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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0970; Project Identifier AD–2020–01359–T; Amendment 39–21305; AD 2020–22–09]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2001–16–13, which applied to certain Airbus SAS Model A330 series airplanes. AD 2001–16–13 required a roto-test inspection of fastener holes of certain fuselage joints for cracks, reinforcement of the fuselage between certain frames, and, if necessary, a high frequency eddy current (HFEC) inspection and repair. As published, the applicability of AD 2001–16–13 inadvertently identified the model designations as serial numbers. This document corrects that error. This new AD requires a roto-test inspection of fastener holes of certain fuselage joints for cracks, reinforcement of the fuselage, and, if necessary, an HFEC inspection and repair. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 25, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 25, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of September 7, 2001 (66 FR 44295, August 23, 2001).

The FAA must receive comments on this AD by December 28, 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 Airbus SAS, Airworthiness Office—EAL, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* internet *http://www.airbus.com.* You may view this referenced service information 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 on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0970.

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–2020–0970; or in person at the Docket Management Facility 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 the Docket Operations office 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 FAA issued AD 2001–16–13, Amendment 39–12382 (66 FR 44295, August 23, 2001) (''AD 2001–16–13''), which applied to certain Model A330 series airplanes. AD 2001–16–13 was prompted by a report that during fatigue testing on the fuselage, cracks were detected in the longitudinal buttstrap at stringer 9, at frame 31, and at frame 37.1. AD 2001–16–13 required a roto-test inspection of fastener holes of certain fuselage joints for cracks, reinforcement of the fuselage between frames 31 and 37.1, and, if necessary, an HFEC inspection and repair. The FAA issued AD 2001–16–13 to address fatigue cracking of the fuselage longitudinal buttstrap, which could result in reduced structural integrity of the fuselage.

Actions Since AD 2001–16–13 Was Issued

Since the FAA issued AD 2001–16–13, the FAA received a report that the applicability of AD 2001–16–13 does not match the applicability of the corresponding Direction Générale de l'Aviation Civile (DGAC) AD: French Airworthiness Directive 2001–075(B), dated March 17, 2001, which is also referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI.'' The model designations identified in the applicability of the MCAI were inadvertently identified as serial numbers in the applicability of AD 2001–16–13.

You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0970.

This AD was prompted by a report of an error in the applicability of AD 2001–16–13. The FAA has determined the applicability must be revised to correct the error. There are no affected U.S. registered airplanes; however, an affected airplane might be imported and placed on the U.S. Register in the future. The FAA is issuing this AD to address fatigue cracking of the fuselage longitudinal buttstrap, which could result in reduced structural integrity of the fuselage.

Since the FAA issued AD 2001–16–13, the FAA has reviewed Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002 (the FAA referred to Airbus Service

Bulletin A330–53–3090, Revision 02, dated January 9, 2001, as the appropriate source of service information for accomplishing the actions required by AD 2001–16–13). Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002, clarifies certain inspection areas and specifies no additional work is needed for airplanes modified by a previous revision. The FAA has determined Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002, is an appropriate source of service information for accomplishing the required actions of this AD.

Related IBR Material Under 1 CFR Part 51

Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002. This service information describes procedures for a roto-test inspection of fastener holes of certain fuselage joints for cracks, reinforcement of the fuselage between frames 31 and 37.1, and, if necessary, an HFEC inspection.

This AD also requires Airbus Service Bulletin A330–53–3090, Revision 02, dated January 9, 2001, which the Director of the Federal Register approved for incorporation by reference as of September 7, 2001 (66 FR 44295, August 23, 2001).

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

FAA's Determination

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 and service information 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 a roto-test inspection of fastener holes of certain fuselage joints for cracks, reinforcement of the fuselage between frames 31 and 37.1, and, if necessary, an HFEC inspection and repair.

FAA's Justification and Determination of the Effective Date

There are currently no domestic operators of these products. Therefore, the FAA finds that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not precede it by notice and opportunity for public comment. The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0970; Project Identifier AD–2020–01359–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. 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 consider all comments received by the closing date and may amend this AD based on those comments.

The FAA will post all comments the FAA receives, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the FAA receives about this AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this 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 the person identified in the **FOR FURTHER INFORMATION CONTACT** section. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

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

Currently, there are no affected U.S.-registered airplanes. If an affected airplane is imported and placed on the U.S. Register in the future, the FAA provides the following cost estimates to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product
377 work-hours × $85 per hour = $32,045	$6,187	$38,232

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

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:

■ a. Removing airworthiness directive (AD) 2001–16–13, Amendment 39–12382 (66 FR 44295, August 23, 2001), and

■ b. Adding the following new AD:

2020–22–09 Airbus SAS: Amendment 39–21305; Docket No. FAA–2020–0970; Project Identifier AD–2020–01359–T.

(a) Effective Date

This AD is effective November 25, 2020.

(b) Affected ADs

This AD replaces AD 2001–16–13, Amendment 39–12382 (66 FR 44295, August 23, 2001) (''AD 2001–16–13'').

(c) Applicability

This AD applies to Airbus SAS Model A330–301, –321, –322, –323, –341, –342, and –343 airplanes, certificated in any category, except airplanes on which Airbus Industrie Modification 46636 has been accomplished in production or which have been modified in service as specified in Airbus Service Bulletin A330–53–3090.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a report that during fatigue testing on the fuselage, cracks were detected in the longitudinal buttstrap at stringer 9, at frame 31, and at frame 37.1. The FAA is issuing this AD to address fatigue cracking of the fuselage longitudinal buttstrap, which could result in reduced structural integrity of the fuselage.

(f) Compliance

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

(g) Retained Inspection, with New Service Information

This paragraph restates the requirements of paragraph (a) of AD 2001–16–13, with new service information. Prior to the accumulation of 15,000 total flight cycles: Perform a roto-test inspection to detect cracks of the fastener holes at frame 31, frame 37.1, and stringer 9, in accordance with Airbus Service Bulletin A330–53–3090, Revision 02, dated January 9, 2001; or Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002.

(h) Retained Reinforcement, With New Service Information

This paragraph restates the requirements of paragraph (b) of AD 2001–16–13, with new service information. If no cracks are detected during the inspection performed in accordance with paragraph (g) of this AD, prior to further flight, reinforce the fuselage structure between frames 31 and 37.1, in accordance with Airbus Service Bulletin A330–53–3090, Revision 02, dated January 9, 2001; or Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002.

(i) Retained Follow-Up Inspection and Repair, With New Service Information and Revised Repair Approval Language

This paragraph restates the requirements of paragraph (c) of AD 2001–16–13, with new service information and revised repair approval language. If any crack is detected during the inspection performed in accordance with paragraph (g) of this AD, prior to further flight, perform a high frequency eddy current (HFEC) inspection to determine the crack length, in accordance with Airbus Service Bulletin A330–53–3090, Revision 02, dated January 9, 2001; or Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002. Prior to further flight, repair the crack in accordance with a method approved by the Direction Générale de l'Aviation Civile (or its delegated agent) or using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or the European Union Aviation Safety Agency (EASA); or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the 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 the European Union Aviation Safety Agency (EASA); or Airbus SAS's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (j)(2) of this AD: If any service information contains procedures or tests that are identified as RC, those 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.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) French airworthiness directive 2001–075(B), dated March 17, 2001, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0970.

(2) 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.*

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on November 25, 2020.

(i) Airbus Service Bulletin A330–53–3090, Revision 03, dated December 11, 2002.

(ii) [Reserved]

(4) The following service information was approved for IBR on September 7, 2001 (66 FR 44295, August 23, 2001).

(i) Airbus Service Bulletin A330–53–3090, Revision 02, dated January 9, 2001.

(ii) [Reserved]

(5) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* internet *https://www.airbus.com.*

(6) You may view this service information 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.

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

Issued on October 26, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–24855 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0687; Project Identifier AD–2020–00571–E; Amendment 39–21314; AD 2020–22–18]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (Type Certificate Previously Held by Allison Engine Company) Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Rolls-Royce Corporation (RRC) AE 2100A, AE 2100D2, AE 2100D2A, and AE 2100P model turboprop engines. This AD was prompted by a report of a propeller gearbox (PGB) development test conducted by the manufacturer, in which high vibration occurred due to a fatigue crack that initiated in the PGB shaft and carrier assembly. This AD requires assignment of usage hours to the PGB shaft and carrier assembly at the next engine shop visit and replacement of PGB shaft and carrier assemblies prior to exceeding the new life limits established by the manufacturer. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 15, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 15, 2020.

ADDRESSES: For service information identified in this final rule, contact Rolls-Royce Corporation, 450 South Meridian Street, Mail Code NB–01–06, Indianapolis, IN 46225; phone: 317–230–1667; email: *CMSEindyOSD@rolls-royce.com;* internet: *www.rolls-royce.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0687.

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–2020–0687; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kyri Zaroyiannis, Aerospace Engineer, Chicago ACO Branch, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018; phone: 847–294–7836; fax: 847–294–7834; email: *kyri.zaroyiannis@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all RRC AE 2100A, AE 2100D2, AE 2100D2A, and AE 2100P model turboprop engines. The NPRM published in the **Federal Register** on August 11, 2020 (85 FR 48482). The NPRM was prompted by a report of a PGB development test conducted by the manufacturer, in which high vibration occurred due to a fatigue crack that initiated in the PGB shaft and carrier assembly. In the NPRM, the FAA proposed to require the assignment of usage hours to the PGB shaft and carrier assembly at the next engine shop visit and replacement of PGB shaft and carrier assemblies before exceeding the new life limits established by the manufacturer. The FAA is issuing this AD to address the unsafe condition on these products.

Comments

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

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. The FAA has determined that these minor changes:

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed RRC Alert Service Bulletin (ASB) AE 2100A–A–72–322/AE 2100P–A–72–047, Revision 1 (single document), dated May 11, 2018, and RRC ASB AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111, Revision 1 (single document), dated May 28, 2018. RRC ASB AE 2100A–A–72–322/AE 2100P–A–72–047 describes procedures for assigning usage hours to the PGB shaft and carrier assemblies on RRC AE 2100A and AE 2100P model engines. RRC ASB AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111 describes procedures for verifying the PGB shaft and carrier assembly serial numbers and assigning usage hours to the PGB shaft and carrier assemblies on RRC AE 2100D2 and AE 2100D2A model engines. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA reviewed Task 05–10–00–800–801 of RRC AE 2100A Engine Maintenance Manual (MM) CSP31005, Revision 57, dated August 15, 2019, and Task 05–12–11–800–802 of RRC AE 2100A Engine MM CSP31005, Revision 57, dated August 15, 2019. Task 05–10–00–800–801 of RRC AE 2100A Engine MM provides information for

determining the usage hours and engine cycles for each life-limited part on RRC AE 2100A model engines. Task 05–12–11–800–802 of RRC AE 2100A Engine MM specifies the PGB shaft and carrier assembly life limits.

The FAA reviewed Task 05–11–00–800–801 of RRC AE 2100D2 and AE 2100D2A Engine MM CSP34081, Revision 64, dated June 1, 2020, and Task 05–12–11–800–802 of RRC AE 2100D2 and AE 2100D2A Engine MM CSP34081, Revision 64, dated June 1, 2020. Task 05–11–00–800–801 of RRC AE 2100D2 and AE 2100D2A Engine MM provides information for determining the usage hours and engine cycles for each life-limited part on RRC AE 2100D2 and AE 2100D2A model engines. Task 05–12–11–800–802 of RRC AE 2100D2 and AE 2100D2A Engine MM specifies the PGB shaft and carrier assembly life limits.

The FAA reviewed Task 05–10–00–800–801 of RRC AE 2100P Engine MM CSP31015, Revision 15, dated May 15, 2018. Task 05–10–00–800–801 of RRC AE 2100P Engine MM provides information for determining the usage hours and engine cycles for each life-limited part on RRC AE 2100P model engines. Task 05–12–11–800–802 of RRC AE 2100P Engine MM specifies the PGB shaft and carrier assembly life limits.

Costs of Compliance

The FAA estimates that this AD affects 18 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Assign usage hours to PGB shaft and carrier assembly.	3 work-hours × $85 per hour = $255	$0	$255	$4,590
Remove and replace PGB shaft and carrier assembly.	15 work-hours × $85 per hour = $1,275	49,952	51,227	922,086

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–22–18 Rolls-Royce Corporation (Type Certificate previously held by Allison Engine Company): Amendment 39–21314; Docket No. FAA–2020–0687; Project Identifier AD–2020–00571–E.

(a) Effective Date

This AD is effective December 15, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Rolls-Royce Corporation (RRC) (Type Certificate previously held by Allison Engine Company) AE 2100A, AE 2100D2, AE 2100D2A, and AE 2100P model turboprop engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7210, Turbine Engine Reduction Gear.

(e) Unsafe Condition

This AD was prompted by a report of a propeller gearbox (PGB) development test in which high vibration occurred due to a fatigue crack that initiated in the propeller shaft. The FAA is issuing this AD to prevent loss of the propeller. The unsafe condition, if not addressed, could result in damage to the engine and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) No later than the next shop visit for the engine with the PGB, or the next shop visit for the PGB only, whichever shop visit occurs first after the effective date of this AD, assign usage hours to the installed PGB shaft and carrier assembly using RRC Alert Service Bulletin (ASB) AE 2100A–A–72–322/AE 2100P–A–72–047, Revision 1 (single document), dated May 11, 2018, or RRC ASB AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111, Revision 1 (single document), dated May 28, 2018.

(2) After the effective date of this AD, before exceeding the life limit (usage hours) specified in Table 1 to paragraph (g)(2) (Table 1) of this AD, remove the PGB shaft and carrier assembly, identified by part numbers (P/Ns) in Table 1, from service and replace with a part eligible for installation.

Table 1 to Paragraph (g)(2) – Life Limits

Engine model	PGB Shaft and Carrier Assembly P/Ns	Life limit (usage hours)
AE 2100A	23056553, 23061011, 23088746, 23088595, 23087076, 23087077, 23089419, 23088757, 23092770, 23092769	100,000
AE 2100P	23056553, 23061011, 23088746, 23088595, 23087076, 23087077, 23089419, 23088757, 23092770, 23092769	100,000
AE 2100D2/D2A	23061011, 23088746, 23088595, 23087076, 23087077, 23089419, 23088757, 23092770, 23092769	30,000

(h) No Reporting Requirement

The reporting requirements in RRC ASB AE 2100A–A–72–322/AE 2100P–A–72–047, Revision 1 (single document), dated May 11, 2018, and RRC ASB AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111, Revision 1 (single document), dated May 28, 2018, are not required by this AD.

(i) Credit for Previous Actions

You may take credit for assigning the usage hours required by paragraph (g) of this AD if you performed the action before the effective date of this AD using RRC ASB AE 2100A–A–72–322/AE 2100P–A–72–047, original issue (single document), dated January 15, 2018, or RR AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111, original issue (single document), dated January 15, 2018.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Chicago ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (k).

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

(k) Related Information

For more information about this AD, contact Kyri Zaroyiannis, Aerospace Engineer, Chicago ACO Branch, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018; phone: 847–294–7836; fax: 847–294–7834; email: *kyri.zaroyiannis@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Rolls-Royce Corporation (RRC) Alert Service Bulletin (ASB) AE 2100A–A–72–322/AE 2100P–A–72–047, Revision 1 (single document), dated May 11, 2018.

(ii) RRC ASB AE 2100D2–A–72–111/AE 2100D3–A–72–313/AE 2100J–A–72–111, Revision 1 (single document), dated May 28, 2018.

(3) For RRC service information identified in this AD, contact Rolls-Royce Corporation, 450 South Meridian Street, Mail Code NB–01–06, Indianapolis, IN 46225; phone: 317–230–1667; email: *CMSEindyOSD@rolls-royce.com;* internet: *www.rolls-royce.com.*

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

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

Issued on October 23, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–24865 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0734; Airspace Docket No. 20–AGL–29]

RIN 2120–AA66

Revocation of Class E Airspace; Delavan, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revokes the Class E airspace extending upward from 700 feet above the surface at Lake Lawn Airport, Delavan, WI, due to the cancellation of the instrument procedures at that airport and the airspace no longer being required.

DATES: Effective 0901 UTC, February 25, 2021. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

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

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

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it revokes the Class E airspace extending upward from 700 feet above the surface at Lake Lawn Airport, Delavan, WI, due to the cancellation of the instrument procedures at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 49609; August 14, 2020) for Docket No. FAA–2020–0734 to revoke the Class E airspace extending upward from 700 feet above the surface at Lake Lawn Airport, Delavan, WI. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 revokes the Class E airspace extending upward from 700 feet above the surface Lake Lawn Airport, Delavan, WI, as this airspace no longer being required.

This action is the result of the cancellation of instrument procedures at this airport.

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

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

AGL WI E5 Delavan, WI [Remove]

Issued in Fort Worth, Texas, on November 4, 2020.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–24810 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0708; Airspace Docket No. 20–ACE–14]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Waterloo, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class D and Class E airspace at Waterloo Regional Airport, Waterloo, IA. This action is the result of an airspace review due to the closure of runway 6/24 at Waterloo Regional Airport. The names and geographic coordinates of the airport and navigational aids are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, February 25, 2021. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class D airspace, Class E surface airspace, Class E airspace area designated as an extension to Class D and Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface at Waterloo Regional Airport, IA, to support instrument flight rule operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 49607; August 14, 2020) for Docket No. FAA–2020–0708 to amend the Class D and Class E airspace at Waterloo Regional Airport, Waterloo, IA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71:

Amends the Class D airspace at Waterloo Regional Airport, Waterloo, IA, by updating the name (previously Waterloo Municipal Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database; and replaces the outdated term ''Airport/Facility Directory'' with ''Chart Supplement'';

Amends the Class E surface area Waterloo Regional Airport by updating the name (previously Waterloo Municipal Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database; and replaces the outdated term ''Airport/Facility Directory'' with ''Chart Supplement'';

Amends the Class E airspace area designated as an extension to Class D and Class E surface airspace at Waterloo Regional Airport by removing the extensions east, south, and southwest of the VORTAC, as they are no longer needed; adds an extension within 1 mile each side of the 128° bearing from the Waterloo Regional: RWY 12–LOC extending from the 4.3-mile radius of the Waterloo Regional Airport to 4.4 miles southeast of the Waterloo Regional Airport; amends the extension north of the VOR/DME to the 356° radial (previously 351° radial); and updates the name and geographic coordinates of the Waterloo Regional Airport (previously Waterloo Municipal Airport) and the name of the Waterloo VOR/DME (previously Waterloo VORTAC) to coincide with the FAA's aeronautical database;

And amends the Class E airspace extending upward from 700 feet above the surface at Waterloo Regional Airport by removing the extension southeast of the airport, as it is no longer needed; adds an extension 2.4 miles each side of the 313° radial of the Waterloo VOR/DME extending from the 6.8-mile radius of the Waterloo Regional Airport to 7 miles northwest of the Waterloo VOR/DME; adds an extension 2.4 miles each side of the 356° radial of the Waterloo VOR/DME extending from the 6.8-mile radius of the Waterloo Regional Airport to 7 miles northwest of the Waterloo VOR/DME; and updates the name and geographic coordinates of the Waterloo Regional Airport (previously Waterloo Municipal Airport) and the name of the Waterloo VOR/DME (previously Waterloo VORTAC) to coincide with the FAA's aeronautical database.

This action is due to an airspace review caused by the closure of runway 6/24 at Waterloo Regional Airport.

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

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ACE IA D Waterloo, IA [Amended]

Waterloo Regional Airport, IA
(Lat. 42°33′26″ N, long. 92°24′01″ W)

That airspace extending upward from the surface to and including 3,400 feet MSL within a 4.3-mile radius of Waterloo Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and times will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Airspace Areas Designated as a Surface Area.

* * * * *

ACE IA E2 Waterloo, IA [Amended]

Waterloo Regional Airport, IA
(Lat. 42°33′26″ N, long. 92°24′01″ W)

Within a 4.3-mile radius of Waterloo Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

ACE IA E4 Waterloo, IA [Amended]

Waterloo Regional Airport, IA
(Lat. 42°33′26″ N, long. 92°24′01″ W)
Waterloo Regional: RWY 12–LOC
(Lat. 42°32′55″ N, long. 92°22′53″ W)
Waterloo VOR/DME
(Lat. 42°33′23″ N, long. 92°23′56″ W)

That airspace extending upward from the surface within 1 mile each side of the 128° bearing from the Waterloo Regional: RWY 12–LOC extending from the 4.3-mile radius of the Waterloo Regional Airport to 4.4-miles southeast of the Waterloo Regional Airport, and within 2.4 miles each side of the 313° radial from the Waterloo VOR/DME extending from the 4.3-mile radius of the Waterloo Regional Airport to 7 miles northwest of the Waterloo VOR/DME, and within 2.4 miles each side of the 356° radial from the Waterloo VOR/DME extending from the 4.3-mile radius of the Waterloo Regional Airport to 7 miles north of the Waterloo VOR/DME.

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

* * * * *

ACE IA E5 Waterloo, IA [Amended]

Waterloo Regional Airport, IA
(Lat. 42°33′26″ N, long. 92°24′01″ W)
Waterloo VOR/DME
(Lat. 42°33′23″ N, long. 92°23′56″ W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Waterloo Regional Airport, and within 2.4 miles each side of the 313° radial from the Waterloo VOR/DME extending from the 6.8-mile radius of the Waterloo Regional Airport to 7 miles northwest of the Waterloo VOR/DME, and within 2.4 miles each side of the 356° radial from the Waterloo VOR/DME extending from the 6.8-mile radius of the Waterloo Regional Airport to 7 miles north of the Waterloo VOR/DME.

Issued in Fort Worth, Texas, on November 4, 2020.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–24809 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 11

[Docket No. FR–6192–I–01]

RIN 2501–AD93

Implementing Executive Order 13891; Promoting the Rule of Law Through Improved Agency Guidance Documents

AGENCY: Office of General Counsel, HUD.

ACTION: Interim final rule.

SUMMARY: This interim rule implements Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' This E.O. requires Federal agencies to publish regulations that establish processes and procedures for issuing guidance documents. The interim rule would create a new part 11 in title 24 of the Code of Federal Regulations (CFR) that outlines HUD policy on guidance documents and how HUD designates guidance documents. The interim rule would also establish a procedure by which the public may petition HUD for the withdrawal or modification of guidance documents, and the process for the public to make comments on certain significant guidance documents.

DATES:

Effective Date: December 10, 2020.

Comment Due Date: January 11, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. All submissions must refer to the above docket number and title. There are two methods for submitting public comments.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with

speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Associate General Counsel, Office of Legislation and Regulation, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10282, Washington, DC 20410; telephone number 202–708–1793 (this is not a toll-free number). Individuals with hearing or speech impediments may access this number via TTY by calling the Federal Relay Service during working hours at 1–800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. The Purpose of HUD Guidance Documents

The Department of Housing and Urban Development issues guidance documents that are statements of general applicability and future effect that set forth policy on statutory, regulatory, or technical issues or interpret statute or regulation. HUD guidance generally clarifies existing regulatory or statutory requirements that pertain to HUD programs or operations. HUD's guidance documents do not have the force and effect of law, except when restating statutory or regulatory authority or as incorporated into a contract. HUD guidance documents are not used to impose new requirements on the public except as expressly authorized by law.[1]

B. Executive Order 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents

On October 9, 2019 (84 FR 55235), the President issued E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' E.O. 13891 recognizes that the Administrative Procedure Act (5 U.S.C. 551–559) (APA) exempts from the notice and comment requirements for rule making ''interpretive rules, general statements of policy, or rules of agency organization, procedure or practice,'' except when required by statute except when it is required by statute. 5 U.S.C. 553(b). E.O. 13891 provides, however, that agencies have sometimes used this authority to regulate the public without following the notice and comment rulemaking procedures of the APA. As a result, E.O. 13891 reaffirms Executive Branch policy that, consistent with applicable law and except as authorized by law or incorporated into a contract, Federal agencies treat guidance documents as non-binding both in law and practice.

To further this policy, E.O. 13891 requires that each Federal agency take certain actions to ensure the transparent availability and use of guidance documents; to treat guidance documents as non-binding in law and practice, to the extent consistent with applicable law; and to take public input into account when appropriate in formulating or modifying significant guidance documents. Pursuant to section 6 of E.O. 13891, the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA) on October 31, 2019, issued memorandum M–20–02 entitled, ''Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents' '' (OMB Guidance)[2] instructing Federal agencies regarding compliance with requirements of E.O. 13891. Among other things, E.O. 13891 requires that Federal agencies make their guidance documents available at a single, searchable, indexed website, and that the website include a statement that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract. Federal agencies must also review their guidance documents, rescind guidance documents that it determines should no longer be in effect, and inform the public of these actions by **Federal Register** notice.

Of significance to this interim rule, E.O. 13891 requires that each Federal agency codify procedures for issuing guidance documents by amending an existing regulation or adopting a new regulation, pursuant to the OMB Guidance. E.O. 13891 and the OMB Guidance require that the agency regulation on guidance incorporate specific elements. These elements include:

- Requiring that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;
- Establishing procedures for the public to petition for withdrawal or modification of a particular guidance document; and
- Establishing procedures for the issuance of significant guidance documents unless the OIRA Administrator and the agency agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all of requirements. These procedures include: Affording the public not less than 30 days for the submission of comments, unless the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest; requiring the approval of an agency head or component head appointed by the President; and requiring OIRA review of the guidance under E.O. 12866 (Regulatory Planning and Review).

Significant guidance documents must also comply with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

II. This Interim Rule

This interim rule implements E.O. 13891 by establishing a new part 11 in title 24, CFR, that sets forth the Department's policy and procedures for issuing guidance documents. Part 11 would be codified in Subtitle A of HUD's title of the CFR and establish requirements that generally apply to all HUD programs. It supplements part 10 in the same title which establishes the policy and procedures for promulgating regulations.

Section 11.1 states HUD's policy regarding the issuance of guidance documents and reflects the requirements of E.O. 13891. HUD's policy regarding the issuance of guidance documents is based on three core principles. First, as reflected in § 11.1(a), HUD provides that guidance documents will be treated as non-binding and will not impose on members of the public new requirements that have the force and effect of law, except as authorized by law or regulation, or as incorporated into a contract. Consistent with this principle, this paragraph provides that the each of the Department's guidance documents will clearly state that it does not have the force and effect of law, except as authorized by law or as incorporated into a contract.

[1] See, *e.g.,* Reverse Mortgage Stabilization Act of 2013 (Pub. L. 113–29, approved August 9, 2013) and the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289, approved July 30, 2008).

[2] OMB memorandum M–20–02 of October 31, 2019, is available at *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf.*

Second, § 11.1(b) reflects the principle of seeking public participation in the development of significant guidance documents. Toward this goal, paragraph (b) of this section provides that HUD will seek public participation in the development of significant guidance documents and will afford the public not less than thirty days for the submission of comments, except when the Department finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest. HUD may use various methods to obtain public participation including by publishing a notice in the **Federal Register** announcing the availability of significant guidance documents for comment.

Finally, § 11.1(c) reflects the principle that agency guidance should be transparent and made readily available to the public. Toward this end, paragraph (c) of this section provides that HUD will make available guidance documents on a single, searchable, indexed public website. Section 11.1(c) makes clear that guidance documents not posted on the Department's guidance website shall no longer have effect and shall not be cited except to establish historical fact. Finally, § 11.1(c) provides that in furtherance of its policy of transparency and encouraging public participation, the Department is establishing a procedure at § 11.6 for the public to request the withdrawal or modification of a particular guidance document.

Section 11.2 of the interim rule provides definitions of ''guidance document,'' ''guidance portal,'' ''OIRA,'' and ''significant guidance document.'' ''Guidance document'' is defined as a statement of general applicability, designed to shape or intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. Consistent with E.O. 13891, the definition lists several types of documents that are not guidance documents. These include rules promulgated under section 553 of the APA (5 U.S.C. 553) (APA), rules exempt from rulemaking requirements under the APA, notices of funding availability, grant agreements, cooperative agreements, or contracts entered into with program participants in accordance with statutory and regulatory requirements, agency adjudicatory decisions, internal guidance that is not intended to have a substantial effect on regulated parties, legal opinions, legal briefs, and court filings, notices regarding particular locations and facilities, research papers and studies, and correspondence and communications with individual persons or entities not intended to set policy, including communications regarding program administration, enforcement actions, and notices of violation, or Congressional correspondence. These issuances are not statements of ''general applicability, intended to have future effect on the behavior of regulated parties,'' as stated in the E.O. Rather, these issuances only affect single entities based on their specific circumstances. As such, they are not within the definition of ''guidance document'' in the E.O.

''Guidance portal'' is defined at § 11.2(b) as the single, publicly accessible, searchable website where HUD posts or links to all guidance documents that are in effect. ''OIRA'' is defined at § 11.2(c) to mean the Office of Information and Regulatory Affairs at OMB. ''Significant guidance document,'' is defined at § 11.2(d), and reflects section 3(f) of E.O. 12866. Specifically, significant guidance documents mean guidance documents that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Consistent with E.O. 12866 and E.O. 13891, HUD will make an initial determination of whether a guidance document is significant and OIRA will make a final determination.

Section 11.3 describes the applicability of part 11. It provides that part 11 applies to the issuance of guidance documents covered by E.O. 13891. It also provides that HUD and OIRA may jointly determine that a guidance document is exempt from some or all of the requirements of this part due to exigency, safety, health, or other compelling cause. It should be noted that there are cases where specific aspects of part 11 may not apply. For example, this rule contains the same good cause exemption from notice and comment as exists for regulations under section 553(b) of the Administrative Procedure Act.

Section 11.3(c) also reflects the exemption provided by E.O. 13891 for guidance documents ''as authorized by law[3] or as incorporated into a contract.'' For example, this part does not apply to handbooks and mortgagee letters issued by the Federal Housing Administration (FHA). HUD's FHA program provides mortgage insurance on loans made by FHA-approved lenders. Participants in HUD's insured mortgage programs have a contractual relationship with HUD. HUD has no obligation to insure any mortgage, and so can set the terms and conditions under which a mortgage is insured. A mortgagee likewise has no obligation to insure a mortgage with FHA; a mortgagee who chooses to accept the conditions and participate in the mortgage insurance program assents to these terms and conditions. In addition, the participation of mortgagee's in FHA programs is governed by statutes such as the National Housing Act and HUD's regulations. Mortgagee letters either reflect these statutes and regulations or are essentially contractual in nature.

The exception for guidance documents ''as authorized by law or as incorporated into a contract'' also applies to Participant Memoranda and Multiclass Participant Memoranda issued by the Government National Mortgage Association (Ginnie Mae). Ginnie Mae, through its Mortgage-Backed Securities (MBS) Programs, guarantees securities that are backed by pools of mortgages and issued by mortgage lenders (Issuers) approved by Ginnie Mae. Participant Memoranda announce policy and Mortgage Backed Securities Guide changes accessed by Issuers, Document Custodians and other participants in Ginnie Mae programs. They are part of the agreement to participate in Ginnie Mae programs, which is voluntary, and so essentially contractual requirements.

Section 11.4(a) requires that all guidance documents be published and posted on HUD's guidance portal unless it is guidance under § 11.3(c) or the requirement is waived under the procedures in § 11.4(c). Section 11.4(b) also requires that each document be in a searchable, machine readable format and have certain information, including

[3] Examples of publications authorized by law include Fair Market Rents, under Section 8(c)(1) of the United States Housing Act of 1937 (USHA), as amended by the Housing Opportunities Through Modernization Act of 2016 (HOTMA); Qualified Census Tract and Difficult Development Area designations, under Internal Revenue Code (IRC) Section 42, as enacted by the Tax Reform Act of 1986; Annual Adjustment Factors under the United States Housing Act of 1937; Section 8 Annual Inflation Factors for Public Housing under HUD's annual appropriations acts.

a title, an identification of any previous document that it revises or replaces, the issuing office, the date of issuance, document identification number, the applicable legal authority or authorities, a brief summary, the persons to whom the guidance applies, and a statement that the guidance document lacks the force and effect of binding law, except as authorized by statute, regulation or as incorporated into a contract. For significant guidance documents, § 11.4(b)(9) provides that HUD's guidance documents will comply with the applicable requirement for regulations or rules including significant regulatory actions, set forth in Executive Orders 12866, 13563, (Improving Regulation and Regulatory Review, 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

Section 11.4(c) provides that a senior policy official may request a waiver from posting a document or category of documents on the HUD guidance portal. Such a request will be submitted to OIRA for review.

Section 11.6 sets forth the procedure for members of the public to request the withdrawal or removal of a particular guidance document. Under this section, any member of the public can direct their petition to the applicable program office head with a copy to the Office of General Counsel, setting forth all data and arguments available to the petitioner supporting the action sought. Under paragraph (c) of this section, the Department shall respond to all petitions for the removal or modification of guidance documents no later than 90 days after receipt of the petitioner's request.

Section 11.8 provides for public participation in the formulation of significant guidance documents through at least a 30-day public notice and comment period. Paragraph (a) of this section provides that OIRA, consistent with E.O. 12866 and with the advice of the Department, shall identify or determine which guidance documents are significant. Section 11.8 provides that the Department may employ various methods of providing for public participation in the development of significant guidance documents and may publish a notice in the **Federal Register** announcing the availability of a significant guidance document. This section also outlines certain actions the Department will take before the final issuance of a significant guidance document, including responding to major issues raised in the comments, OIRA review, and non-delegable approval by a Presidentially appointed official.

III. Justification for Interim Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect in accordance with its own regulations on rulemaking, 24 CFR part 10. Part 10, however, provides for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public comment procedure is ''impracticable, unnecessary, or contrary to the public interest.''

The Department finds that good cause exists to publish this interim rule. This interim rule implements E.O. 13891, which directs that HUD take certain actions to ensure the transparent availability and use of guidance documents; to treat guidance documents as non-binding in law and practice, to the extent consistent with applicable law and except authorized by law or incorporated into a contract; to take public input into account when appropriate in formulating or modifying significant guidance documents and provide a procedure for the public to petition for the withdrawal or modification of a particular guidance document. While this interim rule does exercise some discretion on the part of HUD, the exercise relies on E.O. 13891's mandates for HUD to initiate actions on matters of internal procedure. Further, the internal procedures established by this rule do not impose on members of the public new requirements that have the force and effect of law.

Although HUD has determined that good cause exists to publish this rule for effect without prior solicitation of public comment, HUD recognizes the value and importance of public input in the rulemaking process. Accordingly, HUD is issuing these regulatory amendments on an interim basis and providing a 60-day public comment period.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under E.O. 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. E.O. 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This interim rule has been determined not to be a ''significant regulatory action,'' under section 3(f) of E.O. 12866 and therefore was not reviewed by OMB. The Office of Information and Regulatory Affairs (OIRA) has designated this rule not as a major rule under the Congressional Review Act (5 U.S.C. 801 *et seq.*).

Environmental Impact

The interim rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this interim rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This rule does not impose a Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule requires HUD to follow certain procedures in issuing guidance documents. These procedures include establishing a single agency website where the public can find all HUD guidance in effect; OMB review to determine whether guidance is significant, and OMB review of

significant guidance; public comment on significant guidance; and a procedure for the public to request withdrawal or modification of a guidance document. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

E.O. 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of Section 6 of the E.O. This interim rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt state law within the meaning of the E.O.

List of Subjects in 24 CFR Part 11

Administrative practice and procedure.

For the reasons described in the preamble, the Department of Housing and Urban Development adds 24 CFR part 11 as set forth below:

PART 11—GUIDANCE DOCUMENTS: POLICY AND PROCEDURES

Sec.
11.1 Policy.
11.2 Definitions.
11.3 Applicability.
11.4 Published guidance documents.
11.6 Withdrawal or modification of documents.
11.8 Issuance of significant guidance documents.

Authority: 42 U.S.C. 3535(d); E.O. 13891, 84 FR 55235, October 9, 2019.

§ 11.1 Policy.

(a) *Non-binding effect of guidance documents.* The Department of Housing and Urban Development issues guidance documents that help explain its programs and policies or communicate other important information to members of the public. These statements of general applicability include interpreting existing law and regulation, clarifying existing program obligations, or otherwise providing information that assists members of the public subject to HUD's statutes and regulations comply with statutory and regulatory reporting requirements. The Department's policy is that guidance documents issued by HUD shall be treated as non-binding and will not impose on members of the public new requirements that have the force and effect of law, except as authorized by statue or regulation or incorporated into a contract. Consistent with this policy, each of the Department's guidance documents will clearly state that it does not have the force and effect of law, except as authorized by law or as incorporated into a contract.

(b) *Public participation in development of significant guidance.* The Department recognizes the benefit of providing members of the public the opportunity to participate in the development of significant guidance documents, as defined in § 11.2(d). Public participation can provide the Department more comprehensive data, facts, and information on which to base its decisions. It is, therefore, the policy of the Department that its significant guidance documents will afford the public not less than thirty days for the submission of comments, except when the Department finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest (and incorporates such finding and a brief statement of the reasons into the guidance document). The Department may employ various methods of providing public participation, including publishing a request for information or notice in the **Federal Register** inviting public comments or publishing a request on its website.

(c) *Single searchable website; procedure to request withdrawal.* The Department is committed to facilitating access to guidance documents by regulated entities and the public. It is, therefore, the policy of the Department to make available a comprehensive set of guidance documents on a single, searchable, indexed website that contains or links to all guidance documents currently in effect. Guidance documents not posted on the Department's guidance website shall no longer have effect and shall not be cited except to establish historical fact. In addition, the Department establishes a procedure, as provided in § 11.6, for the public to request the withdrawal or modification of a particular guidance document.

§ 11.2 Definitions.

(a) *Guidance document* means a statement of general applicability, designed to shape or intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. HUD guidance documents include, but are not limited to, handbooks, policy statements, policy directives, notices of general applicability, compliance documents, bulletins, documents addressing frequently asked questions, and other direct notices issued by HUD program offices, but do not include:

(1) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code (as codified at 24 CFR part 10), or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(3) Rules of agency organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;

(4) Decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(5) Internal guidance directed to HUD or other agencies that is not intended to have substantial future effect on the substantive behavior of regulated parties;

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials, or directed to particular parties about circumstance-specific questions;

(7) Legal briefs, charges, and other court filings intended to persuade a court, or administrative or arbitral authority;

(8) Notices regarding particular locations or facilities;

(9) Research papers and studies;

(10) Notices of Funding Availability, and correspondence and communications with individual persons or entities not intended to set general policy, including grant agreements with individual program participants and other communications regarding program administration, enforcement actions, and notices of violation, or congressional correspondence.

(b) *Guidance portal* means the single, publicly accessible, searchable website where HUD posts or links to all guidance documents that are in effect.

(c) *OIRA* means the Office of Information and Regulatory Affairs at the Office of Management and Budget.

(d) *Significant guidance document* means a guidance document that may reasonably be anticipated to:

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

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency

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

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866, ''Regulatory Planning and Review.''

§ 11.3 Applicability.

(a) This part governs HUD's issuance of guidance documents.

(b) HUD and the Administrator of OIRA may jointly determine that a guidance document is exempt from some or all of the requirements of this part for exigency, safety, health, or other compelling cause.

(c) This part is not applicable to any guidance document that is authorized by law or contemplated by or incorporated into a contract, including:

(1) Handbooks and mortgagee letters issued by the Federal Housing Administration; and

(2) All Participant Memoranda and Multiclass Participant Memoranda issued by the Government National Mortgage Association.

§ 11.4 Published guidance documents.

(a) HUD makes available to the public a comprehensive set of guidance documents through a guidance portal that can be accessed from the Department's public website. Unless exempt pursuant to paragraph (c) of § 11.3 or a waiver is granted under paragraph (c) of this section, HUD will publish or link to each guidance document that is in effect on its guidance portal.

(b) Each guidance document issued pursuant to this part shall:

(1) Be in a user-searchable, machine readable format;

(2) Provide the document title, and identify what, if any, previous document the new guidance document revises or replaces;

(3) Identify the issuing office or division;

(4) Indicate the date of issuance and the unique document identification number;

(5) Identify the applicable legal authority or authorities for issuance of the guidance, and provide a brief summary of the subject matter the document covers;

(6) Describe the document contents as guidance, pursuant to § 11.2(a);

(7) Identify the activities to which and the persons to whom the document applies;

(8) State that the guidance document, if meeting the definition thereof, lacks the force and effect of binding law; and

(9) For significant guidance documents, comply with the applicable requirement for regulations or rules including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review, 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

(c) A senior policy official may request a waiver of the requirement to post a guidance document or a category of guidance documents. Such a request should be submitted through OIRA for review. A request for a waiver should clearly explain the purpose of the document(s) and why making the document(s) publicly available on an agency website would cause specific harm or otherwise interfere with the agency's mission.

§ 11.6 Removal or modification of documents.

(a) The Department may rescind, remove from its public website or modify published guidance documents on its own initiative, or in the response to the petition of any interested person.

(b) *Public petition.* Any interested person may petition the applicable program office head for the modification or withdrawal of a guidance document. Each petition shall:

(1) Be directed to the applicable program office head with a copy to the Office of General Counsel, Office of Legislation and Regulations, Department of Housing and Urban Development, Washington, DC 20410;

(2) Identify with specificity the guidance document sought to be withdrawn or modified and, if applicable, set forth the text or substance of the interim modification;

(3) Explain the interest of the petitioner in the action sought; and

(4) Set forth any data and arguments available to the petitioner in support of the action sought.

(c) The Department shall respond to all petitions for the removal or modification of guidance documents no later than 90 days after receipt of the petitioner's request unless the Secretary makes an extension for good cause or consideration is deferred pursuant to paragraph (e) of this section.

(d) The Department will post a copy of requests for withdrawal or modification and responses on its website.

(e) The Department will consolidate multiple requests for the same guidance document and need not consider a single guidance document more than once each calendar year.

(f) If the program office head or the person with delegated authority finds that the petition contains substantial justification, the guidance document will be withdrawn or, consistent with the requirements of this part, modified as appropriate. If the program office head or person with delegated authority finds that the petition does not contain substantial justification, or based on other considerations such official deems relevant, the petition will be denied by letter or other notice, with a brief statement of the ground for denial.

§ 11.8 Issuance of significant guidance documents.

(a) Determination of significance. Consistent with E.O. 12866 and E.O. 13891, HUD will make an initial determination of significance and OIRA, with the advice of the Department, will make a final determination.

(b) *Notice of a significant guidance document.* Except as provided by paragraph (d) of this section, HUD will afford the public not less than thirty days for the submission of comments prior to issuing a significant guidance document and will publicly respond to major categories of, or the most significant, concerns raised in comments. The Department may employ various methods of providing for public participation in the development of a significant guidance documents including publishing a notice in the **Federal Register** announcing the availability of a significant guidance document which includes:

(1) The substance or terms of the interim guidance or a description of the subject matter and issues involved;

(2) Direction on how to access the draft guidance document available on the Department's website; and

(3) The citation to the statutory provision or regulation (in Code of Federal Regulations format) to which the guidance document applies or which it interprets.

(c) Each draft guidance document announced in the **Federal Register** shall be available on the HUD website,

concurrent with the publication of public notice and comment period.

(d) *Exception.* The Department may omit the public participation requirement of this section if it for good cause determines that public notice and comment is impracticable, unnecessary, or contrary to the public interest. The Department shall incorporate a brief statement of the reasons for its determination to omit public participation into its guidance document.

(e) *Review and approval.* (1) Unless excepted under paragraph (c) of this section, the issuance of a significant guidance document will follow review by OIRA under Executive Order 12866, which may run in whole or part, concurrently with the public comment process in paragraph (a) or this section.

(2) Approval of significant guidance documents shall be by signature of the Secretary, Deputy Secretary, General Counsel, or Assistant Secretary or equivalent, or by an official who is serving in an acting capacity in any of the foregoing positions.

Benjamin S. Carson, Sr.,

Secretary.

[FR Doc. 2020–23982 Filed 11–9–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2020–0656]

RIN 1625–AA08

Special Local Regulation; Boat Parade; San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary special local regulation (SLR) on the waters of San Diego Bay, California to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway during a boat parade. This SLR temporarily encompasses all navigable waters, from surface to bottom, on a pre-determined course in the northern portion of the San Diego Main Ship Channel from Shelter Island Basin, past the Embarcadero, crossing the federal navigable channel and ending off of Coronado Island.

DATES: This rule is effective from 10 a.m. through 1 p.m. on November 11, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0656 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant John Santorum, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable due to the short time between the Coast Guard received final details of the event on October 21, 2020, and the scheduled event occurring on November 11, 2020. The marine event sponsor of this boat parade is expecting to draw a high concentration of vessels to the San Diego Bay area along the proposed parade route. Traditionally, the San Diego Bay area serves as a major thoroughfare for commercial traffic, naval operations, ferry routes, and a number of other recreational uses. The Coast Guard is establishing this SLR to minimize impacts on this congested waterway. We must establish this SLR by November 11, 2020 to ensure the safety of individuals, property, and the marine environment and we do not have sufficient time to request and respond to comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because prompt action is needed to respond to the potential safety hazards associated with the location, size and complexity of the boat parade that is planned to take place on November 11, 2020.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port (COTP) Sector San Diego has determined that potential hazards associated with the proposed parade will be a safety concern for anyone within the vicinity of the parade route. This rule is needed to protect personnel, vessels, spectators, and the marine environment in the navigable waters of the San Diego Bay in the vicinity of the marine event during the enforcement period of this rule.

IV. Discussion of the Rule

This rule establishes an SLR from 10 a.m. until 1 p.m. on November 11, 2020. The SLR will cover all navigable waters on a pre-determined course in the northern portion of the San Diego Main Ship Channel from Shelter Island Basin, past the Embarcadero, crossing the federal navigable channel and ending off of Coronado Island. The duration of the SLR is intended to protect personnel, vessels, spectators, and the marine environment in these navigable waters before, during, and after the event is scheduled to occur. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area unless authorized by the Captain of the Port, or his designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the SLR. The Coast Guard will publish a Local Notice to Mariners and will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 that details the vessel restrictions of the regulated area.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves an SLR lasting less than four hours that will monitor entry to the SLR area for the duration of the enforcement period to cover before, during and after the parade has concluded. It is categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS.

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

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

■ 2. Add § 100.T11–043 to read as follows:

§ 100.T11–043 Boat Parade, San Diego, CA

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

(1) *Parade Area:* All navigable waters, from surface to bottom, on a pre-determined course in the northern portion of the San Diego Main Ship Channel from Shelter Island Basin, past the Embarcadero, crossing the federal navigable channel and ending off of Coronado Island.

(2) [Reserved.

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

Designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the regulations in this section.

Participant means all persons and vessels registered with the event sponsor as a participants in the parade.

(c) *Regulations.* (1) All non-participants are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area described in paragraph (a) of this section unless authorized by the Captain of the Port Sector San Diego or their designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by calling the Sector San Diego JHOC at 619–278–7033. Those in the regulated area, including

participants, must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(3) The COTP will provide notice of the regulated areas through advanced notice via Broadcast Notice to Mariners and by on-scene designated representatives.

