danger and inefficient in regard to overall case processing. *See* 84 FR at 69640.

To the extent that the rule disproportionately affects any group referenced by the commenters, the rule was not intentionally drafted to discriminate against any group. The provisions of the rule apply equally to all asylum applicants without regard to any applicant's ethnic or national background, or any other personal characteristics separate and apart from the criminal or conduct history laid out in the rule. Accordingly, the rule does not violate the Equal Protection Clause of the Fourteenth Amendment. *See Washington* v. *Davis,* 426 U.S. 229, 242 (1976) (''[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.'' (citation omitted)); *cf. United States* v. *Smith,* 818 F.2d 687, 691 (9th Cir. 1987) (''We begin our review of this challenge by holding that persons convicted of crimes are not a suspect class.'').

As explained in the proposed rule, Congress expressly authorized the Attorney General and the Secretary to establish conditions or limitations for the consideration of asylum applications under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)) that are not inconsistent with the statute. *See* 84 FR at 69643. The Departments promulgate this final rule in accordance with those statutory sections, and in doing so, have promulgated a rule that is equally applicable to all races. The Departments strongly disavow any allegation of white supremacy.

The Departments reiterate that the rule does not encourage or facilitate hostility towards immigrants. Instead, the rule categorically precludes from asylum eligibility certain aliens based on criminal convictions, and, in one limited instance, criminal conduct, because the Departments believe the current case-by-case adjudicatory approach yields inconsistent results that are both ineffective to protect the American public from danger and inefficient in regard to overall case processing. The rule retains the current general statutory asylum system, *see* 84 FR at 69640, with the result that applicants for asylum must prove that they are (1) statutorily eligible for asylum, and (2) merit a favorable exercise of discretion. INA 208(b)(1)(A), 240(c)(4)(A) (8 U.S.C. 1158(b)(1)(A) 1229a(c)(4)(A)); *see also Matter of A–B–,* 27 I&N Dec. at 345 n.12. That framework continues to be equally applicable to persons of all races.

The rule does not affect regulatory provisions regarding refugee processing under 8 CFR parts 207, 209, 1207, and 1209, and it does not categorically exclude refugees from the United States or facilitate hostility towards immigrants. The Departments disavow allegations that the government used smuggling prosecutions against parents and caregivers specifically to deter families from seeking asylum. Rather, the Departments anticipate that the rule will better facilitate efficient processing of asylum applications by introducing a more streamlined approach, thus helping families who qualify for asylum and demonstrate their applications merit a favorable decision.

k. Problems With the Criminal Justice System

Comment: Commenters opposed the proposed rule because they alleged that it implicates a criminal justice system that suffers from structural challenges such as racial profiling, unjust outcomes, barriers to equal justice, and incentives to plead guilty, especially in the context of misdemeanors.

Related to commenters' concerns regarding racism in the NPRM,[40] commenters explained their concern that the NPRM imports racial disparities prevalent in the criminal justice system into the immigration system, stating, ''[a]sylum seekers of color, like all communities of color in the United States, are already disproportionately targeted and punished by the criminal justice system.'' Particularly, commenters stated that both undocumented and documented non-white immigrants are arrested, convicted of drug crimes, given longer sentences, and deported more frequently than their white counterparts. Further, commenters stated that LGBTQ aliens are more prone to experiencing violence from police.

One commenter opposed the NPRM, stating that it would exacerbate problems in our criminal justice system, such as increased incarceration, deportations, and racial profiling, which would, in turn, exacerbate health concerns for individuals and communities.

Response: The final rule amends the Departments' respective regulations governing bars to asylum eligibility. The rule clarifies the effect of criminal convictions and, in one instance, criminal conduct, in the asylum context and removes regulations governing automatic reconsideration of discretionary denials of asylum applications. *See* 84 FR at 69640. Accordingly, commenters' concerns regarding structural challenges to the criminal justice system are outside the scope of this rulemaking. The rule does not seek or intend to address actual or alleged injustices of the criminal justice system as a whole, as referenced by the commenters, including racial profiling, disparities based on race and sexual orientation, unjust outcomes, barriers to equal justice, incentives to plead guilty, and health concerns following alleged increases in incarceration, deportations, and racial profiling.

[40] *See* section II.C.6.j for further discussion.

l. Automatic Review of Discretionary Denials

Comment: Many commenters expressed strong opposition to the rule because it eliminates automatic review of discretionary denials. Commenters were concerned that language barriers and lack of financial resources may prevent applicants with meritorious claims from adequately presenting their cases. According to commenters, ''[m]aintaining reconsiderations of discretionary denials of asylum is therefore absolutely critical to ensuring that immigrant survivors who are eligible for asylum have another opportunity to defend and prove their right to obtain asylum protections.''

Response: The Departments disagree that reconsideration of discretionary denials of asylum is necessary and find that commenters' concerns regarding removal of these provisions are unwarranted. First, the current regulations providing for automatic reconsideration of discretionary denials at 8 CFR 208.16(e) and 1208.16(e) are inefficient, unclear, and unnecessary. *See* 84 FR at 69656. Federal courts have expressed similar sentiment as they approach related litigation. *See Shantu* v. *Lynch,* 654 F. App'x 608, 613–14 (4th Cir. 2016) (discussing unresolved anomalies of the regulations regarding reconsideration of discretionary denials); *see also* 84 FR at 69656–57.