(d) *Enforcement period.* This section will be enforced from 10 a.m. through 1 p.m. on Wednesday, November 11, 2020.

Dated: November 3, 2020.

T.J. Barelli,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2020–24860 Filed 11–9–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0655]

RIN 1625–AA87

Security Zone; Fleet Week Demonstration Area, San Diego Bay, San Diego, CA

AGENCY: Coast Guard, Homeland Security Department (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary 900-foot radius security zone on the navigable waters of the U.S. off of Broadway Pier in San Diego Bay, San Diego, CA, in support of Fleet Week San Diego on November 11, 2020. This action is necessary to provide for the safety and security of U.S. Coast Guard surface and aerial assets, crews and support personnel who will be performing mission search and rescue demonstrations. This rulemaking prohibits persons and vessels from entering, transiting, or anchoring in the security zone unless authorized by the Captain of the Port San Diego or his designated representative.

DATES: This rule is effective from 10 a.m. through 2 p.m. on November 11, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0655 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant John Santorum, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. The Coast Guard did not receive final details for this event until October 21, 2020. The Coast Guard must establish this security zone by November 11, 2020 and lacks sufficient time to provide a reasonable comment period and consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying implementation of this rulemaking is contrary to public interest and is needed to ensure the safety and security of military personnel and assets on November 11, 2020.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port San Diego (COTP) has determined that potential hazards associated with military demonstrations on November 11, 2020 will be a security concern for military assets in the vicinity of the Broadway pier in San Diego Bay, San Diego, CA. This rule is needed to protect military personnel, vessels, and the marine environment on the navigable waters within the security zone during the San Diego Fleet Week event.

IV. Discussion of the Rule

This rule establishes a temporary security zone from 10 a.m. until 2 p.m. on November 11, 2020. The security zone will encompass the waters within a 900-foot radius centered at position: 32°42′56″ N, 117°10′46″ W off the Broadway Pier in the San Diego Bay. The purpose of the security zone is to protect the U.S. Coast Guard surface and aerial assets, crews, and support personnel who will be performing search and rescue demonstrations in San Diego, CA. No vessel or person will be permitted to enter the security zone without obtaining permission from the COTP or his designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-day of the security zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of the San Diego Bay. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule will allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a security zone lasting only 5 days that will prohibit entry within a 900-foot feet radius of a designated coordinate west of Broadway Pier in San Diego Bay. It is categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–042 to read as follows:

§165.T11–042 Security Zone; San Diego Bay; San Diego, CA.

(a) *Location.* The following area is a security zone, including all navigable waters of San Diego Bay, from surface to sea floor, within a 900-foot radius centered at the following coordinate: 32°42′56″ N, 117°10′46″ W.

(b) *Definition.* The term ''designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, and other officer operating a Coast Guard vessel, or a Federal, State, or local officer designated by or assisting the Captain of the Port San Diego in the enforcement of the regulated area.

(c) *Regulations.* (1) Under the general security zone regulations in subpart D of this part, all persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the security zone unless authorized by the Captain of the Port Sector San Diego (COTP) or his designated representative.

(2) The security zone is closed to all vessel traffic, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the security zone must contact the COTP or the COTP's designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the security zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative. Persons and vessels may request permission to enter the security zone on VHF channel 16 or through the 24-hour Command Center at telephone (619) 278–7033.

(d) *Enforcement period.* This section will be enforced from 10 a.m. through 2 p.m. on November 11, 2020.

Dated: November 3, 2020.

T. J. Barelli,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2020–24863 Filed 11–9–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0109; FRL–10014–84–Region 9]

Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona; Nonattainment Plan for the Hayden SO_2 Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a partial approval and partial disapproval of an Arizona state implementation plan (SIP) revision for attaining the 2010 1-hour primary sulfur dioxide (SO_2) national ambient air quality standard (NAAQS or ''standard'') for the Hayden SO_2 nonattainment area (NAA). This SIP revision (hereinafter called the ''Hayden SO_2 Plan'' or ''Plan'') includes Arizona's attainment demonstration and other elements required under the Clean Air Act (CAA or ''Act''). The EPA is approving the base year and projected emissions inventories and affirming that the new source review requirements for the area have been met. We are disapproving the attainment demonstration, as well as other elements of the Plan tied to this demonstration, namely, the requirement for meeting reasonable further progress (RFP) toward attainment of the NAAQS, reasonably available control measures and reasonably available control technology (RACM/RACT), enforceable emissions limitations and control measures, and contingency measures.

DATES: This rule will be effective on December 10, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R09–OAR–2020–0109. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Ashley Graham, EPA Region IX, Air Division, Air Planning Office, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3877 or by email at *graham.ashleyr@epa.gov.*

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

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I. Background

On June 22, 2010, the EPA promulgated a new 1-hour primary SO_2 NAAQS of 75 parts per billion (ppb) (hereinafter called ''the 2010 SO_2 NAAQS'' or ''the SO_2 NAAQS''). This standard is met at an ambient air quality monitoring site when the 3-year average of the annual 99th percentile of daily maximum 1-hour average concentrations does not exceed 75 ppb, as determined in accordance with appendix T of 40 CFR part 50.[1] On August 5, 2013, the EPA designated 29 areas of the country as nonattainment for the 2010 SO_2 NAAQS, including the Hayden SO_2 NAA within Arizona.[2] These area designations became effective on October 4, 2013. Section 191(a) of the CAA directs states to submit SIP revisions for areas designated as nonattainment for the SO_2 NAAQS to the EPA within 18 months of the effective date of the designation, *i.e.,* in this case by no later than April 4, 2015. Under CAA section 192(a), these SIP submissions are required to include measures that will bring the NAA into attainment of the NAAQS as expeditiously as practicable, but no later than five years from the effective date of designation. The attainment date for the Hayden SO_2 NAA was October 4, 2018.

Nonattainment plans for SO_2 must meet sections 110, 172, 191, and 192 of the CAA. The EPA's regulations governing nonattainment SIP submissions are set forth at 40 CFR part 51, with specific procedural requirements and control strategy requirements residing at subparts F and G, respectively. Soon after Congress enacted the 1990 Amendments to the CAA, the EPA issued comprehensive guidance on SIP revisions in the ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble'').[3] Among other things, the General Preamble addressed SO_2 SIP submissions and fundamental principles for SIP control strategies.[4] On April 23, 2014, the EPA issued guidance for meeting the statutory requirements in SO_2 SIP submissions in a document titled, ''Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions'' (''2014 SO_2 Guidance'').[5] In the 2014 SO_2 Guidance, the EPA described the statutory requirements for a complete nonattainment plan, which include: An accurate emissions inventory of current emissions for all sources of SO_2 within the NAA; an attainment demonstration; a demonstration of RFP; implementation of RACM (including RACT); new source review; enforceable emissions limitations and control measures; conformity; and adequate contingency measures for the affected area.

For the EPA to fully approve a SIP revision as meeting the requirements of CAA sections 110, 172, 191, and 192, and the EPA's regulations at 40 CFR part 51, the plan for the affected area needs to demonstrate that each of the aforementioned requirements has been met. Under CAA section 110(l), the EPA may not approve a plan that would interfere with any applicable requirement concerning NAAQS attainment and RFP, or any other applicable requirement. Under CAA section 193, no requirement in effect (or required to be adopted by an order, settlement, agreement, or plan in effect before November 15, 1990) in any area that is a NAA for any air pollutant may be modified in any manner unless it ensures equivalent or greater emission reductions of such air pollutant.

The EPA published a notice on March 18, 2016, finding that Arizona and other states had failed to submit the required SO_2 nonattainment plans for the Hayden SO_2 NAA and several other areas by the submittal deadline.[6] This finding, which became effective on April 18, 2016, initiated a deadline under CAA section 179(a) for the potential imposition of new source review offset and highway funding sanctions. Additionally, under CAA section 110(c),

[1] 75 FR 35520 (codified at 40 CFR 50.17(a)–(b)).

[2] 78 FR 47191 (codified at 40 CFR part 81, subpart C).

[3] 57 FR 13498 (April 16, 1992).

[4] Id. at 13545–13549, 13567–13568.

[5] EPA, Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions, April 23, 2014, available at *https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.*

[6] 81 FR 14736 (March 18, 2016).

the finding triggered a requirement that the EPA promulgate a federal implementation plan within two years of the effective date of the finding unless the State has submitted, and the EPA has approved, the nonattainment plan as meeting applicable requirements.

In response to the EPA's finding, the Arizona Department of Environmental Quality (ADEQ) submitted the Hayden SO_2 Plan on March 9, 2017, and submitted associated final rules on April 6, 2017.[7] The EPA issued letters dated July 17, 2017, and September 26, 2017, finding the submittals complete and halting the sanctions clock under CAA section 179(a).[8]

II. Public Comments and EPA Responses

The EPA proposed to partially approve and partially disapprove the Hayden SO_2 Plan on May 22, 2020.[9] Our proposed action contains more information on the basis for this rulemaking and on our evaluation of the submittal. In a separate, concurrent action, we also proposed a limited approval and limited disapproval of Arizona Administrative Code, Title 18, Chapter 2, Article 13, Section R18–2–B1302 (''Rule B1302'').[10]

The EPA's proposed action for the Hayden SO_2 Plan provided a 30-day public comment period. During this period, we received comments from Freeport-McMoRan Incorporated (FMI) and ASARCO LLC (''Asarco'').[11] [12] We also received comments from ADEQ, submitted to the docket for our related proposal on Rule B1302, that are relevant to our proposed action on the Hayden SO_2 Plan.[13] All comments received on both proposals, including the comments from ADEQ, are included in the docket for this action. The comments from FMI pertain to Rule B1302 and are addressed in our final action on the rule. Copies of these responses are also included in the docket for this action.[14] The comments from ADEQ and from Asarco, along with our responses, are summarized below.

A. Comments From ADEQ

Comment: ADEQ's comment letter expresses concern that the EPA's proposed action does not clearly acknowledge the work that ADEQ and Asarco have completed since identifying the modeling error that was part of the basis for the EPA's proposed disapproval of the modeled attainment demonstration and related elements. ADEQ describes the modeling error that was discovered in 2017 after the SIP revision was submitted to the EPA and discusses the extensive work that was conducted to develop a revised modeling methodology. These efforts include additional analyses, work to justify new assumptions and modeling parameters, and the development of new modeling files and a modeling technical support document (TSD), draft versions of which were shared with EPA staff for review. ADEQ does not dispute the modeling error and acknowledges that the EPA was required to take action on the SIP revision submitted in March 2017. However, ADEQ expresses concern that the language in the EPA's proposal could lead the reader to believe that it knowingly submitted a SIP revision containing a flawed attainment demonstration, that the error was a recent discovery, or that it has taken no action to resolve the modeling issue. ADEQ contends that a clarification regarding the additional modeling efforts would help avoid any misunderstanding. Finally, ADEQ asserts that the new modeling methodology shows attainment of the NAAQS and that it was approved by the EPA in 2018.

Response: We agree that extensive work has been done by ADEQ and Asarco, in consultation with EPA staff, to correct the flawed modeling in the March 2017 submittal. While we noted in our proposal that ADEQ has been working with Asarco and the EPA on revised modeling, we acknowledge that the high level of effort that has gone into that work was not clearly presented in our proposed action and the sequence of ADEQ submitting the SIP revision in March 2017, identifying the error later in 2017, and subsequently working extensively with Asarco and the EPA to correct the error was not discussed.

In response to the statement that the new methodology was approved by the EPA in 2018, we would like to clarify that, while ADEQ and Asarco consulted with EPA staff to revise the modeling, and has shared new modeling files and a modeling TSD with EPA staff, these documents have not undergone ADEQ public notice and comment or been formally submitted to the EPA as a SIP revision. Therefore, the revised modeling has not been formally approved by the EPA and was not evaluated as part of our proposed action. Only upon such future submission, if it occurs, will the EPA be able to formally evaluate and make a determination regarding its adequacy to demonstrate attainment of the 2010 SO_2 NAAQS.

B. Comments From Asarco

Comment: Asarco notes that it has spent considerable time and resources since 2011, in collaboration with ADEQ and the EPA, to achieve attainment of the 2010 SO_2 NAAQS in the Hayden NAA. The commenter states that Asarco's efforts, including improvements to the capture and control systems, retrofits and rebalancing of the converter aisle to enhance sulfur recovery at the acid plant, and installation of an improved preheater system to reduce startup emissions, have resulted in SO_2 emission reductions of approximately 90 percent relative to pre-2010 levels.

Response: The EPA acknowledges the efforts that Asarco has undertaken to reduce SO_2 emissions and improve air quality in the Hayden SO_2 NAA. A

[7] Letters dated March 8, 2017, and April 6, 2017, from Tim Franquist, Director, Air Quality Division, ADEQ, to Alexis Strauss, Acting Regional Administrator, EPA Region IX. Although the cover letter for the Hayden SO_2 Plan was dated March 8, 2017, the Plan was transmitted to the EPA on March 9, 2017.

[8] Letters dated July 17, 2017, and September 26, 2017, from Elizabeth Adams, Acting Air Division Director, EPA Region IX, to Tim Franquist, Director, Air Quality Division, ADEQ.

[9] 85 FR 31118.

[10] 85 FR 31113 (May 22, 2020).

[11] Letter dated June 22, 2020, from Todd Weaver, Senior Counsel, Freeport-McMoRan, to Rulemaking Docket EPA–R09–2020–0109, Subject: ''Re: Comments on Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona Nonattainment Plan for the Hayden SO_2 Nonattainment Area (EPA–R09–OAR–2020–0109) and Limited Approval, Limited Disapproval of Arizona Plan Revisions, Hayden Area; Sulfur Dioxide Control Measures—Copper Smelters (EPA–R09–OAR–2020–0173).''

[12] Letter dated June 22, 2020, from Amy Veek, Environmental Manager, Asarco Hayden Operations, ASARCO LLC, to Ashley Graham, Air Planning Office, Air Division, EPA Region 9, Subject: ''Re: Comments of ASARCO LLC on (1) ''Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona; Nonattainment Plan for the Hayden SO_2 Nonattainment Area, 85 FR 31118 (May 22, 2020), Docket No. EPA–R09–OAR–2020–0109. (2) ''Limited Approval, Limited Disapproval of Arizona Air Plan Revisions, Hayden Area; Sulfur Dioxide Control Measures—Copper Smelters, 85 FR 31113 (May 22, 2020), Docket No. EPA–R09–OAR–2020–0173.''

[13] Letter dated June 18, 2020, from Daniel Czecholinski, Air Quality Division Director, ADEQ, to Rulemaking Docket EPA–HQ–OAR–2020–0109, Subject: ''Partial Approval Partial Disapproval of Air Quality Implementation Plans; Arizona; Nonattainment Plan for the Hayden SO_2 Nonattainment Area, Docket ID Number: EPA–HQ–OAR–2020–0109.'' ADEQ's comment letter mistakenly references Rulemaking Docket ''EPA–HQ–OAR–2020–0109'' instead of the rulemaking docket for this action, ''EPA–R09–OAR–2020–0109,'' and was submitted to the rulemaking docket for our related proposal on Rule B1302, ''EPA–R09–OAR–2020–0173.''

[14] Response to Comments Document for the EPA's Final Actions on the ''Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS'' and Rule R18–2–B1302, ''Limits on SO_2 Emissions from the Hayden Smelter'' (September 2020).

summary of the equipment and process upgrades that have been implemented was included in our proposed action,[15] and a more detailed discussion was included in the TSD accompanying our proposed action on Rule B1302.[16]

Comment: Asarco asserts that the statement in the EPA's proposal that an error in ADEQ's modeling ''changed predicted SO_2 concentrations such that the modeling no longer shows attainment of the 2010 SO_2 NAAQS'' [17] is disingenuous because ADEQ's revised modeling demonstration shows attainment of the 2010 SO_2 NAAQS. Asarco believes that the accompanying footnote [18] in the proposed action suggests that the modeling error was discovered in 2020, rather than in 2017, and suggests that the EPA should have acknowledged that ADEQ's revised modeling shows attainment even if the EPA felt compelled to act only on the submitted version of the plan.

Response: As discussed in our response to ADEQ's comments in Section II.A of this notice, the EPA does not dispute that the modeling error was discovered in 2017. We referenced the 2020 email [19] in our proposed action because we did not have contemporaneous documentation of the discovery of the modeling error to cite in our proposal. We did not intend for our proposal to suggest that the modeling error was identified in 2020 and acknowledge the extensive work that has been done by ADEQ and Asarco to revise the modeling in the March 2017 SIP revision.

We also note that ADEQ and Asarco have informally sent draft revised modeling to EPA staff, who have provided feedback on the draft revised modeling. However, as previously noted, ADEQ has not yet released the revised modeling for public notice and comment or formally submitted the modeling to the EPA as a SIP revision. Accordingly, the EPA has not yet reviewed the revised modeling for approvability under the applicable requirements of the CAA and EPA regulations.

Comment: Asarco asserts that under CAA section 172(c)(6), ''other control measures, means or techniques'' may be sufficient to achieve and demonstrate attainment of the NAAQS, and therefore, it does not agree that the Hayden SO_2 Plan cannot be approved without numeric fugitive emissions limits. Asarco contends that the EPA improperly relied upon selective citation of the CAA and EPA regulations and non-binding guidance to conclude that a numeric fugitive emissions limit is required. Asarco lists the ''other control measures, means or techniques'' provided for in the Hayden SO_2 Plan, which it asserts are sufficient ''to achieve and demonstrate attainment of the 2010 SO_2 NAAQS,'' including new and upgraded capture and control equipment, operation and maintenance plans for process and control equipment, numeric emissions limits on the main stack, a new preheater system to reduce startup emissions, work practice controls for fugitive emissions, and fugitive emissions studies to evaluate the efficacy of the improved gas capture and control equipment.

Response: We disagree with this comment. Section 172(c)(6) of the CAA requires attainment plans to include ''enforceable emission limitations, and such other control measures, means or techniques'' as necessary or appropriate to provide for attainment. The guidance documents we cited in our proposal (*i.e.,* the General Preamble and the 2014 SO_2 Guidance) describe and interpret CAA section 172(c)(6) and other binding statutory and regulatory requirements. While the guidance documents are not themselves binding, they guide the EPA's review of SIP submittals for compliance with the relevant requirements. In any case, the text of section 172(c)(6) is clear that the EPA must determine whether a submitted SIP includes all enforceable emission limitations and other measures that are necessary to provide for attainment. While measures other than emission limits might be sufficient by themselves in some circumstances (for example, where a particular source contributes little to the attainment problem or is not susceptible to a numeric limit due to technological limitations), such circumstances do not exist in this case, given that fugitive SO_2 emissions at the Hayden facility have the potential to cause or contribute to NAAQS violations and are capable of being continuously monitored.[20]

The measures listed in Asarco's comment, while important components of the control strategy, do not ensure that fugitive emissions will remain at the level that was assumed in the attainment modeling. In particular, the installation of new and improved capture and control equipment was expected to reduce fugitive emissions, but, in the absence of ongoing monitoring, it is not known whether these changes were sufficient to reduce emissions to the level necessary to achieve attainment. Similarly, operation and maintenance requirements and work practice controls are helpful for ensuring that process and control equipment are properly operated, but they do not correspond to or assure achievement of any particular level of emissions.

The fugitive emissions studies, the first of which began last year, will provide better information regarding the actual level of fugitive emissions from the facility. However, these studies will last for only one year each and do not correspond to any numeric emission limit. Therefore, if one of the studies were to show that fugitive emissions exceeded the levels assumed in the attainment modeling, this would not constitute a violation of an emissions limit that could give rise to an enforcement action. Rather, it would simply trigger a requirement for Asarco to conduct new modeling to assess whether the NAAQS would still be attained at the higher emissions levels.[21] If that modeling shows an increased likelihood of a NAAQS exceedance, then Asarco would have to submit to ADEQ a proposed revision to its operations and maintenance plan and associated modeling to demonstrate attainment of the NAAQS. ADEQ would then submit revisions to the operational limits and volumetric flow monitoring provisions, and a revised attainment demonstration to the EPA as a SIP revision.

There is substantial risk that fugitive emissions from the facility could cause or contribute to violations of the 2010 SO_2 NAAQS. Consequently, the Plan must assure that these emissions are limited in an enforceable manner. A process for future evaluation of fugitive emissions and potential future SIP revisions contingent on the results of that evaluation cannot substitute for enforceable limitations on fugitive emissions. Moreover, if fugitive emissions were to increase during the period between the two studies or after the second study, there would be no mechanism to address those increased emissions. In contrast, if the Plan were to rely on enforceable numeric fugitive emissions limits corresponding to the

[15] 85 FR 31118, 31122.

[16] EPA, ''Technical Support Document for the EPA's Rulemaking for the Arizona State Implementation Plan; Arizona Administrative Code, Title 18, Chapter 2, Article 13, Part B—Hayden, Arizona, Planning Area, R18–2–B1302—Limits on SO_2 Emissions from the Hayden Smelter,'' April 2020 (''Rule B1302 TSD'').

[17] 85 FR 31118, 31120.

[18] Id. at footnote 16.

[19] Email dated March 25, 2020, from Farah Esmaeili, ADEQ, to Rynda Kay, EPA Region IX.

[20] Letter dated April 29, 2019, from Elizabeth Adams, Air Division Director, EPA Region IX, to Timothy Franquist, Air Director, ADEQ, Subject: ''Re: Comments on draft letter regarding R18–2–B1302'' (''April 2019 Comment Letter'').

[21] See Arizona Administrative Code R18–2–C1302 Appendix 14 paragraphs A.14.8 and 9.

modeled fugitive emissions levels, with ongoing monitoring, recordkeeping and reporting requirements, then an exceedance of any of these emissions levels would be a violation of the SIP that could result in an immediate enforcement action by ADEQ, the EPA, or a third party. Such an approach would satisfy the requirement of CAA section 172(c)(6) for enforceable limits and other measures that provide for attainment of the 2010 SO_2 NAAQS.

Finally, Asarco lists the stack emission limits among the control measures that it believes are sufficient to demonstrate attainment. As discussed in our proposal, the stack emission limits would be enforceable were it not for the flaws in monitoring, recordkeeping and reporting requirements. In any case, the stack limits have no bearing on the SIP's flaw in not imposing an enforceable limit for fugitive SO_2 emissions.

For the foregoing reasons, we conclude that the requirements for enforceable limits and other measures that provide for attainment of the SO_2 NAAQS under CAA section 172(c)(6) have not been satisfied.

Comment: Asarco reiterates its view that the EPA's proposal is dismissive of the progress that Asarco has made in reducing total SO_2 emissions at the Hayden smelter, and that it implies that fugitive emissions controls at the smelter are inadequate. Asarco cites emissions reductions observed based on the initial data collected during the first fugitive emissions study to assert that fugitive emissions are well below what is needed to ensure attainment of the 2010 SO_2 NAAQS.

Response: The EPA acknowledges the progress that has been made to reduce SO_2 emissions at the Hayden smelter. As discussed in Asarco's comments and in the TSD accompanying our proposed action on Rule B1302, Asarco's SO_2 control strategy includes several equipment and process upgrades, including replacement of the electrostatic precipitator and flash furnace with a new vent gas baghouse system; replacement of five 13-foot diameter converters with new 15-foot diameter units that operate more efficiently; installation of extended secondary and tertiary hooding in the converter aisle to maximize ventilation gas capture during charging, transfer, and tapping operations; and improvements to the acid plant with an upgraded pre-heater system.[22] ADEQ has estimated that the converter retrofit project would reduce SO_2 emissions from the smelter by 90 percent between 2011 and 2019.

With regards to the adequacy of the fugitive emissions controls, the EPA disagrees that there are sufficient data to conclude that fugitive emissions are below the level needed to ensure attainment. Asarco references emissions reductions based on initial data collected during the first fugitive emissions study, stating that ''[u]nder the Plan, fugitive emissions fall from a maximum annual average of 295 pounds/hour to an average range between 4.3 and 39.8 pounds/hour.'' However, Asarco has not provided the hourly emissions data from specific roofline sources over an extended period that would be necessary to assess whether the recently monitored levels of fugitive emissions have been consistently at or below the levels necessary for attainment. Moreover, even if recent fugitive emissions have been below the modeled level, there is no assurance that these levels will be maintained over the long-term because, as described in the previous response, the Plan and Rule B1302 do not include any ongoing requirements to measure fugitive emissions or assure that these emissions remain low.

Comment: Regarding the EPA's position that Rule B1302 subsection (E)(4) ''provides an option for alternative sampling points that could undermine the enforceability of the stack emission limit by providing undue flexibility to change sampling points without undergoing a SIP revision,''[23] the commenter states that the EPA's concern is not justified and lacks merit because the provision requires Asarco to demonstrate to ADEQ's satisfaction that the measurement ''would yield inaccurate results or would be technologically infeasible'' prior to using an alternative sampling point. Asarco asserts that it would be indefensible for the EPA to require inaccurate results be used to demonstrate attainment. Lastly, Asarco notes that it has recommended that ADEQ withdraw subsection (E)(4) because Asarco and ADEQ have agreed that the monitoring points are yielding acceptable results so this issue should be resolved upon ADEQ's submittal of a revised plan.

Response: The EPA disagrees that this issue lacks merit. The EPA is not suggesting that inaccurate sampling points be required to be used to demonstrate attainment, but rather that any change to sampling points should be the subject of EPA and public review through a SIP revision. As noted in our proposal, one of four basic principles that apply to all SIPs and control strategies is replicability, which means that ''where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and non-subjective such that two independent entities applying the procedures would obtain the same result.''[24] We find that the language in Rule B1302 subsection (E)(4) allowing for ''measurement of the flow rate at an alternative sampling point'' where the measurement in the outlet of the control equipment ''would yield inaccurate results or would be technologically infeasible'' is too general and subjective to ensure that two independent entities applying this standard would reach the same conclusion. For example, ADEQ might find that measurement of stack gas volumetric flow rate in the outlet of a particular piece of SO_2 control equipment is technologically infeasible in a situation where the EPA might conclude that such measurement is feasible. Moreover, the rule does not specify any procedures or criteria for determining whether measurement at the alternative sampling point would yield accurate and representative results. Therefore, this provision of the rule is inconsistent with the principle of replicability.

As stated in the April 2019 Comment Letter conveying the EPA's comments to ADEQ regarding Rule B1302, the EPA agrees that withdrawal of subsection (E)(4) is appropriate and will resolve this issue, if such withdrawal occurs.

Comment: Asarco objects to the EPA's position that Rule B1302 subsection (E)(6) ''allows for nearly 10 percent of total facility SO_2 emissions annually to be exempt from continuous emissions monitoring systems; this deficiency could compromise the enforceability of the main stack emission limit.''[25] The commenter asserts that there is no deficiency and the basis for disapproval lacks merit because the provision to allow Asarco to petition ADEQ to replace the continuous emissions monitoring system (CEMS) with annual stack testing and report emissions rates as a pounds per hour (lb/hr) or pounds per ton production factor would still allow calculation of the emissions rates. Asarco states that there were legitimate concerns that it would not be able to perform a relative accuracy test audit (RATA) of the CEMS due to the low concentrations of SO_2 present, but that it has now determined that it can perform a RATA of the relevant CEMS

[22] Rule B1302 TSD, 5.

[23] 85 FR 31118, 31120.

[24] General Preamble, 13568.

[25] 85 FR 31118, 31120.

and has requested that ADEQ withdraw subsection (E)(6) in ADEQ's submittal of a revised plan to resolve this issue.

Response: The EPA disagrees that this issue lacks merit. While the rule language does provide for an emissions value that can allow for the calculation of an overall stack emissions rate, we do not consider this sufficient to ensure the enforceability of the one-hour main stack emissions limit given the large variability in hourly emissions from the Asarco facility. The commenter asserts that units encompassed by the provision typically emit less than 75 lb/hr SO_2; however, we note that Asarco's emissions estimate for these units forecasts a maximum emission rate as high as 417 lb/hr SO_2 (out of a total 1,069.1 lb/hr or 1,518 lb/hr main stack limit).[26] In addition, we note that source test results represent a ''snapshot'' of unit emissions (and of corresponding unit operations) at the time of the source test. Generally, source tests must be performed at approximately 80 to 100 percent of maximum operating levels, and emissions limits relying upon a source test for demonstrating compliance typically require continuous monitoring of one or more parameters of unit operation. This allows for the determination that unit operations are representative of source test conditions and ensures the validity of the source test result. Rule B1302 subsection (E)(6), however, relies solely on source test results for demonstrating compliance, which we do not consider sufficient to ensure enforceability of the main stack emissions limit. As stated in our April 2019 Comment Letter, the EPA agrees that withdrawal of subsection (E)(6) is appropriate and will resolve this issue, if such withdrawal occurs.

Comment: Asarco objects to the EPA's position that Rule B1302 ''lacks a method for measuring or calculating emissions from a shutdown ventilation flue; this omission could compromise the enforceability of the main stack emission limit.''[27] Asarco asserts that the concern is unfounded and lacks merit. Asarco explains the purpose of the shutdown ventilation flue and describes the procedure for calculating emissions for planned and unplanned shutdowns. Asarco notes that the procedure and resulting values are included in the SIP documentation but that to resolve the issue, it has requested that ADEQ revise the operation and maintenance plan requirements in the SIP to document the SO_2 emitted during planned and unplanned use of the shutdown ventilation flue and require the use of the operation and maintenance plan value in compliance calculations.

Response: The EPA disagrees that the concern is unfounded and lacks merit. While the procedure for calculating emissions for planned and unplanned shutdowns and the value are included in supporting documentation for the Plan, they are not included in Rule B1302 or elsewhere in the SIP; therefore, they are not currently enforceable.

Comment: Regarding the EPA's position that Rule B1302 ''lacks a method for calculating hourly SO_2 emissions,''[28] Asarco asserts that the calculation method is presented in subsections (F)(1) and (F)(2) and acknowledges that there was a typographical omission of the ''valid hour'' definition that was included in Arizona's submission. Asarco notes that it has submitted to ADEQ the same definition included in the EPA-approved plan for the 2010 SO_2 NAAQS for the Miami, Arizona area and that Asarco has requested that ADEQ include it in a revised submittal to resolve the issue.

Response: The omission of the ''valid hour'' definition leads to ambiguity in how hourly emissions are calculated, thus undermining enforceability. However, the EPA agrees that inclusion of a ''valid hour'' definition will clarify the method for calculating hourly SO_2 emissions for the Hayden facility and will resolve this issue, if submitted to the EPA in a future SIP revision.

Comment: The commenter states that Asarco is disappointed that the EPA has not evaluated a fundamental part of the Hayden SO_2 control strategy—*i.e.,* the ''dual limit.'' Asarco discusses its rationale for the dual limit, states that there is no basis for the EPA to question it, and states that it is presumptively approvable under the EPA's SO_2 Guidance.

Response: As noted in our proposal on Rule B1302, we are approving the main stack emission limit because it is more stringent than the existing requirements in state law, as well as new operational standards and monitoring, recordkeeping, and reporting requirements for the smelter.[29] However, as noted in our proposed action on the Hayden SO_2 Plan, we are not evaluating its adequacy to ensure attainment of the 2010 SO_2 NAAQS because (1) ADEQ has not demonstrated that the emission limits in Rule B1302 are sufficient to provide for attainment, and (2) the stack emission limit is not fully enforceable due to various deficiencies in Rule B1302.[30]

Comment: Asarco states that it disagrees with the EPA's conclusion that the modeling in the Hayden SO_2 Plan is flawed. It notes that the revised modeling that was informally submitted to EPA staff indicates that the Converter Retrofit Project meets the RACM/RACT requirements and that Asarco's understands that the revised modeling will be submitted to the EPA as a SIP revision.

Response: As discussed above, the EPA has not reviewed the revised modeling because, as Asarco acknowledges, it has not been formally submitted to the EPA as a SIP revision. The EPA's proposal to disapprove the RACM/RACT demonstration is based on the modeling that was submitted as part of the March 2017 SIP submittal. Both ADEQ and Asarco acknowledge the error in the modeling in the March 2017 submittal. The EPA will review any revised modeling upon formal submission of such modeling to the EPA as a SIP revision.

Comment: Asarco states that ADEQ intends to submit a SIP revision that includes updated modeling that shows attainment; removal of Rule B1302, Section (E)(4); removal of Rule B1302, Section (E)(6); a provision in the operation and maintenance plan to demonstrate the quantity of SO_2 present during planned and unplanned use of the shutdown ventilation flue; and a ''valid hour'' definition that is the same as the definition in the approved Miami SO_2 SIP. Asarco reiterates its position that the CAA does not require the Hayden SO_2 SIP to include numeric fugitive emissions limits but notes that it is working with ADEQ to establish workable emissions limits and monitoring provisions for demonstrating compliance with such limits. Asarco also states that the submission of the SIP revision is imminent and recommends that the EPA prioritize action on the pending revised submittal rather than development of a new plan.

Response: As discussed above, the EPA disagrees with the commenter's assertion that the CAA does not require enforceable emissions limitations for fugitive emissions. Section 172(c)(6) of the Act requires attainment plans to include ''enforceable emission limitations, and such other control measures, means or techniques'' as necessary and appropriate to provide for attainment. With regards to the SIP revision that ADEQ and Asarco have been working on, the EPA will review

[26] See *B-1j_Forecast_Emissions_20160927.xlsx* in the rulemaking docket for this action.

[27] 85 FR 31118, 31120.

[28] Id.

[29] 85 FR 31113, 31115.

[30] 85 FR 31118, 31120.

the submittal for approvability under the applicable requirements of the CAA and EPA regulations once it has undergone ADEQ public notice and comment and been formally submitted to the EPA. While the EPA looks forward to reviewing the prospective submittal, the EPA must also fulfill its obligation under section 110(k) of the CAA to act on ADEQ's 2017 submittal.

III. The EPA's Final Action

For the reasons discussed in our proposed action and above, the EPA is finalizing our partial approval and partial disapproval of the Hayden SO_2 Plan. The EPA is approving the emissions inventory element under CAA section 172(c)(3) and (4) and affirming that the State has met the new source review requirements for the Hayden SO_2 NAA under section 172(c)(5). We are disapproving the attainment demonstration, RACM/RACT, enforceable emission limitations, RFP, and contingency measure elements because they do not meet the requirements of the CAA for the 2010 SO_2 NAAQS. As a result of this final partial disapproval, the offset sanction in CAA section 179(b)(2) will be imposed 18 months after the effective date this action, and the highway funding sanction in CAA section 179(b)(1) six months after the offset sanction is imposed. A sanction will not be imposed if the EPA determines that a subsequent SIP submission corrects the identified deficiencies before the applicable deadline.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because SIP approvals, including limited approvals, are exempted under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

M. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 11, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

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

Dated: October 10, 2020.

John Busterud,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart D—Arizona

■ 2. In 52.120(e), amend Table 1 under the heading ''Part D Elements and Plans (Other than for the Metropolitan Phoenix and Tucson Areas)'' by adding an entry for ''Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS'' after the entry for ''SIP Revision: Hayden Lead Nonattainment Area, excluding Appendix C.''

§ 52.120 Identification of plan.

* * * * *

(e) * * *

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES

[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively] [1]

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
*	*	*	*	*
Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas)				
*	*	*	*	*
Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS. Chapter 3, Chapter 8, Appendix A, and Appendix B.	Hayden, AZ Sulfur Dioxide Nonattainment Area.	March 9, 2017	[INSERT **FEDERAL REGISTER** CITATION], November 10, 2020.	Adopted by the Arizona Department of Environmental Quality and submitted to the EPA as an attachment to letter dated March 8, 2017. The EPA approved the emissions inventory element and affirmed that the State had met the new source review requirements for the area. The EPA disapproved the attainment demonstration, RACM/RACT, enforceable emission limitations, RFP, and contingency measure elements.
*	*	*	*	*

[1] Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.

* * * * *

■ 3. Section 52.124 is amended by revising paragraph (c) to read as follows:

§ 52.124 Part D disapproval.

* * * * *

(c) The following portions of the ''Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS'' are disapproved because they do not meet the requirements of Part D of the Clean Air Act:

(1) Attainment demonstration,

(2) Reasonably available control measures/reasonably available control technology,

(3) Enforceable emission limitations,

(4) Reasonable further progress, and

(5) Contingency measures.

[FR Doc. 2020–23030 Filed 11–9–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1, 60–2, 60–300, and 60–741

[OFCCP–2019–0007–0001]

RIN 1250–AA10

Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (''the Department'') publishes this final rule to codify procedures that the Office of Federal Contract Compliance Programs (''OFCCP'' or ''the agency'') uses to resolve potential discrimination and other material violations of the laws and regulations administered by OFCCP applicable to Federal contractors and subcontractors, add clarifying definitions to specify the types of evidence OFCCP uses to support its discrimination findings, and correct the title of OFCCP's agency head.

DATES: These regulations are effective December 10, 2020.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Background

A. Legal Authority

OFCCP administers and enforces Executive Order 11246, as amended

(E.O. 11246); section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA); and their implementing regulations.[1] Collectively, these laws require Federal contractors and subcontractors[2] to take affirmative action to ensure equal employment opportunity, and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, E.O. 11246 prohibits a contractor from discharging or otherwise discriminating against applicants or employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

Issued in 1965, and amended several times in the intervening years, E.O. 11246 has two principal purposes. First, it prohibits covered Federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, national origin, or because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity.

The requirements in E.O. 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that combined total in excess of $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount. Supply and service contractors with 50 or more employees and a single Federal contract or subcontract of $50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–2. Construction contractors have different affirmative action requirements under E.O. 11246 at 41 CFR part 60–4.

Enacted in 1973, and amended since, the purpose of section 503 is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal contractors. Second, it requires each covered Federal contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities. The requirements in section 503 generally apply to any business or organization that holds a single Federal contract or subcontract in excess of $15,000.[3] Contractors with 50 or more employees and a single Federal contract or subcontract of $50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–741, subpart C.

Enacted in 1974 and amended in the intervening years, VEVRAA prohibits Federal contractors and subcontractors from discriminating against employees and applicants because of status as a protected veteran (defined by the statute to include disabled veterans, recently separated veterans, Armed Forces Service Medal Veterans, and active duty wartime or campaign badge veterans). It also requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans. The requirements in VEVRAA generally apply to any business or organization that holds a single Federal contract or subcontract in excess of $150,000.[4] Contractors with 50 or more employees and a single Federal contract or subcontract of $150,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–300, subpart C.

Pursuant to these laws, receiving a Federal contract comes with a number of responsibilities. Contractors are required to comply with all provisions of these laws as well as the rules, regulations, and relevant orders of the Secretary of Labor. Where OFCCP finds noncompliance under any of the three laws or their implementing regulations, it utilizes established procedures to either facilitate resolution[5] or proceed to administrative enforcement as necessary to secure compliance.[6] A contractor found in violation who fails to correct violations of OFCCP's regulations may, after the opportunity for a hearing, have its contracts canceled, terminated, or suspended and/or may be subject to debarment.[7]

B. Overview of Rule

The Department publishes this final rule to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal employment opportunity laws. The rule will help OFCCP to increase the number of contractors that the agency evaluates and focus on resolving stronger cases through the strategic allocation of limited agency resources. The procedures codified in the final rule aim to achieve that end by increasing the transparency of OFCCP's operations so that contractors and OFCCP can resolve potential violations through a clear, mutual understanding of the issues. The final rule also enables OFCCP to pursue resolution of stronger cases efficiently and as early in the compliance evaluation process as possible, through the Predetermination Notice (PDN) procedures and the early resolution conciliation option. Critically, the final rule establishes consistent parameters for findings and preliminary findings of discrimination, and provides contractors with more certainty as to OFCCP's operative standards for compliance evaluations, and provides guardrails on the agency's issuance of pre-enforcement notices. The Department issues this rule as an exercise of its enforcement discretion to focus OFCCP's resources on those cases with the strongest evidence. This approach is neither compelled nor prohibited by Title VII and OFCCP case law.

On December 30, 2019 (84 FR 71875), the Department published a notice of proposed rulemaking (NPRM) to codify provisions that provide contractors with greater certainty about the procedures that OFCCP follows during compliance evaluations to resolve employment discrimination and other material violations of the laws it enforces. Specifically, the Department proposed

[1] OFCCP will also begin enforcing Section 4 of Executive Order 13950, ''Combating Race and Sex Stereotyping'' for Federal contracts or subcontracts entered on or after November 21, 2020. OFCCP is currently implementing this Executive order.

[2] Hereinafter, the terms ''contractor'' and ''Federal contractor'' are used to refer collectively to contractors and subcontractors that fall under OFCCP's authority, unless otherwise expressly stated.

[3] Effective October 1, 2010, the coverage threshold under section 503 increased from $10,000 to $15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds,* 75 FR 53129 (Aug. 30, 2010).

[4] Effective October 1, 2015, the coverage threshold under VEVRAA increased from $100,000 to $150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds,* 80 FR 38293 (July 2, 2015).

[5] 41 CFR 60–1.28, 60–1.33, 60–300.62, 60–300.64, 60–741.62, and 60–741.64; Federal Contract Compliance Manual Chapter 8 (Dec. 2019); Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018); Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018).

[6] 41 CFR 60–1.26, 60–300.65, and 60–741.65.

[7] 41 CFR 60–1.27, 60–300.66, and 60–741.66.

to codify two formal notices that the agency uses when it finds potential violations: The PDN and the Notice of Violation (NOV). Since 1988, these procedures have been embedded in the Federal Contract Compliance Manual (FCCM), the primary document used by agency staff as the procedural framework for the execution of quality and timely compliance evaluations and complaint investigations. The Department proposed to clarify the different types of evidence that it uses to support a PDN or NOV through the addition of definitions for ''statistical evidence'' and ''nonstatistical evidence.'' To increase efficiency, the Department also proposed to codify an option that allows contractors to expedite the conclusion of a compliance evaluation by entering directly into a conciliation agreement prior to issuance of a PDN or NOV. Finally, the Department proposed to update outdated references to the official title of OFCCP's agency head from ''Deputy Assistant Secretary'' to ''Director.''

After careful consideration of the comments received in response to its proposal, the Department has decided to finalize the rule with several key changes. First, the final rule clarifies that the evidentiary standards OFCCP must meet in order to issue a PDN in a discrimination case must also be met before issuing NOVs. Second, OFCCP changed the terms that the final rule defines from ''statistical evidence'' and ''nonstatistical evidence'' to ''quantitative evidence'' and ''qualitative evidence,'' to provide greater clarity as to the types of evidence that OFCCP collects and how it uses the different types of evidence to support the issuance of pre-enforcement notices. Third, the final rule differentiates the procedures followed for disparate treatment and disparate impact theories of discrimination, which have separate, although similar, elements, and provides clarity on the evidentiary standards OFCCP will have to meet to issue pre-enforcement notices under each legal theory. Fourth, the final rule requires OFCCP to provide qualitative evidence supporting a finding of discriminatory intent for all cases proceeding under a disparate treatment theory, subject to certain enumerated exceptions. Fifth, in order to issue a PDN or NOV in cases involving a disparate impact theory of discrimination, the final rule requires OFCCP to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect. Sixth, the final rule clarifies that OFCCP must explain in detail the basis for its findings in pre-enforcement notices, obtain approval from the OFCCP Director or acting agency head, and, upon the contractor's request, provide the model and variables used in the agency's statistical analysis and an explanation for any variable that was excluded from the statistical analysis. Seventh, in the final rule OFCCP extends the amount of time contractors have to respond to a PDN to 30 days with the possibility of extension, as opposed to the 15 days proposed in the NPRM, in response to comments requesting more time to respond. These changes are fully explained below. In addition, in response to several commenters, OFCCP provides additional guidance in this preamble on how it will measure practical significance.

This final rule is an Executive Order (E.O.) 13771 regulatory action. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2). Details on the estimated costs of this rule can be found in the economic analysis below.

C. Need for Rulemaking

As stated above, the Department believes this rule is needed to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhances the efficient enforcement of equal employment opportunity laws, but one commenter, a compliance consulting firm, specifically questioned the need for rulemaking. The commenter objected to codification of OFCCP's resolution procedures, asserting that it would be better for OFCCP to update the FCCM or the agency's directives system. OFCCP is guided by four central principles: Certainty, efficiency, recognition, and transparency. This focus is informed at least in part by criticisms the agency received in previous years that OFCCP has at times lacked sufficient transparency, clarity, certainty, and timeliness in its dealings with contractors, and criticisms stating that the agency has brought cases without an adequate evidentiary foundation.[8] While many of these criticisms have been addressed by directives and other guidance in the intervening years, this final rule further addresses such concerns by codifying procedures that already exist in the FCCM and agency guidance with some additional modifications to improve clarity and transparency. The FCCM and agency directives are not legally binding and have not gone through formal notice and public comment. Therefore, they do not provide the same level of certainty that this final rule does. *See, e.g., Promoting Regulatory Openness Through Good Guidance (PRO Good Guidance),* 85 FR 53163 (Aug. 28, 2020); *see also* E.O. 13924, Sec. 6(e), 85 FR 31353, 31355 (May 22, 2020) (''All rules of evidence and procedure should be public, clear, and effective.''); *id.* Sec. 6(i) (''Administrative enforcement should be free of unfair surprise.'').[9] A notice-and-comment rulemaking process also ensures that the public's views are heard and that the agency gains the benefit of public input that can improve the content of the final rule. Codifying the use of PDNs, NOVs, and an early conciliation option promotes predictability, efficiency, and timeliness. Additionally, the final rule establishes guardrails on the agency's issuance of pre-enforcement notices and the allocation of agency resources by providing clear evidentiary standards that OFCCP must meet to pursue preliminary findings and findings. The Department will continue to examine means of furthering both these goals through other rulemakings and guidance documents, as appropriate.

Section by Section Analysis

A. Definitions

To provide greater clarity and certainty to Federal contractors, the rule defines ''qualitative evidence'' and ''quantitative evidence,'' which OFCCP uses to support a finding or preliminary finding of discrimination in a PDN or NOV. In the NPRM, OFCCP proposed to add definitions for ''nonstatistical evidence'' and ''statistical evidence.'' In response to comments on the proposed definitions, the Department revises the terms to ''qualitative evidence'' and ''quantitative evidence,'' respectively, and provides additional clarifying language in the final rule to address issues raised by commenters.

The term ''qualitative evidence'' is defined in the final rule to include the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination, and clarifies the purposes for which it will be used.

[8] *See, e.g.,* U.S. Chamber of Commerce, *OFCCP: Right Mission, Wrong Tactics—Recommendations for Reform* (Sept. 21, 2017), *www.uschamber.com/report/ofccp-right-mission-wrong-tactics-recommendations-reform.*

[9] OFCCP will update the FCCM in light of this final rule and revise or repeal any directives as needed.