Further, there are currently multiple avenues through which an asylum applicant may challenge a discretionary denial, with the result that removing the regulations providing for reconsideration (8 CFR 208.16(e) and 1208.16(e)) does not effectively render asylum eligibility determinations final. *See* 84 FR at 69657. First, under 8 CFR 1003.23(b)(1), an immigration judge may reconsider a decision upon his or her own motion.[41] Second, also under 8 CFR 1003.23(b)(1), an alien may file a motion to reconsider with the immigration judge. Third, under 8 CFR 1003.38, an alien may file an appeal with the BIA. The Departments have concluded that these alternatives sufficiently preserve the alien's ability to obtain review of the immigration judge's discretionary asylum decision, while removing the confusing, inefficient, and unnecessary automatic review provisions at 8 CFR 208.16(e) and 1208.16(e).

7. Recommendations

Comment: Commenters provided numerous recommendations to the Departments.

First, several commenters suggested that the Departments provide annual bias training to all immigration judges and prosecutors.

Next, two commenters recommended that the sentencing guidelines as provided in the Washington Adult Sentencing Guidelines Manual be incorporated into the NPRM to provide clarity and guidance to immigration judges.

Another commenter asserted that international human rights law obligations required the Departments to

> (1) put in place and allocate resources to the identification and assessment of protection needs; and (2) establish mechanisms for entry and stay of migrants who are considered to have protection needs prohibiting their return under international human rights law, including non-refoulement, as well as the rights to health, family life, best interests of the child, and torture rehabilitation.

A commenter suggested the Departments should incorporate recent innovative criminal justice reforms. For example, the commenter pointed to special drug trafficking courts that ''recognize the need for discretion in the determination of criminal culpability'' and suggested that the Departments should create specialized asylum eligibility courts.

Another commenter emphasized the effects of climate change, claiming that the United States should be ''creating new categories of asylum given the predictions on climate change migrants and the latest UN human rights ruling declaring governments cannot deport people back to countries if their lives are in danger due to climate change.''

One commenter recommended that the Departments continue to hire more immigration judges and asylum officers and to retain discretion with immigration adjudicators to make determinations on a case-by-case basis rather than expand the categorical bars.

Some commenters emphasized the general need for comprehensive, compassionate immigration reform. One commenter specifically urged the Departments to support the New Way Forward Act, which, according to the commenter, ''rolls back harmful immigration laws [because] it proposes immigration reform measures that dismantle abuses of our system and our asylum seeking community.''

Some commenters urged the Departments to take a more ''welcoming'' approach, citing the positive effects of diversity and economic advantages.

Another commenter, despite opposing the NPRM, provided several recommendations regarding the domestic violence crime bar and primary perpetrator exception should the Departments publish the rule as final. First, the commenter recommended that all immigration adjudicators should receive specialized training developed with input from stakeholders regarding domestic violence and the unique vulnerabilities faced by immigrants. Second, the commenter recommended that an automatic supervisory review should follow any determination that an applicant does not meet an exception to an asylum bar. Third, the commenter recommended that adjudicators should be required to provide written explanations of (1) the factual findings, weighed against the evidence, if a determination is made that an applicant does not meet an exception to the asylum bar and (2) their initial decisions to apply the bar, including what '''serious reasons' existed for believing that the applicant engaged in acts of domestic violence or extreme cruelty.'' Fourth, when applicants do not meet the exception, the commenter recommended that adjudicators identify what evidence, if any, was provided by the alleged primary perpetrator, how it was weighed, and what the adjudicator did to determine whether it was false or fabricated. Fifth, the commenter requested that agencies regularly engage with stakeholders to assess the impact of the bar and the exception on survivors.

Several commenters urged the Departments to dedicate their efforts to ensuring that individuals fleeing violence would be granted full asylum protections. One commenter suggested that the bars to asylum be narrowed by eliminating the bar related to convictions in other countries.

Some commenters suggested that families, especially children, be allowed to apply for asylum together, rather than require each person to file a separate application.

Response: The Departments note the commenters' recommendations.

Some commenters' suggestions involved issues or topics outside the scope of the rule, such as the suggestions that immigration judges should be provided certain types of training or to allow for additional flexibilities for family-based versus individual asylum applications. The

[41] On August 26, 2020, the Department of Justice proposed restricting the ability of an immigration judge to reconsider a decision upon his or her own motion. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491, 52504–06 (Aug. 26, 2020). That rule has not yet been finalized, but even if the proposal is adopted in the final rule, asylum applicants would still remain able to file a motion to reconsider or an appeal in order to challenge an immigration judge's discretionary denial in these circumstances.

Departments may consider these recommendations in the event of additional rulemakings, but do not take any further action in response to these out-of-scope suggestions at this point.

Other commenters' suggestions involved topics outside the authority of the Departments, such as suggestions that there should be new asylum-related protections due to concerns surrounding climate change or that legislative changes to the immigration laws should be enacted. If Congress enacts these or other changes to the immigration laws, the Departments' regulations will reflect such changes in future rules. However, this rule is designed to implement the immigration laws currently in force.

Regarding the remaining suggestions related to the provisions of this rule, the Departments decline to adopt the recommendations or make changes to the proposed rule except as set out below in section III. Overall, the Departments find that the commenters' recommendations would frustrate the rule's purpose by slowing and prolonging the adjudicatory process, thereby undermining the goal of more efficiently processing asylum claims. Further, the Departments have determined, as discussed above, that the included offenses are significant offenses that warrant rendering aliens described by the rule ineligible for asylum.

For example, the Departments decline to adopt one commenter's requests to automatically require supervisory review of an asylum officer's decision to apply a bar, or to require the asylum officer or immigration judge to issue a written decision explaining the application of the bars. The Departments believe that the existing processes for issuing decisions and providing review of asylum determinations give sufficient protections to applicants. *See, e.g.,* 8 CFR 208.14(c)(1) (explaining that, for a removable alien, when an asylum officer cannot grant an asylum application, the officer shall refer the application for adjudication in removal proceedings by an immigration judge); 8 CFR 1003.3(a)(1) (providing for appeals of immigration judge decisions to the BIA); 8 CFR 1003.37(a) (explaining that a ''decision of the Immigration Judge may be rendered orally or in writing,'' and that, if the decision is oral, it shall be ''stated by the Immigration Judge in the presence of the parties'' and a memorandum ''summarizing the oral decision shall be served on the parties''). Requiring additional steps beyond these long-standing processes would only create inefficiencies that this rule seeks to avoid. For example, this rule removes the automatic review of a discretionary denial of asylum specifically because ''mandating that the decision maker reevaluate the very issue just decided is an inefficient practice that * * * grants insufficient deference to the original fact finding and exercise of discretion.'' 84 FR at 69657.

The Departments also decline to incorporate a commenter's suggestion to include the Washington Adult Sentencing Guidelines Manual into the rule, as the Departments believe the rule provides sufficient guidance to adjudicators without adding a specific state's criminal law manual, which would only add confusion to the immigration adjudication process.

D. Comments Regarding Regulatory Requirements

1. Administrative Procedure Act

Comment: Commenters raised concerns that this rule violated the APA's requirements, as set forth in 5 U.S.C. 553(b) through (d). First, commenters stated that the 30-day comment period was not sufficient for such a significant rule and that, at a minimum, the comment period should have been 60 days. Commenters cited the complexity of the legal and policy issues raised by the rule, the impact of the rule on asylum-seekers, and the potential implications of the rule regarding the United States' compliance with international and domestic asylum law. In support, commenters referenced Executive Orders 12866 and 13563, both of which recommend a ''meaningful opportunity to comment'' with a comment period of not less than 60 days ''in most cases.'' They also noted that the comment period for this rule ran through the winter holiday season, with multiple Federal holidays.

Commenters also stated that the rule was arbitrary and capricious under the APA because the Departments did not provide sufficient evidence to support such significant changes. For example, commenters noted the lack of statistics regarding the number of asylum seekers that would be affected by the rule and expressed concerned that the Departments were relying on conclusory statements in support of the rule.

Commenters further stated that the reasons given for the rule were insufficient and, therefore, arbitrary and capricious. For example, commenters took issue with the Departments' explanation that the additional categories of criminal bars were necessary to address the ''inefficient'' and ''unpredictable'' case-by-case adjudication process. Instead, commenters stated that the case-by-case process ensured that the adjudicator takes into account all of the relevant factors in making a determination.

Commenters had specific concerns with the rule's provision that all felony convictions constitute a particularly serious crime. Commenters stated that the rule provided no evidence to support the provision, and that a criminal record in and of itself does not reliably predict future dangerousness. Further, the provision does not address persons who accept plea deals to avoid lengthy potential sentences; who have rehabilitated since the conviction; or who have committed a crime that does not involve a danger to the community or circumstances when a Federal, State, or local judge has concluded that no danger exists by, for example, imposing a noncustodial sentence.

Commenters stated that the rule was arbitrary and capricious because it is inconsistent with the statute, *see* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)), which requires a separate showing from the particularly serious crime determination that the alien constitutes a danger to the community.

Commenters also raised concerns with the ''reason to believe'' standard for gang-related crime determinations. The commenters asserted that the standard relied on ineffective, inaccurate, and discriminatory practices and was therefore arbitrary and capricious.

Response: The Departments believe the 30-day comment period was sufficient to allow for a meaningful public input, as evidenced by the significant number of public comments received, including almost 80 detailed comments from interested organizations. The APA does not require a specific comment period length. *See* 5 U.S.C. 553(b)–(c). Similarly, although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, such a period is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit recently stated that, ''[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.'' *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)). Litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances, and the Departments are unaware of any case

law holding that a 30-day comment period was insufficient. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period).

The Departments also believe that the 30-day comment period was preferable to a longer comment period since this rule involves public safety concerns. *Cf. Haw. Helicopter Operators Ass'n* v. *FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (noting that the Federal Aviation Administration had good cause to not engage in notice-and-comment rulemaking because the rule was needed to protect public safety as demonstrated by numerous then-recent helicopter crashes). By proceeding with a 30-day comment period rather than a 60-day period, the Departments are able to more quickly finalize and implement this rule, which prevents persons with certain criminal histories, such as domestic violence or gang-related crimes, from receiving asylum and potentially residing or prolonging their presence in the United States on that basis during the pendency of the asylum process.

Regarding commenters' APA concerns about the statistical analysis in this rule, the Departments reiterate that they are unable to provide precise data on the number of persons affected by the rule because the Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions and pertinent criminal conduct, that would be subject to the bars added by this rule. An attempt to quantify the population affected would risk providing the public with inaccurate data that at best would be unhelpful. As a general matter, the rule will likely result in fewer asylum grants annually, but the Departments do not believe that further analysis—in the absence of any reliable data—is warranted. *See Stilwell* v. *Office of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009) (''The APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation.''); *see also id.* (upholding an agency's decision to rely on its ''long experience'' and ''considered judgment,'' rather than statistical analyses, in promulgating a rule).