The term ''quantitative evidence'' is included to clarify the support needed for OFCCP to determine that there is a statistically significant disparity in a contractor's employment selection or compensation outcomes affecting a group protected under OFCCP's laws. The definition of ''quantitative evidence'' in the final rule also includes quantitative analyses, such as cohort analyses, which are comparisons of similarly situated individuals or small groups of applicants or employees that are numerical in nature but do not use hypothesis testing techniques. Both terms are germane to the resolution procedures that this rule codifies.

The change in terminology helps better capture the distinction between these types of evidence. The term ''qualitative evidence'' gives an affirmative, descriptive label to the types of evidence that fall into that category. The term ''quantitative evidence'' better encapsulates OFCCP's analytical evidence given the agency's use of descriptive statistics and non-parametric and cohort analyses, in addition to a variety of statistical tests based on hypothesis testing. Quantitative analysis involves numerical comparisons, but it is not limited to the sort of hypothesis testing that OFCCP typically performs in systemic assessments of pay or selection outcomes, which might be more clearly thought of as ''statistical evidence.'' By contrast, the term ''quantitative evidence'' comfortably describes all these types of numerical analyses.

The change in terminology also allows a clear delineation of the rules governing the sufficiency of the evidence required for OFCCP to issue a PDN or NOV. As explained more fully below, the Department has decided that, subject to certain exceptions, OFCCP will issue a PDN or NOV only if there is quantitative (*i.e.,* statistical or other numerical) evidence, practical significance, and qualitative evidence. The broader definition of *quantitative evidence* means that OFCCP does not necessarily need *statistical* evidence; and the Department similarly changed the title of *nonstatistical evidence* to *qualitative evidence.* The exceptions to the general rule also use these modified definitions, as discussed below.

1. Qualitative Evidence

The definition of ''qualitative evidence'' provides a nonexhaustive list of types of anecdotal and other evidence that OFCCP considers before and relies upon in issuing a PDN. Such evidence is not the result of statistical analysis or other quantitative comparisons, and may be probative of a contractor's discriminatory or non-discriminatory intent. In response to comments received, and in order to provide greater clarity, the definition in the final rule has been revised to further clarify the meaning of qualitative evidence, and to provide additional explanation regarding how OFCCP uses it during its compliance evaluations.

Before issuing a PDN, OFCCP assesses qualitative evidence obtained during the course of its compliance evaluations. In order to proceed under a disparate treatment theory of liability, OFCCP must generally provide qualitative evidence that justifies a finding of discriminatory intent, whether on its own or in combination with quantitative evidence. Qualitative evidence in such cases may include factual testimony, interview statements, written communications, documentation, internal company policies, or other evidence that supports an inference of intentional discrimination towards members of a protected class, particularly when made by a decision maker involved in the action under investigation, or evidence that weighs against such an inference. Importantly, OFCCP may proceed with issuing a PDN where the qualitative evidence is particularly strong, such as when the agency encounters a facially discriminatory policy or a contractor has admitted to discriminatory conduct.

Examples of qualitative evidence from previous OFCCP compliance reviews help illustrate the meaning of the term. For example, consider a company president who sent an email to managers stating his concern that women were unable to lift heavy objects and that, if women were hired for stockroom positions, there would be a higher risk of on-the-job injuries, which would impact the company's profitability. If this rationale was used to exclude women from stockroom positions due to their sex, rather than basing selection on applicants' physical ability to perform the required tasks, the president's email would be an example of qualitative evidence supporting an inference of discriminatory intent. Often the evidence is less direct: In a hiring case involving management trainee positions for which prior sales and customer service experience were stated criteria, OFCCP gathered qualitative evidence regarding individual rejected applicants who had much stronger experience in those areas than certain hires.

Qualitative evidence may include information obtained through testimony or other documentation of individuals who were denied information or who were provided misleading or contradictory information about the contractor's employment or compensation practices in circumstances that suggest discriminatory treatment based on a protected characteristic. OFCCP may also consider interview statements or other documentary evidence concerning a contractor using broad discretion or subjectivity in hiring, promotion, or compensation decisions in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic, although the final rule clarifies that the mere fact broad discretion or subjectivity exists does not, in and of itself, demonstrate that an employment action is discriminatory.[10] Testimony or interview statements that OFCCP relies upon in issuing a PDN may not consist wholly of mere assumptions or purely speculative reasoning about the contractor's actions, but must include some objective factual basis from which to infer discriminatory intent. For example, a witness's statement merely conveying his or her subjective belief that the contractor discriminated would not be sufficient. However, a witness's statement that a particular manager discriminated against him or her that was backed by specific examples of problematic or unequal treatment would be evidence of discriminatory intent.

OFCCP may also use qualitative evidence to rebut a contractor's explanation for statistical disparities or its critique of OFCCP's statistical analysis. For example, in one recent case a contractor argued that OFCCP should have included in its statistical analysis a variable to account for applicants who held an asbestos removal license, which was a requirement for employment. OFCCP presented qualitative evidence consisting of a hiring official's testimony that he hired workers without an asbestos removal license, testimony from an individual who attended a

[10] *See, e.g., OFCCP* v. *Analogic Corp.,* 2017–OFC–00001, at 41 n.60 (Rec. Dec. & Order Mar. 22, 2019) (''[t]he fact that hiring criteria or practices are subjective, and are thus susceptible to discriminatory application, is only marginally relevant to the question of discriminatory intent in the absence of proof that the criteria were, in fact, applied in a discriminatory manner.'') (quoting *Gay* v. *Waiters' & Dairy Lunchmen's Union, Local No. 30,* 694 F.2d 531, 554 (9th Cir. 1982)); *see generally Wal-Mart Stores Inc.* v. *Dukes,* 564 U.S. 338, 355 (2011) (holding policy of allowing supervisory discretion over employment matters showed ''the opposite of a uniform employment practice that would provide commonality needed for a class action'' claiming disparate treatment of female workers); *cf. White* v. *Rice,* 46 F.3d 1130 (4th Cir. 1995) (''such a subjective belief [of gender discrimination] cannot serve as the basis for judicial relief'').

recruiting session where the contractor stated that it provided a 4-day training course for new hires on asbestos removal, and testimony from the owner who started the asbestos training school onsite.[11]

One comment requested that the final rule require anecdotal evidence as a condition of issuing a PDN, and that anecdotal evidence should be defined consistent with established authority as evidence that leads to an inference of disparate treatment. OFCCP has amended the final rule to require qualitative evidence, along with sufficient quantitative evidence and practical significance (as specified below), for all PDNs issued under a disparate treatment theory of liability, with clearly delineated exceptions. OFCCP has also revised the definition of *qualitative evidence* as described in the preceding paragraphs to clarify that anecdotal evidence includes facts that are relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations.[12]

Other comments on OFCCP's proposed definition of ''nonstatistical evidence'' (now ''qualitative evidence'' in this final rule) sought to have testimony on the extent of ''subjectivity involved in making employment decisions'' removed as an example, or to provide further explanation as to how and when subjectivity could be used to support findings of discrimination. OFCCP declines to remove this example altogether because first-hand testimony about the level of subjectivity involved in a decision may, in certain cases, bolster other evidence of disparity.[13] For example, in one case,[14] OFCCP gathered qualitative evidence to investigate a hiring issue where African-American applicants were disproportionately screened out based on two disposition codes, one of which related to a subjectively applied credit check. In that case, OFCCP gathered statements from rejected applicants in the disfavored group who met all qualification requirements but, according to the contractor's disposition codes, were rejected because of a ''bad'' credit check without being given the opportunity to address the results. Additionally, OFCCP determined based on evidence obtained from the recruiters who evaluated the credit checks that the recruiters were unable to provide any objective standards that were used to screen out applicants. Such evidence demonstrating the level of subjectivity involved in employment decisions, in connection with other evidence, may be helpful to OFCCP in making a preliminary finding that the contractor then has an opportunity to rebut. However, as stated above, the Department agrees that the mere fact that a contractor has supervisory discretion in its employment decisions is not by itself probative of discriminatory intent. OFCCP has qualified the appropriate use of such evidence in the final rule, explaining in the regulatory text that documents about the extent of discretion or subjectivity involved in making employment decisions may be used as qualitative evidence, but only in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic.

The Department notes that qualitative evidence may also weigh against a finding of discrimination, depending on the surrounding facts and circumstances. Although mere compliance with basic legal obligations will not be considered by the agency as dispositive evidence weighing against a finding of discrimination, OFCCP may consider testimony and other documentation that includes indicia that a contractor has made good faith efforts to comply with its equal employment opportunity obligations. For instance, a contractor may provide evidence that it has taken specific actions to advance equal employment opportunity as evidence that it did not discriminate intentionally. A contractor may also show evidence of actions taken to correct discrimination issues that a contractor may have identified during annual reviews of its selection and compensation systems. For disparate treatment cases, OFCCP will consider such evidence in conjunction with other qualitative and quantitative evidence to inform a decision on whether to issue a PDN alleging a pattern and practice of intentional discrimination.

2. Quantitative Evidence

As discussed above, the final rule uses a definition of *quantitative evidence* rather than *statistical evidence* as in the proposed rule. The most important difference is that the definition of *quantitative evidence* is broader than statistical evidence. OFCCP uses a number of quantitative measures to determine whether a particular disparity in employment selection or compensation is sufficiently robust to support a finding of discrimination. The final rule thus clarifies that quantitative comparisons, such as ''cohort analyses,'' and summary data that reflect a contractor's differential selections and/or compensation between similarly situated individuals are included within the definition of ''quantitative evidence.'' OFCCP did not receive any comments suggesting that OFCCP reclassify this type of evidence, likely because the proposed definition of *statistical evidence* was specific to hypothesis-testing techniques. However, OFCCP believes the more exacting distinction in the final rule between quantitatively driven evidence and anecdotal evidence provides greater clarity to stakeholders. Comparative analyses, such as cohort analysis, while quantitative in nature, are distinct from hypothesis-based statistical measures. In some cases, statistical regression analysis cannot be reliably performed due to small sample sizes or the lack of meaningful, quantifiable variables by which to conduct the analysis. OFCCP may use numerical cohort analysis or small group assessment techniques in possible combination with a global test for these cases. The relevant employee group used for the small group analyses will generally align with how the contractor establishes specific positions and job groups, provided the job functions and responsibilities of particular positions are similar. In other circumstances, a general comparison of outcomes shown through simple numeric ratios may demonstrate disparities between the number of individuals hired in comparison to the available pool of qualified applicants in a protected membership class. For example, OFCCP can generally infer hiring discrimination when a contractor's workforce for a particular position is comprised of 95% from one racial group and 5% from all other racial groups combined, yet qualified applicants for that position comprised

[11] *See OFCCP* v. *WMS Solutions, Inc.,* 2015–OFC–09, (Rec. Dec. & Order May 12, 2020).

[12] To be clear, evidence demonstrating that the challenged selection procedure is consistent with business necessity does not need to be provided by OFCCP, but rather by the contractor. Once provided, however, such evidence may be relevant when the agency is determining whether to issue an NOV or SCN.

[13] *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977, 990–91 (1988) (''If an employer's undisciplined system of subjective decision-making has precisely the same effect as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply in both. . . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach. . . .'').

[14] *OFCCP* v. *Bank of America,* 1997–OFC–16, at 14 (Final Dec. & Order Apr. 21, 2016).

50% for the first racial group and 50% for the other racial groups.

OFCCP also uses statistical measures.[15] As described in the NPRM, the most familiar statistical measure is the standard deviation, which represents a standardized measure of the difference between selection rates or compensation between groups. The U.S. Supreme Court has described a disparity as ''suspect to a social scientist'' when a statistic from ''large samples'' falls more than ''two or three standard deviations'' from its expected value under a null hypothesis.[16] In general, the null hypothesis employed by OFCCP for purposes of its regression analyses assumes that the contractor's employment decisions are non-discriminatory and that there are no relevant differences between racial groups or genders in the relevant employee or applicant population after the agency controls for the major, measurable variables used by the contractor in its decision-making.[17] The greater the number of standard deviations, the less likely such a statistical disparity would be produced by chance were the null hypothesis correct, and the more likely the null hypothesis may reasonably be rejected.[18]

To estimate the probability of selection and compensation disparities occurring by chance, OFCCP has historically conducted regression analyses of selection and compensation outcomes, which seek to control for the major, measurable variables used by the contractor in its decision-making. The final rule provides, as did the NPRM, that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements: (1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more); (2) the Z statistic has a value greater than two; or (3) the probability value is less than 0.05.

OFCCP requests information from the contractor regarding the qualifications it seeks in hiring after identifying an initial disparity in selections. Likewise it requests additional information from contractors regarding pay variables after identifying initial indicators. OFCCP uses the information provided by the contractor to perform its regression analyses in an effort to tailor the analyses to each contractor's specific compensation or personnel practices pertaining to groupings of similarly situated individuals. In circumstances where the contractor does not provide such variables, OFCCP will utilize measurable variables generally used by employers in selection and compensation decisions in conducting the regression analysis.

OFCCP may exclude a variable as tainted only when OFCCP determines that the variable reflects underlying discrimination or is being used as pretext. For example, if a contractor's compensation system depends heavily on the amount of revenue an employee brings in, but there is evidence that the contractor directs more lucrative sales prospects to men because they are men, it may be appropriate to exclude a revenue-generation variable in the regression analysis to that extent. Another example may be where there is evidence that a contractor does not apply the variable in a uniform fashion, such as considering or weighing the variable differently for individuals belonging to different demographic groups. OFCCP will disclose any exclusions to the contractor at the time it provides its quantitative analysis and provide the contractor with an opportunity to rebut exclusion of the variable at issue.

For OFCCP to consider the major, measurable parameters and variables that the contractor uses in its selection or compensation practices, the contractor must provide the preferred qualifications that it uses along with sufficient data for OFCCP to include such variables in its regression analysis. OFCCP will assess all of the variables that a contractor provides, including preferred qualifications. If OFCCP concludes that a variable should not be included in its analysis, it will explain why and allow the contractor an opportunity to rebut, as provided in the previous paragraph.

The Department received a few comments specific to the proposed definition of ''statistical evidence'' (now ''quantitative evidence'' in the final rule). The comments suggest that OFCCP should ensure that the definition accounts for all factors impacting an employment or compensation decision, allows OFCCP to tailor models to contractor practices, and groups only similarly situated employees. OFCCP's definition of *quantitative evidence* provides a list of parameters and variables generally used by employers that OFCCP will use in its hypothesis testing. It does not list every conceivable variable, nor is that necessary.[19] With that said, the list included in the definition is not exhaustive, and OFCCP has left the final definition flexible enough to include variables used by contractors in their employment practices. The definition will allow OFCCP to tailor statistical models based on contractor practices and form groups that meet the relevant ''similarly situated'' standard in the context of a potential systemic discrimination case.

Another commenter requested clarification as to whether OFCCP's treatment of statistical evidence applies to only claims of disparate treatment, or also to disparate impact claims. OFCCP applies quantitative evidence, as defined in the final rule, in the same manner for disparate treatment and disparate impact class claims, as both claims require evidence of a disparity between favored and disfavored groups. In addition, for disparate treatment claims, quantitative evidence may support an inference of intentional discrimination, while for disparate impact claims, quantitative evidence may support an inference that a specific policy or practice is causing a disparate impact.

[15] Some examples of the statistical measures that OFCCP may use are the Chi square, Fisher's exact, Z-test, and regression analyses that measure disparities in terms of standard deviations. As discussed further below, OFCCP considers statistical evidence in combination with qualitative evidence and the practical significance of a disparity as part of a comprehensive approach to decision-making about the issuance of pre-enforcement notices.

[16] *See Castaneda* v. *Partida,* 430 U.S. 482, 496 n.17 (1977) (''As a general rule for large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.'')*; see also Hazelwood Sch. Dist.* v. *United States,* 433 U.S. 299, 311 n.17 (1977) (providing that ''a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race'').

[17] To be more precise, the null hypothesis for the statistical regression analyses that OFCCP conducts during its compliance reviews comprises the following three assumptions: (1) The contractor's decisions were made using non-biased criteria, (2) the skills and competencies evaluated by the contractor's non-biased criteria are normally distributed throughout the relevant employee or applicant population without regard to race or gender, and (3) the agency's statistical modeling is able to accurately capture the non-biased criteria used by the contractor in its selection and/or compensation decisions.

[18] *See* David H. Kaye & David A. Freedman, ''Reference Guide on Statistics,'' National Academy of Sciences (2011), *www.fjc.gov/sites/default/files/2012/SciMan3D07.pdf,* at 250–51.

[19] OFCCP need not account for every conceivable variable, *See, e.g., Bazemore* v. *Friday,* 478 U.S. 385, 400 (1986) (''[I]t is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.''); *McClain* v. *Lufkin Indus., Inc.,* 519 F.3d 264, 280 (5th Cir. 2008) (''However, in selecting an appropriate pool and performing regression analysis in Title VII cases, the Supreme Court has taught that a plaintiff's regression analysis need not include 'all measurable variables.'''') (citing *Bazemore,* 478 U.S. at 400); *Mozee* v. *Am. Commercial Marine Serv. Co.,* 940 F.2d 1036, 1045 (7th Cir. 1991) (same).

The Department is aware that its statistical methods have been criticized, including by commenters in this rulemaking.[20] OFCCP uses established statistical methods in its analyses, but nonetheless the Department is considering whether to further examine, either in a rulemaking or in subregulatory guidance, the agency's methodologies, including issues such as variables used, as it did in a 2018 directive on analyzing compensation.[21] However, such a project is outside the scope of this rulemaking.

3. Practical Significance

Practical significance within the framework of equal employment opportunity enforcement refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group.[22] The concept focuses on the contextual impact or importance of the disparity, rather than its likelihood of occurring by chance as in measures of statistical significance. OFCCP uses measures of practical significance as a tool of enforcement discretion to ensure it is targeting the strongest cases in its compliance reviews with the most compelling evidence, as well as a safeguard against the limitations of statistical modeling when attempting to explain complex human phenomena. Modeling need not and cannot capture every facet of human interaction in the workplace, or of contractors' evaluations of employees and applicants; but when outcomes among what appear to be similarly situated individuals differ greatly, OFCCP can be more confident that discrimination at work. Given OFCCP's limited resources, considering practical significance helps the agency ensure that it is directing its efforts effectively. Weighing practical significance as one of the thresholds for issuing pre-enforcement notices is thus an important part of OFCCP's comprehensive approach to compliance evaluations.

Five comments addressed the issue of ''practical significance'' in OFCCP's compliance reviews. One comment recommended against such a definition due to variance among the measures of practical significance used in different employment scenarios, while another comment recommended against requiring practical significance prior to issuing a PDN as it would create an unnecessary barrier to investigating discrimination. Three commenters asked the Department to add a definition to the final rule. Two commenters sought clarity and greater certainty so that contractors would know how the term, as used in the regulation, would be applied. One comment added that a significant shortcoming of the proposed regulation was that it did not require an assessment of practical significance before issuing adverse findings. Another comment specifically requested a definition with express standards that OFCCP would apply in assessing practical significance so that OFCCP's use of practical significance could be part of negotiations with the contractor.

The Department declines to add a specific definition for the term in the final rule because there is not a settled definition in the relevant academic literature and a variety of measures may be appropriate to use in any given case. The Department will continue to evaluate that position and propose a new rulemaking if it determines that such thresholds should be codified. However, in order to provide more clarity for contractors, the Department describes below common types of practical-significance measures and explains the metrics that OFCCP will customarily use moving forward. The Department believes that providing these guidelines for both its compliance officers and contractors will help make OFCCP's compliance reviews more transparent and efficient. These guidelines are particularly useful given that the final rule generally requires that OFCCP find any disparity that forms the basis for an allegation of discrimination to be practically significant before issuing a PDN or NOV.

There is no single, specific measurement of practical significance appropriate to all compensation, hiring, promotion, and termination decisions. There are several common measures of practical significance discussed in scholarly literature from the labor economics field.[23] Some of the measures of practical significance that have been used by OFCCP include size-of-selection shortfall; ''four-fifths rule'' (or ''80 percent rule''); odds ratio; percentage of pay disparity; and the Type II squared semi-partial correlation coefficient. For example, with regard to using the size of shortfall, one practical significance threshold is a shortfall of at least two[24] in a hiring analysis where, based on the number of applicants and hires, the expectation would be for a contractor to have hired at least two additional members of the disfavored group in a neutral selection process. The ''four-fifths rule'' or ''80 percent rule'' is a measure of practical significance that relies on the ''impact ratio''—if the selection rate for a disfavored group is less than 80 percent of the selection rate for the favored group, it is generally considered evidence of adverse impact.[25] Odds ratios can also be used, which refer to the ratio of the odds of one group being selected compared to the odds of another group. Odds ratio takes into account both the selection and rejection rates of the disfavored group and can bolster the statistically significant findings.[26]

In the employment selection context, OFCCP will ordinarily use the impact ratio as its measure of practical significance, which is the ratio of employee selection rates between the disfavored and favored group. The impact ratio is a common measurement of practical significance that has been used since the 1970s.[27] This statistical measure has the advantages of simplicity and clarity.

OFCCP utilizes a sliding scale to assess whether the impact ratio in a particular matter indicates that a disparity is practically significant. OFCCP's determination to issue a pre-enforcement notice depends on the strength of the relevant qualitative and quantitative evidence, as well as whether the disparity is practically significant. OFCCP uses the following thresholds to assess practical significance in the selection context to determine whether to issue pre-enforcement notices:

[20] *See supra* note 8.

[21] Directive 2018–05, ''Analysis of Contractor Compensation Practices During a Compliance Evaluation'' (Aug. 24, 2018).

[22] *See* Practical Significance in EEO Analysis Frequently Asked Questions, Question #5, *www.dol.gov/agencies/ofccp/faqs/practical-significance.*

[23] For an overview of the most common measures of practical significance, see Frederick Oswald, Eric Dunleavy & Amy Shaw, ''Measuring Practical Significance in Adverse Impact Analysis'' in *Adverse Impact Analysis: Understanding Data, Statistics, and Risk,* Scott B. Morris & Eric Dunleavy (Eds.) (2017), *www.researchgate.net/publication/314245607_Measuring_practical_significance_in_adverse_impact_analysis;* and Joseph Gastwirth, ''Some Recurrent Problems in Interpreting Statistical Evidence in Equal Employment Cases,'' *Law, Probability & Risk* (2017).

[24] *OFCCP* v. *TNT Crust,* 2004–OFC–3, at 21 (Order on Liability Sept. 10, 2007) (''Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.'').

[25] 41 CFR 60–3.4(D).

[26] *But see* Kaye & Freedman, *supra* note 18 at 235 (observing that ''[a]lthough the odds ratio has desirable mathematical properties, its meaning may be less clear than that of the selection ratio or the simple difference'').

[27] *See* 41 CFR 60–3.4(D).

Impact Ratio of Selection Rates

> 0.9 Very Unlikely
0.8–0.9 Unlikely
0.7–0.8 Likely
< 0.7 Very Likely

An impact ratio of 0.8 is a frequently cited benchmark in the equal employment opportunity literature for determining whether the impact ratio of a selection disparity is practically significant, as described above, which is why OFCCP adopts it as the hinge point between a likely and unlikely finding of practical significance for selection decisions.[28] For impact ratios below 0.9, OFCCP will apply its discretion in determining whether to issue a pre-enforcement notice according to the strength or weakness of the evidence in particular cases, but the agency will require strong additional supporting evidence when the impact ratio is between 0.8 and 0.9. In addition, because the impact ratio is a less effective statistical measure when selection rates are very small, OFCCP utilizes a 3% disparity between the selection rates of disfavored and favored groups as a general minimum threshold for a finding of practical significance, although there may be situations with very low selection rates, such as a 4% selection rate for the favored group and a 1% selection rate for the disfavored group, where the odds ratio and other evidence would still support a finding of practical significance.[29]

In the compensation context, OFCCP's standard measure of practical significance will be the percentage difference in compensation, which refers to the percentage difference between the mean compensation of employees within the disfavored group in proportion to the mean compensation of employees within the favored group. As with selection rates, OFCCP's determination of whether to issue a pre-enforcement notice depends on the practical significance of the compensation disparity in combination with the strength of the relevant qualitative and quantitative evidence. OFCCP will use the following thresholds to assess practical significance in the compensation context:

Size of Compensation Disparity

< 1% Very Unlikely
1–2% Unlikely
2–5% Likely
> 5% Very Likely

OFCCP has used a 1% compensation disparity as a threshold in some previous interactions with contractors, such that the agency did not proceed with issuing pre-enforcement notices if compensation disparities were below that level. This guidance formalizes that threshold as a clear benchmark for the issuance of pre-enforcement notices. For compensation disparities above 1%, the agency has discretion in determining whether to issue a pre-enforcement notice according to the facts and circumstances of individual cases, but OFCCP will be unlikely to determine that a compensation disparity below 2% is practically significant unless there is additional strong supporting evidence. When compensation disparities are greater than 5%, OFCCP will nearly always find that a compensation disparity is practically significant if the agency also determines that its statistical model is sound. In rare cases, OFCCP may also apply more rigorous practical significance tests to measure the import of compensation disparities, such as the standardized difference between disfavored and favored groups or the Type II squared semi-partial correlation, which help ensure the agency is applying its practical significance standard relatively uniformly across administrative cases.

OFCCP will use the measures above to make an informed decision on the potential strength of the case and whether, in light of the quantitative and qualitative evidence, the size of an observed disparity justifies moving forward with enforcement procedures.

B. Resolution Procedures

This final rule codifies many of OFCCP's currently used procedures with adjustments to provide greater clarity, certainty, and transparency to contractors, to ensure that OFCCP appropriately allocates its resources by proceeding with cases that have solid evidentiary support and meaningful impact, to establish guidelines and guardrails on the agency's issuance of pre-enforcement notices, and to encourage appropriate early resolution with contractors.

OFCCP's Existing Compliance Evaluation and Resolution Procedures

OFCCP determines whether a Federal contractor has met the legal obligations of E.O. 11246, section 503, VEVRAA, and their implementing regulations during a compliance evaluation.[30] The agency uses a neutral selection process to schedule contractors for compliance evaluations.[31] A compliance evaluation consists of one or any combination of the following investigative procedures, as set forth in OFCCP's implementing regulations: A compliance review, an offsite review of records, a compliance check, or a focused review.[32] With the exception of the compliance check, the purpose of which is to determine whether the contractor maintains required records and to provide related compliance assistance, the other types of compliance evaluations that OFCCP undertakes may result in the agency making a preliminary determination, through its collection and analysis of information provided by the contractor, that the information reviewed indicates the contractor has discriminated against members of a protected class in hiring, promotion, termination, compensation, or other employment practices. Because OFCCP evaluates all of a contractor establishment's employment processes, the agency has focused on identifying and resolving systemic discrimination. Findings often are supported by

[28] *See* 41 CFR 60–3.4; Uniform Guidelines on Employee Selection Procedures Section 4D (''A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.'').

[29] For example, if the selection rate of a favored group is 10%, OFCCP will generally not find practical significance unless the selection rate for the disfavored group is 7% or less, even though the impact ratio would be 0.7 (or less). *See, e.g.,* Oswald, Dunleavy, & Shaw, ''Measuring Practical Significance in Adverse Impact Analysis,'' *supra* note 23, at 104 (''The spirit of the [4/5ths] rule [*i.e.* that a selection disparity is not practically significant unless the impact ratio is less than 0.8] can . . . be violated when very small disparities do not satisfy the 4/5ths rule [and thus would be found practically significant]. For example, hiring 3.5% of disadvantaged applicants versus 5% of advantaged applicants is a mere 1.5% difference in selection rates, but is an impact ratio of [0.7] . . . .'').

[30] OFCCP also ensures compliance with these laws by investigating complaints filed by applicants and employees who believe that a Federal contractor discriminated against them. However, the resolution procedures for complaints differ from compliance evaluations and would not be altered by this rule. For complaint resolution procedures, see FCCM Chapter 6 and 41 CFR 60–1.24, 60–300.61, and 60–741.61. The FCCM is available at *www.dol.gov/agencies/ofccp/manual/fccm.*

[31] The majority of OFCCP's compliance evaluations are for supply and service contractors. OFCCP increased the number of contractors on its supply and service scheduling list over the past three fiscal years, from 801 in FY 2017 to 3,500 in FY 2019. The FY 2020 scheduling list is comprised of 2,250 establishments. A description of OFCCP's current scheduling methodology for supply and service contractors is available on the agency's website at *www.dol.gov/sites/dolgov/files/ofccp/scheduling/files/SL20R1_SupplyService_Methodology_FinalFEDQA508c.pdf.* The 2020 scheduling list for construction consists of 200 establishments. A description of OFCCP's current scheduling methodology for construction contractors is available at *www.dol.gov/sites/dolgov/files/ofccp/scheduling/files/SL20R1_Construction_Methodology_FinalFEDQA508c.pdf.*

[32] *See* 41 CFR 60–1.20(a), 60–300.60(a), and 60–741.60(a). The resolution procedures described in this rule do not apply to compliance checks.

statistical evidence, particularly in compliance reviews.

Preliminary findings of discrimination in a compliance evaluation trigger OFCCP's resolution procedures. At the beginning of this process, the agency discusses its preliminary findings with the contractor. This discussion also serves to familiarize the contractor with OFCCP's resolution procedures, including the agency's current options for early resolution.[33] If the preliminary findings are not resolved at that stage, OFCCP formalizes the preliminary findings in a PDN, a letter that is sent to the contractor following review and approval by the Director or acting agency head.[34] To determine whether the evidence of discrimination is sufficient to warrant a PDN, OFCCP considers whether a disparity identified during the compliance evaluation is practically significant and whether quantitative evidence and qualitative evidence supports the preliminary finding. OFCCP will always seek out qualitative evidence during compliance evaluations, regardless of the strength of the quantitative evidence. As discussed more fully below, there may be factors applicable in a particular case that explain why OFCCP could not obtain either quantitative or qualitative evidence during its evaluation.

OFCCP issues the PDN to encourage communication with contractors and provide them an opportunity to respond to preliminary findings prior to the issuance of a more formal NOV. If a contractor does not sufficiently rebut the preliminary findings identified in the PDN that evidence of unlawful discrimination exists, OFCCP issues the NOV following approval by the Director or acting agency head to notify the contractor that the agency found discrimination violations of one or more of the laws it enforces. Under this final rule, the PDN will explain the basis for the agency's preliminary findings, *i.e.,* by identifying the statistically significant disparity or other quantitative evidence, describing the practical significance of that disparity, and describing how the relevant qualitative evidence supports the particular theory of discrimination. Upon request, OFCCP will also provide contractors with information sufficient to recreate the agency's quantitative findings and in some cases may be able to do so even before the PDN has been issued. Contractors are invited to respond to the PDN, and the agency must consider the response in determining whether to issue an NOV.

The NOV lists the corrective actions that are required to resolve those violations, and invites conciliation. OFCCP responds in the NOV (or in a simultaneously provided reply) to any new arguments or information raised by the contractor in its PDN response.[35] After issuing the NOV, OFCCP generally pursues a written conciliation agreement with any contractor willing to correct the violation or deficiency identified in the NOV.[36] A conciliation agreement is a binding written agreement between a contractor and OFCCP that details specific contractor commitments, actions, or both that it will undertake in order to resolve the violations set forth in the agreement. Conciliation agreements were codified in OFCCP's regulations in 1979. OFCCP is committed to active engagement with the contractor to conciliate a matter, and has issued directives detailing how the agency will prioritize the efficient resolution of violations it finds in its compliance evaluations.[37] If the contractor is unwilling to enter into a conciliation agreement to correct the violations, OFCCP issues a Show Cause Notice (SCN) requiring the contractor to provide reasons demonstrating why formal enforcement proceedings by the Solicitor of Labor or other appropriate action should not be instituted.

Material violations that are not discriminatory in nature also trigger OFCCP's resolution procedures for compliance evaluations. Rather than initiating resolution with a PDN for violations that do not involve discrimination, OFCCP generally begins the process with an NOV before proceeding to a conciliation agreement,[38] or the SCN as a last resort. For cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters, OFCCP issues the SCN without first issuing an NOV for material violations that are non-discriminatory in nature; as discussed more fully later in this preamble, this practice will continue under this final rule.[39]

Recently, OFCCP has promoted the efficient resolution of material violations for multi-establishment Federal contractors with early resolution procedures laid out in an agency directive.[40] These procedures allow OFCCP and contractors to work together to resolve violations or indications of violations without resorting to formal process, including litigation before an administrative law judge.

In addition, OFCCP has recently prioritized alternative dispute resolution to help resolve cases at the conciliation or pre-litigation phase, which ensures prompt remedies and avoids the delay, expense, and uncertainty of litigation. OFCCP has established an Ombuds Service that can help facilitate settlement discussions at the conciliation stage, as well as a Pre-Referral Mediation Program that provides for a full pre-litigation administrative mediation following an SCN and prior to referral to the Solicitor of Labor. Although the rule text does not directly address the Ombuds Service or Pre-Referral Mediation Program, these programs are compatible and consistent with the goals and procedures established by the rule, and the agency intends to continue providing both programs in conjunction with these procedures.

[33] OFCCP prioritizes the early and efficient resolution of potential discrimination. *See* Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018), *www.dol.gov/agencies/ofccp/directives/2019–02.* The rule does not codify OFCCP's early resolution procedures themselves. It does, however, provide a framework for OFCCP and contractors to explore expedited conciliation options, such as the early resolution procedures set forth in Directive 2019–02.

[34] *See* Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018). OFCCP issued this directive to ensure that PDNs be used in all compliance evaluations with preliminary discrimination findings, both individual and systemic. Directive 2018–01 is available at *www.dol.gov/agencies/ofccp/directives/2018–01.* Prior to the directive, use of PDNs was discretionary and reserved for systemic discrimination findings. *See* FCCM, Chapter 8 (detailing the procedures that OFCCP follows for issuing PDNs).

[35] *See* FCCM, Chapter 8; *see also* FCCM, Key Terms and Phrases.

[36] In rare circumstances, OFCCP may determine that settlement is not appropriate and refer a matter at this stage directly to the Office of the Solicitor of Labor to pursue formal enforcement proceedings rather than pursuing a conciliation agreement. *See* 41 CFR 60–1.26(b), 60–300.62, 60–300.65(a), 60–741.62(a), 60–741.65(a). OFCCP strongly disfavors this route.

[37] *See* Directive 2020–02, ''Efficiency in Compliance Evaluations'' (Apr. 17, 2020), *www.dol.gov/agencies/ofccp/directives/2020-02;* Directive 2020–03, ''Pre-Referral Mediation Program'' (Apr. 17, 2020), *www.dol.gov/agencies/ofccp/directives/2020-03.*

[38] FCCM, Chapter 8F00; FCCM, Chapter 8H00. For example, OFCCP may issue an NOV and enter into a conciliation agreement for failure to maintain records in accordance with 41 CFR 60–1.12, 60–300.80, and 60–741.80, or for failure to maintain affirmative action programs as required by 41 CFR part 60–2, 41 CFR part 60–300, subpart C, and 41 CFR part 60–741, subpart C.

[39] *See* FCCM, Chapter 8D01 (explaining that OFCCP issues the SCN without first issuing an NOV when a contractor fails to provide the records, information, or data requested in the scheduling letter and when the contractor refuses to provide access to its premises for an onsite review).

[40] *See* Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018), *www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm.*

Resolution Procedures Provisions of the Final Rule

The Department proposed in the NPRM to codify many of OFCCP's resolution procedures in its E.O. 11246, section 503, and VEVRAA regulations at 41 CFR parts 60–1, 60–300, and 60–741, respectively. The proposed regulatory text was the same in each part, except that one subparagraph of the section 503 regulations, at 41 CFR 60–741.62(b), retains an existing provision concerning remedial benchmarks specific to the section 503 regulatory scheme that is not present in the other parts.

Specifically, the Department proposed to codify the procedures that OFCCP follows when determining whether to issue a PDN or NOV for discrimination and other material violations. As a matter of enforcement discretion and prioritization of resources, the Department proposed issuing a PDN only after considering statistical evidence, practical significance, and nonstatistical evidence. Additionally, under the proposed rule, OFCCP would have only issued a PDN without nonstatistical evidence when OFCCP's statistical evidence indicates a confidence level of 99% or higher, which equates to three or more standard deviations or a p value of 0.01 or less. Furthermore, the Department proposed to codify the availability of an expedited conciliation option.[41]

The Department has decided to finalize the early conciliation option and the codification of its PDN and NOV procedures with changes from the proposed rule, as noted above. To repeat, the significant changes are that the final rule clarifies that issuance of NOVs is governed by the same evidentiary standards as issuance of PDNs; clarifies the standards OFCCP uses when determining whether to issue a pre-enforcement notice under a disparate treatment and/or disparate impact theory of discrimination; requires OFCCP to provide qualitative evidence supporting a finding of discriminatory intent to proceed under a disparate treatment theory, subject to certain enumerated exceptions; requires OFCCP to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect to issue a PDN or NOV under a disparate impact theory; explains that OFCCP must explain in detail the basis for its finding (including, if applicable and as described further below, the reasons for any lack of qualitative evidence) and obtain the Director's (or acting agency head's) approval to issue a PDN or NOV; and provides that, upon the contractor's request, OFCCP will provide the model and variables used in its statistical analysis and an explanation for any variable that was excluded from the statistical analysis.

In the rest of this section, the Department describes the final rule's resolution procedures, including the changes from the NPRM, and responds to relevant comments. The Department refers to the section and paragraph numbers in 41 CFR 60–1.33, which concerns E.O. 11246. As described below, the Department adopts the same provisions in the regulations for VEVRAA (41 CFR part 60–300) and section 503 (41 CFR part 60–741).

1. Predetermination Notice

Section 60–1.33(a) of the final rule allows OFCCP to issue a PDN if a compliance evaluation indicates evidence sufficient to support a preliminary finding of disparate treatment or disparate impact,[42] subject to certain parameters, which are discussed below.[43] Multiple commenters sought clarity on what thresholds OFCCP would use in evaluating evidence supporting an allegation of disparate impact discrimination. The final rule provides clarity by providing distinct provisions for disparate treatment and disparate impact claims. It also requires the OFCCP Director or acting agency head to approve issuance of a PDN.

(a) Disparate Treatment Theory of Liability

Subject to certain exceptions discussed below, paragraph (a)(1) provides that OFCCP may issue a PDN under a disparate treatment theory of liability if the agency (i) provides quantitative evidence; (ii) demonstrates that the unexplained disparity is practically significant; and (iii) provides qualitative evidence that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

The NPRM would have required nonstatistical evidence if OFCCP's statistical evidence indicated a disparity of less than three standard deviations and, conversely, would have allowed claims to proceed without nonstatistical evidence if OFCCP's statistical evidence indicated a disparity of three standard deviations or greater. The Department has decided to require qualitative evidence in all disparate treatment cases as the general default. Qualitative evidence is very important to support a preliminary finding of intentional discrimination, which is a fundamental element of disparate treatment claims. Indeed, in some instances qualitative evidence is direct, powerful, and on its own can prove disparate treatment. Quantitative evidence of statistical significance alone, by contrast, can only provide an inference of intent because at base it is able to prove only that, if the null hypothesis is correct, then the observed outcome is highly unlikely to have occurred by chance. It thus remains possible that the observed statistical disparities were the result of something other than unlawful discrimination.[44] Nevertheless, statistical evidence can be important evidence because it assesses actions taken by the company over a course of time and across multiple employees, which may be indicative of discriminatory intent.[45] The final rule thus clarifies that there is no set quantum of qualitative evidence; rather,

[41] The Department did not propose to codify OFCCP's early resolution procedures per se. Rather, the NPRM acknowledged the early resolution option, which is governed by agency directives.

[42] Here and elsewhere in this final rule, references to evidence sufficient to support a preliminary finding or finding of disparate treatment or disparate impact refer to the amount of evidence OFCCP requires to continue forward with its review. Whether the evidence is sufficient to pursue formal enforcement proceedings is a separate and later determination made by the Solicitor of Labor.

[43] One commenter recommended that OFCCP make PDNs mandatory rather than discretionary in cases involving discrimination. OFCCP made this policy change in 2018 with Directive 2018–01, the stated purpose of which is to ''establish the consistent use of PDNs for discrimination cases, both individual and systemic.'' Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018), *www.dol.gov/agencies/ofccp/directives/2018-01.* Since then, the change has been embedded in the FCCM and now this final rule.

[44] *See supra* note 16. It is important to remember that a rejection of the null hypothesis due to the magnitude of a statistical disparity does not by itself mean that an alternative hypothesis—for example, that a contractor discriminated against its applicants or employees—is true. Instead, other assumptions underlying the null hypothesis (*see supra* note 17) could be flawed, and/or there may be alternative hypotheses that explain the data. *See, e.g.,* Kaye & Freedman, *supra* note 18, at 257; *see also Coleman* v. *Quaker Oats Co.,* 232 F.3d 1271, 1283 (9th Cir. 2000) (finding a disparity with a p-value of ''3 in 100 billion'' did not demonstrate age discrimination because the defendant ''never contend[ed] that the disparity occurred by chance, just that it did not occur for discriminatory reasons. When other pertinent variables were factored in, the statistical disparity diminished and finally disappeared''). Nevertheless, if there is a plausible alternative explanation, the factual basis for such explanation should be identified by the contractor during its audit so that the alternative may be included in OFCCP's model.

[45] Of course, in cases where there have been findings of discrimination, quantitative evidence may also demonstrate the harm suffered by the affected class.

the required strength of the qualitative evidence depends on the strength of the quantitative evidence and the extent of the practical significance.

As discussed above, the Department's definition of *quantitative evidence* includes nonstatistical, but quantitative, analysis such as cohort analyses. Subject to the enumerated exceptions in the final rule, qualitative evidence must also be present for OFCCP to issue a pre-enforcement notice in cases where OFCCP is relying on nonstatistical quantitative evidence for the same reason that qualitative evidence is required where OFCCP is relying on statistical evidence. Nonstatistical quantitative comparisons can also be used by OFCCP to support other statistical evidence that shows statistically significant disparities; however, OFCCP must also have qualitative evidence to proceed with the issuance of pre-enforcement notices in such cases unless one of the final rule's enumerated exceptions applies.

Paragraph (a)(2) provides three exceptions to paragraph (a)(1)'s general criteria that OFCCP must satisfy when it alleges findings or preliminary findings of disparate treatment discrimination. The three exceptions encompass situations where the Department believes it is a worthwhile use of OFCCP's resources to proceed with a case despite not satisfying all three requirements of paragraph (a)(1). For the reasons stated above relating to the importance of qualitative evidence, the Department has not adopted the NPRM's proposal to allow PDNs to be issued on the basis of statistical evidence alone when the disparity shown was three standard deviations or more. However, as discussed more fully below, one of the exceptions allows OFCCP to proceed with a case if the agency finds an extraordinarily compelling disparity. In that situation, the reasons for requiring qualitative evidence have less force, and OFCCP deems it appropriate to continue without qualitative evidence.

Paragraph (a)(2)(i) ensures that OFCCP can move forward with issuing a PDN when the qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment, regardless of quantitative evidence.[46] For example, during a compliance review or focused review OFCCP could uncover direct evidence that a contractor took adverse employment action against a protected group of employees, or circumstantial evidence that, *e.g.,* members of a protected group with superior qualifications were denied selections that were awarded to similarly situated members of another group with inferior qualifications. If this evidence were sufficiently strong, OFCCP should be able to move forward with a PDN without findings of statistical and practical significance, and paragraph (a)(2)(i) makes sure the agency has that flexibility.

Paragraph (a)(2)(ii) is designed to capture the ''inexorable zero'' concept from Title VII case law and other rare situations where the numerical disparities are so overwhelming that, in OFCCP's judgment, additional evidence of discriminatory intent is unnecessary to support a preliminary finding.[47] In the context of an OFCCP compliance evaluation, this could occur, *e.g.,* when the disparity in selections for a given job between a favored and disfavored group is so extraordinarily compelling that by itself the evidence strongly supports a preliminary finding of disparate treatment. For example, a court in a famous Title VII case found the ''inexorable zero'' standard satisfied by a trucking company that had hired 57 white truckers in Atlanta but no black truckers—even though at the time Atlanta was 22% African-American—and in Los Angeles had hired 372 white truckers but only two black truckers.[48]

The Department believes this safety valve for overwhelming quantitative evidence is appropriate for OFCCP's enforcement strategy. Nevertheless, the Department declines to lift the requirement for qualitative evidence in other cases. The Department acknowledges that the requirement for qualitative evidence in all other cases is neither compelled nor prohibited by Title VII case law. This is by design and central to the purpose of this rule. The Department is sensitive to past criticisms that OFCCP over-relied on statistical modeling or used models that did not properly account for contractors' legitimate, nondiscriminatory employment practices. The Department also wants to direct OFCCP's resources to the most compelling cases and those most likely to have a practical impact. Requiring qualitative evidence responds to those criticisms and better directs OFCCP's efforts. This requirement helps ensure that OFCCP's cases are well-grounded in fact, that its presentations are likely to be persuasive in resolution efforts, that its referrals for litigation are credible, and that it is using its resources effectively. This is also consistent with the view of commenters who argued that solely relying on statistical evidence is rarely appropriate in disparate treatment cases (where discriminatory intent must be established as the cause of the disparate treatment), and thus should be reserved for only egregious cases.[49] As stated previously, OFCCP will seek to develop supporting qualitative evidence in all of its cases, including those with gross numerical or statistical disparities. In those rare circumstances where OFCCP issues a PDN based on evidence of extraordinary numerical or statistical disparities and no supporting qualitative evidence, OFCCP will provide an explanation for the lack of qualitative evidence and justification for the agency's decision to proceed with resolution procedures in the PDN, allowing the contractor an opportunity to respond.

Finally, paragraph (a)(2)(iii) is an exception clarifying that OFCCP may issue a PDN in the absence of qualitative evidence if the contractor has prevented OFCCP from compiling qualitative evidence. For example, OFCCP may proceed without qualitative evidence if the contractor has prevented OFCCP from interviewing employees who may have knowledge of facts relevant to a preliminary indicator of discrimination during compliance evaluations, or has destroyed or failed to produce personnel or employment records that similarly may have contained information relevant to a preliminary indicator of discrimination.[50] The Department

[46] *See supra* note 42. This is how individual discrimination cases are traditionally proven. *See McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) (describing traditional burden-shifting analysis under Title VII); *see also Desert Palace Inc.* v. *Costa,* 539 U.S. 90 (2003) (describing the burden of proof in mixed-motive cases under Title VII).

[47] *Cf. Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 342 n.23 (1977) (''[The] fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.' '') (citing *United States* v. *T.I.M.E.-D.C. Inc.,* 517 F.2d 299, 315 (5th Cir. 1975)); *Valentino* v. *U.S. Postal Serv.,* 674 F.2d 56, 72–73 (D.C. Cir. 1982) (''small numbers are not per se useless, especially if the disparity shown is egregious. The 'inexorable zero' can raise an inference of discrimination even if the subgroup analyzed is relatively small.''); *cf. also Hazelwood Sch. Dist.,* 433 U.S. at 307–08 (''Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.'') (citing *Int'l Bhd. of Teamsters,* 431 U.S. at 339)); *Analogic Corp.,* 2017–OFC–00001, at 39 (''Courts have held evidence of gross statistical disparity alone may be sufficient to establish a pattern and practice case of intentional discrimination.'').