Likewise, the Departments disagree with commenters that the NPRM did not sufficiently explain the reasons for adding additional per se criminal bars. As explained in the NPRM, immigration judges and the BIA have had difficulty applying the ''particularly serious crime'' bar and, therefore, the Departments believe additional standalone criminal bars will provide a clear and efficient process for adjudicating asylum applications involving criminal convictions. *See* 84 FR at 69646. The Attorney General and the Secretary have not issued regulations identifying additional categories of convictions that qualify as particularly serious crimes, which has in turn resulted in adjudicators and the courts analyzing on a case-by-case basis whether individual criminal statutes qualify as particularly serious crimes. However, this statute-by-statute determination has not provided adjudicators with sufficient guidance in making ''particularly serious crime'' determinations due to the individualized nature of the BIA's determinations. *See id.* By adding these standalone criminal bars, the rule helps ensure that immigration adjudicators will be able to apply clear standards outside of applying the particularly serious crime bar. In regards to commenters' concerns about the blanket felony conviction bar, the Departments chose to include a bar for all felony convictions because it provides a clear standard to apply in adjudicating the effect to be given to criminal offenses as part of asylum determinations.

Adjudicators will be able to efficiently determine the effect of criminal convictions without resort to complex legal determinations as to the immigration effects of a specific criminal statute. The Departments are aware that the particular personal circumstances and facts of each case are unique; however, the Departments believe that the clarity and consistency of a per se rule outweigh any benefits of a case-by-case approach.

Further, adding a bar to asylum eligibility for all felony convictions recognizes the significance of felony convictions. For example, Congress recognized the relationship between felonies and the seriousness of criminal offenses when it explicitly defined ''aggravated felony'' to include numerous offenses requiring a term of imprisonment of at least one year. *See* INA 101(a)(43)(F), (G), (J), (P), (R), (S) (8 U.S.C. 1101(a)(43)(F), (G), (J), (P), (R), (S)). Similarly, Congress focused on the importance of felonies in the Armed Career Criminal Act, a sentencing enhancement statute for persons who have been convicted of three violent felonies, which requires the predicate offenses to be punishable by imprisonment for terms exceeding one year. *See* 18 U.S.C. 924(e)(2)(B).

The Departments also disagree that the use of the ''reason to believe'' standard for gang-related crime determinations is arbitrary and capricious. The ''reason to believe'' standard is used in multiple subsections of section 212 of the Act (8 U.S.C. 1182) in making inadmissibility determinations, and the Federal circuit courts have had no issues reviewing immigration judges' ''reason to believe'' inadmissibility determinations. *See, e.g., Chavez-Reyes* v. *Holder,* 741 F.3d 1, 3–4 (9th Cir. 2014) (reviewing ''reason to believe'' determination for substantial evidence); *Lopez-Molina,* 368 F.3d at 1211 (same). There is no reason that the Departments cannot apply this same standard when determining whether a criminal conviction involves gang activity.

In addition, the Departments disagree with commenters that the use of the ''reason to believe'' standard would enable adjudicators to rely on inaccurate, ineffective, or discriminatory evidence when making determinations regarding gang-related crimes. As discussed above, immigration judges are already charged with considering material and relevant evidence. 8 CFR 1240.1(c). To make this determination, immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna,* 325 F.3d at 405 (quoting *Bustos-Torres,* 898 F.2d at 1055). Nothing in the rule undermines or withdraws from this standard. If an alien believes that an adjudicator has relied on inaccurate, ineffective, or discriminatory evidence in making this determination, such decision would be subject to further review.

Finally, the Departments clarify that this rule creates additional standalone criminal bars to asylum and does not alter the definitions of the ''particularly serious crime'' bar. As a result, this rule does not create any inconsistencies with the ''particularly serious crime'' bar statutory language regarding dangerousness, which, the Departments note, does not require a separate finding of dangerousness. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)); *see also, e.g., Matter of R–A–M–,* 25 I&N Dec. 657, 662 (BIA 2012) (explaining that, for purposes of the ''particularly serious crime'' bar, ''it is not necessary to make a separate determination whether the alien is a danger to the community'').

2. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Comment: Commenters raised concerns that the Departments' cost-benefit analysis presented no evidence that potential benefits from the rule exceed the potential costs. For example, commenters explained that the Departments' primary stated reason for adopting new categorical bars was that the exercise of discretion has created inefficiency and inconsistency. However, commenters stated that the Departments' cost-benefit estimates failed to account for new assessments regarding numerous questions of law and fact that the rule would require. Accordingly, commenters argued that the Departments' cost-benefit analysis was unreliable.

Further, commenters stated that the agencies did not comply with Executive Orders 12866, 13563, and 13771, which require agencies to quantify potential costs to the fullest extent possible. Commenters explained that the Departments noted that the rule would likely result in fewer asylum grants annually but failed to quantify or evaluate the impact of the decrease and did not provide any evidence or indication that an attempt was made at quantifying this impact. Commenters explained that the Departments are required to use the best methods available to estimate regulatory costs and benefits, even if those estimates cannot be precise. Commenters also noted that the Departments did not attempt to provide a high and low estimate for the rule's potential impacts despite such an estimation being common practice in rulemaking.

Commenters noted that public comments on this rule and other recent asylum-related rulemakings provided the Departments with data regarding the impacts of asylum denials. Commenters gave examples of potential costs that the Departments failed to consider, including, for example, costs from the differences in benefits for individuals who may obtain only lesser protection in the form of statutory withholding of removal or protection under the CAT regulations; costs from the detention and deportation of individuals who would otherwise have meritorious asylum claims; economic and non-economic costs to asylum-seekers' families; costs to businesses that currently employ or are patronized by asylum-seekers; costs from the torture and killings of deported asylum-seekers; and intangible costs from the diminution of respect for U.S. treaty obligations and diminution of respect for human life and the safety of asylum-seekers, among others. As a result, commenters stated that the Departments did not support their conclusion that ''the expected costs of this proposed rule are likely to be de minimis.''

Response: The Departments disagree that the rule will create additional adjudicatory burdens that will outweigh the rule's benefits. The purpose of the rule is to limit asylum eligibility for persons with certain criminal convictions, which in turn will lessen the burdens on the overtaxed asylum system. There are currently more than one million pending cases at the immigration courts, with significant year over year increases, despite a near doubling of the number of immigration judges over the past decade and the completion of historic numbers of cases. *See* EOIR, *Adjudication Statistics: Pending Cases* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1242166/download;* EOIR, *Adjudication Statistics: Immigration Judge (IJ) Hiring* (June 2020), *https://www.justice.gov/eoir/page/file/1242156/download;* EOIR, *Adjudication Statistics: New Cases and Total Completions* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1060841/download*). Of these pending cases, over 575,000 include an asylum application.

These new bars will help achieve the goal of alleviating the burden on the immigration system while retaining the existing framework for asylum adjudications. As stated in the NPRM, this rule does not change the role of an immigration judge or asylum officer in adjudicating asylum applications; immigration judges and asylum officers currently consider an applicant's criminal history to determine the associated immigration consequences, if any, and whether the applicant warrants asylum as a matter of discretion. *See* 84 FR at 69657–58. These additional bars will be considered under that existing framework and, therefore, the Departments do not anticipate additional costs to the adjudication process.

In addition, the Departments believe the rule complies with the cost-benefit analysis required by Executive Orders 12866, 13563, and 13771. Executive Order 12866 requires the Departments to quantify costs ''to the fullest extent that these can be usefully estimated.'' *See* E.O. 12866, 58 FR 51735, 51735, sec. 1(a) (Sept. 30, 1993). As explained in the NPRM, the Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions and pertinent criminal conduct, that would be subject to the bars added by this rule. Without this data, the Departments cannot reliably estimate the population effected by this rule, outside of identifying the group likely affected by the rule: Asylum applicants with criminal convictions and pertinent criminal conduct, barred under this rule, and asylum applicants denied asylum solely as a matter of discretion that will no longer receive automatic review of such decisions.

Based on this identified population, commenters provided a number of potential ancillary costs to the likely increase in asylum denials under these additional bars, which the Departments have reviewed. As explained in the NPRM, a main effect of the likely increase in asylum denials is a potential increase in grants of statutory withholding of removal or protection under the CAT regulations. 84 FR at 69658. These forms of protection do not provide the same benefits as asylum, including the ability to gain permanent status in the United States, obtain derivative status for family members, or travel outside the country. Such non-monetary costs are difficult to quantify, but the Departments believe that the similarly difficult-to-quantify benefits associated with the rule—such as a reduction in the risks associated with dangerous aliens and an increase in adjudicative efficiency—outweigh these costs.

Commenters also cited other potential costs, such as the effects that the bars could have on businesses employing or patronized by asylum applicants. However, such projections were general, tenuous, and unsupported by data, and the Departments are unaware of any reliable data parsing business income attributable to individuals affected by this rule—*i.e.,* asylum applicants who have been convicted of or engaged in certain types of criminal behavior—as opposed to non-criminal asylum applicants, asylees, refugees, aliens granted statutory withholding of removal or protection under the CAT, or other groups of aliens in general. Moreover, because aliens may still obtain work authorization if granted withholding of removal or protection under the CAT, 8 CFR 274a.12(a)(10), this rule would not necessarily foreclose employment or patronage opportunities for aliens subject to its parameters. Finally, even if there were identifiable economic costs for these aliens, the Departments believe that the benefits associated with limiting asylum eligibility based on certain criminal conduct would outweigh them because

of (1) the rule's likely impact in improving adjudicatory efficiency, and (2) the intangible benefits associated with promotion of the rule of law. *See* E.O. 12866, 58 FR at 51734 (directing agencies to account for ''qualitative'' benefits that are ''difficult to quantify,'' but which are ''essential to consider''). The Departments further disagree with commenters' assertions that these bars will have a negative intangible cost on the United States' interests or international standing, as Congress expressly conferred on the Attorney General and the Secretary the authority to provide these additional asylum limitations, which—as explained in the NPRM—are consistent with U.S. treaty obligations. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)); 84 FR at 69644.

III. Provisions of the Final Rule

The Departments have considered and responded to the comments received in response to the NPRM. In accordance with the authorities discussed above in section I.A, the Departments are now issuing this final rule to finalize the NPRM. The final rule adopts the provisions of the NPRM as final, with the following minor edits for clarity, for the reasons discussed above in section II in response to the comments received.[42]

A. 8 CFR 208.13(c)(6)(ii)

As drafted in the NPRM, 8 CFR 208.13(c)(6)(ii) would have included a reference to ''the Secretary:'' ''The alien has been convicted [of a crime] that the Secretary knows or has reason to believe * * * .'' For internal consistency within 8 CFR 208.13(c)(6)(ii) and for specificity, the Departments are replacing this reference to ''the Secretary'' with ''the asylum officer,'' the officials in DHS who adjudicate asylum applications.