[48] See *T.I.M.E.-D.C., Inc.,* 517 F.2d at 315 n.29, *vacated on other grounds,* 431 U.S. 324 (1977) (vacating judgment with respect to individual relief but otherwise upholding the 5th Circuit's finding regarding the ''inexorable zero'' standard).

[49] *Supra* note 47.

[50] *See* 41 CFR 60–1.12(e), 60–1.43, 60–3.15, 60–300.80–81, and 60–741.80–81.

believes this exception is necessary to avoid creating an incentive for contractors not to comply with OFCCP compliance evaluations.

(b) Disparate Impact Theory of Liability

Paragraph (a)(3) sets out OFCCP's evidentiary standard for findings or preliminary findings of discrimination premised on a disparate impact theory. Title VII's statutory text, as well as interpretive case law, requires not only that the plaintiff must demonstrate the existence of an adverse impact on a protected group, but that it must identify the particular employment practice causing that impact, unless the elements of the employer's decision-making process cannot be separated for analysis.[51] For findings of discrimination premised on a disparate impact theory, paragraph (a)(3) therefore requires OFCCP to first demonstrate that a disparity has both sufficient quantitative evidence and is practically significant (paragraphs (a)(3)(i) and (ii)), and second to identify the policy or practice of the contractor causing the disparate impact (paragraph (a)(3)(iii)).[52] As the Supreme Court has said, disparate-impact liability is concerned not with statistical imbalances alone but on the eradication of policies that form ''artificial, arbitrary, and unnecessary barriers'' to disfavored groups.[53]

OFCCP received a few comments seeking clarity on whether the evidentiary thresholds for issuance of a PDN apply to disparate impact findings or just disparate treatment findings and stating that statistical evidence is only relevant to disparate treatment because the NPRM suggested that statistical evidence can support an inference of discriminatory intent. The quantitative evidence and practical significance requirements apply to findings and preliminary findings of disparate impact. The Department here requires the same level of quantitative evidence as it does for disparate treatment claims—in both kinds of cases, typically a two-standard-deviation showing of disparate results after accounting for relevant variables to establish a statistically significant disparity. OFCCP also requires practical significance for the same reasons it requires it for disparate treatment claims: to prioritize agency resources, to be especially confident in its statistical findings, and to ensure it is bringing compelling cases.[54]

For disparate impact cases, the PDN must also specifically identify the policy or practice that is causing an adverse impact,[55] and provide factual support to explain how the particular policy or practice is causing the discriminatory effect. This is typically accomplished using statistical evidence to demonstrate that the identified policy or practice specifically is causing the disparity. However, consistent with the Title VII statute and relevant case law, if the elements of the decision-making process cannot be separated for analysis, OFCCP may issue the PDN without identifying the exact step causing disparate impact.[56] This could include, for instance, if a contractor has destroyed or failed to maintain records of its employment policies or processes preventing OFCCP from analyzing specific steps of the process. OFCCP expects to invoke this exception rarely.

(c) Disclosure to Contractors

Multiple comments asked OFCCP to provide more descriptive detail on the evidence that supports preliminary findings in the PDN, to include the type of employment action resulting in a preliminary finding, and to provide enough information so the contractor can investigate the preliminary findings and respond. The agency has taken significant steps in recent years to be more transparent and believes that the level of specificity that contractors seek is already required by the FCCM and recent directives.[57] To provide greater certainty, the agency recommits specifically to be transparent in disclosing the quantitative evidence, the determination of potential significance, and a summary of the relevant qualitative evidence OFCCP has accumulated, where applicable. Paragraph (a)(4) requires that the PDN disclose the quantitative and qualitative evidence relied upon by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. The PDN also must contain an explanation for the agency's finding of practical significance. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or if providing that information would otherwise violate confidentiality or privacy protections afforded by law. As stated previously, when the exception

[51] 42 U.S.C. 2000e(k)(1). *See generally Ricci* v. *DeStefano,* 557 U.S. 557, 577–78 (2009).

[52] Consistent with note42, *supra,* the final rule does not require OFCCP, at the PDN stage, to provide evidence that would rebut the contractor's burden of demonstrating that the selection procedure in question has been properly validated. This is in part because, under OFCCP's regulations, a contractor is not required to validate selection procedures until it is aware of an adverse impact, *see* 41 CFR 60–3.4(C), which it may not be until OFCCP issues the PDN.

[53] *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.,* 576 U.S. 519, 543 (2015) (quoting *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971)); *see also id.* at 542 (''[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.'') (quoting *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642, 653 (1989)). Although *Inclusive Communities* involved a disparate impact claim under the federal Fair Housing Act, courts have applied the case in the Title VII context as well. *See, e.g., Davis* v. *District of Columbia,* 925 F.3d 1240, 1251 (D.C. Cir. 2019); *Gagliano* v. *Mabus,* No. 15–cv–2299, 2019 WL 3306293, at *2 (S.D. Cal. July 23, 2019); *see also Inclusive Communities,* 576 U.S. at 539–40 (describing the analysis required under the FHA as analogous to the disparate impact standard under Title VII).

[54] Of course, quantitative evidence also demonstrates that a disparity exists.

[55] 41 CFR 60–3.3A; *see also Analogic Corp.,* 2017–OFC–00001, at 31 (''In order to establish a disparate impact violation, OFCCP must demonstrate Analogic 'uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic.]'') (citing 42 U.S.C. 2000e–2(k)(1)(A)(i); *Wal-Mart Stores Inc.* v. *Dukes,* 564 U.S. 338 (2011); *Wards Cove Packaging Co.,* 490 U.S. at 657; *Connecticut* v. *Teal,* 457 U.S. 440, 446 (1982); *Robinson* v. *Metro-North Commuter R.R. Co.,* 267 F.3d 147, 160 (2d Cir. 2001)); *see also Griggs,* 401 U.S. at 431 (''[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.''); *see also TNT Crust,* 2004–OFC–3, at 35 (finding employer discriminated against Hispanic applicants by requiring that laborers possess basic English skills, which resulted in an adverse impact and was not demonstrably related to legitimate business necessities) (citing *Griggs,* 401 U.S. at 431–32)).

[56] 42 U.S.C. 2000e–(k)(1)(B)(i); *see also Analogic Corp.,* 2017–OFC–00001, at 33 (''Courts have determined the Title VII exception to the general rule requiring a plaintiff to identify a specific employment practice caused the disparity is applicable only when the plaintiff has demonstrated the elements of the decision-making process cannot be separated for analysis.'') (citing *Davis* v. *Cintas Corp.,* 717 F.3d 476, 496 (6th Cir. 2013); *Bennett* v. *Nucor Corp.,* 656 F.3d 892, 817–18 (8th Cir. 2011)); *Lufkin Indus., Inc.,* 519 F.3d at 278 (collecting cases in which courts found employment practices were ''not capable of separation for analysis'').

[57] Chapter 8E01 of the FCCM states, ''[The PDN] description will include identification of the discrimination victim(s), *e.g.,* the affected class or individual(s); the employment action(s) giving rise to the preliminary findings; and the basis for the liability determination (*e.g.,* disparate treatment in the selection of minority technicians). The PDN should also include facts and the results of analyses that support the preliminary determination and recommended remedies. Typically, the PDN includes the magnitude of the impact in terms of shortfalls or pay disparities and the measure of statistical certainty (*e.g.,* standard deviation).'' *See also* FCCM, Letter L–35. OFCCP also provides guidance on what to communicate to contractors in Directive 2018–08, ''Transparency in OFCCP Compliance Activities'' (Sept. 2018), *www.dol.gov/agencies/ofccp/directives/2018-08,* and Directive 2018–05, *see supra* note 21.

in paragraph (a)(2)(ii) applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the PDN based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in its statistical analysis and an explanation for why any variable proposed by the contractor was excluded from the statistical analysis.

One commenter sought clarity on how OFCCP weighs evidence provided by the contractor to rebut preliminary findings. However, further guidance on the weighing of that kind of evidence is not well-suited to regulatory text, as how OFCCP evaluates a contractor's response depends on the particular facts under review in each case. That same commenter expressed concern regarding the amount of qualitative evidence required before issuing a PDN and asked OFCCP to include language in the final rule to quantify how much nonstatistical evidence is needed for OFCCP to make a preliminary finding. As discussed previously, the amount of evidence available—as well as its quality, credibility, and content, which may range from innocuous to very concerning—will depend on the facts of each compliance evaluation, and it is impracticable for OFCCP to prescribe a set volume or specific characteristics of qualitative evidence that would be sufficient in every conceivable evaluation. The evidence OFCCP examines and chooses to reject or rely upon will be based on the overall facts and circumstances of each particular case. The PDN will provide sufficient information to contractors to be able to understand OFCCP's finding and to meaningfully respond.

Similarly, the Department received comments seeking a definition for ''material'' violation and clarity on what the agency considers ''preliminary findings.'' The Department did not propose these definitions in the NPRM and declines to add definitions for these terms to the final rule. Definitions for the terms are not needed. The final rule provides significant clarity regarding, and guardrails for issuing, pre-enforcement notices. To the extent commenters were concerned with material but non-discriminatory violations, (*e.g.,* recordkeeping, failure to implement audit and reporting systems), those also trigger OFCCP's resolution procedures for compliance evaluations.[58] Rather than sending a PDN for potential violations that do not involve discrimination, OFCCP generally sends an NOV before proceeding to a conciliation agreement, or the SCN as a last resort.[59] This final rule codifies use of the NOV for all material violations, with the exception of cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters. For those cases, OFCCP will continue its current practice of proceeding directly to issuing an SCN to expedite resolution of those issues.

(d) Response Deadline

In response to several comments, paragraph (a)(5) of the final rule increases the time for contractors to respond to a PDN from 15 to 30 days with the possibility of an extension. OFCCP believes that with all of the information being provided to a contractor in the PDN, including the summary of evidence, and the option to request additional information about the statistical analysis, that a contractor will likely need 30 days to respond, with the possibility of an extension for good cause shown.

2. Notice of Violation

Section 60–1.33(b) of the final rule governs NOVs. The Department did not receive any comments solely concerning the NOV, with some commenters generally addressing both the PDN and NOV thresholds. Nevertheless, the Department has decided to revise § 60–1.33(b) to make it clear that NOVs alleging discrimination findings are subject to the same requirements as PDNs, and that OFCCP will fully consider the arguments raised and information provided by contractors in response to PDNs.

Section 60–1.33(b)(1) explains that OFCCP may issue an NOV if, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5), the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination,[60] or that the contractor has committed other material violations of the equal opportunity clause. The NOV informs the contractor that corrective action is required and invites conciliation through a written agreement. This section also requires the OFCCP Director or acting agency head to approve an NOV before it is issued.

Paragraph (b)(1) codifies use of the NOV for all material violations. An NOV is the first formal notification a contractor receives for a material violation that does not involve discrimination. However, consistent with current OFCCP policy and practice, the final rule allows OFCCP to proceed straight to a SCN if the asserted violation is that the contractor has denied OFCCP access to individuals or documents or otherwise failed to submit information requested in OFCCP's OMB-approved scheduling letters. These types of violations require expedited treatment because they directly inhibit OFCCP's compliance evaluations and cause delays in resolution of those evaluations. The Department did not intend for the NPRM to require an NOV for these types of violations and makes the exception explicit in the final rule.

Paragraphs (b)(2) through (4) govern specifically NOVs that allege a finding of discrimination. Paragraph (b)(2) provides that OFCCP will only issue an NOV alleging a finding of discrimination if the contractor has not sufficiently rebutted the preliminary findings identified in the PDN or if the contractor failed to respond. Paragraph (b)(3) clarifies that the requirements for issuing a PDN also apply to an NOV alleging a discrimination violation. Finally, paragraph (b)(4) clarifies that OFCCP must reasonably address all concerns and defenses raised by the contractor in response to the PDN.

3. Show Cause Notice

SCNs are governed by existing sections in the Code of Federal Regulations.[61] The Department did not propose to revise those sections and does not now adopt any revisions.

OFCCP may issue SCNs when the OFCCP Director has reasonable cause to believe that a contractor has violated an equal opportunity clause. As noted above, the final rule retains OFCCP's ability, consistent with current practice, to proceed directly to issuing a SCN for cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters. In discrimination cases, SCNs generally follow issuance of an NOV

[58] FCCM, Chapter 8F00; FCCM, Chapter 8H00. For example, OFCCP may issue an NOV and enter into a conciliation agreement for failure to maintain records in accordance with 41 CFR 60–1.12, 60–300.80, and 60–741.80, or for failure to maintain affirmative action programs as required by 41 CFR part 60–2, 41 CFR part 60–300, subpart C, and 41 CFR part 60–741, subpart C.

[59] In some instances, OFCCP issues the SCN without first issuing an NOV for material violations that are non-discriminatory in nature. *See* FCCM, Chapter 8D01 (explaining that OFCCP issues the SCN without first issuing an NOV when a contractor fails to provide the records, information, or data requested in the scheduling letter and when the contractor refuses to provide access to its premises for an onsite review).

[60] *See* note 42, *supra.*

[61] 41 CFR 60–1.28, 60–300.64, and 60–741.64.

and the contractor's rejection of OFCCP's offer to conciliate or a failure of conciliation. Notwithstanding a rejection or failure of conciliation, pre-referral mediation remains a viable option for contractors who have received a SCN. If a contractor raises new or different information or arguments in response to an NOV, the agency's policy is to address those issues before or coincident with issuing a SCN. The Department notes the evidentiary standards that must be met in order to issue PDNs and NOVs in discrimination cases must also be met in order to issue a SCN in such cases; this is the most reasonable reading of the regulation's current requirement that the Director must have ''reasonable cause'' to believe a violation has occurred in order to issue a SCN, so no change to the regulatory text is needed. The Department also notes that meeting the evidentiary standards for issuing PDNs and NOVs does not necessarily mean that a case is legally sufficient to initiate litigation. The Solicitor of Labor retains authority to pursue formal enforcement proceedings and will do so only after determining that the required legal elements of a disparate treatment and/or disparate impact claim, as relevant, are satisfied.

4. Conciliation Agreements

Before this rule, § 60–1.33 provided for conciliation agreements. The Department has retained this provision without substantive change as § 60–1.33(c) of the final rule.[62]

5. Expedited Conciliation Option

This rule clarifies in § 60–1.33(d) that Federal contractors have the option to bypass the PDN and NOV procedures to enter directly into a conciliation agreement when there are preliminary findings of material violations, regardless of whether those violations involve discrimination. This option for conciliation may suit contractors who wish to expedite the resolution of discrimination or other material violations. Recently, OFCCP has sought to promote the efficient resolution of material violations for multi-establishment Federal contractors with early resolution procedures.[63] The final rule furthers the agency's efforts to improve efficiency and prioritize early resolution of cases by codifying an expedited option for resolution that would apply to compliance reviews in their early stages.

The Department received six comments relevant to the expedited conciliation option. One contractor organization specifically asked OFCCP to endorse use of the Early Resolution Procedures (ERP) and Early Resolution Conciliation Agreements (ERCAs) in its final rule and codify the process. While the Department fully endorses use of ERP and ERCAs as an expedited conciliation option, and the agency intends to continue using this option where a contractor is interested, it declines to codify the procedures at this time. OFCCP only recently began using ERP and ERCAs to promote corporate-wide compliance, and the procedures are still evolving as the program matures. Under the current procedures, OFCCP may alert contractors of their option to conciliate even before the agency issues a PDN, and the contractor has the option to initiate the resolution procedures. If material violations exist, the contractor may agree to participate in ERP, ultimately resulting in an ERCA. The agency will continue to provide subregulatory guidance on these procedures as the program develops.

One commenter requested establishment of a pre-PDN conference between the contractor and the agency to discuss the issues that OFCCP intends to identify in the PDN. OFCCP's current practice is to engage in the equivalent of a pre-PDN conference through regular contact with the contractor, and the agency is committed to continuing to do so.[64] Likewise, the ERP process requires a pre-PDN conference to discuss the potential ERCA if a contractor expresses interest in pursuing one. However, the Department believes it is premature to require a pre-PDN conference in all matters. Between the PDN, NOV, and SCN, there already are three mandatory notices that provide the contractor information about OFCCP's findings (or preliminary findings) of discrimination, as well as opportunities for the contractor to respond to each one, before a matter is referred for enforcement. Adding another step would likely add unnecessary delay. Moreover, OFCCP already offers early conciliation as well as its Ombuds Service for assistance with complaints about the agency's conduct. The agency will continue to evaluate whether a mandatory formal pre-PDN conference would be helpful, but declines to adopt that procedure at this time.

Other comments expressed concern that the early resolution option would coerce contractors into conciliation by combining data from multiple establishments and that OFCCP would use the early resolution option as a way, in the words of one commenter, ''to circumvent legal standards by OFCCP personnel through initiation of discussions about resolution of merely 'potential' employment discrimination that does not meet legal standards.'' OFCCP does not and will not use early resolution procedures to coerce contractors or to circumvent legal standards, and the Department has revised § 60–1.33(d) to make it clear that contractors' participation must be voluntary. This language should not be interpreted to be coercive. It is intended to be permissive. One commenter further suggested that the Department should not allow OFCCP staff to initiate discussions about expedited conciliation options. While the Department appreciates the commenter's concern, the Department believes that allowing OFCCP staff to inform contractors that expedited conciliation is an available option is important to ensure that contractors are aware of that option. However, the final rule clarifies that OFCCP staff may not require or insist that the contractor avail itself of the expedited conciliation option. OFCCP's headquarters office also provides oversight of early resolution conciliations to ensure a degree of consistency in their content. Finally, OFCCP declines to change the label of this section, as suggested by one comment.

6. Severability

The Department has decided to include a severability provision as part of this final rule. To the extent that any provision of this final rule is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

C. Miscellaneous Comments

A number of comments are not addressed above because they are not directly germane to the provisions of the final rule. Eight comments were not posted to *Regulations.gov* either because of lack of relevance to the proposed rule or because they were exact duplicates of an already posted comment. One comment was withdrawn after posting because the submitter subsequently provided a revised version that was posted instead.

[62] The Department added a comma between ''complaint investigation'' and ''or other review'' in the first sentence of this provision.

[63] *See supra* note 40.

[64] Chapter 2O00 of the FCCM states, ''After advising the contractor of its compliance evaluation findings, the [compliance officer] must provide formal notification through a PDN . . . when there are preliminary indicators of discrimination.''

One commenter noted that age discrimination is not mentioned in the proposed rule. That is because none of the laws that OFCCP enforces protect applicants or employees from discrimination on the basis of age. The Age Discrimination in Employment Act, the primary Federal law prohibiting age discrimination in employment, is enforced and administered by the Equal Employment Opportunity Commission.

Three comments pertained to previously issued OFCCP guidance about how the agency analyzes compensation discrimination.[65] The comments asked for clarification regarding how OFCCP groups employees for pay analysis and which neutrality tests OFCCP uses to determine whether pay variables are neutral. One of the comments suggested that the Department should rescind the OFCCP policy directive that provides guidance on how the agency analyzes compensation to determine whether discrimination may be present.[66] The Department declines at this time to expand the scope of this rule to include further guidance concerning pay analysis groupings specifically or to rescind its compensation directive. The Department appreciates the input received and is considering addressing its methods of compensation analysis in a future rulemaking or in new guidance documents.

Finally, five comments specifically requested that the comment period be extended. After considering those requests, the Department determined that the original 30-day comment period provided adequate time for the public to comment on the proposed rule. Notably, the Administrative Procedure Act (APA) does not set forth a mandatory minimum time for public comments, but rather more generally requires an ''opportunity to participate in the rule making through submission of written data, views, or arguments.'' [67] OFCCP posted its declination letter on *Regulations.gov* as a supplement to the proposed rule on January 27, 2020.

D. Changes in 41 CFR Parts 60–300 and 60–741

OFCCP has separate regulations concerning E.O. 11246, VEVRAA, and section 503. No commenter suggested that OFCCP's resolution procedures or the proposed definitions should be applied differently depending on the law the agency is enforcing. The Department thus adopts the same definitions and provisions on resolution procedures in 41 CFR part 60–300 (VEVRAA) and 41 CFR part 60–741 (section 503) that are described above for 41 CFR part 60–1 (E.O. 11246).

E. Agency Head Title

The final rule replaces outdated references to the official title of OFCCP's agency head in E.O. 11246 regulations, from ''Deputy Assistant Secretary'' to ''Director,'' throughout the entirety of 41 CFR parts 60–1 and 60–2. The Department made the same change to the regulations implementing VEVRAA and section 503 through final rules in 2013.[68] The Department made the change after the Department of Labor abolished the Employment Standards Administration in November 2009. This restructuring resulted in the change of title for OFCCP's agency head, from ''Deputy Assistant Secretary'' (reporting to the head of the Employment Standards Administration) to ''Director'' reporting directly to the Secretary of Labor. The Department received no comments on this change and adopts it in the final rule.

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. OMB has determined that this rule is a significant regulatory action under E.O. 12866 and has reviewed the final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

A. Need for Rulemaking

The final rule addresses stakeholder concerns by codifying the use of PDNs, NOVs, and an early conciliation option that already exist in the FCCM and agency guidance, such as directives. The FCCM and agency directives are not legally binding and have not gone through formal notice and public comment. They thus do not provide the same level of clarity, transparency, and certainty that this final rule does. The final rule also modifies those procedures to improve clarity and transparency, establish guardrails on the agency's issuance of pre-enforcement notices, and further the strategic allocation of limited agency resources.

B. Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the codified procedures and modifications in this rulemaking. In the NPRM, the Department utilized the General Services Administration's System for Award Management (SAM) database to identify the number of contractors who may be impacted by the

[65] *See* Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018), *www.dol.gov/agencies/ofccp/directives/2018-01.* OFCCP issued this directive to ensure that PDNs be used in all compliance evaluations with preliminary discrimination findings, both individual and systemic. Prior to the directive, use of PDNs was discretionary and reserved for systemic discrimination findings. *See* FCCM, Chapter 8 (detailing the procedures that OFCCP follows for issuing PDNs).

[66] *Id.*

[67] 5 U.S.C. 553(c). Thirty-day public comment periods are broadly viewed as permissible under the APA, particularly where, as here, the proposal is fairly straightforward and is not detailed or highly technical in nature. *See, e.g., Conn. Light & Power Co.* v. *Nuclear Regulatory Comm'n.,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a thirty-day comment period even though the ''technical complexity'' of the regulation was ''such that a somewhat longer comment period might have been helpful''); *Conference of State Bank Supervisors* v. *Office of Thrift Supervision,* 792 F. Supp. 837, 844 (D.D.C. 1992) (upholding the sufficiency of a thirty-day comment period).

[68] *See* 41 CFR 60–300.2(h) and 60–741.2(f); *see also* 78 FR 58613 (Sept. 24, 2013); 78 FR 58681 (Sept. 24, 2013).

rule.[69] Those registered in the SAM database consist of contractor firms, and other entities such as state and local governments and other organizations that are interested in Federal contracting opportunities, and other forms of Federal financial assistance. In the NPRM, the Department acknowledged that the SAM number likely resulted in an overestimation because the system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority.

The Department received no comments on using the SAM database to determine the affected contractor universe in the NPRM. However, in the final rule, the Department reevaluated the contractors likely to be affected and decided to utilize the Employment Information Report (EEO–1) data, which identifies the number of contractors that could be scheduled for a compliance evaluation. By using the EEO–1 Report data, the Department mitigates the problems identified with the SAM data that resulted in the overestimation of the contractor universe. The EEO–1 Report must be filed by covered Federal contractors who: (1) Have 50 or more employees; (2) are prime contractors or first-tier subcontractors; and (3) have a contract, subcontract, or purchase order amounting to $50,000 or more. OFCCP schedules only contractors who meet those thresholds for compliance evaluations. While the Department acknowledges that all Federal contractors may learn their EEO requirements in order to comply with the laws that OFCCP enforces, only those contractors scheduled for a compliance evaluation are likely to have a need to learn the resolution procedures because only those contractors may need to interact with OFCCP through these new resolution procedures. Further, because this rule stipulates procedures OFCCP must follow if it desires to issue a PDN or NOV, unless and until a contractor is scheduled for a compliance evaluation, the contractor need not familiarize itself with these changes. This change significantly alters the number of contractors possibly impacted by the final rule, reducing the number to 26,514.[70] The Department believes the updated number of contractors is a more accurate estimation of those entities possibly impacted by the final rule and still likely overstates the number of entities that will take time to familiarize themselves.

1. Cost of Rule Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it takes for contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials such as a fact sheet and answers to frequently asked questions.

In line with recent assessments in other rulemakings, the agency has determined that either a Human Resources Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the rule. OFCCP estimates that 50 percent of the reviewers would be human resources managers and 50 percent would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resources managers and lawyers. The mean hourly wage of a human resources manager is $62.29 and the mean hourly wage of a lawyer is $69.86.[71] Therefore, the average hourly wage rate is $66.08 (($62.29 + $69.86)/2). OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The agency used a fringe benefits rate of 46 percent[72] and an overhead rate of 17 percent,[73] resulting in a fully loaded hourly compensation rate of $107.71 ($66.08 + ($66.08 × 46 percent) + ($66.08 × 17 percent)). The estimated labor cost to contractors is reflected in Table 1, below.

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate	Overhead rate	Fully loaded hourly compensation
Human Resources Managers and Lawyers	$66.08	46%	17%	$107.71

The agency estimates that it will take a minimum of 30 minutes (½ hour) for a human resources manager or lawyer at each contractor firm to either read the rule or read the compliance assistance materials provided by OFCCP to learn more about the codified procedures. One commenter, a contractor organization, asserted that the agency underestimated the time needed to become familiar with the proposed rule. The commenter provided an alternate estimate of two to three hours. OFCCP acknowledges that the precise amount of time each company will take to become familiar with understanding the new regulations is difficult to estimate. The elements that the agency uses in its calculation take into account the length and complexity of the rule. Thus, OFCCP has decided to retain its initial estimate of one-half hour for rule familiarization. The one-half hour estimate is an average across all contractors and accounts for the time needed to read the rule or read the compliance assistance materials provided by OFCCP to learn more about the codified procedures.

Another contractor organization asserted that the agency's calculations did not account for the use of outside third parties that are used by Federal contractors and subcontractors to fully understand a contractor's obligations under the proposed regulations. The commenter surveyed its constituents and provided an estimate between $1,000 and $5,000 for outside assistance. The commenter did not provide specific data on the

[69] U.S. General Services Administration, System for Award Management, data released in monthly files, *www.sam.gov.* In the NPRM, OFCCP used August 2019 data and identified 420,000 contractors that may be impacted by the proposed rule.

[70] OFCCP obtained the total number of contractors from the most recent EEO–1 Report data available, which is from FY 2018.

[71] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, *www.bls.gov/oes/current/oes_nat.htm.*

[72] BLS, Employer Costs for Employee Compensation, *www.bls.gov/ncs/data.htm.* Wages and salaries averaged $24.26 per hour worked in 2017, while benefit costs averaged $11.26, which is a benefits rate of 46 percent.

[73] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' (June 10, 2002), *www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

characteristics of the contractors surveyed. The Department notes that some companies may decide to outsource familiarization with the new procedures, just as some companies may wait until OFCCP initiates an investigation before familiarizing themselves with the new procedures, but OFCCP does not anticipate that companies will incur both in-house and third party familiarization costs. The Department thus declines to add these third-party costs to its estimate in addition to the costs already calculated.

Consequently, the estimated burden for rule familiarization is 13,257 hours (26,514 contractor firms × ½ hour). The Department calculates the total estimated cost of rule familiarization as $1,427,911 (13,257 hours × $107.71/hour) in the first year, which amounts to a 10-year annualized cost of $162,519 at a discount rate of 3 percent (which is $6.13 per contractor firm) or $190,002 at a discount rate of 7 percent (which is $7.17 per contractor firm). Table 2, below, reflects the estimated regulatory familiarization costs for the final rule.

TABLE 2—REGULATORY FAMILIARIZATION COST

Total number of contractors	26,514
Time to review rule	30 minutes
Human Resources Managers fully loaded hourly compensation	$107.71
Regulatory familiarization cost in the first year	$1,427,911
Annualized cost with 3 percent discounting	$162,519
Annualized cost per contractor with 3 percent discounting	$6.13
Annualized cost with 7 percent discounting	$190,002
Annualized cost per contractor with 7 percent discounting	$7.17

The rule does not include any additional costs because it adds no new requirements or burdens on contractors. When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the perpetual annualized cost is $81,215 at a 7 percent discount rate in 2016 dollars.[74]

[74] To comply with E.O. 13771 accounting, the Department multiplied the rule familiarization cost for Year 1 ($1,427,911) by the GDP deflator (0.9582) to convert the cost to 2016 dollars ($1,368,224). The Department used this result to determine the perpetual annualized cost ($106,456) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided $106,456 by 1.07^4, which equals $81,215.

2. Cost Savings

OFCCP expects contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions, as well as the clarity of OFCCP's procedures related to resolution of material violations, provides certainty to contractors of what is required as well as an option for contractors to more expeditiously resolve the violations.

If the rule increases clarity for Federal contractors, this impact most likely will yield cost savings to taxpayers (if contractor fees decrease because they do not need to engage third party representatives to interpret OFCCP's procedures and requirements). In addition, by increasing clarity for both contractors and for OFCCP, the rule may reduce costs associated with resolving preliminary findings and violations through conciliation by making it clearer to both sides at the outset what is required by the regulation.

3. Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important and states that agencies may consider such benefits. This rule has equity and fairness benefits, which are explicitly recognized in E.O. 13563. The rule is designed to achieve these benefits by:

- Supporting more effective enforcement of prohibitions against certain types of employment discrimination;
- Increasing fairness for contractors by providing more transparency and certainty on the agency's resolution procedures;
- Establishing guardrails on the agency's issuance of pre-enforcement notices;
- Providing more efficient remedies to workers victimized by employment discrimination by effectuating corporate-wide corrective actions in conciliation agreements that may reach more victims than standard establishment-based conciliation agreements;
- Facilitating a more efficient option for contractors to resolve potential discrimination by providing notice of OFCCP's preliminary findings earlier in the compliance review process; and
- Furthering the strategic allocation of limited agency resources.

C. Alternatives

In addition to the approach proposed in the rule, the Department considered alternative approaches. The Department considered leaving OFCCP's resolution procedures described only in agency subregulatory guidance. Though OFCCP codified ''conciliation agreements'' in 1979, the agency's other resolution procedures, namely the PDN and NOV, have only been explained in subregulatory guidance. Maintaining the status quo has led to OFCCP's inconsistent use of the PDN across agency offices, creating inefficiencies and leading to greater uncertainty for Federal contractors. Though the agency has taken recent subregulatory measures to increase consistency and certainty, codifying these agency resolution procedures will have a stronger impact and promote more efficient enforcement of E.O. 11246, section 503, and VEVRAA than the status quo alternative.

The Department also considered different types of evidentiary standards for OFCCP to issue PDNs and NOVs. For example, the Department considered mandating a higher threshold for statistical significance, such as the three-standard-deviation threshold proposed in the NPRM, and not mandating qualitative evidence. The Department ultimately determined that requiring statistical evidence with two standard deviations or other quantitative evidence, a finding of practical significance, and appropriate qualitative evidence best balances all the equities involved and promotes efficient and effective allocation of resources.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The agency did not receive any public comments on the Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. The RFA requires agencies to consider the impact of a regulation on a wide range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must review whether a rule would have a significant economic impact on a substantial number of small entities. *See 5* U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as

described in the RFA.[75] However if an agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

The Department does not believe that this rule will have a significant economic impact on a substantial number of small entities. The final rule will most likely affect small firms in the construction industry (NAICS Sector 23) and small firms in the management of companies and enterprises industry (NAICS Sector 55). The annualized cost for both industries at a discount rate of 7 percent for rule familiarization is $7.17 per entity ($50.33 in the first year) which is far less than 1 percent of the annual revenue of the smallest of the small entities affected by the final rule (0.01% for construction and 0.02% for management of companies and enterprises). Accordingly, the Department certifies that the final rule will not have a significant economic impact on a substantial number of small entities. That is consistent with the Department's analysis in the NPRM.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

The Department has determined that there is no new requirement for information collection associated with this rule. The information collection contained in the existing E.O. 11246, section 503, and VEVRAA regulations are currently approved under OMB Control Number 1250–0001 (Construction Recordkeeping and Reporting Requirements), OMB Control Number 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service), OMB Control Number 1250–0004 (Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended), and OMB Control Number 1250–0005 (Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503). Consequently, this rule does not require review by the OMB under the authority of the Paperwork Reduction Act.

Executive Order 13132 (Federalism)

The Department has reviewed the rule in accordance with E.O. 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' 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.''

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

The rule does not have tribal implications under E.O. 13175 that requires a tribal summary impact statement. The rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

41 CFR Parts 60–1 and 60–2

Administrative practice and procedure, Civil rights, Discrimination, Employment, Equal employment opportunity, Government contracts, Government procurement, Labor.

41 CFR Parts 60–300 and 60–741

Administrative practice and procedure, Civil rights, Discrimination, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Labor, Veterans.

Craig E. Leen,

Director, Office of Federal Contract Compliance Programs.

For the reasons stated in the preamble, the Office of Federal Contract Compliance Programs amends 41 CFR parts 60–1, 60–2, 60–300, and 60–741 as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

■ 2. In part 60–1, except for § 60–1.3, revise all references to ''Deputy Assistant Secretary'' to read ''Director''.

■ 3. Amend § 60–1.3 by removing the definition for ''Deputy Assistant Secretary'' and adding definitions for ''Director'', ''Qualitative evidence'', and ''Quantitative evidence'' in alphabetical order to read as follows:

§ 60–1.3 Definitions.

* * * * *

Director means the Director, Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, or his or her designee.

* * * * *

Qualitative evidence includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

Quantitative evidence includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor

[75] *Id.*

(including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

■ 4. Revise § 60–1.33 to read as follows:

§ 60–1.33 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material

violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

(e) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

■ 5. The authority citation for part 60–2 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971.

§ 60–2.1, 60–2.2, and 60–2.31 [Amended]

■ 6. In §§ 60–2.1, 60–2.2, and 60–2.31, remove ''Deputy Assistant Secretary'' everywhere it appears and add ''Director'' in its place.

PART 60–300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

■ 7. The authority citation for part 60–300 continues to read as follows:

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

■ 8. Amend § 60–300.2 by redesignating paragraphs (t) through (cc) as paragraphs (v) through (ee) and adding new paragraphs (t) and (u) to read as follows:

§ 60–300.2 Definitions.

* * * * *

(t) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(u) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

■ 9. Revise § 60–300.62 to read as follows:

§ 60–300.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

(e) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

■ 10. The authority citation for part 60–741 continues to read as follows:

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

■ 11. Amend § 60–741.2 by redesignating paragraphs (s) through (bb) as paragraphs (u) through (dd) and adding new paragraphs (s) and (t) to read as follows:

§ 60–741.2 Definitions.

* * * * *

(s) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment

decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(t) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

■ 12. Revise § 60–741.62 to read as follows:

§ 60–741.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from

disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

(e) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

(f) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[FR Doc. 2020–24858 Filed 11–9–20; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201103–0287]

RIN 0648–BI15

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States

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

ACTION: Final rule.

SUMMARY: This rule announces the approval of, and regulations to implement, an action to require commercially permitted vessels in both the New England and Mid-Atlantic Fishery Management Council regions to submit vessel trip reports electronically within 48 hours of the end of a trip. This action will also require for-hire vessels with permits for species managed by the New England Fishery Management Council to submit vessel trip reports electronically within 48 hours of the end of a trip. Document retention requirements will be removed with this action. This action is intended to increase data quality and timeliness of vessel trip reports.

DATES: This rule is effective November 10, 2021.

ADDRESSES: Copies of the Joint Omnibus Electronic Vessel Trip Reporting Framework Adjustment prepared by the Mid-Atlantic and New England Fishery Management Council in support of this action are available from Dr. Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North Street, Suite 201, Dover, DE 19901. The supporting documents are also accessible via the internet at: *https://www.mafmc.org/actions/commercial-evtr-framework, https://www.nefmc.org/library/omnibus-commercial-evtr-framework,* or *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Senior Fishery Program Specialist, phone: 978–281–9218; email: *Moira.Kelly@noaa.gov.*

SUPPLEMENTARY INFORMATION: Currently, commercial vessels are required to submit vessel trip reports (VTR) either on paper or electronically following each trip. Several fishery management plans require weekly submission of commercial vessel trip reports; others require monthly submission. Vessels issued a for-hire permit for a Mid-Atlantic Council fishery are required to submit vessel trip reports electronically within 48 hours of the end of a fishing trip (September 11, 2017; 82 FR 42610). Vessels issued a for-hire permit for a New England Council fishery are subject to the same requirements as that FMP's commercial permit.

A detailed summary of the development of this action can be found in the supporting documentation (see **ADDRESSES**) and the proposed rule (July 17, 2020; 85 FR 43528).

Approved Measures

With this action, vessels issued a commercial or for-hire permit for all Mid-Atlantic and New England Council-managed fisheries will be required to submit vessel trip reports electronically within 48 hours of the end of a fishing trip. This action is applicable to all commercial and for-hire permits issued pursuant to the following Fishery Management Plans: Atlantic Herring; Atlantic Mackerel, Squid, Butterfish; Northeast Multispecies; Surfclam and Ocean Quahog; Atlantic Bluefish; Atlantic Deep-Sea Red Crab; Atlantic Sea Scallop; Summer Flounder, Scup, Black Sea Bass; Monkfish; Northeast Skate Complex; Spiny Dogfish; and Tilefish. This requirement does not apply to vessels issued *only* a Federal lobster permit or to federally permitted private recreational tilefish vessels (July 16, 2020; 85 FR 43149).

In addition to the method and submission timeframe changes, document retention requirements that are no longer necessary with electronic reporting will be removed. Specifically, the requirement to retain copies of the previously submitted vessel trip reports on board the vessel will no longer be applicable. Owners will have access to trip reports submitted electronically on the device from which they were submitted and on the Fish Online website.

There are no other changes to the vessel trip reporting requirements, including the requirement that vessel operators are obligated to fill out the vessel trip report with all information ascertainable prior to entering port.

Implementation

Electronic Vessel Trip Reporting Systems

There are several applications available to vessel owners for electronic vessel trip reporting. Information about approved application platforms are available on our website (*https://www.fisheries.noaa.gov/new-england-*

mid-atlantic/resources-fishing/vessel-trip-reporting-greater-atlantic-region#electronic-vessel-trip-reporting). Vessel owners and operators should determine which application is appropriate for their vessel and operations.

Training and Implementation Timing

In order to ensure adequate time for all vessel owners to transition to electronic vessel trip reporting systems, there will be several training opportunities available prior to the delayed implementation date (see **DATES**). Training opportunities and recordings will be available on the Mid-Atlantic Council's website (*https://www.mafmc.org/commercial-evtr*).

Comments and Responses

Four comments were received during the public comment period. One comment was unrelated to the proposed action and is not considered further.

Comment: Two comments were received from for-hire vessel operators in the mid-Atlantic suggesting that 48 hours was an insufficient amount of time for operators to submit vessel trip reports following the end of a trip. In addition, these comments suggested that the reports were redundant, difficult to fill out, and that filling out the report at sea was unsafe.

Response: For-hire vessel operators with Mid-Atlantic Council-managed permits have been required to submit vessel trip reports electronically within 48 hours of the end of a trip since March 2018. Since then, the majority of these reports (70 percent) have been submitted within 1 day, with nearly 80 percent of reports submitted within the required 48 hours. The requirement to have vessel trip reports filled out with all information that is ascertainable prior to entering port is a long-standing requirement and is not being changed in this action. Finally, many of the electronic reporting applications use favorites, frequently used responses, auto-population, and drop-down features to streamline reporting and minimize the number of fields that need to be individually key-punched. Vessel operators should review all available applications to determine which is easiest for them to use.

Comment: A comment was received from the Atlantic Offshore Lobstermen's Association supporting the shift to electronic reporting and encouraging ample outreach and training opportunities prior to the rule becoming effective. The Association also recommends that electronic reporting should not require expensive software or additional hardware that vessel owners are required to obtain.

Response: As noted above, we intend to offer many training opportunities and have delayed implementation of the requirements until November 10, 2021. In addition, most approved electronic reporting applications can be used on a mobile phone or a variety of tablets (both iOS and Android options are available). As such, vessel owners will likely be able to download their desired application onto a device that they already own.

Classification

NMFS is issuing this rule pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, which provides specific authority for implementing this action. Section 304(b)(1)(A) authorizes NMFS to issue regulations to implement approved Council recommendations. NMFS is extending the requirements of this action to vessels issued for-hire permits for New England Council fisheries pursuant to 305(d) of the Magnuson-Stevens Act. This action is necessary to carry out the intention of the Councils to make reporting requirements across all fishery management plans and sectors consistent and to minimize confusion among industry stakeholders. The NMFS Assistant Administrator has determined that this final rule is consistent with the Joint Omnibus Electronic Vessel Trip Reporting Framework Adjustment; the Fishery Management Plans for (1) Atlantic herring, (2) Mackerel, Squid, Butterfish, (3) Northeast Multispecies, (4) Surfclam and Ocean Quahog, (5) Atlantic Bluefish, (6) Atlantic Deep-Sea Red Crab, (7) Atlantic Sea Scallop, (8) Summer Flounder, Scup, Black Sea Bass, (9) Monkfish, (10) Northeast Skate Complex, (11) Spiny Dogfish, and (12) Tilefish; other provisions of the Magnuson-Stevens Act; and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866. This final rule is considered an Executive Order 13771 deregulatory action.

This proposed rule does not contain policies with Federalism or takings implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule does not contain a change to a collection of information requirement for purposes of the Paperwork Reduction Act of 1995. The existing collection of information requirements would continue to apply under the following OMB Control Number(s): 0648–0202, Greater Atlantic Region Permit Family of Forms.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping, and reporting requirements.

Dated: November 3, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.7, revise paragraphs (b)(1), (c), and (d), remove and reserve paragraph (e)(2), and revise paragraph (f)(2) to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(1) *Fishing Vessel Trip Reports.* The owner or operator of any vessel issued a valid permit, or eligible to renew a limited access permit under this part must maintain on board the vessel, and submit, an accurate fishing log report for each fishing trip, regardless of species fished for or taken, by electronic means. This report must be entered into and submitted through a software application approved by NMFS. The reporting requirements specified in paragraph (b)(1)(i) of this section for an owner or operator of a vessel fishing for, possessing, or landing Atlantic chub mackerel are effective through December 31, 2020.

(i) *Vessel owners or operators.* With the exception of those vessel owners or operators fishing under a surfclam or ocean quahog permit, at least the following information as applicable and any other information required by the Regional Administrator must be provided:

(A) Vessel name;
(B) USCG documentation number (or state registration number, if undocumented);
(C) Permit number;
(D) Date/time sailed;
(E) Date/time landed;
(F) Trip type;
(G) Number of crew;
(H) Number of anglers (if a charter or party boat);
(I) Gear fished;
(J) Quantity and size of gear;
(K) Mesh/ring size;
(L) Chart area fished;
(M) Average depth;
(N) Latitude/longitude;
(O) Total hauls per area fished;
(P) Average tow time duration;
(Q) Hail weight, in pounds (or count of individual fish, if a party or charter vessel), by species, of all species, or parts of species, such as monkfish livers, landed or discarded; and, in the case of skate discards, ''small'' (*i.e.,* less than 23 inches (58.42 cm), total length) or ''large'' (*i.e.,* 23 inches (58.42 cm) or greater, total length) skates;
(R) Dealer permit number;
(S) Dealer name;
(T) Date sold, port and state landed; and
(U) Vessel operator's name, signature, and operator's permit number (if applicable).

(ii) *Atlantic mackerel owners or operators.* The owner or operator of a vessel issued a limited access Atlantic mackerel permit must report catch (retained and discarded) of Atlantic mackerel daily via VMS, unless exempted by the Regional Administrator. The report must include at least the following information, and any other information required by the Regional Administrator: Fishing Vessel Trip Report serial number; month, day, and year Atlantic mackerel was caught; total pounds of Atlantic mackerel retained and total pounds of all fish retained. Daily Atlantic mackerel VMS catch reports must be submitted in 24-hr intervals for each day and must be submitted by 0900 hr on the following day. Reports are required even if Atlantic mackerel caught that day have not yet been landed. This report does not exempt the owner or operator from other applicable reporting requirements of this section.

(iii) *Surfclam and Ocean Quahog owners or operators.* The owner or operator of any vessel conducting any surfclam and ocean quahog fishing operations must provide at least the following information and any other information required by the Regional Administrator:
(A) Name and permit number of the vessel;
(B) Total amount in bushels of each species taken;
(C) Date(s) caught;
(D) Time at sea;
(E) Duration of fishing time;
(F) Locality fished;
(G) Crew size;
(H) Crew share by percentage;
(I) Landing port;
(J) Date sold;
(K) Price per bushel;
(L) Buyer;
(M) Tag numbers from cages used;
(N) Quantity of surfclams and ocean quahogs discarded; and
(O) Allocation permit number.

(iv) *Private tilefish recreational vessel owners and operators.* The owner or operator of any fishing vessel that holds a Federal private recreational tilefish permit, must report for each recreational trip fishing for or retaining blueline or golden tilefish in the Tilefish Management Unit. The required Vessel Trip Report must be submitted by electronic means. This report must be submitted through a NMFS-approved electronic reporting system within 24 hours of the trip returning to port. The vessel operator may keep paper records while onboard and upload the data after landing. The report must contain the following information:
(A) Vessel name;
(B) USCG documentation number (or state registration number, if undocumented);
(C) Permit number;
(D) Date/time sailed;
(E) Date/time landed;
(F) Trip type;
(G) Number of anglers;
(H) Species;
(I) Gear fished;
(J) Quantity and size of gear;
(K) Soak time;
(L) Depth;
(M) Chart Area;
(N) Latitude/longitude where fishing occurred;
(O) Count of individual golden and blueline tilefish landed or discarded; and
(P) Port and state landed.

* * * * *

(c) *When to fill out a vessel trip report.* Vessel trip reports required by paragraph (b)(1)(i) of this section must be filled out with all required information, except for information not yet ascertainable, prior to entering port. Information that may be considered unascertainable prior to entering port includes dealer name, dealer permit number, and date sold. Vessel trip reports must be completed as soon as the information becomes available. Vessel trip reports required by paragraph (b)(1)(iii) of this section must be filled out before landing any surfclams or ocean quahogs.

(d) *Inspection.* Upon the request of an authorized officer or an employee of NMFS designated by the Regional Administrator to make such inspections, all persons required to submit reports under this part must make immediately available for inspection reports, and all records upon which those reports are or will be based, that are required to be submitted or kept under this part.

* * * * *

(f) * * *

(2) *Fishing vessel trip reports*—(i) *Timing requirements.* For any vessel issued a valid commercial or charter/party permit, or eligible to renew a limited access permit under this part, fishing vessel trip reports, required by paragraph (b)(1) of this section, must be submitted within 48 hours at the conclusion of a trip.

(ii) *Commercial trips.* For the purposes of paragraph (f)(2) of this section, the date when fish are offloaded from a commercial vessel will establish the conclusion of a commercial trip.

(iii) *Charter/party trips.* For the purposes of paragraph (f)(2) of this section, the date a charter/party vessel enters port will establish the conclusion of a for-hire trip.

(iv) *Private recreational tilefish trips.* Private recreational tilefish electronic log reports, required by paragraph (b)(1)(iv) of this section, must be submitted within 24 hours after entering port at the conclusion of a trip.

* * * * *

[FR Doc. 2020–24921 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 201102–0284]

RIN 0648–BH61

Pacific Island Fisheries; Swordfish Trip Limits in the American Samoa Pelagic Longline Fishery

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

ACTION: Final rule.

SUMMARY: This final rule removes the swordfish retention limit in the American Samoa deep-set longline fishery. The intent of this rule is to

eliminate wasteful regulatory discards of marketable seafood, increasing efficiency and benefits to the local community and the Nation.

DATES: The final rule is effective December 10, 2020.

ADDRESSES: Copies of an environmental analyses and other supporting documents for this action are available at *https://www.regulations.gov/docket?D=NOAA-NMFS-2019-0123.*

FOR FURTHER INFORMATION CONTACT: Sarah Ellgen, NMFS PIR Sustainable Fisheries, 808–725–5173.

SUPPLEMENTARY INFORMATION: The Council and NMFS manage the American Samoa deep-set longline fishery under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP) and implementing regulations, as authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The fishery targets South Pacific albacore, and occasionally catches other pelagic fish, including swordfish. In 2011, NMFS implemented FEP Amendment 5, which included gear and operational requirements intended to reduce interactions with green sea turtles (76 FR 52888, August 24, 2011). That rule included a limit of 10 swordfish per trip for vessels over 40 ft (12.2 m). The limit was intended to discourage switching from deep-set gear targeting albacore to shallow-set gear targeting swordfish because shallow-set fishing may interact more frequently with green sea turtles than deep-set fishing due to the depth of the hooks.

In the years since implementation of that rule, the number of swordfish caught per trip has been small, and there has been no evidence that longline fishermen have targeted swordfish, nor has there been any recent interest in shallow-set fishing in the S. Pacific. From 2008 through 2018, the average number of swordfish caught was 1.3 fish per trip.

The requirement for vessels over 40 ft (12.2 m) to discard swordfish in excess of the 10-fish limit results in wasteful discards, lost revenues, and an unnecessary reduction in seafood. Removing the swordfish limit allows fishermen to retain a few more swordfish that might be caught incidentally during deep-set fishing and are otherwise wastefully discarded. This rule maintains existing gear and operational safeguards to reduce interactions with green sea turtles. The stock of Southwest Pacific swordfish is neither overfished nor subject to overfishing. All other management measures (including a limited entry program, prohibited fishing areas, fishery observers, logbook reporting, vessel monitoring system, and gear and operational requirements) will remain in place and continue to apply in the fishery.

Comments and Responses

On June 29, 2020, NMFS published a proposed rule and request for public comments (85 FR 38837). The comment period ended July 14, 2020. NMFS received seven comments from a total of three submitters and responds below.

Comment 1: The primary goal of this action is to eliminate wasteful regulatory discards of swordfish and increase efficiency.

Response: We have clarified that goal in the environmental assessment and the preamble to this final rule.

Comment 2: The limited amount of discarded swordfish does not constitute a reduction in seafood available to the Nation, so the limit should be retained.

Response: Although the amount of swordfish discarded is small, the fish have already been caught. Requiring their discard is unnecessarily wasteful. This rule considers the importance of supplying fresh fish to the American Samoa community by allowing retention of those few fish that would otherwise have been discarded.

Comment 3: Interactions between the fishery and green sea turtles are still a problem, so NMFS should retain the swordfish limit because it is part of a suite of requirements designed to discourage shallow-set fishing, which could have a relatively greater impact on green sea turtles.

Response: The suite of gear and operational requirements are the primary measures to reduce green sea turtle interactions. They do this by ensuring that hooks are set deeper than 100 m, below the depth inhabited by the turtles. Those measures remain unchanged and continue to afford the intended protections to green sea turtles.

The swordfish retention limit was an additional safeguard modeled on the N Pacific deep-set fishery. The limit was intended to dissuade fishermen from switching from typical deep-set gear used to target albacore to shallow-set fishing targeting swordfish, with its potential for a relatively higher rate of green sea turtle interactions. There is no evidence, however, that fishermen have switched to, or are interested in, shallow-set fishing for swordfish in the S. Pacific.

By removing the limit, NMFS is eliminating the negative impacts of wasteful discards, while retaining the requirements that benefit green sea turtles. The Council and NMFS will continue to monitor the fisheries, and if there are indications of interest in shallow-set fishing, the Council and NMFS could consider different or additional management measures, including the establishment of a well-managed shallow-set longline fishery in the S. Pacific.

Comment 4: Eliminating the swordfish retention limit for fishing south of the Equator might incentivize other U.S. longline fisheries to shift their fishing location. If NMFS removes the retention limit, the rule should apply only to vessels with an American Samoa longline limited access permit. The retention limit should remain in place for vessels holding Western Pacific general longline permits or Hawaii longline limited access permits.

Response: American Samoa has a very small market demand for fresh fish, and limited options to export fresh-frozen fish. Accordingly, it is highly unlikely that shallow-set longline fishermen from other areas would consider landing their catch in Pago Pago. Also, restricting the action to a permit type, rather than fishing location, would not directly control where fishermen could land their catch. This is because vessels may have multiple permits, which allows them to land their catch in Hawaii, American Samoa, or the West Coast. Practical constraints, however, such as the travel distance between ports of landing with high fuel costs, and the lack of a swordfish market in American Samoa, result in distinct fisheries that fish and land their catch either in and around American Samoa, or in and around Hawaii and California. The gear and operational requirements for fishing south of the Equator apply to all U.S. longline fishing, regardless of permit type, which continues to protect green sea turtles. The Council and NMFS will continue to monitor the fisheries, and if there are indications that the normal patterns of fishing and landing locations are changing, the Council and NMFS could consider different or additional management measures.

Comment 5: The American Samoa longline fishery has landed catch in California, and the identified action area south of the Equator is a subset of the area in which the fishery operates. This suggests that fishing effort in the eastern Pacific Ocean may have a larger impact on leatherback turtles than thought. Thus, NMFS should not finalize the rule unless it first completes Endangered Species Act (ESA) consultation on the American Samoa fishery.

Response: Longline vessels based in American Samoa operate almost exclusively south of the Equator in the

western Pacific. From 2008 through 2018, less than one percent of fishing effort occurred north of the Equator, and less than one percent in the eastern Pacific for vessels that either started or ended fishing trips in American Samoa.

NMFS reinitiated Section 7 consultation on the American Samoa longline fishery on April 3, 2019. The reinitiation to consult under the ESA was triggered by new ESA-listings and exceedance of the incidental take statement (ITS) in the 2015 Biological Opinion (BiOp) for green, hawksbill, and olive ridley sea turtles. The 2015 ITS for leatherback turtles, however, was not exceeded.

On May 6, 2020, NMFS completed an updated review of the potential effects of the American Samoa longline fishery on listed species during the period of consultation under the ESA. In that review, NMFS determined that there was no new information that would lead us to reconsider the core assumptions and conclusions reached in the 2015 BiOp for leatherback turtle, South Pacific loggerhead turtle, Indo-West Pacific scalloped hammerhead shark, humpback whale, sperm whale, and six reef-building corals. As a result, we found that the 2015 BiOp remains valid for these species during the period of reinitiated consultation.

Since the publication of the 2015 BiOp, NMFS has received no information to believe that eliminating the swordfish retention limit will change the conduct of the fishery or that the fishery might cause additional harm to the leatherback status during the period of consultation. We note that from 2015 until the present, the fishery has operated well within the ITS limits in the 2015 BiOp. Additionally, in reaching the no jeopardy decision for leatherbacks in the 2015 BiOp, NMFS explained that recent research indicated a continual and significant decline of the leatherback population. Present data on leatherbacks are consistent with this 2015 core assumption, that is, that some populations are stable or increasing, but the data also indicate that other populations for which information is available are either decreasing or have collapsed. Further, because all other management measures will continue to apply in the fishery, and because we do not expect either a change in the operation of the fishery or the number of interactions authorized under the 2015 ITS, we determined that the 2015 BiOp remains valid during the period of consultation.

Comment 6: The 15-day comment period was insufficient.

Response: The development of the action occurred in public meetings of the Council's advisory panels, Science and Statistical Committee, and the Council, itself, over several years. The Council provided notice of the rulemaking in local media releases, newsletter articles, and on the Council's website. Nonetheless, a comment period of 15 days is expressly allowed by section 304(b) of the Magnuson-Stevens Act.

Comment 7. The proposed rule alters the FEP, so the Council should prepare a plan amendment and NMFS should accept public comment for a 60-day period.

Response. This rule implements a regulatory amendment, *i.e.,* a change to existing regulations, and the Council is not required to amend the FEP, consistent with sections 303(c) and 304(b) of the Magnuson-Stevens Act.

Changes From the Proposed Rule

This final rule contains no changes from the proposed rule.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the FEP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS did not receive any comments regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule is considered an Executive Order 13771 deregulatory action.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Longline, Pacific Islands, Seafood, Swordfish.

Dated: November 3, 2020.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 665 as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for 50 CFR part 665 continues to read as follows:

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

■ 2. In § 665.813, revise paragraph (k) introductory text and remove paragraph (k)(5) to read as follows:

§ 665.813 Western Pacific longline fishing restrictions.

* * * * *

(k) *South Pacific longline requirements.* When fishing south of the Equator (0° lat.) for western Pacific pelagic MUS, owners and operators of vessels longer than 40 ft (12.2 m) registered for use with any valid longline permit issued pursuant to § 665.801 must use longline gear that is configured according to the requirements in paragraphs (k)(1) through (4) of this section.

* * * * *

[FR Doc. 2020–24752 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 85, No. 218

Tuesday, November 10, 2020

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

FEDERAL RESERVE SYSTEM

12 CFR Parts 225, 238, and 252

[Regulations Y, LL, and YY; Docket No. R–1724]

RIN 7100–AF95

Amendments to Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies; Correction

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice of proposed rulemaking with request for comment; correction.

SUMMARY: This document corrects the portions of the discussion related to collections of information published with a proposed rule published in the **Federal Register** of October 7, 2020, regarding Amendments to Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies. This correction adds the OMB control number for the reporting form FR LL. In addition, the previously published document incorrectly listed the estimated recordkeeping burden associated with the FR YY information collection. This correction also provides a corrected burden estimate.

DATES: Comments must be received by November 20, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Tokarski, Lead Regulatory Analyst (202) 452–5241 or Robert Dahl, Senior Regulatory Analyst, (202) 452–7627, Office of Data Management and Business Services. For the hearing impaired and users of TDD please call (202) 263–4869. You may also contact any of the individuals named in the proposed rule published on October 7, 2020 at 82 FR 63228.

SUPPLEMENTARY INFORMATION:

Corrections

In proposed rule FR Doc. 2020–22166, beginning on page 63222 in the issue of October 7, 2020, make the following corrections in the Supplementary Information section:

1. On page 63229, in the third column, under the ''Other Revisions'' heading, correct the OMB control number from ''7100–NEW'' to ''7100–0380.''

2. On page 63230, in the first column, under *Current estimated annual burden:* remove ''41,619 hours'' and replace with ''27,751 hours,'' and under *Proposed revisions estimated annual burden:* remove ''13,868 hours'' and replace with ''1 hour.''

3. On page 63230, in the second column, under *Total estimated annual burden:* remove ''27,751 hours'' and replace with ''27,752 hours.''

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2020–24436 Filed 11–9–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1018; Project Identifier MCAI–2020–01383–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2018–19–01, which applies to all Airbus Helicopters Model AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–365N1, and SA–366G1 helicopters. AD 2018–19–01 requires repetitive inspections of the aft fuselage outer skin. Since the FAA issued AD 2018–19–01, it was determined that Model SA–365N helicopters are also affected by the unsafe condition. This proposed AD would continue to require repetitive inspections and would add Model SA–365N helicopters, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by December 28, 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 89990 1000; 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, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1018.

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–2020–1018; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aviation Safety

Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email *kathleen.arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1018; Project Identifier MCAI–2020–01383–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email *kathleen.arrigotti@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA issued AD 2018–19–01, Amendment 39–19401 (83 FR 46862, September 17, 2018) (AD 2018–19–01), which applies to all Airbus Helicopters Model AS 365N2, AS 365 N3, EC 155B, EC155B1, SA–365N1, and SA–366G1 helicopters. AD 2018–19–01 requires repetitive inspections of the aft fuselage outer skin. The FAA issued AD 2018–19–01 to address disbonding of the aft fuselage (baggage compartment area) outer skin. This condition could result in loss of aft fuselage structural integrity and subsequent loss of control of the helicopter.

Actions Since AD 2018–19–01 Was Issued

Since the FAA issued AD 2018–19–01, it was determined that Model SA–365N helicopters are also affected by the unsafe condition. In addition, it was determined the repetitive inspection interval can be extended under certain conditions.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0080, dated April 3, 2019 (EASA AD 2019–0080) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus Helicopters Model AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–365N, and SA–365N1 helicopters.

This proposed AD was prompted by the determination that Model SA–365N helicopters are also affected by the unsafe condition. The FAA is proposing this AD to address disbonding of the aft fuselage outer skin. This condition could result in loss of aft fuselage structural integrity and subsequent loss of control of the helicopter. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2019–0080 describes procedures for repetitive inspections of the aft fuselage outer skin for Model AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–365N, and SA–365N1 helicopters.

Airbus Helicopters ASB No. SA366–05.48, Revision 1, dated March 27, 2019, describes procedures for repetitive inspections of the aft fuselage outer skin for Model SA366–G1 helicopters.

This proposed AD would also require Airbus Helicopters ASB No. SA366–05.48, Revision 0, dated July 21, 2017, which the Director of the Federal Register approved for incorporation by reference as of October 22, 2018 (83 FR 46862, September 17, 2018).

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

FAA's Determination and Requirements of This Proposed AD

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

Explanation of Retained Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2018–19–01, this proposed AD would retain all of the requirements of AD 2018–19–01. Those requirements are referenced in EASA AD 2019–0080, which, in turn, is referenced in paragraph (g) of this proposed AD.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0080 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this Proposed AD and the MCAI.''

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 2019–0080 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0080 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that

operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2019–0080 that is required for compliance with EASA AD 2019–0080 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1018 after the FAA final rule is published.

Differences Between This Proposed AD and the MCAI

The applicability of EASA AD 2019–0080 does not include Airbus Helicopters Model SA–366G1 helicopters. Those helicopters are no longer listed on the EASA type certificate data sheet (TCDS); however, they are still listed on the U.S. TCDS and are affected by the unsafe condition. Therefore, the FAA has included Airbus Helicopters Model SA–366G1 helicopters in the applicability of this proposed AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 52 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
4 work-hours × $85 per hour = $340	$0	$340	$17,680

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 10 work-hours × $85 per hour = $850	Up to $20,000	$20,850

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–19–01, Amendment 39–19401 (83 FR 46862, September 17, 2018), and adding the following new AD:

Airbus Helicopters: Docket No. FAA–2020–1018; Project Identifier MCAI–2020–01383–R.

(a) Comments Due Date

The FAA must receive comments by December 28, 2020.

(b) Affected Airworthiness Directives (ADs)

This AD removes AD 2018–19–01, Amendment 39–19401 (83 FR 46862, September 17, 2018) (AD 2018–19–01).

(c) Applicability

This AD applies to Airbus Helicopters Model AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–365N, SA–365N1, and SA–366G1 helicopters, certificated in any category, all serial numbers.

(d) Subject

Joint Aircraft System Component (JASC) Code 5300, Fuselage Structure.

(e) Reason

This AD was prompted by aft fuselage (baggage compartment area) outer skin disbonding. The FAA is issuing this AD to address disbonding of the aft fuselage outer skin. This condition could result in loss of aft fuselage structural integrity and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0080, dated April 3, 2019 (EASA AD 2019–0080).

(h) Exceptions to EASA AD 2019–0080

(1) Where EASA AD 2019–0080 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2019–0080 refers to September 19, 2017 (the effective date of EASA AD 2017–0165), this AD requires using October 22, 2018 (the effective date of AD 2018–19–01).

(3) For Airbus Helicopters Model SA–366G1 helicopters: Where EASA AD 2019–0080 refers to ''the instructions of the applicable ASB,'' use Airbus Helicopters ASB No. SA366–05.48, Revision 0, dated July 21, 2017; or Airbus Helicopters ASB No. SA366–05.48, Revision 1, dated March 27, 2019.

(4) Where EASA AD 2019–0080 refers to Group 1 helicopters, for this AD, Model SA–366G1 helicopters are considered Group 1 helicopters.

(5) Paragraph (5) of EASA AD 2019–0080 specifies to ''contact AH [Airbus Helicopters] for approved skin panel repair or replacement instructions and accomplish those instructions accordingly.'' For this AD, for any repair or replacement of the panel done before the effective date of this AD, it is not required to contact Airbus Helicopters. For any repair or replacement of the panel done on or after the effective date of this AD, the repair or replacement must be done using a method approved by the Manager, Rotorcraft Standards Branch, FAA. For a repair or replacement method to be approved by the Manager, Rotorcraft Standards Branch, FAA, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

(6) The ''Remarks'' section of EASA AD 2019–0080 does not apply to this AD.

(7) Where EASA AD 2019–0080 refers to flight hours (FH), this AD requires using hours time-in-service.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(j) Related Information

(1) For EASA AD 2019–0080, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. 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–2020–1018.

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

Issued on November 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–24853 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1020; Project Identifier MCAI–2020–00988–T]

RIN 2120–AA64

Airworthiness Directives; Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, CN–235–300 airplanes and Model C–295 airplanes. This proposed AD was prompted by cracks found on certain left- and right-hand stringers in a certain area of the fuselage. This proposed AD would require repetitive inspections for cracking or broken rivets of certain left- and right-hand stringers and surrounding structure, and repair if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by December 28, 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 EASA material that will be 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–2020–1020.

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–2020–1020; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views about this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time. Send your

comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1020; Project Identifier MCAI–2020–00988–T at the beginning of your comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received by the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this NPRM because of those comments.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0159, dated July 16, 2020 (''EASA AD 2020–0159'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, CN–235–300 airplanes and Model C–295 airplanes.

This proposed AD was prompted by cracks found on certain left-and right-hand stringers in the area of frame (FR) 43 of the fuselage. The FAA is proposing this AD to address such cracking in the stringers, which could result in reduced structural integrity of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0159 describes procedures for repetitive detailed visual (DET) or high frequency eddy current inspections of the stringer P0a and P0a' at the riveted line of the attachment to the gusset and along the stringer head, in particular at the area of the last attachment of the gusset to the stringer in the midpoint between FR43 and FR44, repetitive DET inspections for fatigue cracks of the fuselage skin, along the stringers' footprint and surrounding structure and the attachment of the gusset to the FR43; repetitive DET inspections for fatigue cracks of the actuator bracket on FR43, along the radius of the vertical nerves, inner lug holes, and attachment holes of the bracket to FR43; repetitive DET inspections for fatigue cracks or broken rivets in the web and joint clips to skin and stringer of both sides of the frame between stringer P1d and P1d' (two stringers for each side from the central stringer P0a); repetitive DET inspections for fatigue cracks or broken rivets of the gussets, along the flange which joins FR43; and repair of any cracking or broken rivets.

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

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0159 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 2020–0159 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0159 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0159 that is required for compliance with EASA AD 2020–0159 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1020 after the FAA final rule is published.

Interim Action

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

Costs of Compliance

The FAA estimates that this proposed AD affects 8 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$1,360

The FAA has received no definitive data that would enable providing cost estimates for the on-condition action specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.): Docket No. FAA–2020–1020; Project Identifier MCAI–2020–00988–T.

(a) Comments Due Date

The FAA must receive comments by December 28, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Defense and Space S.A. Model CN–235, CN–235–100, CN–235–200, CN–235–300 airplanes and Model C–295 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by cracks found on certain left- and right-hand stringers in the area of frame (FR) 43 of the fuselage. The FAA is issuing this AD to address such cracking in the stringers, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0159, dated July 16, 2020 (''EASA AD 2020–0159'').

(h) Exceptions to EASA AD 2020–0159

(1) Where EASA AD 2020–0159 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0159 does not apply to this AD.

(3) Where EASA AD 2020–0159 lists a compliance time of ''during the next A-check, or within 300 FH after the effective date of this AD, whichever occurs later,'' this AD requires using a compliance time of within 300 flight hours (FH) after the effective date of this AD.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2020–0159 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(k) Related Information

(1) For information about EASA AD 2020–0159, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1020.

(2) For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section,

International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

Issued on November 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–24876 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0879; Airspace Docket No. 20–AGL–36]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Kankakee, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Greater Kankakee Airport, Kankakee, IL. The FAA is proposing this action as the result of an airspace review caused by the decommissioning of the Kankakee VHF omnidirectional range (VOR) navigation aid as part of the VOR Minimum Operational Network (MON) Program.

DATES: Comments must be received on or before December 28, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–0879/Airspace Docket No. 20–AGL–36, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0879/Airspace Docket No. 20–AGL–36.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace extending upward from 700 feet above the surface to within a 6.6-mile (decreased from a 7-mile) radius of Greater Kankakee Airport, Kankakee, IL; removing the Kankakee VOR/DME and associated extensions from the airspace legal description; and amending the southwest extension to 4 (increased from 2) miles each side of the 214° (previously 218°) bearing from the Greater Kankakee: RWY 04–LOC (previously the airport) extending from

the 6.6-mile (decreased from 7-mile) radius to 16.8 (increased from 16.6) miles southwest of the airport; and removing the city associated with the airport to comply with changes to FAA Order 7400.2M, Procedures for Handling Airspace Matters.

This action is the result of an airspace review caused by the decommissioning of the Kankakee VOR, which provided navigation information for the instrument procedures this airport, as part of the VOR MON Program.

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

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

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

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

* * * * *

AGL IL E5 Kankakee, IL [Amended]

Greater Kankakee Airport, IL
(Lat. 41°04′17″ N, long. 87°50′47″ W)

Greater Kankakee: RWY 04–LOC
(Lat. 41°05′00″ N, long. 87°50′12″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Greater Kankakee Airport, and within 4 miles each side of the 214° bearing from the Greater Kankakee: RWY 04–LOC extending from the 6.6-mile radius of the airport to 16.8 miles southwest of the airport.

Issued in Fort Worth, Texas, on November 4, 2020.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–24878 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106808–19]

RIN 1545–BP32

Additional First Year Depreciation Deduction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of a notice of proposed rulemaking.

SUMMARY: This document withdraws a portion of a notice of proposed rulemaking published in the **Federal Register** on September 24, 2019. The withdrawn portion relates to the extent to which a partner is deemed to have a depreciable interest in property held by a partnership.

DATES: Section 1.168(k)–2(b)(3)(iii)(B)(*5*) of proposed rules (REG–106808–19) published in the **Federal Register** on September 24, 2019 (84 FR 50152) is withdrawn effective January 11, 2021].

FOR FURTHER INFORMATION CONTACT: Elizabeth R. Binder at (202) 317–4869 or Kathleen Reed at (202) 317–4660 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On August 8, 2018, the Department of the Treasury (Treasury Department) and the IRS published a notice of proposed rulemaking (REG–104397–18) in the **Federal Register** (83 FR 39292) containing proposed regulations under section 168(k) (2018 Proposed Regulations). After full consideration of the comments received on the 2018 Proposed Regulations and the testimony heard at the public hearing on November 28, 2018, the Treasury Department and the IRS published final regulations in the **Federal Register** as TD 9874 on September 24, 2019 (84 FR 50208) (the 2019 Final Regulations) adopting the 2018 Proposed Regulations with modifications in response to such comments and testimony.

Concurrently with the publication of the 2019 Final Regulations, the Treasury Department and the IRS published an additional notice of proposed rulemaking (REG–106808–19) in the **Federal Register** (84 FR 50152) withdrawing certain provisions of the 2018 Proposed Regulations and proposing additional guidance under section 168(k) (2019 Proposed Regulations).

The 2019 Proposed Regulations include § 1.168(k)–2(b)(3)(iii)(B)(*5*), which addresses the extent to which a partner is deemed to have a depreciable interest in property held by a partnership. This document withdraws § 1.168(k)–2(b)(3)(iii)(B)(*5*) of the 2019 Proposed Regulations for the reason stated in the Summary of Comments and Explanation of Revisions section of the final regulations published in the **Federal Register** by the Treasury Department and the IRS as TD 9916 on November 10, 2020.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Partial Withdrawal of a Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, § 1.168(k)–2(b)(3)(iii)(B)(*5*) of the notice of proposed rulemaking (REG–106808–19) published in the **Federal Register** on

September 24, 2019 (84 FR 50152) is withdrawn.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2020–24026 Filed 11–5–20; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 50

Terrorism Risk Insurance Program; Updated Regulations in Light of the Terrorism Risk Insurance Program Reauthorization Act of 2019, and for Other Purposes

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Department of the Treasury (Treasury) is issuing proposed rules to implement technical changes to the Terrorism Risk Insurance Program (TRIP or Program) required by the Terrorism Risk Insurance Program Reauthorization Act of 2019 (2019 Reauthorization Act), and to update links to the Program's website, where additional information relating to the administration of the Program is located for public reference. In addition, Treasury is proposing rules to: Clarify the manner in which Treasury will calculate ''property and casualty insurance losses'' for purposes of considering certification of an act of terrorism, and ''insured losses'' when administering the financial sharing mechanisms under the Program, including the Program Trigger and Program Cap; and incorporate into the Program rules prior guidance provided by Treasury in connection with stand-alone cyber insurance under the Program. Treasury also seeks further public comment concerning the certification process under the Program, and the participation of captive insurers in the Program, to facilitate further analysis and study by the Federal Insurance Office (FIO) of the Program and potential future rulemakings in these areas.

DATES: Comments must be in writing and received by January 11, 2021. Early submissions are encouraged.

ADDRESSES: Please submit comments electronically through the Federal eRulemaking Portal: *http://www.regulations.gov,* or by mail (if hard copy, preferably an original and two copies) to the Federal Insurance Office, Attention: Richard Ifft, Room 1410 MT, Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically. All comments should be captioned with ''2019 TRIA Reauthorization Proposed Rules Comments.'' Please include your name, organizational affiliation, address, email address and telephone number in your comment. Where appropriate, a comment should include a short Executive Summary (no more than five single-spaced pages).

In general, comments received will be posted on *http://www.regulations.gov* without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Richard Ifft, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202–622–2922, or Lindsey Baldwin, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202–622–3220.

SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act (TRIA) [1] was enacted following the attacks on September 11, 2001 to address disruptions in the market for terrorism risk insurance, to help ensure the continued availability and affordability of commercial property and casualty insurance for terrorism risk, and to help private markets stabilize and build insurance capacity to absorb any future losses for terrorism events. TRIA requires insurers to ''make available'' terrorism risk insurance for commercial property and casualty losses resulting from certified acts of terrorism (insured losses) and provides for shared public and private compensation for such insured losses. Under TRIA, the Secretary of the Treasury administers the Program, with the assistance of FIO.

The Program was originally scheduled to terminate on December 31, 2005, but it was extended several times between 2005 and 2015.[2] Most recently, on December 20, 2019, President Trump signed into law the 2019 Reauthorization Act.[3] Section 502 of that Act extends the Program's termination date to December 31, 2027. The risk-sharing mechanisms for calendar year 2020 remain constant for the entire reauthorization period, and are not modified by the 2019 Reauthorization Act.[4]

Treasury is issuing this notice of proposed rulemaking to align certain dates in the Program regulations with the 2019 Reauthorization Act. Treasury is also taking this opportunity to update links to the Program website in the regulations.

Treasury is also proposing several changes in response to a recent report by the Government Accountability Office (GAO) addressing certain sources of risk and uncertainty related to the Program.[5] In the report, GAO indicated that, based upon its engagement with stakeholders during the preparation of the report, some uncertainty may exist about how Treasury would factor in policyholder retention amounts in calculating ''property and casualty insurance losses'' versus ''insured losses'' to determine the Program certification threshold, Program Trigger, and Program Cap.[6] GAO recommended that Treasury provide further clarification to ''prevent uncertainty in the insurance market and potential litigation following a terrorist event that could delay insurance payments and economic recovery.'' [7] Treasury agrees that the reduction of uncertainty is an important goal. Accordingly, Treasury proposes certain rule changes designed to clarify how Treasury will apply these defined terms to effectuate the intent and goals of the Program.

Treasury is also proposing certain changes based on previous Treasury guidance regarding cyber coverage. In December 2016, Treasury issued interim guidance confirming that certain stand-alone cyber coverage written in a TRIP-eligible line of insurance was within the scope of the Program, such that insurers were obligated to adhere to the ''make available'' and disclosure requirements under TRIA for such coverage.[8]

[1] 15 U.S.C. 6701 note.

[2] Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, 119 Stat. 2660; Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110–160, 121 Stat.1839; Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3.

[3] Public Law 116–94, 133 Stat. 2534, Title V.

[4] TRIA, sec. 103(e)(1)(B)(vi).

[5] GAO, *Terrorism Risk Insurance: Program Changes Have Reduced Federal Fiscal Exposure* (GAO–20–348) (April 2020), *https://www.gao.gov/assets/710/706243.pdf.*

[6] *Id.* at 18–19.

[7] *Id.* at 19.

[8] Guidance Concerning Stand-Alone Cyber Liability Insurance Policies Under the Terrorism Risk Insurance Program, 81 FR 95312 (Dec. 27, 2016) (Cyber Guidance), *https://www.federalregister.gov/documents/2016/12/27/2016-31244/guidance-concerning-stand-alone-*

Treasury is proposing certain definitional changes to incorporate the cyber coverage guidance in the Program regulations.

While Treasury seeks comments from interested parties and the public on all aspects of the proposed rules, it particularly seeks comments on issues related to the certification process and the participation of captive insurers in the Program. Comments received will inform additional analyses concerning the Program and potential future rulemakings. Treasury has determined to further review these topics partly in response to a May 2020 report [9] issued by the Advisory Committee on Risk-Sharing Mechanisms (ACRSM), which was established under the 2015 Reauthorization Act to provide advice, recommendations, and encouragement to Treasury for the creation and development of non-governmental, private market risk-sharing mechanisms to protect against losses arising from acts of terrorism.[10] The ACRSM Report identifies a number of Program areas for further action and study by Treasury, including Treasury's existing rules governing the certification process as well as the participation within TRIP of captive insurers and other alternative carrier mechanisms.[11]

The changes are explained below in the context of the proposed rules.

II. Program Regulations

Rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, can be found in Subparts A, B, and C of 31 CFR part 50. Treasury's rules applying provisions of the Act to state residual market insurance entities and state workers' compensation funds are located at Subpart D of 31 CFR part 50. Rules addressing Treasury's data collection authorities are found at Subpart F of 31 CFR part 50. Subpart G of 31 CFR part 50 contains the Program's certification regulations. Rules setting forth procedures for filing claims for payment of the Federal share of compensation for insured losses are found at Subpart H of 31 CFR part 50. Subpart I of 31 CFR part 50 contains rules on audit and recordkeeping requirements for insurers, while Subpart J of 31 CFR part 50 addresses recoupment and surcharge procedures. Finally, Subpart K of 31 CFR part 50 contains rules implementing the litigation management provisions of TRIA, and Subpart L of 31 CFR part 50 addresses rules concerning the cap on annual liability under TRIA.[12]

III. The Proposed Rules

This proposed rulemaking would revise 31 CFR part 50 to incorporate new dates pursuant to the 2019 Reauthorization Act. The proposed rules also provide an updated link to the Program's website. Finally, the proposed rules identify certain changes designed to clarify how Treasury will apply certain defined terms to effectuate the intent and goals of the Program and incorporate Treasury's prior guidance concerning stand-alone cyber coverage.

B. Description of the Proposed Rules

The changes to the existing rules at 31 CFR part 50 as provided for in these proposed rules, on a section-by-section basis, are as follows:

Subpart A—General Provisions

Section 50.1—Authority, purpose, and scope.

The proposed change adds the 2019 Reauthorization Act to the statutory authority for the Program.

Section 50.4—Definitions

The proposed change to Section 50.4(b)(2)(ii) adds a sentence to the end of the subsection to clarify that, for purposes of calculating the threshold that must be reached before the Secretary may certify an *act of terrorism,* ''property and casualty insurance losses'' include amounts that are ultimately payable by the policyholder, as long as they arise under an insurance policy subject to the Program. ''Property and casualty insurance losses'' is thus broader than *insured loss,* as it is not limited to amounts ''covered'' under the policy. It includes all losses arising from claims associated with TRIP-eligible lines policies, whether or not the policyholder obtained terrorism risk coverage under that policy, or if the losses in question ultimately will be paid by the policyholder.

The $5 million certification threshold in TRIA is based upon ''property and casualty insurance losses,'' a term that is not defined under the statute. By contrast, TRIA defines the term *insured loss,* which governs the calculation of the Program Trigger and the Program Cap, as ''any loss resulting from an act of terrorism . . . that is covered by primary or excess property and casualty insurance issued by an insurer[.]'' [13] The term *property and casualty insurance* is also defined under TRIA, and refers to all insurance subject to the Program.[14] Treasury also commonly refers to *property and casualty insurance* as the ''TRIP-eligible lines of insurance.''

In practice, the certification analysis needed to accurately assess the size of an event involves calculating all losses associated with *property and casualty insurance* policies, regardless of whether the policyholder obtained terrorism risk coverage within the policy. The calculated amount would also include, for example, policy deductibles or fronting arrangements, even though the financial loss associated with these components will ultimately fall on the policyholder.[15] Accordingly, Treasury proposes to add language to Section 50.4(b)(2)(ii) to clarify that, for purposes of the certification analysis, ''property and casualty insurance losses'' include any losses associated with a *property and casualty insurance* policy, even if those losses are ultimately payable by the policyholder.

The proposed change to the definition of *insured loss* in Section 50.4(n) would add subsection (3)(iv) to clarify that *insured loss* does not include amounts that are paid by the policyholder under *property and casualty insurance* policies.

An *insured loss* under TRIA governs payments under the Program, including application of the Program Trigger and Program Cap. As noted above, it is defined as ''any loss resulting from an act of terrorism . . . that is covered by primary or excess property and casualty insurance issued by an insurer[.]'' [16] Insured losses ''covered'' means insured losses paid by insurers under insurance

cyber-liability-insurance-policies-under-the-terrorism-risk.

[9] Advisory Committee on Risk-Sharing Mechanisms, *Initial Report of the Committee* (May 11, 2020) (ACRSM Report), *https://home.treasury.gov/system/files/311/5-20-ACRSM-Report-Final.pdf.*

[10] Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3, § 110.

[11] In addition, GAO issued a separate report in April 2020 in which it recommended that Treasury consider further changes to the rules governing the certification process. *See* GAO, Terrorism Risk Insurance: Market is Stable but Treasury Could Strengthen Communications about Its Processes (GAO–20–364) (April 2020), *https://www.gao.gov/assets/710/706252.pdf.*

[12] To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of TRIA, Treasury has also issued interim guidance to be relied upon by insurers until superseded by regulations.

[13] TRIA, sec. 102(5).

[14] TRIA, sec. 102(11).

[15] Treasury also addressed the potential parameters of the ''property and casualty insurance losses'' language in its 2015 report, The Process for Certifying an ''Act of Terrorism'' Under the Terrorism Risk Insurance Act of 2002 (Certification Report), at 6 (*https://www.treasury.gov/resource-center/fin-mkts/Documents/TRIP_Certification_Report.pdf*).

[16] TRIA, sec. 102(5).

policies within the scope of the Program. This reading is consistent with TRIA's intent, which is to provide a backstop for the losses of insurance companies. There is no mechanism under TRIA for policyholders to recover ''insured losses'' from Treasury.[17] If the *insured loss* of an insurer included the obligations of its policyholders, it could permit an insurer to achieve a double recovery of its losses.[18]

Although the *insured loss* definition under TRIA does not expressly exclude a deductible under a policy for which the policyholder will be responsible, such a deductible would not be ''covered'' by the insurer unless the policyholder failed to pay it.[19] TRIA bases the Federal share payment upon ''all payments made for insured losses'' by the insurer.[20] Therefore, for purposes of the Program Trigger and Program Cap, TRIA contemplates an *insured loss* definition that is limited to the actual losses sustained by the participating insurers. Accordingly, Treasury proposes to add a new subsection (3)(iv) to Section 50.4(n) to clarify that *insured loss* does not include amounts paid by policyholders as part of their retained obligations under TRIP-eligible lines policies subject to the Program.

The proposed change to Section 50.4(w) would incorporate into the Program rules the guidance provided by Treasury in December 2016. That guidance stated that stand-alone cyber liability insurance is subject to the Program, unless it is otherwise identified for state reporting purposes as a type of insurance that is not property and casualty insurance under the Program. In the guidance, Treasury also noted the uncertainty presented in some circumstances as to whether cyber liability insurance is within the scope of the Program, since it is often written as professional liability insurance, which is a type of insurance expressly excluded from TRIP.[21] Treasury observed, however, that the National Association of Insurance Commissioners (NAIC) had recently identified, for state purposes, an insurance product called ''Cyber Liability'' within the general scope of the Other Liability line of insurance, which is generally subject to the Program.[22]

Given that this is a type of insurance[23] within a line of insurance subject to the Program, and is not otherwise excluded in any fashion, Treasury confirmed in its guidance that such stand-alone cyber liability insurance is subject to the Program, and instructed participating insurers (to the extent they were not doing so already) to conform to the ''make available'' and disclosure requirements of TRIA with respect to such policies. Since the TRIA compliance periods identified in the guidance have now passed, there is no need to further modify the Program Rules to address the timing of when TRIA requirements for such insurance must be met.

Section 50.6—Special Rules for Interim Guidance Safe Harbors

The proposed change to Section 50.6(b) updates the reference to the Program's website to the current address and deletes specific reference to now-obsolete prior Interim Guidance.

Subpart B—Disclosures as Conditions for Federal Payment

Section 50.16—Use of Model Forms

The proposed change to Section 50.16 updates the reference to the Program's website to the current address.

Subpart C—Mandatory Availability

Section 50.20—General Mandatory Availability Requirements

The proposed change provides that participating insurers must now comply with the ''make available'' requirement through December 31, 2027, as distinguished from December 31, 2020, given the Program extension provided for under the 2019 Reauthorization Act.

Subpart D—State Residual Market Insurance Entities; Workers' Compensation Funds

Section 50.30—General Participation Requirements

The proposed change to Section 50.30 updates the reference to the Program's website to the current address.

Subpart E—Self-Insurance Arrangements; Captives [Reserved]

Treasury continues to reserve Subpart E for future additional rules addressing the participation of self-insurance arrangements and captive insurers in TRIP. Treasury poses a number of questions below concerning the participation of captive insurers in the Program, as to which it seeks comments from the public.

Subpart F—Data Collection

There are no proposed changes to Subpart F.

Subpart G—Certification

There are no proposed changes to Subpart G. Treasury poses a number of questions below concerning Treasury's certification process under its existing rules, as to which it seeks comments from the public.

Subpart H—Claims Procedures

Section 50.74—Payment of Federal Share of Compensation

The proposed change to Section 50.74 updates the reference to the Program's website to the current address.

Subpart I—Audit and Investigative Procedures

Section 50.83—Adjustment of Civil Monetary Penalty Amount

The proposed change to Section 50.83 updates the reference to the Program's website to the current address.

Subpart J—Recoupment and Surcharge Procedures

Section 50.90—Mandatory and Discretionary Recoupment

The proposed change to Section 50.90 identifies the new dates by which Treasury must collect mandatory recoupment amounts under the 2019 Reauthorization Act.

Subpart K—Federal Cause of Action; Approval of Settlements

Section 50.103—Procedure for Requesting Approval of Proposed Settlements

The proposed change to Section 50.103 updates the reference to the Program's website to the current address.

[17] *See, e.g.,* TRIA, sec. 103(e)(1)(A) (''The Federal share of compensation under the Program to be paid by the Secretary for insured losses *of an insurer* '') (Emphasis added.).

[18] *Id.,* sec. 103(e)(1)(C) (prohibiting duplicative compensation where the Federal Government has through another program already provided compensation for the insured losses in question).

[19] Insurance practices may make the insurer responsible for payment of a policy deductible to a third party, with the policyholder subject to the insurer's claim for reimbursement of the deductible amount. By contrast, the policyholder must satisfy a self-insured retention obligation before any obligation on the part of the insurer is triggered under the policy. Thus, this issue would be limited to policyholder deductibles and not self-insured retentions, which could not be considered ''property and casualty insurance issued by an insurer.'' If an insurer paid a deductible that was not reimbursed by the policyholder (because of financial responsibility issues), Treasury could view such a payment as being within the definition of ''insured loss'' under ''property and casualty insurance issued by an insurer.''

[20] TRIA, sec. 103(b)(5)(B)(ii).

[21] TRIA, sec. 102(11); *see* Cyber Guidance, 81 FR 95312–13.

[22] Cyber Guidance, 81 FR 95313; *see* NAIC, Uniform Property & Casualty Product Coding Matrix (effective Jan. 1, 2020), 10, *https://www.naic.org/documents/industry_pcm_p_c_2020.pdf.*

[23] In one place in the Cyber Guidance, stand-alone cyber liability insurance was identified as, for reporting purposes, a sub-line of insurance within Other Liability, which is not the case, and the proposed rule does not incorporate such language.

Subpart L—Cap on Annual Liability

There are no proposed changes to Subpart L.

IV. Request for Comments Concerning Certification Process and Captive Insurers

FIO periodically issues reports and proposes regulations to address and improve the efficiency and effectiveness of the administration of the Program.

FIO has also received recommendations from the ACRSM on certain issues. In its May 2020 report, the ACRSM made a number of suggestions concerning the certification process under TRIA, including matters concerning the treatment of cyber incidents, a potential petitioning procedure for a certification process, and further adjustment of the existing timeframes in the Program rules associated with the certification process.[24] Treasury invites the public to comment on the following issues:

Program's Treatment of Cyber Events Outside the United States

TRIA is generally limited (subject to certain defined exceptions) to acts of terrorism that ''result[ ] in damage within the United States.'' [25] The ACRSM has asked that FIO evaluate whether ''cyber incidents that occur outside the U.S. with damage outside the U.S., but with impacts both inside and outside the U.S.'' could be eligible for certification under the Program. We request comment on:

(a) Whether cyber events outside the United States can inflict cyber-related losses within the United States that qualify as ''damage within the United States'' for purposes of TRIA;

(b) To the extent such cyber events can be said to inflict losses that qualify as ''damage within the United States,'' whether such losses may also be subject to compensation under the terrorism risk insurance pools or arrangements of other jurisdictions; and

(c) How Treasury could evaluate such losses representing ''damage within the United States'' from a certification standpoint, particularly if the causative cyber events in question take place outside the United States.

Certification Process

The ACRSM recommended that Treasury establish a petitioning procedure under the Program rules that would permit third parties to request that Treasury commence a certification process under its rules. We request comment on:

(a) How such a procedure could be established consistent with TRIA;

(b) What types of parties should be permitted to make such a petition to Treasury; and

(c) The information that a prospective petitioner should be required to submit to inform Treasury that the certification requirements of TRIA have been met, including but not limited to whether property and casualty insurance losses have met the $5 million certification threshold.

The ACRSM also recommended that Treasury consider whether the existing time periods and notification requirements under the certification process should be modified. Treasury invites comment on this proposal, while noting that it has previously acknowledged the difficulty of using prescriptive time periods or requirements in connection with the certification process.[26] We request comment on:

(a) How different time periods or notification requirements under the certification process could affect the administration of the Program and the terrorism risk insurance market; and

(b) How any modifications to the existing time periods or notification requirements would be consistent with the flexibility that Treasury has previously indicated it needs for certification under various circumstances.

Captive Insurers

Prior Treasury studies concerning the effectiveness of the Program have noted, in connection with analysis of the results of modeled loss questions posed by Treasury, that captive insurers have been projected to receive benefits in connection with those hypothetical loss events that are proportionally larger than those received by other insurance industry segments.[27] In addition, the ACRSM Report provides an example of how losses of a similar size could be reimbursed for such insurers as compared with conventional insurers that have a much larger direct earned premium base from which Program deductibles are calculated, and recommends that Treasury provide further transparency concerning the participation of captive insurers in the Program.[28] We request comment on:

(1) With respect to captive insurers:

(a) Whether, in light of the size and operation of captive insurers and the current structure of TRIP, captive insurers are likely to obtain larger payments under the Program in a large loss event as compared to traditional insurers that assume similar risk exposures;

(b) Whether there are administrative rule changes that could be made to the Program rules and administration for captive insurers that would result in recovery percentages for captive insurers that may be more consistent with those indicated in modeled loss analyses for other industry segments;

(c) Whether the Program should attribute some amount of captive parent revenues to captive insurers for TRIP deductible calculation purposes; and

(d) Whether changes to the Program structure for captive insurers could prevent policyholders (who may be unable to obtain terrorism risk insurance in the conventional market for a reasonable price) from obtaining such insurance from captive insurers.

(2) Whether FIO should make public financial information regarding participating captive insurers, taking into account whether this additional transparency would be beneficial to the terrorism risk insurance market and the administration of TRIP. We request comment on:

(a) The information that should and should not be made available to the public;

(b) The reasons for making (or not making) this type of information available to the public;

(c) Whether the publication of information on an individual company basis is consistent with the provisions of TRIA stating that Treasury should only obtain information from participating insurers in an anonymized fashion, and otherwise providing for the confidentiality of the information submitted; [29] and

(d) How making information publicly available concerning captive insurers could address, if at all, the issues presented by potentially disproportionate recoveries by captive insurers under TRIP, or otherwise assist FIO in the administration of the Program.

(3) Any other issues regarding the participation of captive insurers in TRIP.

[24] ACRSM Report, 6, 27.

[27] *See* Treasury, Report on the Effectiveness of the Terrorism Risk Insurance Program (June 2018), 47–53, *https://home.treasury.gov/system/files/311/2018_TRIP_Effectiveness_Report.pdf;* Treasury, Report on the Effectiveness of the Terrorism Risk Insurance Program (June 2020), 49–55, *https://home.treasury.gov/system/files/311/2020-TRIP-Effectiveness-Report.pdf.* Based upon the information available to FIO, this is likely because although captive insurers may insure large exposures of their policyholders, they tend to have smaller deductibles under the Program because of the small amount of their overall TRIP-eligible lines premiums.