B. 8 CFR 1208.13(c)(6)(ii)

Regulations in chapter V of 8 CFR govern proceedings before EOIR and not before DHS. The Departments, however, mistakenly listed both the Attorney General and the Secretary in 8 CFR 1208.13(c)(6)(ii) as drafted in the NPRM: ''The alien has been convicted [of a crime] that the Attorney General or Secretary knows or has reason to believe * * * .'' This final rule removes the reference to the Secretary so that 8 CFR 208.13(c)(6)(ii), governing DHS, references the Secretary, and 8 CFR 1208.13(c)(6)(ii) references only officials within DOJ. It further changes ''Attorney General'' to ''immigration judge'' for internal consistency within the rest of 8 CFR 1208.13.

C. 8 CFR 1208.13(c)(6)(v)(B)

This rule amends the cross-reference in 8 CFR 1208.13(c)(6)(v)(B) so that it reads ''under paragraph (c)(6)(v)(A)'' instead of ''under paragraph (c)(6)(v)'' as published in the NPRM. This change provides clarity and matches the same cross-reference in 8 CFR 208.13(c)(6)(v)(B)–(C) and 8 CFR 1208.13(c)(6)(v)(C).

In addition, this rule changes ''adjudicator'' to ''immigration judge'' for specificity and clarity. This matches the specific reference to ''asylum officer,'' who is the relevant adjudicating entity for DHS, in 8 CFR 208.13(c)(6)(v)(B).

D. 8 CFR 1208.13(c)(7)(v)

As with the change discussed above to 8 CFR 1208.13(c)(6)(v)(B), this rule corrects the reference to the ''asylum officer'' to read ''immigration judge'' in 8 CFR 1208.13(c)(7)(v). The immigration judge is the relevant adjudicator for DOJ's regulations.

E. 8 CFR 1208.13(c)(9)

As with the change discussed above regarding 8 CFR 1208.13(c)(6)(v)(B), this rule removes ''or other adjudicator'' from the proposed text for 8 CFR 1208.13(c)(9). This change provides clarity because the immigration judge is the relevant adjudicator for DOJ's regulations and matches the specific reference to only an ''asylum officer'' in 8 CFR 208.13(c)(9).

F. 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii)

This rule amends the same language in both 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii) so that the provisions instruct that an alien will be barred from asylum if the immigration judge or asylum officer ''knows or has reason to believe'' that the alien has engaged on or after the effective date in certain acts of battery or extreme cruelty. Previously, these provisions provided ''[t]here are serious reasons for believing'' the alien has engaged in such conduct. In other words, the Departments have replaced the ''serious reasons for believing'' standard in proposed 8 CFR 208.13(c)(6)(vii) and proposed 1208.13(c)(6)(vii) with a ''knows or has reason to believe'' standard.

This change is intended to prevent confusion and ensure the rule's consistency, both within the new provisions it adds to 8 CFR and with the INA more generally. As discussed above, the ''reason to believe'' standard is used in multiple subsections of section 212 of the Act (8 U.S.C. 1182) in making inadmissibility determinations. *See, e.g.,* INA 212(a)(2)(C)(i) (8 U.S.C. 1182(a)(2)(C)(i)) (providing that an alien who ''the consular officer or the Attorney General knows or has reason to believe'' is an illicit trafficker of controlled substances is inadmissible). The Federal circuit courts have had no issues reviewing immigration judges' ''reason to believe'' inadmissibility determinations. *See, e.g., Chavez-Reyes,* 741 F.3d at 3–4 (reviewing ''reason to believe'' determination for substantial evidence); *Lopez-Molina,* 368 F.3d at 1211 (same). Further, without this change, the rule may have created additional unintended questions regarding what sort of reasons to believe are sufficient to qualify as ''serious'' reasons. Although the Departments are modifying the language in the final rule to reduce the likelihood of confusion, they reiterate that the language in 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii) is intended to be analogous to similar provisions in 8 CFR 204.2.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Departments have reviewed this proposed rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are eligible to apply for asylum or are otherwise placed in immigration proceedings.

B. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

C. 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 one 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. *See* 2 U.S.C. 1532(a).

[42] In addition, the final rule makes clarifying grammatical edits to the punctuation of the proposed rule, such as by replacing semicolons with periods where relevant.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or 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.

E. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

The Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), has designated this rule a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866, but not an economically significant regulatory action. Accordingly, the rule has been submitted to OMB for review. The Departments certify that this rule has been drafted in accordance with the principles of Executive Order 12866, section 1(b); Executive Order 13563; and Executive Order 13771.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Similarly, Executive Order 13771 requires agencies to manage both the public and private costs of regulatory actions.

Because this final rule does not make substantive changes from the NPRM that would impact the rule's expected costs and benefits, the Departments have performed the same analysis as set out in the NPRM. 84 FR at 69657–59.