[28] ACRSM Report, 6, 19–20.

[29] TRIA, sec. 104(h)(3), (5).

V. Procedural Requirements

Executive Order 12866, ''Regulatory Planning and Review.'' This proposed rule is not a significant regulatory action for purposes of Executive Order 12866, ''Regulatory Planning and Review,'' and thus has not been reviewed by the Office of Management and Budget (OMB).

Regulatory Flexibility Act. Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* Treasury must consider whether this rule, if promulgated, will have a ''significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). In this case, Treasury certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, because the changes it proposes are largely ministerial and are not expected to impact small entities more than the existing Program regulations.

Paperwork Reduction Act. No collection of information is addressed in this proposed rule. Treasury continues to submit to OMB for review, under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d), material changes to existing collection requirements.

List of Subjects in 31 CFR Part 50

Insurance, Terrorism.

For the reasons stated in the preamble, the Department of the Treasury proposes to amend 31 CFR part 50 as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

■ 1. The authority citation for part 50 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107–297, 116 Stat. 2322, as amended by Pub. L. 109–144, 119 Stat. 2660, Pub. L. 110–160, 121 Stat. 1839, Pub. L. 114–1, 129 Stat. 3, Pub. L. 116–94, 133 Stat. 2534 (15 U.S.C. 6701 note), Pub. L. 114–74, 129 Stat. 601, Title VII (28 U.S.C. 2461 note).

■ 2. Amend § 50.1 by revising paragraph (a) as follows:

§ 50.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued pursuant to authority in Title I of the Terrorism Risk Insurance Act of 2002, Public Law 107–297, 116 Stat. 2322, as amended by the Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, 119 Stat. 2660, the Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110–160, 121 Stat. 1839, the Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3, and the Terrorism Risk Insurance Program Reauthorization Act of 2019, Public Law 116–94, 133 Stat. 2534.

* * * * *

■ 3. Amend § 50.4 by revising paragraphs (b)(2)(ii), (n)(3), (w)(1) and (w)(2) as follows:

§ 50.4 Definitions.

* * * * *

(b) * * *

(2) * * *

(ii) Property and casualty insurance losses resulting from the act, in the aggregate, do not exceed $5,000,000. For these purposes, property and casualty insurance losses include any amounts subject to payment under a property and casualty insurance policy, even if the policyholder declined to obtain terrorism risk insurance under the policy or is otherwise ultimately responsible for the payment.

* * * * *

(n) * * *

(3) * * *

(iii) Payments by an insurer in excess of policy limits; or

(iv) Amounts paid by a policyholder as required under the terms and conditions of property and casualty insurance issued by an insurer.

* * * * *

(w) * * *

(1) Means commercial lines within only the following lines of insurance from the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14): Line 1—Fire; Line 2.1—Allied Lines; Line 5.1—Commercial Multiple Peril (non-liability portion); Line 5.2—Commercial Multiple Peril (liability portion); Line 8—Ocean Marine; Line 9—Inland Marine; Line 16—Workers' Compensation; Line 17—Other Liability; Line 18—Products Liability; Line 22—Aircraft (all perils); and Line 27—Boiler and Machinery; a stand-alone cyber liability policy falling within Line 17—Other Liability, is property and casualty insurance, so long as it is not otherwise identified for state reporting purposes as a policy that is not property and casualty insurance, such as professional liability insurance.

(2) Property and casualty insurance does not include:

* * * * *

■ 4. Amend § 50.6 by revising paragraph (b) as follows:

§ 50.6 Special rules for Interim Guidance safe harbors.

* * * * *

(b) For purposes of this section, any Interim Guidance will be posted by Treasury at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program.*

■ 5. Amend § 50.16 by revising paragraph (c) as follows:

§ 50.16 Use of model forms.

* * * * *

(c) *Definitions.* For purposes of this section, references to NAIC Model Disclosure Form No. 1 and NAIC Model Disclosure Form No. 2 refer to such forms as revised in March 2020, or as subsequently modified by the NAIC, provided that Treasury has stated that usage by insurers of any such subsequently modified forms is deemed to satisfy the disclosure requirements of the Act and that the insurer uses the most current forms, so approved by Treasury, that are available at the time of disclosure. These forms may be found on the Treasury website at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program.*

■ 6. Amend § 50.20 by revising paragraphs (b) and (c) as follows:

§ 50.20 General mandatory availability requirements.

* * * * *

(b) *Compliance through 2027.* Under section 108(a) of the Act, an insurer must comply with paragraphs (a)(1) and (2) of this section through calendar year 2027.

(c) *Beyond 2027.* Notwithstanding paragraph (a)(2) of this section and § 50.22(a), property and casualty insurance coverage for insured losses does not have to be made available beyond December 31, 2027, even if the policy period of insurance coverage for losses from events other than acts of terrorism extends beyond that date.

■ 7. Amend § 50.30 by revising paragraph (c) as follows:

§ 50.30 General participation requirements.

* * * * *

(c) *Identification.* Treasury maintains a list of state residual market insurance entities and state workers' compensation funds at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program.* Procedures for providing comments and updates to that list are posted with the list.

■ 8. Amend § 50.74 by revising paragraph (b) as follows:

§ 50.74 Payment of Federal share of compensation.

* * * * *

(b) *Payment process.* Payment of the Federal share of compensation for insured losses will be made to the insurer designated on the Notice of Deductible Erosion required by § 50.72. An insurer that requests payment of the Federal share of compensation for insured losses must receive payment through electronic funds transfer. The insurer must establish either an account for reimbursement as described in paragraph (c) of this section (if the insurer only seeks reimbursement) or a segregated account as described in paragraph (d) of this section (if the insurer seeks advance payments or a combination of advance payments and reimbursement). Applicable procedures will be posted at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program* or otherwise will be made publicly available.

* * * * *

■ 9. Amend § 50.83 by revising paragraph (b) as follows:

§ 50.83 Adjustment of civil monetary penalty amount.

* * * * *

(b) *Annual adjustment.* The maximum penalty amount that may be assessed under this section will be adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. 2461 note, by January 15 of each year and the updated amount will be posted in the **Federal Register** and on the Treasury website at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program.*

■ 10. Amend § 50.90 by revising paragraph (c) as follows:

§ 50.90 Mandatory and discretionary recoupment.

* * * * *

(c) If the Secretary imposes a Federal terrorism policy surcharge as provided in paragraph (a) of this section, then the required amounts, based upon the extent to which payments for the Federal share of compensation have been made by the collection deadlines in section 103(e)(7)(E) of the Act, shall be collected in accordance with such deadlines:

(1) For any act of terrorism that occurs on or before December 31, 2022, the Secretary shall collect all required amounts by September 30, 2024;

(2) For any act of terrorism that occurs between January 1 and December 31, 2023, the Secretary shall collect 35 percent of any required amounts by September 30, 2024, and the remainder by September 30, 2029; and

(3) For any act of terrorism that occurs on or after January 1, 2024, the Secretary shall collect all required amounts by September 30, 2029.

■ 11. Amend § 50.103 by revising paragraph (a) as follows:

§ 50.103 Procedure for requesting approval of proposed settlements.

(a) *Submission of notice.* Insurers must request advance approval of a proposed settlement by submitting a notice of the proposed settlement and other required information in writing to the Terrorism Risk Insurance Program Office or its designated representative. The address where notices are to be submitted will be available at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program* following any certification of an act of terrorism pursuant to section 102(1) of the Act.

* * * * *

Dated: October 30, 2020.

Jonathan Greenstein,

Deputy Assistant Secretary for Financial Institutions Policy.

[FR Doc. 2020–24522 Filed 11–9–20; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket Ns. 20–105; FCC 20–120; FRS 17210]

Assessment and Collection of Regulatory Fees for Fiscal Year 2020

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on several regulatory fee issues impacting international services.

DATES: Submit comments on or before December 10, 2020; and reply comments December 28, 2020.

ADDRESSES: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments identified by MD Docket No. 20–105, by any of the following methods below. Comments and reply comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by 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: Roland Helvajian, Office of Managing Director at (202) 418–0444.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking ((*Further Notice*)), FCC 20–120, MD Docket No. 20–105, adopted and released on August 31, 2020. The full text of this document is available for public inspection on the Commission's website at *https://docs.fcc.gov/public/attachments/FCC-20-120A1.pdf.* This document is available in alternative formats (computer diskette, large print, audio record, and braille). Persons with disabilities who need documents in these formats may contact the FCC by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

I. Procedural Matters

1. *Ex Parte Information.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. In proceedings governed by § 1.49(f) of the Commission's rules 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.

2. *Initial Regulatory Flexibility Analysis.* An initial regulatory flexibility analysis (IRFA) is contained in this summary. Comments to the IRFA must be identified as responses to the IRFA and filed by the deadlines for comments on the Notice of Proposed Rulemaking. The Commission will send a copy of the Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

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

II. Notice Of Proposed Rulemaking

4. In this Further Notice of Proposed Rulemaking, we invite comment on four proposals from commenters in this proceeding to differentiate regulatory fees for different types of NGSO systems in future years. *First,* Kineis notes the Commission has already concluded that a separate fee for small satellites would be appropriate; the NGSO systems vary dramatically in size, number of space stations, spectrum required, and services offered; the proposed fee increase for NGSO systems is substantial; and the Commission has not addressed this issue in many years. Kineis therefore proposes a formula to determine NGSO regulatory fees: × (number of operating satellites) multiplied by y (total transmit bandwidth) = index value. Kineis suggests fee tiers based on groupings of index values and basing the difference in fees on the average index value for each tier. We seek comment on this proposal.

5. *Second,* Eutelsat contends that the fees assessed on NGSO systems should be separated into small and large NGSO systems, based on the number of satellites in the system. According to Eutelsat, large and complex NGSO systems require more staff time to oversee and receive greater benefits from the Commission. Smaller NGSO systems in more established bands, Eutelsat suggests, represent a smaller burden on Commission staff because they have greater sharing capabilities and operate in less congested and less contested frequency bands. We seek comment on this proposal.

6. *Third,* Myriota proposes we divide NGSO systems into three categories: fixed-satellite service (FSS); mobile-satellite service (MSS); and remote sensing, Earth-exploration satellite service (EESS), and other NGSO systems. Myriota explains that the Commission has spent multiple years on the NGSO FSS processing round for more than ten applicants and some applicants seeking constellations of tens of thousands of satellites. Myriota contends that other types of NGSO systems, such as MSS or EESS systems, require fewer resources because they have fewer applicants and less complex issues, relative to the FSS systems. In addition, NGSO rulemakings from 2017–2019 primarily benefited NGSO FSS systems and the Commission has not updated the rules for MSS or remote sensing during that time period. Myriota argues that the Commission's rules for NGSO FSS systems generally reflect a level of complexity not present for other NGSO systems due to the extremely large constellations and complex sharing and coordination requirements. We seek comment on this proposal.

7. *Finally,* AWS suggests that we assess a nominal fee for NGSO systems with five or fewer U.S. licensed earth stations for TT&C and non-domestic data downlink purposes. AWS proposes that the regulatory fee would be assessed on a per earth station basis at the same rate as earth station licenses. We seek comment on this proposal.

8. The Commission considers the adoption of a new fee category or a change in fee categories only when it develops sufficient basis for making the change. Commenters should address whether the proposal are in accord with the requirements of section 9. Commenters should also address whether such proposals serve the goal of ensuring that our actions in assessing regulatory fees are fair, administrable, and sustainable.

9. It has not been the experience of Commission staff reviewing satellite applications that certain broad categories of NGSO systems require substantially more time to process than others under the current rules. A smaller NGSO system in bands shared with other services may require greater staff efforts to approve than a larger NGSO system in bands without coordination difficulties. NGSO FSS systems, while occupying substantial staff time to review in the past few years, have also benefited from streamlining rulemakings that have eliminated some of the most cumbersome technical demonstrations, such as equivalent power-flux density showings. In contrast, systems operating in services that are allegedly easier to license, such as EESS, have involved complicated, multi-year coordination, phased deployments, multiple application amendments, and frequent grants in part, with the associated staff investment. Nonetheless, we recognize that the Commission has created the regulatory category for small satellites, in part, to charge different fees for certain systems. Accordingly, we invite comment on the proposals above regarding other categories of NGSO systems for FY 2021.

III. Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rulemaking. Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on this *Further Notice.* The Commission will send a copy of the *Notice,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* seeks comment on a regulatory fee issue raised by commenters for fiscal year (FY) 2021. In the *Further Notice,* the Commission seeks comment on four proposals to differentiate regulatory fees for different types of nongeostationary orbit satellite (NGSO) systems. The Commission seeks comment on a proposed formula to determine NGSO regulatory fees: × (number of operating satellites) multiplied by y (total transmit bandwidth) = index value. The Commission also seeks comment on separating large and small NGSO systems into different categories, based on the number of satellites in each system. In addition, the Commission seeks comment on a proposal to divide NGSO systems into categories: Fixed-satellite service (FSS); mobile-satellite service (MSS); and remote sensing, Earth-exploration satellite service (EESS), and other NGSO systems. Finally, the Commission seeks comment on assessing a nominal fee for NGSO systems with five or fewer U.S. licensed earth stations for telemetry, tracking, and command (TT&C) and non-domestic data downlink purposes, on a per earth station basis at the same rate as earth station licenses. The Commission seeks comment on these four proposals for different regulatory fee categories of NGSO systems for FY 2021.

B. Legal Basis

3. This action, including publication of proposed rules, is authorized under sections (4)(i) and (j), 159, and 303(r) of the Communications Act of 1934, as amended.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

5. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

6. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

7. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2012 Census of Governments indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37, 132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.'' Governmental entities are, however, exempt from application fees.

8. *All Other Telecommunications.* ''All Other Telecommunications'' is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or Voice over internet Protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $35 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Thus, a majority of ''All Other Telecommunications'' firms potentially affected by the proposals in the *Further Notice* can be considered small.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements for Small Entities

9. This *Further Notice* does not propose any changes to the Commission's current information collection, reporting, recordkeeping, or compliance requirements.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

10. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) The establishment of

differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

11. The *Further Notice* seeks comment on four proposals for NGSO regulatory fee categories for FY 2021. The Commission will release a Notice of Proposed Rulemaking for all regulatory fees for FY 2021; the Further Notice will give parties an opportunity to file comments prior to the annual Notice of Proposed Rulemaking. If any of these proposals are adopted, it may reduce the regulatory fee burden on some satellite entities. In addition, the section 9(e)(2) annual regulatory fee exemption of $1,000 will reduce burdens on small entities with annual regulatory fees that total $1,000 or less.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

12. None.

IV. Ordering Clauses

13. Accordingly, *it is ordered* that, pursuant to section 9(a), (b), (e), (f), and (g) of the Communications Act of 1934, as amended, 47 U.S.C. 159(a), (b), (e), (f), and (g), this Notice of Proposed Rulemaking *is hereby adopted*.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2020–24503 Filed 11–9–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

48 CFR Parts 326 and 352

[Docket No. OI–2012–0005]

RIN 0917–AA18

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Indian Health Service (IHS), Department of Health and Human Services (HHS).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: The United States Department of Health and Human Services (HHS) is proposing to issue regulations guiding implementation of the Buy Indian Act, which provides IHS with authority to set-aside procurement contracts for Indian-owned and controlled businesses.

DATES: Send your comments on or before January 11, 2021.

ADDRESSES: You may send comments identified by docket number January 11, 2021 using any of the following methods:

Evonne Bennett, Acting Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services (OMS), Indian Health Service, 5600 Fishers Lane, Mail Stop 09E70, Rockville, MD 20857.

Tiffani Redding, Director, Office of Recipient Integrity Coordination (ORIC), Department of Health and Human Services, Office of the Assistant Secretary for Financial Resources (ASFR), Room 533H, Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this proposed rule contact:

Evonne Bennett, Acting Director, Division of Regulatory Policy Coordination (DRPC), Office of Management Services, Indian Health Service, 301–443–4750, *evonne.bennett@ihs.gov;* or Santiago Almaraz, Acting Director Office of Management Services, Indian Health Service, 301–443–4872, *santiago.almaraz@ihs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Health Service (IHS) is an agency of the United States Department of Health and Human Services (HHS) whose principal mission is to provide health care to American Indians and Alaska Natives. 25 U.S.C. 1661. IHS' authority to provide health care services to the American Indian and Alaska Native people derives from the Snyder Act of 1921, 25 U.S.C. 13, a broad, general authority to ''expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,'' for, among other things, the ''relief of distress and conservation of health.'' 25 U.S.C. 13. In 1954, Congress transferred this responsibility and other health care ''functions, responsibilities, authorities, and duties of the Department of the Interior'' (including the Snyder Act) to the Department of Health, Education, and Welfare, the predecessor of the Department of Health and Human Services (''HHS''). See Public Law 83–568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 *et seq.*) The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C.1633. This rule is proposed to describe uniform administration procedures that the IHS will use in all of its locations to encourage procurement relationships with Indian labor and industry in the execution of the Buy Indian Act. IHS' current rules are codified at HHSAR, 48 CFR part 326, subpart 326.6.

II. Statutory Authority

The Transfer Act authorizes the Secretary of HHS to ''make such other regulations as he deems desirable to carry out the provisions of the [Transfer Act]''. 42 U.S.C. 2003. The Secretary's authority to carry out functions under the Transfer Act has been vested in the Director of the Indian Health Service under 25 U.S.C. 1661. Because of these authorities, use of the Buy Indian Act is reserved to IHS and is not available for use by any other HHS component. IHS authority to use the Buy Indian Act is further governed by 25 U.S.C.1633, which directs the Secretary to issue regulations governing the application of the Buy Indian Act to construction activities.

III. Overview of Proposed Rule

This rule supplements the Federal Acquisition Regulations (FAR) and the Health and Human Services Acquisition Regulations (HHSAR). This rule formalizes an administrative procedure for all IHS acquisition activities and locations to ensure uniformity for offers submitted by Indian labor and industry under solicitations set aside under the Buy Indian Act and this part.

A. Numbering System

This rule replaces the HHSAR, Subpart 326.6—Acquisitions Under the Buy Indian Act.

B. How This Rule Fits With the Indian Health Service and Department Acquisition Regulations

This rule proposes to amend the HHSAR, which is maintained by Assistant Secretary for Financial Resources (ASFR) pursuant to 48 CFR 301.103. ASFR is responsible for developing and preparing for issuance all acquisition regulatory material to be included in the HHSAR. Accordingly, the rule is being proposed through coordination between IHS and ASFR. The rule is intended to establish Buy Indian Act acquisition policies and procedures for IHS that are consistent with rules proposed and/or adopted by the Department of the Interior.

IV. Tribal Consultation

Under 25 U.S.C. 1672, IHS must consult with Indian tribes and publish, any proposed revision or amendment of any regulation promulgated under the Indian Health Care Improvement Act, in the **Federal Register** not less than sixty days prior to the effective date of such revision or amendment in order to provide adequate notice to, and receive comments from, other interested parties. Because this rule is being promulgated in part based on the Indian Health Care Improvement Act, IHS will be hosting tribal consultation meetings addressing this rule on the following dates at these locations:

Date	Time (local time zone)	Location
November 9, 2020	3:00–4:30 p.m. EST	1–888–391–3141, Participant Code: 8680097.
November 16, 2020	3:00–4:30 p.m. EST	1–888–391–3141, Participant Code: 8680097.

Tribal leader letters announcing these consultation meetings will be distributed to provide advance notice of these consultations.

V. Required Determinations

1. *Regulatory Planning and Review (Executive Orders 12866 and 13563).* Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant. Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. *Regulatory Flexibility Act.* HHS certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

3. *Small Business Regulatory Enforcement Fairness Act.* This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule does not have an annual effect on the economy of $100 million or more. This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act.* This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector nor does the rule impose requirements on State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (E.O. 12630).* This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

6. *Federalism (E.O. 13132).* Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This rule would not substantially and directly affect the relationship between the Federal and State Governments. A Federalism summary impact statement is not required.

7. *Civil Justice Reform (E.O. 12988).* This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule (1) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (2) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation with Indian tribes (E.O. 13175).* IHS strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department and Agency consultation policies and under the criteria in E.O. 13175 and have determined there may be substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking. In addition, we note that 25 U.S.C. 1672 expressly directs consultation prior to amendment of the rule. HHS will hold meetings with the Tribes as stated in the Background section of this preamble.

9. *Paperwork Reduction Act,* 44 U.S.C. 3501, *et seq.* This proposed rule requires offerors to certify whether they met the definition of an ''Indian Economic Enterprise'' and to provide the name of the federally recognized Indian Tribe or Alaska Native Corporation with which they are affiliated. These statements are considered simple representations that an offeror submitted to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act (25 U.S.C. 47, as amended). Because these statements are a simple certification or acknowledgment related to a transaction, they do not qualify as a collection of information under the Paperwork Reduction Act. See 5 CFR 1320.3(h).

10. *National Environmental Policy Act.* This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(c). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. *Clarity of this Regulation.* We are required by Executive Orders 12866

(section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must (1) be logically organized; (2) use the active voice to address readers directly; (3) use common, everyday words and clear language rather than jargon; (4) be divided into short sections and sentences; and (5) use lists and tables wherever possible.

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

12. *Public availability of comments.* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be 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. When submitting comments please identify what topic your comment covers from the following list:

(1) Subcontract Limitations
(2) Buy Indian Act Deviations
(3) Preventing Fraud and Abuse
(4) Covered Construction
(5) Other Topic Related to the Proposed Rule

List of Subjects

48 CFR Part 326

Government procurement, Indians, Indians-business and finance, Reporting and recordkeeping requirements.

48 CFR Part 352

Government procurement.

For the reasons set out in the preamble, the HHS proposes to amend parts 326 and 352 as follows:

CHAPTER 3—HEALTH AND HUMAN SERVICES

Subchapter D—Socioeconomic Programs

PART 326—OTHER SOCIOECONOMIC PROGRAMS

■ 1. The authority citation for part 326 is revised to read as follows:

Authority: 5 U.S.C. 301, 25 U.S.C. 47, 25 U.S.C. 1633, 41 U.S.C. 253(c)(5), and 42 U.S.C. 2003.

■ 2. Revise subpart 326.6 to read as follows:

Subpart 326.6—Acquisitions Under the Buy Indian Act

326.600—General

Sec.
326.600–1 Scope of part.
326.600–2 Buy Indian Act acquisition regulations.

326.601—Definitions

326.601 Definitions.

326.602—Applicability

326.602–1 Scope of part.
326.602–2 Restrictions on the use of the Buy Indian Act.

326.603—Policy

326–603–1 Requirement to give preference to Indian Economic Enterprises.
326–603–2 Delegations and responsibility.
326–603–3 Deviations.

326.604—Procedures

326.604–1 General.
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326.604–3 Debarment and suspension.

326.605—Contract Requirements

326.605–1 Subcontracting limitations.
326.605–2 Performance and payment bonds.

326.606—Representation by an Indian Economic Enterprise Offeror

326.606–1 General.
326.606–2 Representation provision.
326.606–3 Representation process.

326.607—Challenges to Representation

326.607–1 Procedure.

Subpart 326.6—Acquisitions Under the Buy Indian Act

326.600—General

§ 326.600–1 Scope of part.

This subpart implements policies and procedures for the procurement of supplies, general services, architect and engineering (A&E) services, or covered construction (including A&E services), while giving preference to Indian Economic Enterprises under authority of the Buy Indian Act (25 U.S.C. 47).

§ 326.600–2 Buy Indian Act acquisition regulations.

(a) This subpart supplements Federal Acquisition Regulation (FAR) and Health and Human Services Acquisition Regulation (HHSAR) requirements to meet the needs of the Department of Health and Human Services, Indian Health Service in implementing the Buy Indian Act.

(b) This subpart is under the direct oversight and control of the Head of Contracting Activity (HCA), within the Office of Management Services (OMS)—Indian Health Service, Department of Health and Human Services. The HCA, in consultation with the ASFR and the Senior Procurement Executive (SPE), is responsible for promulgating this subpart, and following its enactment, will be primarily responsible for implementing its terms.

(c) Acquisitions conducted under this subpart are subject to all applicable requirements of the FAR and HHSAR, as well as internal policies, procedures, or instructions issued by Indian Health Service. After the FAR, this HHSAR subpart would take precedence over any inconsistent Indian Health Service policies, procedures, or instructions.

326.601—Definitions

§ 326.601 Definitions.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92–203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601–1629h.

Alaska Native Corporation means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as those terms are defined by ANCSA.

Buy Indian Act means section 23 of the Act of June 25, 1910, codified at 25 U.S.C. 47.

Chief Contracting Officer (CCO) means a person with authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government for the respective IHS Areas.

Contracting Officer (CO) means a person with the authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

Covered construction means the planning, design, construction and renovation, including associated architecture and engineering services, of IHS facilities pursuant to 25 U.S.C. 1631 and in the construction of safe water and sanitary waste disposal facilities pursuant to 25 U.S.C. 1632.

Deviation means an exception to the requirement to use the Buy Indian Act in fulfilling an acquisition requirement subject to the Buy Indian Act.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 19.202–6(a).

Federally Recognized Indian Tribe means an Indian tribe, band, nation, or

other recognized group or community, or any Alaska Native village or Native group (as those terms are defined in ANCSA) found on the List of Federally Recognized Tribes. *Governing Body* means the recognized entity empowered to exercise governmental authority over a Federally Recognized Indian Tribe.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Health Service (IHS) means operations at all administrative levels of IHS, including Headquarters, Area Offices and Service Units (inclusive of clinics).

Indian Economic Enterprise (IEE) means any business activity owned by one or more Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations provided that:

(1) The combined Indian, Federally Recognized Indian Tribe, or Alaska Native Corporation ownership of the enterprise constitutes not less than 51 percent;

(2) The Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations must, together, receive at least 51 percent of the earnings from the contract; and

(3) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. The Indian individual(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

Indian Small Business Economic Enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

Interested Party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual award of a particular contract set-aside pursuant the Buy Indian Act.

List of Federally Recognized Tribes means a tribal entity recognized by and eligible for funding and services from the Indian Health Service by virtue of their status as Indian Tribes. A full list of these entities is published annually in the **Federal Register** pursuant to Section 104 of Public Law 103–454, codified at 25 U.S.C. 5131.

Transfer Act of 1954 means the authority of transferred responsibility and other health care ''functions, responsibilities, authorities and duties of the Department of the Interior'' (including the Snyder Act) to health, education and welfare, the predecessor of the Department of Health and Human Services (DHHS). Public Law 83–568, 68 Stat. 674 (1954) (codified at 42 U.S.C. 2001 *et. seq*). The Transfer Act authorizes IHS to use the Buy Indian Act (25 U.S.C. 47) to carry out its health care responsibilities.

326.602—Applicability

§ 326.602–1 Scope of part.

Except as provided in HHSAR 326.602–2, this subpart applies to all acquisitions, including simplified acquisitions, made by IHS, any HHS operating divisions or agency outside of HHS conducting acquisitions on behalf of IHS.

§ 326.602–2 Restrictions on the use of the Buy Indian Act.

(a) IHS may not use the authority of the Buy Indian Act and the procedures contained in this subpart to award intergovernmental contracts to tribal organizations to plan, operate, or administer authorized IHS programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638). IHS must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to ISDEAA are not covered under the FAR and are codified separately under 25 CFR part 900 and 42 CFR part 137.

(b) Contract health services (referred to administratively as Purchased/Referred Care services) are defined at 25 U.S.C. 1603 as excluding services provided by Buy Indian Act contractors. Accordingly, the Buy Indian Act may not be used to obtain services through the Purchased/Referred Care program (previously CHS). Purchase orders for care authorized pursuant to 42 CFR part 136 subpart C may be issued without regard to the provisions of this Part.

326.603—Policy

§ 326.603–1 Requirement to give preference to Indian Economic Enterprises.

(a) Except as provided by 25 U.S.C. 1633, IHS must use the negotiation authority of the Buy Indian Act to give preference to Indians, Federally Recognized Tribes, or Alaska Native Corporations whenever the use of that authority is practicable. Thus, IHS may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, general services, A&E services, or covered construction to meet IHS needs and requirements.

(b) Contract awards under the authority of the Buy Indian Act can be pursued via the acquisition procedures prescribed in this HHSAR subpart in conjunction with the procedures from FAR part 12, 13, 14, 15 and/or 16.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value, by utilizing ISBEE set-aside to the maximum extent possible.

(d) If the CO determines after market research that there is no reasonable expectation of obtaining offers from two or more ISBEEs that will be competitive in terms of market price, product quality, and delivery capability, the CO shall expand the market research to all IEEs to determine if the requirement can be set aside for IEEs.

(e) If the CO determines after market research that there is no reasonable expectation of obtaining two or more offers that will be competitive in terms of market price, product quality, and delivery capability, from ISBEEs and/or IEEs, then the CO shall follow the Deviation process under HHSAR 326.603–3.

(f) Price analysis technique(s) provided in FAR 15.404–1(b) shall be used in determination of price fair and reasonableness when only one offer is received from a responsible ISBEE or IEE in response to an acquisition set-aside under paragraph (c) or (d) of this section.

(g) If the offers received in response to an acquisition set-aside under paragraph (c) or (d) of this section are determined to be unacceptable upon price and/or technical evaluations, then the CO must follow the Deviation process under HHSAR 326.603–3. The CO must document in the deviation determination the reasons why the IEE offeror(s) were not reasonable or otherwise unacceptable.

(1) If a deviation determination is approved, the CO must cancel the current ISBEE or IEE set-aside solicitation and identify, based on current available market research, an alternate set-aside or procurement method.

(h) With respect to covered construction, the provisions of 25 U.S.C. 1633 shall apply. Under 25 U.S.C. 1633, IHS may give a preference to an IEE unless the agency finds, after considering the evaluation criteria listed in 25 U.S.C. 1633, that the project to be contracted for will not be satisfactory or cannot be properly completed or maintained under the proposed contract.

§ 326.603–2 Delegations and responsibility.

(a) The Director, IHS—exercises the authority of the Buy Indian Act pursuant to the Transfer Act of 1954, as delegated pursuant to 25 U.S.C. 1661. Under 25 U.S.C. 1661, the Director is

authorized ''to enter into contracts for the procurement of goods and services to carry out the functions of the IHS.'' IHS exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Head of Contracting Activity, IHS (IHS HCA) is responsible for ensuring that all IHS acquisitions under the Buy Indian Act comply with the requirements of this part.

§ 326.603–3 Deviations.

(a) There are certain instances where the application of the Buy Indian Act to an acquisition may not be appropriate. In these instances, the Contracting Officer must detail the reasons in writing or via email and make a deviation determination.

(b) Some acquisitions by their very nature would make such a written determination unnecessary. The following acquisitions do not require a written deviation from the requirements of the Buy Indian Act:

(1) Any sole source acquisition justified and approved in accordance with FAR Subpart 6.3 and HHSAR 306.3 constitutes an authorized deviation from the requirements of the Buy Indian Act.

(2) Any order or call placed against an indefinite delivery vehicle that already has an approved deviation from the requirements of the Buy Indian Act.

(c) Deviation determinations shall be required for all other acquisitions where the Buy Indian Act is applicable and must be approved as follows:

TABLE 1 TO PARAGRAPH (c)

For a proposed contract action	The following official may authorize a deviation
Exceeding the micro-purchase threshold and up to $25,000.	Contracting Officer.
Exceeding $25,000 but not exceeding $700,000.	Chief Contracting Officer (CCO) (or the IHS Division of Acquisition Policy (DAP) Director, absent a CCO).
Exceeding $700,000 but not exceeding $13.5 million.	IHS Competition Advocate.
Exceeding $13.5 million but not exceeding $68 million.	Head of Contracting Activity.
Exceeding $68 million	HHS Office of Small & Disadvantaged Business Utilization (OSDBU), Office of General Counsel (OGC), HHS Department Competition Advocate and the HHE Senior Procurement Executive.

326.604—Procedures

§ 326.604–1 General.

All acquisitions under the authority of the Buy Indian Act, must conform to all applicable requirements of the FAR and HHSAR.

§ 326–604–2 Procedures for Acquisitions under the Buy Indian Act.

(a) This paragraph applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE; and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE is identified after issuing a solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(b) Clauses and Provisions.

(1) The contracting officer shall insert the provision at HHSAR 352.226–4, NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET–ASIDE, in solicitations for acquisitions that are set aside to ISBEE concerns under HHSAR 326.603–1(c).

(2) The contracting officer shall insert the provision at HHSAR 352.226–5, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET–ASIDE, in solicitations for acquisitions that are set aside to IEE concerns in accordance with HHSAR 326.603–1(d).

(3) The contracting officer shall insert the clause at HHSAR 352.226–6, SUBCONTRACTING LIMITATIONS, in all solicitations and contracts when the contract award is to be made under the authority of the Buy Indian Act.

(4) The contracting officer shall insert the provision at HHSAR 352.226–7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations when the contract award is to be made under the authority of the Buy Indian Act.

§ 326.604–3 Debarment and suspension.

A misrepresentation by an offeror of its status as an IEE, failure to notify the CO of any change in IEE status that would make the contractor ineligible as an IEE, or any violation of the regulations in this part by an offeror or an awardee may lead to debarment or suspension in accordance with FAR 9.406 and 9.407 and HHSAR 309.406 and 309.407.

326.605—Contract Requirements

§ 326.605–1 Subcontracting limitations.

(a) The contracting officer shall insert FAR clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for ISBEEs and IEEs.

§ 326.605–2 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR Part 28 and authorize use of any of the types of security acceptable in accordance with FAR Subpart 28.2 or section 11 of Public Law 98–449, the Indian Financing Act Amendments of 1984 (25 U.S.C. 47a). In accordance with FAR 28.102 and 25 U.S.C. 47a, the CO may accept alternative forms of security in lieu of performance and payment bonds if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

326.606—Representation by an Indian Economic Enterprise Offeror

§ 326.606–1 General.

(a) The CO must insert the provision at HHSAR 352.226–7, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations regardless of dollar value solicited under HHSAR 326.603–1 (c) or (d) and in accordance with this part.

(b) To be considered for an award under HHSAR 326.603–1(c) or (d), an offeror must:

(1) Certify that it meets the definition of ''Indian Economic Enterprise'' in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and

(2) Identify the Federally Recognized Indian Tribe(s) or Alaska Native

Corporation(s) upon which the offeror relies for its IEE status.

(c) The enterprise must meet the definition of ''Indian Economic Enterprise'' throughout the following time periods:

(1) At the time an offer is made in response to a solicitation;

(2) At the time of contract award; and

(3) During the full term of the contract.

(d) If, after award, a contractor no longer meets the eligibility requirements as it has certified and as set forth in this section, then the contractor must provide the CO with written notification within 3 calendar days of its failure to comply with the eligibility requirements. The notification must include:

(1) Full disclosure of circumstances causing the contractor to lose eligibility status; and

(2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to maintain eligibility under the Buy Indian Act or to provide written notification required by paragraph (d) of this section means that:

(1) The contractor may be declared ineligible for future contract awards under this part;

(2) The CO may consider termination for default of the ongoing contract; and

(3) The CO may pursue debarment or suspension of the contractor.

(f) The CO will review the offeror's representation that it is an IEE in a specific bid or proposal and verify that the Federally Recognized Indian Tribe(s) or Alaska Native Corporation(s) that the offeror identifies in the representation is either on the List of Federally Recognized Tribes or is an Alaska Native Corporation. A CO will also investigate the representation if an interested party challenges the IEE representation or if the CO has any other reason to question the representation. The CO may ask the offeror for more information to substantiate the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with HHSAR 326.607.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

§ 326.606–2 Representation provision.

(a) Contracting offices must provide copies of the awardees' IEE representation to any interested parties upon written request. IHS will make awardees' IEE representations via IHS public sites and/or other means.

(b) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act may be a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance may be subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(c) The CO shall inform the Head of Contracting Activity, within 10 business days, of all suspected IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

§ 326.606–3 Representation process.

(a) Only IEEs may participate in acquisitions set aside in accordance with the Buy Indian Act and this part. The procedures in this Part are intended to support responsible IEEs and prevent circumvention or abuse of the Buy Indian Act.

(b) The CO shall review the ownership information furnished under HHSAR 352.226–7(b) and ensure that the information submitted matches the List of Federally Recognized Tribes or is an Alaska Native Corporation, as identified and published via a **Federal Register** Notice as Indian entities recognized by and eligible to receive services from the United States Department of the Interior (DOI), Bureau of Indian Affairs (BIA).

(c) If the CO cannot verify the offeror submission with the List of Federally Recognized Tribes the CO must allow the offeror to correct information submitted under HHSAR 352.226–7(b). The contracting officer should make every effort to allow the offeror to correct the information. If the requirement is time sensitive the contracting officer must specify to the offeror the time and date by which a response is required.

(1) If the CO determines the offeror is not responsive, the CO must document the circumstances and inform the offeror of the determination.

(2) The CO may ask the Office of the General Counsel to review the IEE representation.

(3) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR Subpart 9.1.

326.607—Challenges to Representation

§ 326.607–1 Procedure.

(a) The CO can accept an offeror's written representation of being an ISBEE or IEE (as defined in HHSAR 326.601) only when it is submitted in response to a Sources Sought Notice, Request for Information (RFI) or with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or awardee by filing a written challenge.

(b) Upon receipt of the challenge, the CO shall re-verify the representation of the offeror or awardee in accordance with the requirements of this subpart, including the provisions of 326.606.

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for part 352 is revised to read as follows:

Authority: 5 U.S.C. 301, 40 U.S.C. 121(c)(2), 42 U.S.C. 2003

Subpart 352.2—Text of Provisions and Clauses

■ 2. Add §§ 352.226–4 through 352.226–7 to read as follows:

§ 352.226–4 Notice of Indian Small Business Economic Enterprise set-aside.

As prescribed in HHSAR 326.604–2(b)(1), and in lieu of the requirements of 48 CFR 19.508, insert the following clause in solicitations and contracts for acquisitions that are set aside to Indian Small Business Economic Enterprise concerns.

Notice of Indian Small Business Economic Enterprise Set-Aside

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (HHSAR 326.606) that are also small business concerns. As required by HHSAR § 352.226–7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS Division of Acquisition Policy public website (*www.IHS.gov/DAP*), shall be included in synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not both Indian Economic Enterprises and small business concerns shall not be considered.

(End of clause)

§ 352.226–5 Notice of Indian Economic Enterprise set-aside.

As prescribed in HHSAR 326.604–2(b)(2), insert the following clause in solicitations and contracts involving Indian Economic Enterprise set-asides.

Notice of Indian Economic Enterprise Set-Aside

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian

Economic Enterprises (326.606). As required by HHSAR 352.226–7(b), offerors shall include a completed Indian Economic Enterprise Representation form in response to Sources Sought Notices, Request for Information (RFI) and as part of the proposal submission. The Indian Economic Enterprise Representation form, available on the IHS Division of Acquisition Policy public website (*www.IHS.gov/DAP*), shall be included in synopses, presolicitation notices, and solicitations for the acquisitions under the Buy Indian Act. Offers received from enterprises that are not Indian Economic Enterprises shall not be considered.

(End of clause)

§ 352.226–6 Indian Economic Enterprise Subcontracting Limitations.

A contractor shall not subcontract more than the subcontract limitations specified under FAR 52.219–14 Limitations on Subcontracting. As prescribed in HHSAR 326.604–2(b)(3), insert the following clause in each written solicitation and contract to provide supplies, general services, A&E services, or covered construction:

Indian Economic Enterprise Subcontracting Limitations

(a) Definitions as used in this clause.

(1) *Indian Economic Enterprise Concern* means any business activity owned by one or more Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations that is established for the purpose of profit, provided that:

(i) The combined Indian, Federally Recognized Indian Tribe, or Alaska Native Corporation ownership of the enterprise shall constitute not less than 51 percent;

(ii) The Indians, Federally Recognized Indian Tribes, or Alaska Native Corporations shall, together, receive at least 51 percent of the earnings from the contract; and

(iii) The management and daily business operations of an Indian Economic Enterprise must be controlled by one or more individuals who are Indians. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

(2) *Subcontract* means any agreement (other than one involving an employer-employee relationship) entered into by a subcontractor to furnish supplies and/or services required for performance of a prime contract or a subcontract. It includes but is not limited to contracts and contract modifications.

(3) *Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The contractor must comply with FAR 52.219–14, Limitations on Subcontracting clause throughout the contract period.

(End of clause)

352.226–7 Indian Economic Enterprise representation.

As prescribed in HHSAR 326.604–2(b)(4), insert the following provision in each written solicitation for supplies, services, A&E, or covered construction:

Indian Economic Enterprise Representation

(a) The offeror must represent as part of its offer that it does meet the definition of Indian Economic Enterprise (IEE) as defined in HHSAR 326.601 and that it intends to meet the definition of an IEE throughout the performance of the contract. The offeror must notify the contracting officer within 10 business days, via email, if there is any ownership change affecting compliance with this representation.

(b) The representation must be made on the designated IHS Indian Economic Enterprise Representation form or any successor forms through which the offeror will certify that the ownership requirements defined by HHSAR 326.601 are met.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(End of provision)

Dated: September 30, 2020.

Michael D. Weahkee,

RADM, Assistant Surgeon General, U.S. Public Health Service, Director, Indian Health Service.

Approved: October 6, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

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Notices

Federal Register

Vol. 85, No. 218

Tuesday, November 10, 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 COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; National Survey of Children's Health

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, 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 on the proposed revision of the National Survey of Children's Health, prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 11, 2021.

ADDRESSES: Interested persons are invited to submit written comments by email to *ADDP.NSCH.List@census.gov.* Please reference National Survey of Children's Health in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2020–0027, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Carolyn Pickering, Survey Director, by way of phone (301–763–3873) or email (*Carolyn.M.Pickering@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

Sponsored primarily by the U.S. Department of Health and Human Services' Health Resources Services Administration's Maternal and Child Health Bureau (HRSA MCHB), the National Survey of Children's Health (NSCH) is designed to produce data on the physical and emotional health of children under 18 years of age who live in the United States. The United States Department of Agriculture (USDA) and the United States Department of Health and Human Services' Center for Disease Control and Prevention, National Center on Birth Defects and Developmental Disabilities (CDC–NCBDDD) sponsor supplemental content on the NSCH. Additionally, the upcoming cycle of the NSCH would like to feature four returning state-based oversamples and four new oversamples that are either age-based, state-based, or region-based. The age-based oversample would be funded by the United States Department of Health and Human Services' Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion (CDC–NCCDPHP). The state- or region-based oversamples would be sponsored by Children's Health Care of Atlanta, the State of Colorado, the State of Nebraska, the Ohio Department of Health, the Oregon Center for Children and Youth with Special Health Care Needs, the Southeast Louisiana Area Health Education Center, and the State of Wisconsin.

The NSCH collects information on factors related to the well-being of children, including access to health care, in-home medical care, family interactions, parental health, school and after-school experiences, and neighborhood characteristics. The goal of the 2021 NSCH is to provide HRSA MCHB, the supplemental sponsoring agencies, states, regions, and other data users with the necessary data to support the production of national estimates yearly and state- or region-based estimates with pooled samples on the health and well-being of children, their families, and their communities as well as estimates of the prevalence and impact of children with special health care needs.

NSCH is seeking clearance to make the following changes:

- Increased sample size—The base NSCH sample plus the proposed oversamples may reach up to 300,000 addresses for the 2021 NSCH, compared with 240,000 in 2020. The increased sample will allow individual states and agencies to produce statistically sound child health estimates in a fewer number of pooled years than if the sample were to remain the same annually, thereby resulting in more timely age-, state- and region-based health estimates of children.
- Unconditional incentive distribution percentage—We plan to continue monitoring the effectiveness of the unconditional monetary incentive, but request an increase to the percent of addresses receiving a $5 incentive in the initial screener mailing. Response rates for the unconditional monetary incentive groups showed a statistically significant difference over the control group that did not receive an unconditional monetary incentive. A larger increase in response was noted for the households mailed a $5 compared with the $2 incentive; however, both treatment groups have proven effective at reducing nonresponse bias by encouraging response. For both the 2018 NSCH and 2019 NSCH, the initial screener incentive splits were 45% received $2; 45% received $5; and 10% did not receive an incentive. In the 2020 NSCH, the share of addresses receiving the $5 incentive was increased to 60%, with 30% receiving the $2 incentive; again, 10% did not receive an incentive. The proposal for 2021 NSCH is to remove the $2 incentive group, so 90% receive $5 and 10% would not receive an incentive with the initial mailing. The incentive assignment to each sampled

address would still be random as was done in prior cycles and approved by OMB.

• Alternative invitation letter wording—A random selection of addresses will receive an initial invitation letter than uses the traditional letter design but slightly modified wording that may encourage internet response. This test is conditional on ongoing results from the current NSCH 2020 redesigned envelope and letter test.

• Revised questionnaire content—The NSCH questionnaires with newly proposed and revised content from the sponsors at HRSA MCHB and CDC–NCCDPHP are currently undergoing two rounds of cognitive testing. This testing request was submitted under the generic clearance package and approved by OMB.[1] Based on the results, a final set of proposed new and modified content will be included in the full OMB ICR for the 2021 NSCH.

• Oversamples [2]—In order to inform various priorities that are otherwise not supported by the NSCH, some stakeholders have shown interest in sponsoring an oversample of particular populations as part of the annual NSCH administration. Currently, there are six states, one region, and one federal partner contributing to an oversample as part of the 2021 NSCH. Four states (Colorado, Nebraska, Oregon and Wisconsin) were initially oversampled in 2020, and are continuing with the option as part of the 2021 NSCH. Two states (Louisiana and Ohio) and the Atlanta, GA Metro Area will be oversampled for the first time in 2021. Finally, CDC–NCCDPHP is supporting an oversample of households with young children.

Besides the proposed changes listed above, the 2021 NSCH will proceed with the current design outlined in the previous OMB ICR package. We will continue to make modifications to data collection strategies based on modeled information about paper or internet response preference. Results from prior survey cycles will continue to be used to inform the decisions made regarding future cycles of the NSCH.

From prior cycles of the NSCH, using American Association for Public Opinion Research definitions of response, we can expect for the 2021 NSCH an overall screener completion rate to be about 46.3% and an overall topical completion rate to be about 36.0%.[3] This is different from the overall response rate, which we expect to be about 41.4%.[4]

II. Method of Collection

The 2021 NSCH plan for the web push data collection design includes approximately 70% of the production addresses receiving an initial invite with instructions on how to complete an English or Spanish-language screener questionnaire via the web. Households that decide to complete the web-based survey will be taken through the screener questionnaire to determine if they are eligible for one of three topical instruments. Households that list at least one child who is 0 to 17 years old in the screener are directed into a topical questionnaire immediately after the last screener question. If a household in the web push treatment group decides to complete the paper screener, the household may have a chance to receive an additional topical questionnaire incentive. This group will receive two web survey invitation letters requesting their participation in the survey prior to receiving up to two additional paper screener questionnaires in the second and third follow-up mailings.

The 2021 NSCH plan for the mixed-mode data collection design includes up to 30% of the production addresses receiving a paper screener questionnaire in either the initial or the first nonresponse follow-up and instructions on how to complete an English or Spanish language screener questionnaire via the web. Households that decide to complete the web-based survey will follow the same screener and topical selection path as the web push. Households that choose to complete the paper screener questionnaire rather than completing the survey on the internet and that have eligible children will be mailed a paper topical questionnaire upon receipt of their completed paper screener at the Census Bureau's National Processing Center. If a household in the mixed-mode group chooses to complete the paper screener instead of completing the web-based screener via the internet, then the household may receive an additional topical questionnaire incentive. This group will receive both a web survey invitation letter along with a mailed paper screener questionnaire with either the initial invitation or the first follow-up and each additional nonresponse follow-up mailing.

III. Data

OMB Control Number: 0607–0990.

Form Number(s): NSCH–S1 (English Screener), NSCH–T1 (English Topical for 0- to 5-year-old children), NSCH–T2 (English Topical for 6- to 11-year-old children), NSCH–T3 (English Topical for 12- to 17-year-old children), NSCH–S–S1 (Spanish Screener), NSCH–S–T1 (Spanish Topical for 0- to 5-year-old children), NSCH–S–T2 (Spanish Topical for 6- to 11-year-old children), and NSCH–S–T3 (Spanish Topical for 12- to 17-year-old children).

Type of Review: Regular submission, Request for a Revision of a Currently Approved Collection.

Affected Public: Parents, researchers, policymakers, and family advocates.

Estimated Number of Respondents: 114,818.

Estimated Time per Response: 5 minutes per screener response and 35–36 minutes per topical response, which in total is approximately 40–41 minutes for households with eligible children.

Estimated Total Annual Burden Hours: 39,400.

Estimated Total Annual Cost to Public: $0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. Section 8(b); 42 U.S.C. 701; 1769d(a)(4)(B); and 42 U.S.C. 241.

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,

[1] Generic Clearance Information Collection Request: *https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201909-0607-002&icID=242679.*

[2] State Oversampling in the National Survey of Children's Health: Feasibility, Cost, and Alternative Approaches *https://census.gov/content/dam/Census/programs-surveys/nsch/NSCH_State_Oversample_Summary_Document.pdf.*

[3] Screener Completion Rate is the proportion of screener-eligible households (*i.e.,* occupied residences) that completed a screener. It is equal to (S+X)/(S+X+R+e(UR+UO)), where S is the count of completed screeners with children, X is completed screeners without children, R is screener refusals, and e(UR+UO) is the estimated count of screener eligible households among nonresponding addresses.

The Topical Completion Rate is the proportion of topical-eligible households (*i.e.,* occupied residences with children present) that completed a topical questionnaire. It is equal to I/HCt, where I is the count of completed topicals and HCt is the estimated count of households with children in the sample or S+R+(S+R)/(S+X+R)*e(UR+UO).

[4] Overall Response Rate is the probability a resolved address completes a screener questionnaire and then, when eligible, completes a topical questionnaire.

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. 2020–24920 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Import, End-User, Delivery Verification Certificates and Firearms Entry Clearance Requirements

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on 8/27/2020 (85 FR 52949) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Commerce.

Title: Import, End-User, Delivery Verification Certificates and Firearms Entry Clearance Requirements.

OMB Control Number: 0694–0093.

Form Number(s): BIS–645P, BIS–647P.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 11,776.

Average Hours per Response: 1 to 30 minutes.

Burden Hours: 1,630.

Needs and Uses: This collection of information addresses three activities: (1) Import Certificates/End Use Certificates, (2) Delivery Verification, and (3) Firearms Entry Clearance Requirements.

Import Certificates or End-User Certificates (IC/EUC)—The IC/EUC, BIS–645P, is obtained by the foreign importer and transmitted to the U.S. exporter. They are issued by the government of the country of ultimate destination to exercise legal control over the disposition of the items covered by the IC/EUC. The control exercised by the government issuing the IC/EUC is in addition to the conditions and restrictions placed on the transaction by BIS.

Delivery Verification—The Delivery Verification Certificate (DV) is required by BIS as part of its export control program. The license holder is responsible for having the ultimate consignee complete the BIS–647P, Delivery Verification Certificate Form when the goods are delivered. BIS uses the DV procedure on an ''as needed'' basis. The DV is usually required when there is suspicion of violation of the EAR. Therefore, if the exporter cannot supply the DV, BIS must be notified to determine if an exception is legitimate. Otherwise, the exporter would be in violation of the EAR.

Firearms Entry Clearance Requirements—On January 23, 2020, The Department of Commerce issued a final rule that described how articles the President determines no longer warrant control under the United States Munitions List (USML) Category I—Firearms, Close Assault Weapons and Combat Shotguns; Category II—Guns and Armament; and Category III—Ammunition/Ordnance would be controlled under the Commerce Control List (CCL). This final rule, which became effective on March 9, 2020, was published in conjunction with a final rule on Categories I, II, and III from the Department of State, Directorate of Defense Trade Controls (DDTC).

This entry clearance requirement is necessary due to the changes by the President in determining that certain items no longer warrant control under United States Munitions List (USML) Category I—Firearms, Close Assault Weapons and Combat Shotguns; Category II—Guns and Armament; and Category III—Ammunition/Ordnance would be controlled under the Commerce Control List (CCL). As the State Department previously collected this same type of information, the Department of Commerce controls the CCL and must now take over this collection of information. Section 758.10 Entry clearance requirements for temporary imports will specify the EAR procedures for temporary imports and subsequent exports.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Mandatory.

Legal Authority: §§ 748.9, 748.10, 748.12, 748.14, Part 748 Supplement No. 5, 758.10, 762.5(d), 762.6, 764.2(g)(2), and of the Export Administration Regulations (EAR).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0093.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–24922 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Additional Protocol to the U.S.—International Atomic Energy Agency Safeguards

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance

with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on August 17, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Commerce.

Title: Additional Protocol to the U.S.—International Atomic Energy Agency Safeguards.

OMB Control Number: 0694–0135.

Form Number(s): AP–1 through AP–17, and AP–A through AP–Q.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 500.

Average Hours per Response: 23 minutes to 6 hours.

Burden Hours: 920.

Needs and Uses: The Additional Protocol requires the United States to submit declaration forms to the International Atomic Energy Agency (IAEA) on a number of commercial nuclear and nuclear-related items, materials, and activities that may be used for peaceful nuclear purposes, but also would be necessary elements for a nuclear weapons program. These forms provides the IAEA with information about additional aspects of the U.S. commercial nuclear fuel cycle, including: Mining and milling of nuclear materials; buildings on sites of facilities selected by the IAEA from the U.S. Eligible Facilities List; nuclear-related equipment manufacturing, assembly, or construction; import and export of nuclear and nuclear-related items and materials; and research and development. The Protocol also expands IAEA access to locations where these activities occur in order to verify the form data.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Voluntary or Mandatory.

Legal Authority: Additional Protocol Implementation Act (Title II of Pub. L. 109–401), Executive Order (E.O.) 13458.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0135.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–24919 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–803]

Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that Flex Middle East FZE (Flex), the sole producer/exporter subject to this administrative review, has made sales of subject merchandise at less than normal value. Interested parties are invited to comment on these preliminary results.

DATES: Applicable November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Andrew Huston, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4261.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from the United Arab Emirates (UAE). The notice of initiation of this administrative review was published on January 17, 2020.[1] This review only covers Flex, a producer and exporter of the subject merchandise. The period of review is November 1, 2018 through October 31, 2019. On April 24, 2020, Commerce uniformly tolled deadlines for all antidumping duty and countervailing duty administrative reviews by 50 days,[2] and on July 21, 2020, we uniformly tolled deadlines for all antidumping duty and countervailing duty administrative reviews by an additional 60 days, thereby extending the deadline for these preliminary results until November 19, 2020.[3]

Scope of the Order

The merchandise subject to the order is polyethylene terephthalate film. The product is currently classified under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS number is provided for convenience and for customs purposes, the written product description, available in the Preliminary Decision Memorandum, remains dispositive.[4]

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available with adverse inferences (AFA) for Flex, because this respondent notified Commerce that it would not participate in the review.

For a full description of the methodology and analysis underlying the preliminary application of AFA, *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.* 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

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 3014, 1333 (January 17, 2020).

[2] *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.

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

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates,'' dated concurrently with and hereby adopted by this notice (Preliminary Decision Memorandum).

versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margin for the period November 1, 2018 through October 31, 2019:

Manufacturer/exporter	Weighted-average margin (percent)
Flex Middle East FZE	70.75

Assessment Rates

Upon completion of the administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[5] 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.[6] If the preliminary results are unchanged for the final results, we will instruct CBP to apply an *ad valorem* assessment rate of 70.75 percent to all entries of subject merchandise during the period of review from Flex. We intend to issue liquidation instructions to CBP 15 days after the publication date of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the final results for all shipments of PET Film from the UAE entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the company under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis,* no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.05 percent, the all-others rate established in the investigation.[7] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Normally, Commerce discloses to interested parties the calculations performed in connection with the preliminary results within five days of the date of publication of the notice of preliminary results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, there are no calculations to disclose here because, in accordance with section 776 of the Act, Commerce preliminarily applied AFA to Flex, the only respondent subject to this review.

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.[8] 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.[9] Case and rebuttal briefs should be filed using ACCESS.[10] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[11]

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 through Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time 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.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, 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) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: November 5, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Application of Facts Available and Adverse Inferences
V. Recommendation

[FR Doc. 2020–24937 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–829]

Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination

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

[5] *See* 19 CFR 351.212(b).

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

[7] *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less Than Fair Value for the United Arab Emirates,* 73 FR 66595, 66597 (November 10, 2008).

[8] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[9] *See* 19 CFR 351.309(c)(2) and (d)(2).

[10] *See generally* 19 CFR 351.303.

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of passenger vehicle and light truck tires (passenger tires) from the Socialist Republic of Vietnam (Vietnam). The period of investigation is January 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Michael Romani or Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0198 or (202) 482–0410, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 29, 2020.[1] On August 4, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now October 30, 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 discussed 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 *http://access.trade.gov.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is passenger tires from Vietnam. 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 (*i.e.,* scope).[5] Certain interested parties commented on the scope of the antidumping duty (AD) and countervailing duty (CVD) investigations of passenger tires as it appeared in the *Initiation Notice.* We are currently evaluating the scope comments filed by the interested parties. Commerce intends to issue its preliminary decision regarding the scope of the AD and CVD investigations in the preliminary determinations of the companion AD investigations, the deadline for which is December 29, 2020.[6] We will incorporate the scope decisions from the AD investigations into the scope of the final CVD determination for this investigation after considering any relevant comments submitted in scope case and rebuttal briefs.[7]

Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[8]

Alignment

In accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), Commerce is aligning the final CVD determination in this investigation with the final determination in the companion AD investigation of passenger tires from Vietnam based on a request made by the petitioner.[9] Consequently, the final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than March 15, 2021, unless postponed.

All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act.

In this investigation, Commerce calculated individual estimated countervailable subsidy rates for Kumho Tire (Vietnam) Co., Ltd. and Sailun (Vietnam) Co., Ltd. that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the individual estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[10]

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
Kumho Tire (Vietnam) Co., Ltd	10.08

[1] *See Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation,* 85 FR 38850 (June 29, 2020) (*Initiation Notice*).

[2] *See Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Postponement of Preliminary Determination in the Countervailing Duty Investigation,* 85 FR 48666 (August 12, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam,'' 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) (*Preamble*).

[5] *See Initiation Notice,* 85 FR at 38851.

[6] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 65791 (October 16, 2020).

[7] The deadline for interested parties to submit scope case and rebuttal briefs will be established in the preliminary scope decision memorandum.

[8] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[9] *See* Petitioner's Letter, ''Passenger Vehicle and Light Truck Tires from Vietnam: Request for Alignment,'' dated October 13, 2020.

[10] With two respondents under examination, Commerce normally calculates: (A) A weighted-average of the estimated subsidy rates calculated for the examined respondents; (B) a simple average of the estimated subsidy rates calculated for the examined respondents; and (C) a weighted-average of the estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010). As complete publicly ranged sales data was available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, please *see* Memorandum, ''Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Calculation of All-Others Rate,'' dated concurrently with this notice.

Company	Subsidy rate (percent)
Sailun (Vietnam) Co., Ltd	6.23
All Others	6.77

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries 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**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date 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 on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of such 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 date 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 of 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 time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its determination. 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.

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: October 30, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars.

LT—Identifies a tire intended primarily for service on light trucks.

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service.

All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by this investigation regardless of their intended use.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that fits passenger cars or light trucks. Sizes that fit passenger cars and light trucks include, but are not limited to, the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually. The scope includes all tires that are of a size that fits passenger cars or light trucks, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(3) non-pneumatic tires, such as solid rubber tires;

(4) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1B (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) or PCT–1B (''T'' Type Diagonal (Bias) Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(5) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

[11] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020).

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

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(6) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design.

The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Investigation
IV. Scope Comments
V. Injury Test
VI. Application of the CVD Law to Imports From Vietnam
VII. Subsidies Valuation
VIII. Benchmarks and Interest Rates
IX. Analysis of Programs
X. Conclusion

[FR Doc. 2020–24913 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–826]

Monosodium Glutamate From the Republic of Indonesia: Final Results of Antidumping Duty Administrative Review; 2017–2018

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

SUMMARY: The Department of Commerce (Commerce) determines that the sole mandatory respondent, PT. Cheil Jedang Indonesia (CJ Indonesia), did not sell subject merchandise in the United States at prices below normal value during the period of review (POR) November 1, 2017 through October 31, 2018.

DATES: Applicable November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Gene H. Calvert, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3586.

SUPPLEMENTARY INFORMATION:

Background

On January 16, 2020, Commerce published the *Preliminary Results* of this administrative review in the **Federal Register**.[1] Commerce invited interested parties to comment on the *Preliminary Results.* On June 1, 2020, Ajinomoto Health & Nutrition North America, Inc. (the petitioner) and CJ Indonesia each timely submitted case briefs.[2] CJ Indonesia timely submitted a rebuttal brief on June 8, 2020.[3] No other party submitted a rebuttal brief, and no party requested a hearing in this administrative review. Based on its analysis of the comments that Commerce received, Commerce made no changes to the weighted-average dumping margin determined for CJ Indonesia with respect to the *Preliminary Results.*

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[4] On June 30, 2020, Commerce extended the deadline for the final results by 60 days.[5] On July 21, 2020, Commerce tolled all deadlines for preliminary and final results in administrative reviews by an additional 60 days, thereby extending the deadline for the final results to November 2, 2020.[6]

Scope of the Order

The merchandise covered by the antidumping duty order is monosodium glutamate (MSG), whether or not blended or in solution with other products. For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.[7]

Analysis of Comments Received

Commerce addressed all issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. These issues are identified in the Appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and its electronic version are identical in content.

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[1] *See Monosodium Glutamate from the Republic of Indonesia: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 2717 (January 16, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Petitioner's Letter, ''MSG from Indonesia: Petitioner's Case Brief,'' dated June 1, 2020; *see also* CJ Indonesia's Letter, ''Monosodium Glutamate (''MSG'') from Indonesia; 4th Administrative Review; CJ Case Brief,'' dated June 1, 2020.

[3] *See* CJ Indonesia's Letter, ''Monosodium Glutamate (''MSG'') from Indonesia; 4th Administrative Review; CJ Rebuttal Brief,'' dated June 8, 2020.

[4] *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.

[5] *See* Memorandum, ''Administrative Review of the Antidumping Duty Order on Monosodium Glutamate from the Republic of Indonesia: Extension of Deadline for the Final Results,'' dated June 30, 2020.

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

[7] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Monosodium Glutamate from the Republic of Indonesia,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Changes Since the Preliminary Results

Based on its analysis of the comments that Commerce received, Commerce made changes to its normal value and margin calculations, but these did not change the weighted-average dumping margin determined for CJ Indonesia with respect to the *Preliminary Results*.[8]

Final Results of Review

As a result of this administrative review, Commerce is assigning the following weighted-average dumping margin for the period November 1, 2017 through October 31, 2018:

Producer/exporter	Weighted-average dumping margin (percent)
PT. Cheil Jedang Indonesia	0.00 (*de minimis*).

Disclosure

Commerce intends to disclose the calculations performed in these final results to interested parties within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this administrative review. Commerce intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of this administrative review in the **Federal Register**.

Where CJ Indonesia reported reliable entered values, Commerce calculated importer- (or customer-) specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer).[9] Where Commerce calculated a weighted-average dumping margin by dividing the total amount of dumping for reviewed sales to that party by the total sales quantity associated with those transactions, Commerce will direct CBP to assess importer- (or customer-) specific assessment rates based on the resulting per-unit rates.[10] Where an importer- (or customer-) specific *ad valorem* or per-unit rate is greater than *de minimis* (*i.e.,* 0.50 percent), Commerce will instruct CBP to collect the appropriate duties at the time of liquidation.[11] Where an importer- (or customer-) specific *ad valorem* or per-unit rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[12]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise that entered the United States during the POR that were produced by CJ Indonesia for which CJ Indonesia did not know that its merchandise was destined to the United States, Commerce will instruct CBP to liquidate unreviewed entries at the all-others rate of 6.19 percent,[13] if there is no rate for the intermediate company(ies) involved in the transaction.[14]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of the final results of this administrative review for all shipments of MSG from Indonesia entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results in the **Federal Register**, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for CJ Indonesia 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 administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in a completed segment for the most recent period of review; (3) if the exporter is not a firm covered in this review or in the original investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 6.19 percent, the all-others rate established in the investigation.[15] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification of Interested Parties

Commerce is issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 2, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the Preliminary Results
V. Discussion of the Issues
  Comment 1: Whether the Application of Adverse Facts Available Is Warranted Regarding Certain of CJ Indonesia's U.S. Sales
  Comment 2: Whether CJ Indonesia's General & Administrative Expenses Should Be Revised To Correct a Clerical Error
VI. Recommendation

[FR Doc. 2020–24914 Filed 11–9–20; 8:45 am]

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[8] *See* Issues and Decision Memorandum.

[9] *See* 19 CFR 351.212(b)(1).

[10] *Id.*

[11] *Id.*

[12] *See* 19 CFR 351.106(c)(2).

[13] *See Monosodium Glutamate from the Republic of Indonesia: Final Determination of Sales at Less Than Fair Value,* 79 FR 58329 (September 29, 2014) (*MSG Investigation Final Determination*).

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

[15] *See MSG Investigation Final Determination.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA569]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Berth III New Mooring Dolphins Project in Ketchikan, Alaska

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

ACTION: Notice; proposed incidental harassment authorization.

SUMMARY: NMFS has received a request from the City of Ketchikan, Alaska (COK) for authorization to take marine mammals incidental to the Berth III New Mooring Dolphins Project in Ketchikan, AK. 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-time, 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 December 10, 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.Pauline@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. All comments received are a part of the public record and will generally be posted online at *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: Robert Pauline, 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.

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 May 14, 2020, NMFS received a request from COK for an IHA to take marine mammals incidental to construction activities associated with the Berth III Mooring Dolphin Project in Ketchikan, Alaska. After several revisions, the application was deemed adequate and complete on September 22, 2021. COK's request is for take of nine species of marine mammals by Level B harassment, including Level A harassment of three of these species. Neither COK nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

COK is proposing improvements to Berth III, in order to accommodate a new fleet of large cruise ships (*i.e.* Bliss class) and to meet the needs of the growing cruise ship industry and its vessels in Southeast Alaska. Expansion activities would include vibratory pile removal, vibratory pile driving, impact pile driving and down-the-hole (DTH) pile installation. Underwater sound generated by these in-water activities may result in harassment including Level B harassment and Level A harassment of marine mammal species. In-water work is proposed to occur on approximately 120 days between October 1, 2021 and March 13, 2022 although the IHA would be effective until September 30, 2022.

While Bliss class vessels started calling to Ketchikan during the 2018 cruise ship season and were able to moor at Berth III, operational wind speed restrictions were established to safely moor the vessel to prevent damage to Berth III structures. To safely moor a Bliss class vessel, additional tie

up locations are needed to the north and south ends of the berth. Without the proposed improvements, vessels may be unable to safely moor at Berth III.

Dates and Duration

Construction is expected to take place over a 200-day period between October 1, 2021 and May 1, 2022. Actual in-water work is estimated to take a total of 4 months, 120 days or 17 weeks and is expected to be completed by March 13, 2022. In case of unanticipated delays, the effective dates of the proposed IHA are from October 1, 2021, to September 30, 2022. The daily duration of construction activities will vary based on the daylight hours available. In winter months, shorter 7-hour to 10-hour workdays in available daylight are anticipated and in the early fall and early spring longer daylight workdays of up to 14-hour days are anticipated. While COK may work these hours, not all activity in a workday will generate in-water noise. Work may not begin without sufficient daylight to conduct pre-activity monitoring, and may extend into twilight hours as needed to embed the pile far enough to safely leave piles in place until installation can resume. This is because, during the winter, the shortest days are approximately 7 hours of daylight; however, a portion of the daylight hours consists of civil twilight and it can get darker earlier due to the tall mountains surrounding Ketchikan and the frequent cloudy conditions.

Specific Geographic Region

COK is located in Southeast Alaska on the western coast of Revillagigedo Island, near the southernmost boundary of Alaska. Ketchikan encompasses an area of approximately 3 square miles of land and 1 square mile of water. The site is located on the east side of Tongass Narrows, a marine channel in-between Revillagigedo and Gravina Islands that consists of a long narrow water body approximately 11 miles (17.7 kilometers) in length (See Figure 1). The berth is part of the Port of Ketchikan, an active marine commercial and industrial area.

At the project site where piles will be driven, water depths range between approximately 60 feet (18.3 meters) to 160 feet (48.8 meters) (PND 2006). Tidal currents generally range from 0.3 to 1.6 miles per hour during flood and ebb tides (PND 2006).

The tide range in Ketchikan is significant, with highest observed tides of 21.4 feet (6.5 meters) and lowest observed tides of –5.2 feet (-6.5 meters) based on a mean lower low water (MLLW) elevation of 0.0. Water depths in the area of Tongass Narrows that will be ensonified are generally 160 feet or shallower, but get deeper past the southern end of Pennock Island reaching depths up to 625 feet.

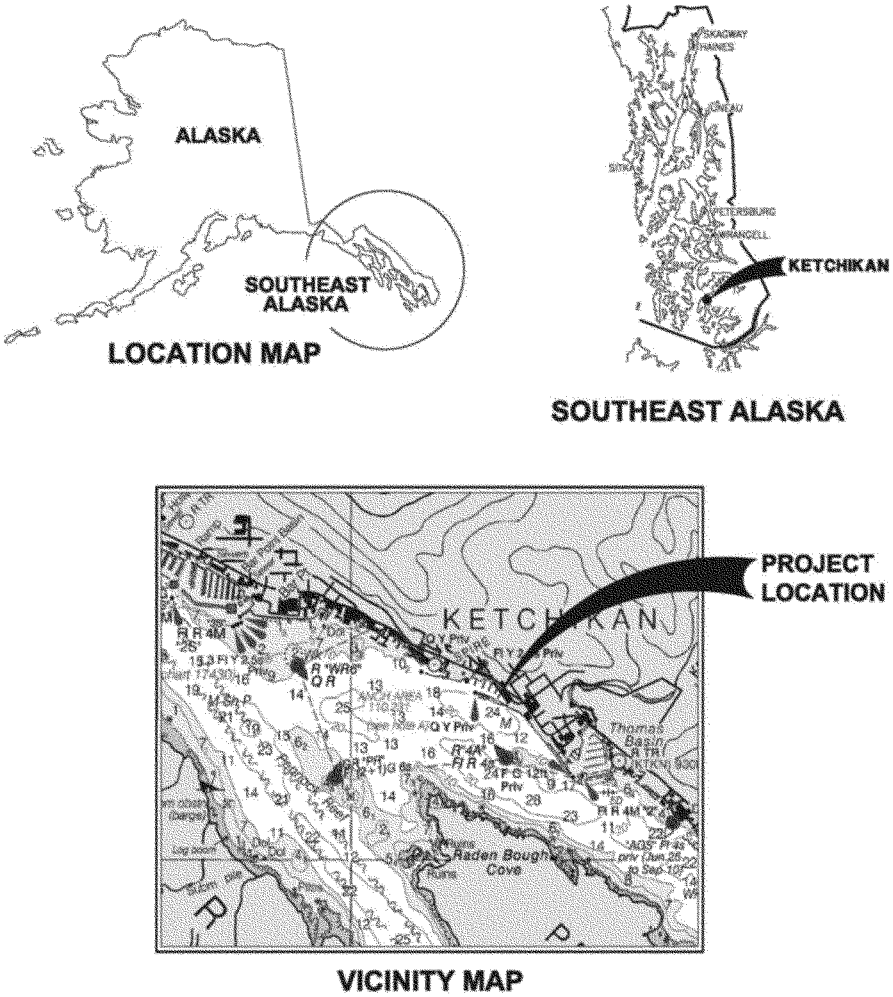

Figure 1. Berth III Project Area

Detailed Description of Specific Activity

The proposed project would install three new mooring dolphins (MD) with one at the north end of Berth III (MD#2) and two at the south end (MD#3 & MD#4) as shown in Figure 2 in COK's IHA application (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*). A total of 20 piles will be installed. Eight of the piles are temporary template piles and would be removed as shown in Table 1. Pile driving will be conducted from an anchored barge, utilizing vibratory and impact hammers to install and remove piles and DTH pile installation to position rock sockets and tension anchors. Rock socketing is a process where a pile is driven by conventional vibratory and impact hammers until reaching solid bedrock. If at that point the pile cannot support the needed load, a hole can be drilled into the rock with a DTH system to allow the pile to be anchored up to 10 or more feet into the solid rock. Tension anchoring involves creating an anchor hole that is smaller in diameter than the pile. The holes extend 10 to 20 feet or more below the bottom of the pile. A steel bar or other anchoring structure (*e.g.,* rebar frame) is then grouted or cemented in place from the bottom of the anchor hole and extending up to the top of the pile. Attaching the anchor bar or frame to the pile then helps anchor the pile in place to support the required project loads.

TABLE 1—PROJECT PILE TYPES AND QUANTITIES

Location	Item	Size and type	Qty
MD#2	Dolphin and Fender Piles	48-inch (1.22 m) steel pipe piles	6
	Temporary Template Piles	30-inch (0.76 m) steel pipe piles	8
MD#3	Dolphin Piles	36-inch (0.9 m) steel pipe piles	3
MD#4	Dolphin Piles	36-inch (0.9 m) steel pipe piles	3

MD#2 will require six 48-inch diameter steel pipe piles up to 180 feet in length each. MD#3 and MD#4 will each require three 36-inch diameter steel pipe piles up to 180 feet in length each. These piles will be installed in water depths up to 110 feet deep and will be driven through approximately 10 feet of loose overburden substrate.

Due to the nature of deep-water pile installation in loose sediment, a variety of means and methods are required to install a single pile. Each pile will be installed using a combination of installation methods: vibratory hammer, impact hammer, and DTH pile installation. COK may alternate between installation methods depending on the conditions encountered. Only one installation method will occur at a time. COK may also be required to splice on additional lengths of pile (*i.e.* weld piles together to make them longer) with up to three splices expected per pile. Piles will be initially driven with a vibratory hammer from a barge-based crane. Following vibratory driving, an impact hammer will be used to seat the piles firmly into bedrock.

COK will initially vibratory drive all permanent piles to first refusal which occurs when they are unable to advance the pile tip any further with a vibratory hammer. This will likely occur at bedrock elevation. COK will seat (or secure) tip of pile into bedrock with an impact hammer usually to a depth of 1 to 2 feet info fractured bedrock. Once the pile has been seated (or secured) into bedrock with the impact hammer, DTH equipment will be employed to create hammered rock sockets. Due to limited overburden, all piles will require hammered rock sockets using DTH equipment. Sockets up to 20 feet deep will be hammered through the pile shaft to the width of the associated pile. COK will then socket hammer the pile up to 20 feet into bedrock. The pile will be drawn into the hammered socket through the hammering action. Finally, on 4 of the 6 piles, a smaller 12-inch diameter DTH device will be used to drill a rock anchor hole into bedrock 60-feet past the pile tip. A 14-inch casing will be inserted into the pile and a 12-inch hole will be hammered up to 60 feet in depth from the base of the rock socket. The 12-inch hole for the rock anchor is hammered beneath the pile tip from within the hollow pipe pile. Three anchor rods will be inserted inside the casing; extending all the way from the top of pile to the tip of the hammered 12-inch hole. The hammered 12-inch hole and casing will be filled with grout after component installation.

Temporary template piles will be required for installation of the permanent piles at MD#2 and will be removed after permanent dolphin piles have been installed. Template piles are not necessary at the MD#3 and MD#4 because the dock structure can be used in lieu of temporary template piles. Temporary template piles will include up to eight 30-inch (0.76 m) diameter piles or smaller. Once installed, each temporary template pile will measure around 150-feet (46 m) in length and will consist of up to two sections that will be spliced together as they are installed. Installation methods for the temporary template piles will be similar to those applied for installation of permanent dolphin piles. COK will initially vibratory drive all temporary piles to first refusal. COK will then seat the tip of pile into bedrock with an impact hammer advancing the tip 1 to 2 feet into fractured bedrock. Once a pile has been seated into bedrock with an impact hammer, COK may elect to socket hammer the pile up to 10 feet into bedrock. COK will use the vibratory hammer to remove the temporary template piles at the MD#2 after the permanent piles have been installed.

Installation of permanent piles at both MD#3 and MD#4 is identical to that described for installation of permanent piles MD#2. Although additional construction actions will be required, the final installation of piles at MD#3 and MD#4 represents the end of all in-water construction activities.

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 2 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 Endangered Species Act (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. Alaska SARs (Muto *et al.* 2020). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2019 SARs (Muto *et al.,* 2020).

TABLE 2—MARINE MAMMALS THAT COULD OCCUR IN THE PROPOSED PROJECT AREA

Common name	Scientific name	MMPA stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance Nbest, (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	139
Family Balaenidae:						
Humpback whale	*Megaptera novaeangliae*	Central North Pacific	-, -,Y	10,103 (0.3; 7,891; 2006)	83	25
Minke whale	*Balaenoptera acutorostrata*	Alaska	-, -, N	N.A.	N.A.	0
Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale	*Orcinus orca*	Alaska Resident	-, -, N	2,347 (N.A.; 2,347; 2012)	24	1
		West Coast Transient	-, -, N	243 (N.A, 243, 2009)	2.4	0
		Northern Resident	-, -, N	302 (N.A.; 302, 2018)	2.2	0.2
		Gulf of Alaska, Aleutian Islands, and Bering Sea Transient.	-, -, N	587 (N.A.;587; 2012	5.87	1
Pacific white-sided dolphin	*Lagenorhynchus obliquidens*	North Pacific	-, -, N	26,880 (N.A.; N.A.; 1990)	N.A.	0
Family Phocoenidae:						
Harbor porpoise	*Phocoena phocoena*	Southeast Alaska	-, -, Y	1,354 (0.10; 896; 2012)	8.95	34
Dall's porpoise	*Phocoenoides dalli*	Alaska	-, -, N	83,400 (0.097; N.A.; 1991.	N.A.	38
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumetopias jubatus*	Eastern U.S.	-, -, N	43,201 (N.A.; 43,201; 2017).	2,592	112
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina richardii*	Clarence Strait	-, -, N	27,659 (N.A.; 24,854; 2015).	746	40

[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. In some cases, CV is not applicable (N.A.).

[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 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.

As indicated above, all nine species (with 12 managed stocks) in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it.

Gray Whale

Gray whales are distributed throughout the North Pacific Ocean and are found primarily in shallow coastal waters (NMFS 2020f; Muto *et al.* 2020). Gray whales in the Eastern North Pacific stock range from the southern Gulf of California, Mexico to the arctic waters of the Bering and Chukchi Seas. Gray whales are generally solitary creatures and travel together alone or in small groups (NMFS 2020f).

Gray whales are rare in the action area and unlikely to occur in Tongass Narrows. They were not observed during the Dahlheim *et al.* (2009) surveys of Alaska's inland waters with surveys conducted in the spring, summer and fall months. No gray whales were reported during the COK Rock Pinnacle Blasting Project (Sitkiewicz 2020). However a gray whale could migrate through or near the Dixon Entrance during November, and possibly travel up the Nichols Channel into the action area as it extends into the Revillagigedo Channel.

Humpback Whale

The humpback whale is distributed worldwide in all ocean basins. Relatively high densities of humpback whales are found in feeding grounds in Southeast Alaska and northern British Columbia, particularly during summer

months. Based on extensive photo identification data.

Humpbacks migrate to Alaska to feed after months of fasting in low latitude breeding grounds. The timing of migration varies among individuals: Most humpbacks begin returning to Alaska in spring and most depart Alaska for southern breeding grounds in fall or winter. Peak numbers of humpbacks in Southeast Alaska occur during late summer to early fall, but because there is significant overlap between departing and returning whales, humpbacks can be found in Alaska feeding grounds in every month of the year (Baker *et al.* 1985, Straley 1990, Witteveen and Wynne 2009). There is also an apparent increase in the number of humpbacks overwintering in feeding grounds in Alaska, including reports in Ketchikan during some years in the winter (Straley *et al.* 2017, Liddle 2015, 84 FR 36891; July 30, 2019).

In 2016 NMFS revised the ESA listing of humpback whales (81 FR 62259; September 8, 2016). NMFS is in the process of reviewing humpback whale stock structure and abundance under the MMPA in light of the ESA revisions. The MMPA stock in southeast Alaska is considered to be the Central North Pacific stock. Humpbacks from 2 of the 14 newly identified Distinct Population Segments (DPSs) occur in the project area: The Mexico DPS, which is a threatened species; and the Hawaii DPS, which is not listed under the ESA. NMFS considers humpback whales in Southeast Alaska to be 94 percent comprised of the Hawaii DPS and 6 percent of the Mexico DPS (Wade *et al.,* 2016). Humpback whales occur frequently in Tongass Narrows and the adjacent Clarence Strait during summer and fall months to feed. Data on the distribution suggests that both the Mexico and Hawaii Distinct Population Segments (DPS) of humpback whales may be present in the Tongass Narrows area. The Alaska Department of Fish and Game reports that humpback whales occur in Clarence Strait year-round, with numbers peaking in May and June and falling off from July to September (ADF&G 2020). Local anecdotal reports indicate that humpback whales are becoming more common and abundant in Tongass Narrows during August and September, which is consistent with research in Southeast Alaska.

The COK Rock Pinnacle project reported one humpback whale sighting of one individual during the project (December 2019 through January 2020). The sighting was 55 minutes post-blast and not recorded as a take (Sitkiewicz 2020).

Southeast Alaska is considered a biologically important area (BIA) for feeding humpback whales between March and May (Ferguson *et al.,* 2015). Most humpback whales migrate to other regions during the winter to breed, but rare events of over-wintering humpbacks have been noted (Straley 1990). It is thought that those humpbacks that remain in Southeast Alaska do so in response to the availability of winter schools of fish prey (Straley 1990).Critical habitat was proposed for designation on October 9, 2019 by NMFS (84 FR 54354). A final determination was not issued at the time of this writing. Proposed Critical Habitat Unit 10 Southeast Alaska encompasses the action area; however, the Department of Defense petitioned for an exclusion of a portion of the Unit 10 due to national security reasons. As a result, the boundary of Unit 10 was redefined to exclude Tongass Narrows and vicinity from the proposed critical habitat designation, including the proposed action area.

Minke Whale

Minke whales are widely distributed throughout the northern hemisphere and are found in both the Pacific and Atlantic oceans. Minke whales in Alaska are considered migratory. During summer months are typically found in the Arctic and during winter months found near the equator (NMFS 2020e). There are no known occurrences of minke whales within the action area. Since their ranges extend into the project area and they have been observed in southeast Alaska, including in Clarence Strait (Dahlheim *et al.* 2009), it is possible the species could occur near the project area. During the surveys by Dalheim *et al.* (2009), all but one encounter was with a single whale and, although infrequent, minke whales were observed during all seasons surveyed (spring, summer and fall). No minke whales where reported during the COK Rock Pinnacle Blasting Project (Sitkiewicz 2020).

Killer Whale

No systematic studies of killer whales have been conducted in or around Tongass Narrows. Killer whales have been observed in Tongass Narrows year-round and are most common during the summer Chinook salmon run (May-July). During the Chinook salmon run, Ketchikan residents have reported pods of 20–30 whales and during the 2016/2017 winter a pod of 5 whales was observed in Tongass Narrows (84 FR 36891; July 30, 2019). Typical pod sizes observed within the project vicinity range from 1 to 10 animals and the frequency of killer whales passing through the action area is estimated to be once per month (Frietag 2017).

Killer whales occurring near Ketchikan could belong to one of four different stocks: Eastern North Pacific Alaska resident stock (Alaska residents); Eastern North Pacific Northern resident stock (Northern residents); Gulf of Alaska, Aleutian Islands, and Bering Sea transient stock (Gulf of Alaska transients); or West Coast transient stock (Muto *et al.,* 2020). The Northern resident stock is a transboundary stock, and includes killer whales that frequent British Columbia, Canada, and southeastern Alaska (Muto *et al.,* 2018).

In recent years, a small number of the Gulf of Alaska transients (identified by genetics and association) have been seen in southeastern Alaska; previously only West Coast transients had been seen in southeastern Alaska (Muto *et al.,* 2020). Therefore, the Gulf of Alaska transient stock occupies a range that includes southeastern Alaska. The West Coast transient stock includes animals that occur in California, Oregon, Washington, British Columbia and southeastern (Muto *et al.,* 2020).

Despite being rare in occurrence during the proposed time of construction (pods expected to absent more often than present), it must be acknowledged that killer whales often travel in pods and would occur as such if they were to occur at all in the project area. While killer whales can be common, they are not known to linger in Tongass Narrows or other similar environments. During the COK's monitoring for the Rock Pinnacle Removal project in December 2019 and January 2020, no killer whales were observed.

Pacific White-Sided Dolphin

There are three stocks of the Pacific white-sided dolphin in U.S. waters. Only the North Pacific stock is found within the action area. The Pacific white-sided dolphin is distributed throughout the temperate north Pacific Ocean, north of Baja California to Alaska's southern coastline and Aleutian Islands. The North Pacific Stock ranges from Canada into Alaska (Muto *et al.* 2019).

Dalheim *et al.* (2009) frequently encountered Pacific white-sided dolphin in Clarence Strait with significant differences in mean group size and rare enough encounters to limit the seasonality investigation to a qualitative note that spring featured the highest number of animals observed. These observations were noted most typically in open strait environments, near the open ocean. Mean group size

was over 20, with no recorded winter observations nor observations made in the Nichols Passage or Behm Canal, located on either side of the Tongass Narrows. Though generally preferring more pelagic, open-water environments, Pacific white-sided dolphin could be present within the action area during the construction period.

There were no sightings of Pacific white-sided dolphins during the COK Rock Pinnacle Blasting Project during monitoring surveys conducted in December 2019 and January 2020 (Sitkiewicz 2020).

Harbor Porpoise

In the eastern North Pacific Ocean, the harbor porpoise ranges from Point Barrow, along the Alaska coast, and down the west coast of North America to Point Conception, California. The Southeast Alaska stock ranges from Cape Suckling to the Canadian border (Muto *et al.* 2019). Harbor porpoises frequent primarily coastal waters in Southeast Alaska (Dahlheim *et al.* 2009) and occur most frequently in waters less than 100 meters (328 feet) deep (Dahlheim *et al.* 2015). The mean group size of harbor porpoise in Southeast Alaska is estimated at two individuals (Dahlheim *et al.,* 2009). They tend to avoid areas with elevated levels of vessel activity and noise such as Tongass Narrows.

Studies of harbor porpoises reported no evidence of seasonal changes in distribution for the inland waters of Southeast Alaska (Dahlheim *et al.* 2009). Ketchikan area densities are expected to be low. While less common within the Tongass Narrows than nearby areas, harbor porpoise could potentially pass through the area and/or occupy the Revillagigedo Channel year-round. Note that their small overall size, lack of a visible blow, low dorsal fins and overall low profile, and short surfacing time make them difficult to spot (Dahlheim *et al.* 2015).

Marine mammal monitoring associated with the COK Rock Pinnacle Removal project did not observe any harbor porpoise during surveys conducted in December 2019 and January 2020 (Sitkiewicz 2020).

Dall's Porpoise

Dall's porpoises are found throughout the North Pacific, from southern Japan to southern California north to the Bering Sea. All Dall's porpoises in Alaska are members of the Alaska stock. This species can be found in offshore, inshore, and nearshore habitat.

Jefferson *et al.* (2019) presents historical survey data showing few sightings in the Ketchikan area. The mean group size of Dall's porpoise in Southeast Alaska is estimated at approximately three individuals (Dahlheim *et al.,* 2009; Jefferson *et al.,* 2019). However, in the Ketchikan vicinity, Dall's porpoises are reported to typically occur in groups of 10–15 animals, with an estimated maximum group size of 20 animals (Freitag 2017). Jefferson *et al.* (2019) presents historical survey data showing few sightings in the Ketchikan area, and based on these occurrence patterns, concludes that Dall's porpoise rarely come into narrow waterways, like Tongass Narrows. Anecdotal reports suggest that Dall's porpoises are found northwest of Ketchikan near the Guard Islands, where waters are deeper, as well as in deeper waters to the southeast of Tongass Narrows. Overall, sightings of Dall's porpoise are infrequent near Ketchikan, but they could be present on any given day during the construction period.

Harbor Seal

Harbor seals inhabit coastal and estuarine waters off Alaska. They haul out on rocks, reefs, beaches, and drifting glacial ice. They are opportunistic feeders and often adjust their distribution to take advantage of locally and seasonally abundant prey (Womble *et al.,* 2009, Allen and Angliss, 2015).

Harbor seals occurring in the project area belong to the Clarence Strait stock. Distribution of the Clarence Strait stock ranges from the east coast of Prince of Wales Island from Cape Chacon north through Clarence Strait to Point Baker and along the east coast of Mitkof and Kupreanof Islands north to Bay Point, including Ernest Sound, Behm Canal, and Pearse Canal (Muto *et al.* 2020). The latest stock assessment analysis indicates that the current 8-year estimate of the Clarence Strait population trend is +138 seals per year, with a probability that the stock is decreasing of 0.413 (Muto *et al.,* 2020). In the project area, they tend to be more abundant during spring, summer and fall months when salmon are present in Ward Creek. Anecdotal evidence indicates that harbor seals typically occur in groups of 1–3 animals in Ward Cove (Spokely 2019). They were not observed in Tongass Narrows during a combined 63.5 hours of marine mammal monitoring that took place in 2001 and 2016 (OSSA 2001, Turnagain 2016). The COK conducted pinnacle rock blasting in December 2019 and January 2020 near the vicinity of the proposed project and recorded a total of 21 harbor seal sightings of 24 individuals over 76.2 hours of pre- and post-blast monitoring (Sitkiewicz 2020). There are no known harbor seal haulouts within the project area. According to the list of harbor seal haulout locations, the closest listed haulouts are located off the tip of Gravina Island, approximately 8 kilometers (5 miles) northwest of Ward Cove (AFSC 2018).

Steller Sea Lion

The Steller sea lion is the largest of the eared seals, ranging along the North Pacific Rim from northern Japan to California, with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands. They are common throughout the inside waters of southeast Alaska and reside in areas nearby Tongass Narrows, but are not commonly observed in Tongass Narrows outside of the Chinook salmon run.

There are several mapped and regularly monitored long-term Steller sea lion haulouts surrounding Ketchikan, such as Grindall island (approximately 20 miles (58 km) from Ketchikan), West Rocks (36 miles/58 km), or Nose Point (37 miles/60 km), but none within Tongass Narrows (Fritz *et al.,* 2015). Sea lions are rarely observed in the Tongass narrows during the winter. Fritz *et al.* (2015) reported adult counts at Grindall Island, located approximately 20 miles (32 km) away from the project area, averaged about 190 between 2002 and 2015. No pups were recorded during this timeframe. West Rock averaged over 650 adults with 0 to 3 pups observed over the same timeframe. These long-term and seasonal haulouts are important habitat for Steller sea lions, but all are outside of the action area. However, due to the proximity of the Grindall Island haulout and the possibility of Steller sea lion movement around this haulout, they are potentially present year-round within the action area.

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 based on 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 3.

TABLE 3—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
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. Nine mammal species (seven cetacean and two pinniped (one otariid and one phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, three are classified as low-frequency cetaceans (*i.e.,* all mysticete species), two are classified as mid-frequency cetaceans (*i.e.,* all delphinid and ziphiid species and the sperm whale), and two are classified as high-frequency cetaceans (*i.e.,* porpoise and Kogia *spp.*).

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.

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. 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 vibratory pile driving and pile removal, impact pile driving, and DTH pile installation. The sounds produced by these activities fall into one of 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 one 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.,* aircraft, 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).

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). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than

impact hammers. Peak sound pressure levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002; Carlson *et al.,* 2005). A DTH hammer is used to place hollow steel piles or casings by drilling. A DTH hammer is a drill bit that drills through the bedrock using a pulse mechanism that functions at the bottom of the hole. This pulsing bit breaks up rock to allow removal of debris and insertion of the pile. The head extends so that the drilling takes place below the pile. The sounds produced by DTH hammers were previously thought to be continuous. However, recent sound source verification (SSV) monitoring has shown that DTH hammer can create sound that can be considered impulsive (Denes *et al.* 2019). Since sound from DTH activities has both impulsive and continuous components, NMFS characterizes sound from DTH pile installation as being impulsive when evaluating potential Level A harassment (*i.e.,* injury) impacts and as being non-impulsive when assessing potential Level B harassment (*i.e.* behavior) effects.

The likely or possible impacts of COK'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; 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 and removal.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving and removal is the primary means by which marine mammals may be harassed from COK'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). In general, exposure to pile driving and removal 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 and removal 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.,* 2004; 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 an 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, as 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 (2015), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SELcum) in an accelerating fashion: At low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise sound exposure level (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 (*Tursiops truncatus*), 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). 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).

Behavioral Harassment—Exposure to noise from pile driving and removal 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–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 and DTH drilling) 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 many of the same species are involved, we expect similar behavioral responses of marine mammals to COK's specified activity. That is, disturbance, if any, is likely to be temporary and localized (*e.g.,* small area movements). Monitoring reports from other recent pile driving and DTH drilling projects in Alaska have observed similar behaviors (for example, the Biorka Island Dock Replacement Project; see *https://www.fisheries.noaa.gov/action/incidental-take-authorization-faa-biorka-island-dock-replacement-project-sitka-ak*).