This rule provides seven additional mandatory bars to eligibility for asylum pursuant to the Attorney General's and the Secretary's authorities under sections 208(b)(2)(C) and 208(d)(5) of the INA (8 U.S.C. 1182(b)(2)(C) and 1182(d)(5)).[43] This rule adds bars on eligibility for aliens who commit certain offenses in the United States after entering the country. Those bars would apply to aliens who are convicted of, or engage in criminal conduct, as appropriate, with respect to: (1) A felony under Federal, State, tribal, or local law; (2) an offense under section 274(a)(1)(A) or (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A) or 1324(a)(2)) (Alien Smuggling or Harboring); (3) an offense under section 276 of the Act (8 U.S.C. 1326) (Illegal Reentry); (4) a Federal, State, tribal, or local crime involving criminal street gang activity; (5) certain Federal, State, tribal, or local offenses concerning the operation of a motor vehicle while under the influence of an intoxicant; (6) a Federal, State, tribal, or local domestic violence offense; and (7) certain misdemeanors under Federal, State, tribal, or local law for offenses related to false identification; the unlawful receipt of public benefits from a Federal, State, tribal, or local entity; or the possession or trafficking of a controlled substance or controlled-substance paraphernalia.

The seven bars are in addition to the existing mandatory bars relating to the persecution of others, convictions for particularly serious crimes, commission of serious nonpolitical crimes, security threats, terrorist activity, and firm resettlement in another country that are currently contained in the INA and its implementing regulations. *See* INA 208(b)(2) (8 U.S.C. 1158(b)(2)); 8 CFR 208.13, 1208.13. Under the current statutory and regulatory framework, asylum officers and immigration judges consider the applicability of mandatory bars to the relief of asylum in every proceeding involving an alien who has submitted a Form I–589 application for asylum. Although this rule expands the mandatory bars to asylum, it does not change the nature or scope of the role of an immigration judge or an asylum officer during proceedings for consideration of asylum applications. Immigration judges and asylum officers are already trained to consider both an alien's previous conduct and criminal record to determine whether any immigration consequences result, and this rule does not propose any adjudications that are more challenging than those that are already conducted. For example, immigration judges already consider the documentation of an alien's criminal record that is filed by the alien, the alien's representative, or the DHS representative in order to determine whether one of the mandatory bars applies and whether the alien warrants asylum as a matter of discretion. Because the new bars all relate to an alien's criminal convictions or other criminal conduct, adjudicators will conduct the same analysis to determine the applicability of the bars proposed by the rule.[44] The Departments do not expect the additional mandatory bars to increase the adjudication time for immigration court proceedings involving asylum applications.

The expansion of the mandatory bars for asylum would likely result in fewer asylum grants annually;[45] however, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. An alien who would be barred from asylum as a result of the rule may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3)) or withholding of removal or deferral of removal under regulations implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3) (8 U.S.C. 1231(b)(3));

[43] As discussed further below, this rule will not otherwise impact the ability of an alien who is denied asylum to receive the protection of withholding of removal under the Act or withholding of removal or deferral of removal under the CAT.

[44] The Departments note that one of the new bars, regarding whether the alien has ''engaged'' in certain acts of battery or extreme cruelty, does not necessarily require a criminal conviction or criminal conduct. The Departments believe that a criminal arrest or conviction is the most likely evidence to be filed with the immigration court related to this bar, but even in cases where no such evidence is available, the analysis by immigration judges related to this bar is not an expansion from the current analysis immigration judges employ in determining whether conduct rises to level of ''extreme cruelty'' under 8 CFR 204.2(c)(1)(vi) in other contexts during removal proceedings. *See, e.g., Bedoya-Melendez* v. *U.S. Atty. Gen.,* 680 F.3d 1321, 1326–28 (11th Cir. 2012) (demonstrating that, although there is a circuit split as to whether the ''extreme cruelty'' analysis is discretionary, all circuits look to conduct and not convictions in conducting the ''extreme cruelty'' analysis); *Stepanovic* v. *Filip,* 554 F.3d 673, 680 (7th Cir. 2009) (explaining that, in analyzing whether conduct rises to the level of ''extreme cruelty,'' the immigration judge ''must determine the facts of a particular case, make a judgment call as to whether those facts constitute cruelty, and, if so, whether the cruelty rises to such a level that it can rightly be described as extreme''). In addition, adjudicators have experience reviewing questions of an alien's conduct in other contexts during the course of removal proceedings. *See* INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C)) (providing that an alien is inadmissible if ''the Attorney General knows or has reason to believe'' that the alien is an illicit trafficker of a controlled substance, regardless of whether the alien has a controlled substance-related conviction).

[45] In Fiscal Year (''FY'') 2018, DOJ's immigration courts granted over 13,000 applications for asylum. *See* EOIR, *Adjudication Statistics: Asylum Decision Rates,* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1248491/download.*

8 CFR 208.16 through 208.18; 1208.16 through 1208.18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule) or deferral of removal.[46] To the extent this rule has any impacts, they would almost exclusively fall on that population.[47]

The full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity. Both asylum applicants and those who receive withholding of removal or protection under CAT may obtain work authorization in the United States. Although asylees may apply for lawful permanent resident status and later citizenship, they are not required to do so, and some do not. Further, although asylees may bring certain family members to the United States, not all asylees have family members or family members who wish to leave their home countries. Moreover, family members of aliens granted withholding of removal may have valid asylum claims in their own right, which would provide them with a potential path to the United States as well. The only clear impact is that aliens granted withholding of removal generally may not travel outside the United States without executing their underlying order of removal and, thus, may not be allowed to return to the United States; however, even in that situation—depending on the destination of their travel—they may have a prima facie case for another grant of withholding of removal should they attempt to reenter. In short, there is no precise quantification available for the impact, if any, of this rule beyond the general notion that it will likely result in fewer grants of asylum on the whole.

Applications for withholding of removal typically require a similar amount of in-court time to complete as an asylum application due to a similar nucleus of facts. 8 CFR 1208.3(b) (an asylum application is deemed to be an application for withholding of removal). In addition, this rule does not affect the eligibility of applicants for the employment authorization documents available to recipients of those protections and during the pendency of the consideration of the application in accordance with the current regulations and agency procedures. *See* 8 CFR 274a.12(c)(8), (c)(18), 208.7, 1208.7.

This rule removes the provision at 8 CFR 208.16(e) and 1208.16(e) regarding automatic reconsideration of discretionary denials of asylum. This change has no impact on DHS adjudicative operations because DHS does not adjudicate withholding requests. DOJ estimates that immigration judges nationwide must apply 8 CFR 1208.16(e) in approximately 800 cases per year on average.[48] The removal of the requirement to reconsider a discretionary denial will increase immigration court efficiencies and reduce any cost from the increased adjudication time by no longer requiring a second review of the same application by the same immigration judge. This impact, however, would likely be minor because of the small number of affected cases, and because affected aliens have other means to seek reconsideration of a discretionary denial of asylum. Accordingly, DOJ has concluded that removal of paragraphs 8 CFR 208.16(e) and 1208.16(e) would not increase the costs of EOIR's operations, and would, if anything, result in a small increase in efficiency. Removal of 8 CFR 208.16(e) and 1208.16(e) may have a marginal cost for aliens in immigration court proceedings by removing one avenue for an alien who would otherwise be denied asylum as a matter of discretion to be granted that relief. However, of the average of 800 aliens situated as such each year during the last 10 years, an average of fewer than 150, or 0.4 percent, of the average 38,000 total asylum completions[49] each year filed an appeal in their case, so the affected population is very small, and the overall impact would be nominal at most.[50] Moreover, such aliens would retain the ability to file a motion to reconsider in such a situation and, thus, would not actually lose the opportunity for reconsideration of a discretionary denial.

For the reasons explained above, the expected costs of this rule are likely to be *de minimis.* This rule is accordingly exempt from Executive Order 13771. *See* OMB, *Guidance Implementing Executive Order 13771, titled* ''*Reducing Regulation and Controlling Regulatory Costs*'' (2017), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

F. Executive Order 13132 (Federalism)

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, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3501 *et seq.,* and its implementing regulations, 5 CFR part 1320.

I. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

[46] Because asylum applications may be denied for multiple reasons and because the proposed bars do not have exact analogues in existing immigration law, there is no precise data on how many otherwise grantable asylum applications would be denied using these bars and, thus, there is no way to calculate precisely how many aliens would be granted withholding. Further, because the immigration judge would have to adjudicate the application in either case, there is no cost to DOJ.

[47] In FY 2018, DOJ's immigration courts completed 45,923 cases with an application for asylum on file. For the first three quarters of FY 2018, 622 applicants were denied asylum but granted withholding.

[48] This approximation is based on the number of initial case completions with an asylum application on file that had a denial of asylum but a grant of withholding during FYs 2009 through the third quarter of 2018.

[49] Thirty-eight thousand is the average of completions of cases with an asylum application on file from FY 2008 through FY 2018. Completions consist of both initial case completions and subsequent case completions.

[50] Because each case may have multiple bases for appeal and appeal bases are not tracked to specific levels of granularity, it is not possible to quantify precisely how many appeals were successful on this particular issue.

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble and pursuant to the authority vested in the Acting Secretary of Homeland Security, part 208 of title 8 of the Code of Federal Regulations is amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as fol1ows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229, 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.13 by adding paragraphs (c)(6) through (9) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) *Additional limitations on eligibility for asylum.* For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the asylum officer knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the asylum officer to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The asylum officer need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(*1*) An alien who is a current or former spouse of the person;

(*2*) An alien with whom the person shares a child in common;

(*3*) An alien who is cohabiting with or has cohabited with the person as a spouse;

(*4*) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(*5*) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the asylum officer is not limited to facts found by the criminal court or provided in the underlying record of conviction.

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(*1*) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(*2*) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(*3*) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) The asylum officer knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) An alien who is a current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local

government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An asylum officer is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 208.16 [Amended]

■ 3. Amend § 208.16 by removing and reserving paragraph (e).

Department of Justice

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR part 1208 as follows:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 4. The authority citation for part 1208 continues to read as fol1ows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; Pub. L. 115–218.

■ 5. Amend § 1208.13 by adding paragraphs (c)(6) through (9) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) *Additional limitations on eligibility for asylum.* For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the immigration judge knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the immigration judge to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The immigration judge need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(*1*) An alien who is a current or former spouse of the person;

(*2*) An alien with whom the person shares a child in common;

(*3*) An alien who is cohabiting with or has cohabited with the person as a spouse;

(*4*) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(*5*) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the immigration judge is not limited to facts found by the criminal court or

provided in the underlying record of conviction.

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(*1*) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(*2*) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(*3*) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) The immigration judge knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) An alien who is a current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the immigration judge determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An immigration judge is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 1208.16 [Amended]

■ 6. Amend § 1208.16 by removing and reserving paragraph (e).

Approved:

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Approved:

Dated: October 14, 2020.

William P. Barr,

Attorney General.

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