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 Ketchikan area contains active commercial shipping, cruise ship and ferry operations, as well as

numerous recreational and other commercial vessels; therefore, background sound levels in the area are already elevated.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving, pile removal and DTH pile installation 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 exceeding the acoustic thresholds. 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 by Level B harassment because of exposure to underwater sound above the behavioral harassment thresholds, which are, in all cases, larger than those associated with airborne sound. 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

COK's construction activities could have localized, temporary impacts on marine mammal habitat by increasing in-water sound pressure levels and slightly decreasing water quality. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater sound. 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 pile driving, elevated levels of underwater noise would ensonify the area where both fish and mammals may 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.

In-water pile driving, pile removal, and DTH pile installation activities would also cause short-term effects on water quality due to increased turbidity. Local strong currents are anticipated to disburse suspended sediments produced by project activities at moderate to rapid rates depending on tidal stage. COK would employ other standard construction best management practices, thereby reducing any impacts. Therefore, the impact from increased turbidity levels is expected to be discountable.

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.,* most of the impacted area is limited to Tongass Narrows) and does not contain habitat of known importance, other than being designated as a feeding BIA for humpback whales during the spring. However, the entirety of southeast Alaska is considered a feeding BIA for humpback whales of which Tongass Narrows represents only a small segment. Additionally, the project area is highly influenced by anthropogenic activities.

Pile installation/removal and drilling may temporarily increase turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. COK must comply with state water quality standards during these operations by using silt curtains and removing all sediments captured as drill cutting discharge to upland disposal sites. In general, turbidity associated with pile installation is localized to about a 25-foot (7.6 m) radius around the pile (Everitt *et al.,* 1980). Any pinnipeds would be transiting the area and could avoid localized areas of turbidity. Therefore, the impact from increased turbidity levels is expected to be discountable to marine mammals. 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 (Fish)

Construction activities would produce continuous (*i.e.,* vibratory pile driving and DTH pile installation) and pulsed (*i.e.* impact driving, DTH pile installation) sounds. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. 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). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.,* 1992; Skalski *et al.,* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality.

The most likely impact to fish from pile driving and drilling 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. There are times of known seasonal marine mammal foraging in Tongass Narrows around fish processing/hatchery infrastructure or when fish are congregating, but the impacted areas of Tongass Narrows are a small portion of the total foraging habitat available in the region. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe of the project and the small project footprint.

Construction activities, in the form of increased turbidity, have the potential to adversely affect forage fish and juvenile salmonid outmigratory routes in the project area. Both herring and salmon form a significant prey base for Steller sea lions, herring is a primary prey species of humpback whales, and both herring and salmon are components of the diet of many other marine mammal species that occur in the project area. Increased turbidity is expected to occur in the immediate vicinity (on the order of 25 feet (7.6 m) or less) of construction activities. However, suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle. Given the limited area affected and high

tidal dilution rates any effects on forage fish and salmon are expected to be minor or negligible. In addition, best management practices would be in effect, which would limit the extent of turbidity to the immediate project area. Finally, exposure to turbid waters from construction activities is not expected to be different from the current exposure; fish and marine mammals in the Tongass Narrows region are routinely exposed to substantial levels of suspended sediment from glacial sources.

In summary, given the temporary nature of the construction project and relatively small areas being affected, pile driving and removal activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. 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 this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* vibratory or impact pile driving or DTH pile installation) 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, primarily for high frequency cetacean species and phocid pinnipeds. Auditory injury is unlikely to occur in low-frequency and mid-frequency cetacean species and otariid pinnipeds. 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). Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment 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 (*e.g.,* hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

COK's proposed activity includes the use of continuous (vibratory pile driving, DTH pile installation) and impulsive (impact pile driving), sources, and therefore the 120 and 160 dB re 1 μPa (rms) criteria are 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). COK's proposed activity includes the use of impulsive (impact pile driving, DTH pile installation) and non-impulsive (vibratory pile driving/removal, DTH pile installation) sources.

These thresholds are provided in Table 4. 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 4—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.

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT—Continued

Hearing group	PTS onset acoustic thresholds * (Received level)	
	Impulsive	Non-impulsive
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 1μPa²s. 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.,* vibratory pile driving, vibratory pile removal, impact pile driving, and DTH pile installation).

Vibratory hammers produce constant sound when operating, and produce vibrations that liquefy the sediment surrounding the pile, allowing it to penetrate to the required seating depth. An impact hammer would then generally 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 of pile, size of the pile, and substrate characteristics (*e.g.,* bedrock).

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 inform selection of representative source levels (see Table 5).

Sound source levels for vibratory installation of 30-inch steel piles were obtained by Denes *et al.* (2016) during the installation of 30-inch steel pipe piles at the Ketchikan Ferry Terminal. Vibratory removal of 30-inch piles is expected to be quieter than installation, so this value is used as a proxy. Sound levels for vibratory installation of 48-inch steel piles were obtained by Austin *et al.* (2016) during the installation of test piles at the Port of Anchorage. The applicant elected to conservatively employ sound source levels for the 48-inch piles as a proxy to calculate harassment isopleths for 36-inch piles.

Sound levels for impact installation of 30-inch steel piles were taken from Denes *et al.* (2016) during the installation of piles at the Ketchikan Ferry Terminal. Sound levels for impact installation of 48-inch steel piles were obtained by Austin *et al.* (2016) during the installation of test piles at the Port of Anchorage. Overall median levels were not reported for peak and single strike SEL values. Therefore, the highest values reported for peak and single strike SEL were used. The highest levels reported were a peak of 213.2 dB re: 1 μPa at 14 m and a single strike SEL of 186.7 dB re: 1 μPa2–sec on pile IP5 at 11 m (Austin *et al.* 2016). Sound source levels for 48-inch piles are used as a proxy to calculate harassment isopleths for 36-inch piles.

DTH pile installation includes drilling (non-impulsive sound) and hammering (impulsive sound) to penetrate rocky substrates (Denes *et al.* 2016; Denes *et al.* 2019; Reyff and Heyvaert 2019). DTH pile installation was initially thought be a primarily non-impulsive noise source. However, Denes *et al.*(2019) concluded from their study in Virginia that DTH should be characterized as impulsive based on a >3 dB difference in sound pressure level in a 0.035-second window (Southall *et al.* 2007) compared to a 1-second window. Therefore, DTH pile installation is treated as both an impulsive and non-impulsive noise source. In order to evaluate Level A harassment, DTH pile installation activities are evaluated according to the impulsive criteria and the User Spreadsheet may be employed. Level B harassment isopleths are determined by applying non-impulsive criteria and using the 120 dB threshold which is also used for vibratory driving. This approach ensures that the largest ranges to effect for both Level A and Level B harassment are accounted for in the take estimation process.

The source level employed to derive Level B harassment isopleths for DTH pile installation (both socketing and anchoring) of all pile sizes was derived from the Denes *et al.* (2016) study at Kodiak, Alaska. The reported median source value for drilling was determined to be 166.2 dB RMS.

For DTH anchoring of 12-inch holes, COK used a sound source level from Guan and Miner (2020) of 146 dB SEL for Level A harassment calculations. For DTH installation of 30 and 36-inch sockets, source levels from Reyff & Heyvaert (2019), Reyff (2020), and Denes *et al.* (2019) were employed.

TABLE 5—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY PILE REMOVAL, VIBRATORY PILE INSTALLATION, IMPACT PILE INSTALLATION, AND DTH PILE INSTALLATION

Method and pile type	Sound source level at 10 meters			Literature source
	SPL rms	SPL_{PK}	SS_{SEL}	
Vibratory Hammer				
30-inch steel piles	161.9	.....	.....	Denes *et al.* 2016.
36- and 48-inch steel piles	168.2	.....	.....	Austin *et al.* 2016.
Impact Hammer				
30-inch diameters	195	208.5	180.7	Austin *et al.* 2016.
36- and 48-inch	198.6	[1] 213.2	[2] 186.7	Austin *et al.* 2016.
DTH Pile Installation				
DTH Sockets (48-inch)	166.2	.....	168	Extrapolated from DTH SSV studies listed below; Denes *et al.* (2016).
DTH Sockets (30-, 36-inch)	166.2	194	164	Reyff & Heyvaert (2019); Reyff (2020); Denes *et al.* (2019); Denes *et al.* (2016).
DTH Anchors (12-inch)	166.2	172	146	Guan and Miner (2020); Denes *et al.* (2016).

[1] Represents maximum value measured at 14 m.
[2] Represents maximum value measured at 11 m.
SS_{SEL} = single strike sound exposure level; dB peak = peak sound level; rms = root mean square.

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 Level A harassment take. 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 driving, vibratory driving and DTH pile installation example from project, NMFS User Spreadsheet predicts the distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would incur PTS.

Inputs used in the User Spreadsheet (Table 6) and the resulting isopleths are reported below (Table 7). Level A harassment thresholds for impulsive sound sources (impact pile driving, DTH pile installation) are defined for both SELcum and Peak SPL, with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the effective Level A harassment isopleth. Note that the peak SPL for DTH installation of 48-in piles is unknown as no sound source verification testing has been conducted on piles of that size. The single strike SEL was extrapolated using data points measured for smaller piles during DTH installation. In this project, Level A harassment isopleths based on SELcum were always larger than those based on Peak SPL.

TABLE 6—PARAMETERS OF PILE DRIVING AND DRILLING ACTIVITY USED IN USER SPREADSHEET

Equipment type	Vibratory pile driver (Installation/removal of 30-in steel piles)	Vibratory pile driver (Installation of 36- and 48-in steel piles)	Impact pile driver (30-in steel piles)	Impact pile driver (36- and 48-in steel piles)	DTH sockets		DTH anchor (12-in steel piles)
					30-, 36-in	48-in	
Spreadsheet Tab Used.	Non-impulsive, continuous.	Non-impulsive, continuous.	Impulsive, Non-continuous.	Impulsive, Non-continuous.	Impulsive, Non-continuous		Impulsive, Non-continuous.
Source Level	161.9 RMS	168.2 RMS	180.7 SS SEL	186.7 SS SEL	164 SS SEL/194 SPLpk.	168 SS SEL	146 SS SEL/172 SPLpk.
Weighting Factor Adjustment (kHz).	2.5	2.5	2	2	2		2.
(a) Activity duration (time) within 24 hours.	(a) Up to 6 hrs OR >6–8 hrs. (c) 1	(a) Up to 6 hrs OR >6–8 hrs. (c) 1	(a) 1–10 minutes (b) Up to 500 strikes. (c) 1	(a) 1–10 minutes (b) Up to 500 strikes. (c) 1	(a) Up to 3 hrs OR >3–6 hrs. (c) 1	(a) Up to 2 hrs OR >2–3 hrs OR >3–4 hrs. (c) 1	(a) Up to 6 hrs OR >6–8 hrs (c) 1.
(b) Number of strikes per pile (impact).			(a) 11–20 minutes (b) 501–1,000 strikes. (c) 1	(a) 11–20 minutes (b) 501–1,000 strikes. (c) 1..			

TABLE 6—PARAMETERS OF PILE DRIVING AND DRILLING ACTIVITY USED IN USER SPREADSHEET—Continued

Equipment type	Vibratory pile driver (Installation/removal of 30-in steel piles)	Vibratory pile driver (Installation of 36- and 48-in steel piles)	Impact pile driver (30-in steel piles)	Impact pile driver (36- and 48-in steel piles)	DTH sockets		DTH anchor (12-in steel piles)
					30-, 36-in	48-in	
(c) Number of piles per day.			(a) 21–30 minutes (b) 1,001–1,500 strikes. (c) 1	(a) 21–30 minutes (b) 1,001–1,500 strikes. (c) 1..			
Propagation (xLogR).	15	15	15	15	15		15.
Distance of source level measurement (meters).	10	10	10	10	10		10.

TABLE 7—CALCULATED DISTANCES TO LEVEL A HARASSMENT ISOPLETHS (m) DURING VIBRATORY PILE INSTALLATION/REMOVAL, IMPACT INSTALLATION AND DTH PILE INSTALLATION FOR EACH HEARING GROUP

Source	Daily duration	PTS onset isopleth (m)				
		Cetaceans			Pinnipeds	
		Low-frequency	Mid-frequency	High-frequency	Phocid	Otariid
30-inch Vibratory (Installation or Removal).	Up to 6 hours	25.9	2.3	38.3	15.7	1.1
	7 to 8 hours	31.4	2.8	46.4	19.1	1.3
36- and 48-inch Vibratory	Up to 6 hours	68.1	6	100.7	41.4	2.9
	7 to 8 hours	82.5	7.3	122	50.1	3.5
Down-the-Hole Socket (30-, 36-inch).	Up to 3 hours	1,225.6	43.6	1,459.9	655.9	47.8
	4 to 6 hours	1,945.5	69.3	2,317.4	1,041.2	75.8
Down-the-Hole Socket (48-inch).	Up to 2	1,728.3	61.5	2,058.7	924.9	67.3
	>2 to 3 hours	2,264.8	80.5	2,697.7	1,212	88.2
	>3 to 4 hours	2,743.6	97.6	3,268	1,468.2	106.9
Down the Hole Anchor (12-inch).	Up to 6 hours	122.8	4.4	146.2	65.7	4.8
	7 to 8 hours	148.7	5.3	177.1	79.6	5.8
30-inch Diesel Impact	Up to 500 strikes (1–10 minutes).	442	15.7	526.4	236.5	17.2
	501–1,000 strikes (11–20 minutes).	701.6	25	835.7	375.4	27.3
	1,001–1,500 strikes (21–30 minutes).	919.3	32.7	1,095	492	35.8
36- and 48-inch Diesel Impact.	Up to 500 strikes (1–10 minutes).	1,221	43	1,455	654	48
	501–1,000 strikes (11–20 minutes).	1,938.5	68.9	2,309	1,037.4	75.5
	1,001–1,500 strikes (21–30 minutes).	2,540.1	90.3	3,025.7	1,359.4	99

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:

$$TL = B * \text{Log10}(R1/R2),$$

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 COK's proposed activity.

Using the practical spreading model, COK determined underwater noise would fall below the behavioral effects threshold of 120 dB rms for marine mammals at a maximum radial distance of 16,343 m for vibratory pile driving of 36 and 48-inch diameter piles. Other activities, including rock anchoring and impact pile driving, have smaller Level B harassment zones. All Level B harassment isopleths are reported in Table 8 below. It should be noted that based on the geography of Tongass Narrows and the surrounding islands, sound will not reach the full distance of the Level B harassment isopleth. The largest Level B Harassment isopleth will be truncated by land masses at approximately 12,500 meters to the southeast and approximately 3,590 meters northwest of the project area. Constraining land masses include

Revillagigedo Island, Gravina Island, Pennock Island and Spire Island.

TABLE 8—CALCULATED LEVEL B HARASSMENT ISOPLETHS

Source	Behavioral disturbance isopleth (m) 120 dB
30-inch Vibratory (Installation or Removal)	6,213
36- and 48-inch Vibratory	16,343
DTH installation (Socket, Anchor)	11,660
30-inch Diesel Impact	2,154
36- and 48-inch Diesel Impact	3,744

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Note that there is no density data for any of the species near the Berth III mooring dolphin project area, therefore the take estimate is informed by qualitative data.

The number of marine mammals that may be exposed to harassment thresholds is calculated by estimating the likelihood of a marine mammal being present within a harassment zone during the associated activities. Estimated marine mammal abundance is determined by reviewing local and regional reports, surveys, permits and observations of abundance and frequency near the proposed project action. For example, for species that are common with the potential to occur daily, the take calculations are based on the group size multiplied by the projected number of days of underwater noise activities. For species that are less common, take estimates are based on group size multiplied by the frequency (*e.g.,* weekly, monthly). The estimated number of takes are based upon reasonable ranges from the best information currently available for these species near the project area.

Authorization of Level A harassment takes was requested by COK for harbor seal, harbor porpoise, and Dall's porpoise. Harbor seals are habituated to fishing vessels and may follow vessels that enter the marina. Dall's and harbor porpoises' small size and speed make it possible that these animals could occur within the Level A harassment zones and potentially incur injury prior to detection.

Humpback Whale

Humpback whales occur frequently in Tongass Narrows and the adjacent Clarence Strait during summer and fall months to feed, but are less common during winter and spring. The average group size during the fall surveys was two whales according to Dalheim *et al.* (2009). Local reports of humpback whale group size in Tongass Narrows are similar, with the typical size being between 1 and 3. During the spring months, humpback whales tend to congregate in areas outside of the Ketchikan area, such as Lynn Canal and Fredrick Sound. Therefore, it is assumed that the occurrence of humpback whales in the project area is two individuals twice per week throughout the project. A group size of two was also assumed in the Biological Opinion provided to the U.S. Army Corp of Engineers (USACE) for the Alaska Department of Transportation & Public Ferries (ADOT&PF) Berth improvement project in Tongass Narrows (NMFS 2019).

Therefore, it is estimated that up to 2 individuals could be exposed to underwater noise twice a week during the 17 weeks of the project's in-water work, for a total of 68 incidents of take from the Central North Pacific stock. Given that 6.1 percent of all humpback whales in Southeast Alaska and northern British Columbia are assumed to be members of the Mexico DPS, while all others are assumed to be members of the Hawaii DPS (Wade *et al.* 2016), NMFS proposes to authorize 68 incidents of take by Level B harassment with 64 instances from the Hawaii DPS and 4 instances from the endangered Mexico DPS.

Take by Level A harassment is not expected for humpback whales because of the expected effectiveness of the monitoring and mitigation measures. While calculated Level A harassment zones are up to 2,800 m, multiple protected species observers (PSOs) will monitoring Tongass Narrows which is < less than 600 m in width and represents a much smaller effective Level A harassment zone. Humpbacks are usually readily visible, therefore, shutdown measures can be implemented prior to any humpback whales incurring PTS within Level A harassment zones.

Steller Sea Lion

Steller sea lion abundance in the Tongass Narrows area is not well known and no systematic studies of Steller sea lions have been conducted in or near the Tongass Narrows area. However, sea lions are known to occur in the Tongass Narrows area throughout the year with peak numbers March through September (ADOT 2019). Sea lions may be present during salmon and herring runs and are known to visit hatcheries and fish processing facilities in the vicinity.

Group sizes are generally 6 to 10 individuals (Freitag 2017) but have been reported to reach 80 animals (Freitag 2017). COK assumed one large group of 10 individuals could be present each day in the project vicinity based on HDR (2019) and Freitag (2017) (as cited in 83 FR 22009; May 11, 2018). NMFS agrees that this daily estimate is appropriate and therefore proposes to authorize up to 1,200 takes by Level B harassment.

Take by Level A harassment is not expected for Steller sea lions because of the relatively small Level A harassment zones for otariids (Table 7) and the expected effectiveness of the monitoring and mitigation measures discussed below.

Harbor Seal

Harbor seal densities in the Tongass Narrows area are not well known. No systematic studies of harbor seals have been conducted in or near Tongass Narrows. Seals are known to occur year-round with little seasonal variation in abundance (Freitag 2017) and local experts estimate that there are about 1 to 3 harbor seals in Tongass Narrows every day, in addition to those that congregate near the seafood processing plants and fish hatcheries. COK conducted pinnacle rock blasting in December 2019 and January 2020 near the vicinity of the proposed project and recorded a total of 21 harbor seal sightings of 24 individuals over 76.2 hours of pre- and post-blast monitoring (Sitkiewicz 2020). Harbor seals were observed in groups ranging from 1–3 animals throughout the 0.70-mile (1.12-kilometer) observation zone. Based on this knowledge, COK assumed an average group size in Tongass Narrows of three individuals. They anticipated that three groups of 3 harbor seals per group could be exposed to project-related underwater noise each day for 120 days of in-water work. Given that harbor seals are known to follow fishing vessels into the marina and may be difficult to detect, COK assumed that one group of three seals could be taken by Level A harassment daily, resulting in 360 Level A harassment takes. NMFS agreed with these assumptions and, therefore, proposes to authorize 720 takes by Level B harassment and 360 takes by Level A harassment.

Dall's Porpoise

The mean group size of Dall's porpoise in Southeast Alaska is estimated at approximately three individuals (Dahlheim *et al.,* 2009; Jefferson *et al.,* 2019). However, in the Ketchikan vicinity, Dall's porpoises are

reported to typically occur in groups of 10–15 animals, with an estimated maximum group size of 20 animals (Freitag 2017, as cited in 83 FR 22009, May 11, 2018). Overall, sightings of Dall's porpoise are infrequent near Ketchikan, but they could be present on any given day during the construction period.

COK assumed that a maximum group size of 20 Dall's porpoise could occur in the project area each month. NMFS concurs with this assessment and proposes to authorize 80 takes of Dall's porpoise over the anticipated four-month project duration.

Given the large size of the Level A harassment zone associated with impact pile driving for high-frequency cetaceans, it is possible Dall's porpoises may enter the Level A harassment zone undetected. Therefore, NMFs proposes to authorize a total of 60 takes of Dall's porpoise by Level B harassment and 20 takes by Level A harassment over the course of the project.

Harbor Porpoise

Harbor porpoises are non-migratory; therefore, occurrence estimates are not dependent on season. Freitag (2017 as cited in 83 FR 37473; August 1, 2018) observed harbor porpoises in Tongass Narrows zero to one time per month. Harbor porpoises observed in the project vicinity typically occur in groups of one to five animals with an estimated maximum group size of eight animals (83 FR 37473, August 1, 2018, Solstice 2018). Based on this previous information from the Ketchikan Berth IV Expansion project and the AKDOT Tongass Narrows project, COK estimated that two groups of five harbor porpoise may enter the Tongass Narrows twice per month. NMFS agrees with this estimate and, therefore, proposes to authorize take of 40 harbor porpoises during the duration of the project.

Given that harbor porpoises are stealthy, having no visible blow and a low profile in the water making the species difficult for monitors to detect (Dahlheim *et al.* 2015), COK requested that a total of 10 takes of harbor porpoises by Level A harassment be authorized. Therefore, NMFS proposes to authorize 10 takes of harbor porpoise by Level A harassment and 30 takes by Level B harassment.

Killer Whale

Typical pod sizes observed within the project vicinity range from 1 to 10 animals. COK assumed that the frequency of killer whales passing through the action area is estimated to be once per month and also conservatively assumed a pod size of 10.

Therefore NMFS proposes to authorize 40 takes of killer whales by Level B harassment.

Take by Level A harassment is not expected for killer whales because of the small Level A harassment zones for mid-frequency cetaceans and the expected effectiveness of the monitoring and mitigation measures discussed below.

Gray Whale

Gray whales have not been reported within the Tongass Narrows; however, their presence cannot be entirely discounted. Since the largest Level B harassment zone extends beyond Tongass Narrows, COK assumed that up to two gray whales may be taken per month. Therefore, NMFS proposes to authorize take by Level B harassment of up to 8 gray whales.

Due to the unlikely occurrence of gray whales and the ability to shut down pile driving activities prior to a whale entering the Level A harassment zone, no Level A harassment takes of gray whales were requested or are proposed for authorization.

Minke Whale

There are no known occurrences of minke whales within the project area although they may be present in Tongass Narrows and Clarence Strait year-round. Their abundance throughout Southeast Alaska is low. However, minke whales are distributed throughout a wide variety of habitats and could occur near the project area. Minke whales are generally sighted as individuals (Dahlheim *et al.* 2009).

Therefore, NMFS proposes to authorize two takes of minke whale by Level B harassment. No Level A harassment takes of minke whales are anticipated due to the very limited occurrence of minke whales and the ability to shut down pile driving activities prior to a whale entering the Level A harassment zone.

Pacific White-Sided Dolphin

Pacific white-sided dolphins have not been reported within the Tongass Narrows; however, the dolphin is within its range and thus its presence cannot be discounted. Pacific white-sided dolphin group sizes generally range from between 20 and 164 animals. For the purposes of this assessment, COK assumed one group of 30 dolphins may be present within the Level B harassment zone every tenth day, or about every other week, similar to what was estimated for a prior IHA (84 FR 36891; July 30, 2019). Therefore, NMFS proposes to authorize 360 takes of Pacific white-sided dolphin by Level B harassment.

No Level A takes are expected due to the relatively small size of Level A harassment zone for mid-frequency cetaceans which can be readily monitored.

Table 9 below summarizes the proposed authorized take for all the species described above as a percentage of stock abundance.

TABLE 9—PROPOSED TAKE BY LEVEL A AND B HARASSMENT AND AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Level B takes	Level A takes	Stock abundance	Percent of stock
Humpback whale [1]	68	N/A	10,103	0.67
Steller sea lion eDPS	1,200	N/A	43,201	2.8
Harbor seal	720	360	27,659	3.9
Dall's porpoise	60	20	83,400	0.09
Harbor porpoise	30	10	1,354	2.9
Killer whale: [2]				
AK resident	40	N/A	2,347	1.7
West coast transient			243	16.46
Northern resident			302	13.25
Gulf of Alaska, Aleutian Islands, and Bering Sea transient			587	6.81
Gray whale	8	N/A	26,960	0.03
Pacific white-sided Dolphin	360	N/A	26,880	1.34

TABLE 9—PROPOSED TAKE BY LEVEL A AND B HARASSMENT AND AS A PERCENTAGE OF STOCK ABUNDANCE—Continued

Species	Level B takes	Level A takes	Stock abundance	Percent of stock
Minke whale	2	N/A	N/A	N/A

[1] Assumes that 6.1 percent of humpback whales exposed are members of the Mexico DPS (Wade *et al.* 2016). Distribution of proposed take by ESA status is 64 Level B takes for Hawaii DPS and 4 Level B take for Mexico DPS.
[2] These percentages assume all takes come from the same killer whale stock, thus the percentage should be adjusted down if multiple stocks are actually affected.

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. 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, as well as subsistence uses. 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 for this 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);
- Briefings must be conducted 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 take has not been authorized, 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 harassment zone to avoid additional take.

The following mitigation measures would apply to COK's in-water construction activities.

- *Establishment of Shutdown Zones*—COK will establish shutdown zones for all pile driving and removal 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 10). Due to sediment characteristics and variation in pile sizes, COK does not know how much time will be required for vibratory driving/removal and DTH installation at each pile or how many strikes will be required for impact installation. Given this uncertainty, COK will utilize a tiered system to identify and monitor appropriate shutdown zones based on activity duration or the number of strikes required for pile installation or removal. During vibratory driving/removal and DTH pile installation, the shutdown zone size will initially be set at the lowest tier, which represents the least amount of active installation/removal time. Shutdown zones will be expanded to the next largest zone after Tier 1 time period has elapsed. For those activities with three specified tiers (*i.e.,* impact driving, DTH socketing), the shutdown zone will be expanded to the largest isopleths identified in Tier 3 if the activity extends beyond the Tier 2 active time period. During impact driving, the shutdown zones associated with 0–500 strikes will be monitored until 500 strikes have occurred. The shutdown zones will increase to the next tier between 501–1,000 strikes. After 1,000 strikes the shutdown zones will subsequently be increased to the largest zone sizes.
- If a marine mammal is entering or is observed within an established shutdown zone, pile driving must be halted or delayed. Pile driving may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without subsequent detections of marine mammals.
- 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.
- *PSOs*—COK will employ PSOs who will be able to fully monitor Level A harassment zones. Placement of PSOs will allow observation of marine mammals within the large segments of the Level B harassment zones. However, due to the large size of some of the Level B harassment zones (Table 8), PSOs will not be able to effectively observe the entire zone.

• *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 take is authorized is present in the harassment zone, activities may begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence.

• *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, COK 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.

• *Scheduling*—Pile driving or removal activities must occur during daylight hours. If poor environmental conditions restrict visibility of the shutdown zones (*e.g.,* from excessive wind or fog, high Beaufort state), pile installation may not be initiated. Work that has begun with a fully cleared Level B harassment zone may continue during inclement weather (*e.g.,* fog, heavy rain) or periods of limited visibility.

TABLE 10—SHUTDOWN AND MONITORING ZONES FOR EACH DRIVING/REMOVAL ACTIVITY

Pile size	Low frequency cetacean shutdown area (m)	Mid frequency cetacean shutdown area (m)	High frequency shutdown area (m) (harbor porpoise, dall's porpoise) [1]	Phocid pinniped shutdown area (m) (harbor seal)	Otariid pinniped shutdown area (m) (steller sea lion)	Level B harassment zone (m)
Vibratory Pile Driving/Removal						
30-inch piles up to 6 hrs	40	10	50	10		6,300
30-inch piles 7 hrs–8 hrs.						
36- and 48- inch piles up to 6 hrs	90	10	50	10		[1] 12,500
36- and 48- inch piles 7 hrs–8 hrs.						
Impact Pile Driving						
30-inch piles up to 500 strikes	500					
30-inch piles 501 to 1,000 strikes	700	40	50	10	40	2,200
30-inch piles 1,001 to 1,500 strikes	1,000					
36- and 48- inch piles up to 500 strikes	1,300	50			50	
36- and 48- inch piles 501 to 1,000 strikes	2,000	70	50	10		3,800
36- and 48- inch piles 1,001 to 1,500 strikes	2,600	90			100	
DTH Socket						
30-, 36-inch piles up to 3 hrs	1,300	50	50	10	50	11,700
30-, 36-inch piles 4 hrs–6 hrs	2,000	70				
48-inch piles up to 2 hours	1,750	65			70	
48-inch piles >2 to 3 hrs	2,300	85			100	
48-inch piles >3 to 4 hours	2,750	100			110	
DTH Anchor						
12-inch hole up to 6 hours	150	10	50	10		6,350
12-inch hole 7hrs–8hrs.						

[1] Represents largest Level B Harassment isopleth. Note that isopleth is truncated by land masses at 12,500 meters.

To minimize impacts to marine mammals and their prey vibratory installation and/or hammering will be used as the primary methods of pile installation. Impact driving will be minimized and used only as needed to seat the pile in its final position or to penetrate material that is too dense for a vibratory hammer.

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).
- Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring must be conducted 30 minutes before, during, and 30 minutes after pile driving and 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. Marine mammal monitoring during pile driving and removal 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
- Where a team of three or more PSOs are required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction;
- COK must submit PSO Curriculum Vitae for approval by NMFS prior to the onset of pile driving.

PSOs should 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.

A minimum of three onshore observers will be stationed along Tongass Narrows at locations that provide optimal visual coverage for shutdown and monitoring zones (see Figures 3 in COK's Marine Mammal Monitoring Plan). To maximize the visual coverage of shutdown and monitoring zones, observers will use elevated platforms at observation points to the extent practicable. Observers will be in contact with each other via two-way radio and with a cellular phone used as back-up communications. The primary purpose of this observer is to implement the shutdown zones and monitor the Level B harassment zones. PSOs must be positioned in order to focus on monitoring these zones. PSOs would scan the waters using binoculars, and/or spotting scopes, and would use a handheld global positioning system (GPS) or range-finder device to verify the distance to each sighting from the project site.

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 equipment is no more than 30 minutes.

Reporting

A draft marine mammal monitoring report would 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. It will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated marine mammal observation 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);
- Weather parameters and water conditions during each monitoring period (*e.g.,* wind speed, percent cover, visibility, sea state) 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 individuals of each species (differentiated by month as appropriate) detected within the harassment zones;
- 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; and

• 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.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Alaska regional stranding coordinator (907–586–7209) as soon as feasible. If the death or injury was clearly caused by the specified activity, the IHA-holder 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).

Vibratory pile removal, vibratory pile driving, impact pile driving, and DTH pile installation have the potential to disturb or displace marine mammals. Specifically, these proposed project activities may result in take, in the form of Level A harassment and Level B harassment. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals.

The Level A harassment zones identified in Table 7 are based upon an animal exposed to vibratory pile driving, impact pile driving, and DTH pile installation for periods of time ranging from 30 minutes for impact driving, up to 8 hours for vibratory driving, up to 6 hours for DTH socketing and 8 hours for DTH anchoring. Exposures of this length are unlikely for vibratory driving/removal and DTH pile installation scenarios given marine mammal movement throughout the area. Even during impact driving scenarios, an animal exposed to the accumulated sound energy would likely only experience only limited PTS at the lower frequencies where pile driving energy is concentrated.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Given that the installation of 12 permanent piles and 8 temporary piles would occur over 4 months, any harassment would be temporary and intermittent. Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (Southall *et al.* 2007, ABR 2016). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving. These reactions and behavioral changes are expected to subside quickly when the exposures cease.

The potential for harassment is minimized through the implementation of the proposed mitigation measures. During all impact driving, implementation of soft start procedures and monitoring of established shutdown zones shall be required, significantly reducing any possibility of injury. Given sufficient notice through use of soft start (for impact driving), marine mammals are expected to move away from an irritating sound source prior to it becoming potentially injurious. To reduce the severity of in-water noise, vibratory pile driving will be the primary installation method for the project and impact hammers will only be used to seat pile tips into fractured bedrock ahead of the hammering operations or if material is encountered that is too dense to penetrate with a vibratory hammer.

The proposed project is located within an active marine commercial and industrial area with no known pinniped haulouts or rookeries near the project area. While construction of mooring dolphins at Berth III would have some permanent removal of habitat available to marine mammals, the area lost is relatively small and not of particular importance to any marine mammals.

Any impacts on prey that would occur during in-water construction would have at most short-terms effects on foraging of individual marine mammals, and likely no effect on the populations of marine mammals as a whole. Therefore, effects on marine mammal prey during the construction are expected to be minimal and, therefore, are unlikely to cause substantial effects on marine mammals at the individual or population level.

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.

For all species except humpback whales, there are no known BIAs near the project zone that would be impacted by COK's proposed activities. For humpback whales, the whole of Southeast Alaska is a seasonal BIA from spring through late fall (Ferguson *et al.,* 2015). However, Tongass Narrows and Clarence Strait are not important portions of this habitat due to development and human presence. Tongass Narrows is also a small passageway and represents a very small portion of the total available habitat for humpback whales. Finally, there is no ESA-designated critical habitat for humpback whales.

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 limited and of low degree;
- Mitigation measures such as employing vibratory driving to the maximum extent practicable, soft-starts, and shut downs will be implemented;
- Impacts to marine mammal habitat are anticipated to be minimal;
- The project area is located in an industrialized and commercial marina;
- The project area does not include any rookeries, or known areas or features of special significance for foraging or reproduction; and
- The anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior.

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 sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is 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 number of instances of take for each species or stock proposed to be taken as a result of this project is included in Table 9. Our analysis shows that less than one-third of the best available population abundance estimate of each species or stock could be taken by harassment. The number of animals proposed to be taken for each authorized stock would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

The west coast transient stock of killer whales represents the highest percentage of a single stock (<17 percent) that is proposed for authorized take. This take percentage also assumes that all authorized killer whale takes would be from this stock, which is highly unlikely given the expansive range of the stock.

A lack of an accepted stock abundance value for the Alaska stock of minke whale did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 1,232 minke whales in coastal waters of the Alaska Peninsula and Aleutian Islands (Zerbini *et al.,* 2006). Given that two takes by Level B harassment are proposed for the stock, comparison to the best estimate of stock abundance shows less than 0.2 percent of the stock is expected to be impacted.

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

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Alaska Native hunters in the Ketchikan vicinity do not traditionally harvest cetaceans (Muto *et al.* 2019). Harbor seals are the most commonly targeted marine mammal that is hunted by Alaska Native subsistence hunters within the Ketchikan area. In 2012 an estimated 595 harbor seals were taken for subsistence uses, with 22 of those occurring in Ketchikan (Wolfe *et al.* 2012). This is the most recent data available. The harbor seal harvest per capita in both communities was low, at 0.02 for Ketchikan. ADF&G subsistence data for Southeast Alaska shows that from 1992 through 2008, plus 2012, from zero to 19 Steller sea lions were taken by Alaska Native hunters per year with typical harvest years ranging from zero to five animals (Wolfe *et al.* 2013). In 2012, it is estimated nine sea lions were taken in all of Southeast Alaska and only from Hoonah and Sitka. There are no known haulout locations in the project area. Both the harbor seal and the Steller sea lion may be temporarily displaced from the action area. However, neither the local population nor any individual pinnipeds are likely to be adversely impacted by the proposed action beyond noise-induced harassment or slight injury. The proposed project is anticipated to have no long-term impact on Steller sea lion or harbor seal populations, or their habitat no long term impacts on the availability of marine mammals for subsistence uses is anticipated.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily

determined that there will not be an unmitigable adverse impact on subsistence uses from COK's proposed activities.

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 Office of Protected Resources consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NMFS Alaska Regional Office.

NMFS is proposing to authorize take of the Mexico DPS of humpback whales, which are listed under the ESA.

The NMFS Office of Protected Resources has requested initiation of Section 7 consultation with the NMFS Alaska Regional Office for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the City of Ketchikan for conducting in-water construction activities as part of the Berth III Expansion Project in Ketchikan between October 1, 2021 and May 1, 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 Berth III New Mooring Dolphins 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, 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 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.

Dated: November 4, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–24871 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA606]

Marine Mammals; File No. 23554

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Colleen Reichmuth, Ph.D., Long Marine Laboratory, Institute of Marine Sciences Address at the University of California at Santa Cruz, 115 McAllister Way, Santa Cruz, CA 95060, has applied in due form for a permit to conduct research on pinnipeds in captivity.

DATES: Written, telefaxed, or email comments must be received on or before December 10, 2020.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 23554 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 23554 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Sara Young or Jennifer Skidmore, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The applicant proposes to conduct comparative psychological and physiological studies with captive California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), spotted seals (*Phoca largha*), ringed seals (*Pusa hispida*), bearded seals (*Erignathus barbatus*), and Hawaiian monk seals (*Neomonachus schauinslandi*) at Long Marine Laboratory (Santa Cruz, CA) and the Alaska SeaLife Center (Seward, AK). Up to four individuals per species may be studied at both facilities at any given time over the duration of the permit, with the exception of the Hawaiian

monk seal, for which a max of one seal will be studied at a time.

During psychological assessments, trained pinnipeds cooperate in behavioral stimulus detection and discrimination tasks conducted on land or in water. Stimuli are controlled sensory cues used to evaluate species-typical sensory and cognitive performance. Stimuli may be from any sensory modality, though there is an emphasis on hearing so that conservation issues related to ocean noise can be addressed. Up to three times per day, depending on the procedure, animals may participate in voluntary psychological assessment procedures such as: active acoustic playbacks, passive acoustic recording, behavioral observations, cognitive studies, incidental harassment, signal detection and discrimination, associative learning, photography and videography on land and underwater.

For physiological assessments, the same individuals, except the Hawaiian monk seal, participate in routine physical evaluations to improve understanding of their general biology, including growth and development, nutritional requirements, health status, and environmental tolerance. This research includes longitudinal measurements of growth, nutrition, health, metabolism, physiological capacities, and environmental tolerance. Data are collected from husbandry records, individuals trained to cooperate in physiological measurements, and sedated animals during routine veterinary examinations. Open-flow respirometry methods will be used to gather metabolic data from animals trained to rest and breathe under a plastic dome. Up to three times per day, depending on the procedure, animals may participate in voluntary physiological procedures such as: Passive acoustic recording, drug and sedative administration, collection of molt, scat, and urine, Evan's blue dye and serial blood samples, external and internal instrumentation, flipper tagging, measuring, metabolic chamber or hood studies, behavioral observations, oral fecal markers, collecting of shed whiskers, photogrammetry, photography and videography, flyovers from unmanned aircraft systems, restraint, blood sampling, hair clipping, transport, ultrasound, underwater photography and videography, and weighing.

The application also includes a request for the unintentional mortality of up to two pinnipeds total of any species over the duration of the permit associated with research or transport including humane euthanasia at discretion of attending vet for medical purposes due to research, as well as necropsy and export of parts from the animals. The applicant requests a 5-year permit.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 5, 2020.

Amy Sloan,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–24917 Filed 11–9–20; 8:45 am]

BILLING CODE 3510–22–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Notice of Correction

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia.

ACTION: Notice; correction.

SUMMARY: The Court Services and Offender Supervision Services for the District of Columbia (CSOSA) is correcting a notice published in the October 30, 2020 issue of the **Federal Register** (Notice) entitled SES Performance Review Board (PRB). This correction applies to the misspelling of the name of a PRB member.

FOR FURTHER INFORMATION CONTACT: William Layne, Assistant Director, Human Capital Planning and Executive Resources, Court Services and Offender Supervision Agency for the District of Columbia, 800 North Capitol Street NW, Suite 701, Washington, DC 20005, (202) 220–5637.

Correction

1. In the Notice, the PRB member's name is listed as Victor Valentino Davis. The correct name is Victor Valentine Davis.

Dated: November 4, 2020.

Rochelle Durant,

Federal Register Liaison.

[FR Doc. 2020–24891 Filed 11–9–20; 8:45 am]

BILLING CODE 3129–04–P

DEPARTMENT OF DEFENSE

Department of the Army

Performance Review Board Membership

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Notice is given of the names of members of a Performance Review Board for the Department of the Army.

DATES: *Applicable Date:* November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Smith, Civilian Senior Leader Management Office, 111 Army Pentagon, Washington, DC 20310–0111.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

The Department of the Army Performance Review Board will be composed of a subset of the following individuals:

1. Ms. Lisha Adams, Executive Deputy to the Commanding General, U.S. Army Materiel Command, Redstone Arsenal, AL
2. Ms. Christina Altendorf, Chief, Engineering and Construction Division, U.S. Army Corps of Engineers, Washington, DC
3. Mr. Stephen Austin, Assistant Chief of the Army Reserve, Office of the Chief of Army Reserve, Washington, DC
4. Mr. Mark Averill, Deputy Administrative Assistant to the Secretary of the Army & Director Resources and Program Agency, Office of the Administrative Assistant to the Secretary of the Army, Washington, DC
5. Dr. David Bridges, Senior Research Scientist (Environmental Science), U.S. Army Corps of Engineers, Vicksburg, MS
6. Mr. William Brinkley, Deputy Chief of Staff, G–1/4 (Personnel And Logistics), U.S. Army Training and Doctrine Command, Fort Eustis, VA
7. LTG Gary Brito, Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–1, Washington, DC
8. Ms. Kimberly Buehler, Director, Army Office of Small Business Programs, Office of the Secretary of the Army, Washington, DC
9. Ms. Carol Burton, Director, Civilian Human Resources Agency, Office of the Deputy Chief of Staff, G–1, Washington, DC
10. GEN Christopher Cavoli, Commanding General, U.S. Army Europe, Wiesbaden, Germany
11. Dr. Juanita Christensen, Director, CCDC Aviation & Missile Center, Combat

Capabilities Development Command, U.S. Army Futures Command, Redstone Arsenal, AL
12. Mr. Alexander Conyers, Deputy Assistant Secretary of the Army (Army Review Boards), Office of the Assistant Secretary of the Army (Manpower & Reserve Affairs), Washington, DC
13. GEN Edward Daly, Commanding General, U.S. Army Materiel Command, Redstone Arsenal, AL
14. Mr. John Daniels, Deputy Assistant Secretary of the Army (Plans, Programs And Resources), Office of the Assistant Secretary of the Army (Acquisition, Logistics & Technology), Washington, DC
15. Ms. Karen Durham-Aguilera, Executive Director of the Army National Cemeteries Program, Office of the Secretary of the Army, Washington, DC
16. Mr. Ryan Fisher, Principal Deputy Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Civil Works), Washington, DC
17. Dr. Elizabeth Fleming, Deputy Director, Engineer Research and Development Center, U.S. Army Corps of Engineers, Vicksburg, MS
18. LTG Charles Flynn, Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–3/5/7, Washington, DC
19. Dr. Karl Friedl, Senior Research Scientist (Performance Physiology), U.S. Army Medical Command, Natick, MA
20. GEN Paul Funk, Commanding General, U.S. Army Training and Doctrine Command, Fort Eustis, VA
21. LTG Duane Gamble, Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–4, Washington, DC
22. Mr. Greg Garcia, Deputy Chief Information Officer, Office of the Chief Information Officer, G–6, Washington, DC
23. GEN Michael Garrett, Commanding General, U.S. Army Forces Command, Fort Bragg, NC
24. Ms. Susan Goodyear, Deputy Chief Executive Officer, U.S. Army Futures Command, Austin, TX
25. Mr. Larry Gottardi, Director, Civilian Senior Leader Management Office, Washington, DC
26. Mr. Ross Guckert, Program Executive Officer, Enterprise Information Systems, Office of the Assistant Secretary of the Army (Acquisition, Logistics & Technology), Washington, DC
27. Mr. John Hall, Deputy to the Commanding General, U.S. Army Training and Doctrine Command, Fort Eustis, VA
28. MG David Hill, Deputy Chief of Engineers & Deputy Commanding General, U.S. Army Corps of Engineers, Washington, DC
29. Mr. Michael Hutchison, Deputy to the Commander, Surface Deployment and Distribution Command, U.S. Army Materiel Command, Scott Air Force Base, IL
30. HON R.D. James, Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Civil Works), Washington, DC
31. HON Bruce Jette, Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Acquisition, Logistics & Technology), Washington, DC
32. Dr. Marti Jett-Tilton, Senior Research Scientist (Systems Biology), U.S. Army Medical Command, Fort Detrick, MD
33. Mr. James Johnson, Deputy to the Commander, U.S. Army Space and Missile Defense Command/Army Forces Strategic Command, Huntsville, AL
34. Ms. Kathatine Kelley, Chief Human Capital Officer, U.S. Army Futures Command, Austin, TX
35. Mr. Thomas Kelly III, Deputy Under Secretary of the Army, Office of the Deputy Under Secretary of the Army, Washington, DC
36. Mr. David Kim, Director of Support, U.S. Army Intelligence and Security Command, Fort Belvoir, VA
37. Mr. Daniel Klippstein, Assistant Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–9, Washington, DC
38. Mr. Michael Lacey, Deputy General Counsel (Operations and Personnel), Office of the General Counsel, Washington, DC
39. Mr. Jeffrey Langhout, Director, CCDC Ground Vehicle Systems Center, Combat Capabilities Development Command, U.S. Army Futures Command, Warren, MI
40. Mr. Alvin Lee, Director of Civil Works, U.S. Army Corps of Engineers, Washington, DC
41. Mr. Mark Lewis, Deputy to the Assistant Secretary, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), Washington, DC
42. Mr. Stephen Loftus, Deputy Assistant Secretary of the Army (Cost and Economics), Office of the Assistant Secretary of the Army (Financial Management & Comptroller), Washington, DC
43. Mr. Christopher Lowman, Assistant Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–4, Washington, DC
44. LTG Robert Marion, Principal Military Deputy, Office of the Assistant Secretary of the Army (Acquisition, Logistics & Technology), Washington, DC
45. Dr. David Markowitz, Chief Data Officer & Analytics Officer, Office of the Deputy Chief of Staff, G–8, Washington, DC
46. LTG Theodore Martin, Deputy Commanding General & Chief of Staff, U.S. Army Training and Doctrine Command, Fort Eustis, VA
47. Mr. David May, Senior Cyber Intelligence Advisor, U.S. Army Training and Doctrine Command, Fort Gordon, GA
48. Mr. Phillip McGhee, Deputy Chief of Staff for Resource Management, G8, U.S. Army Forces Command, Fort Bragg, NC
49. Ms. Kathleen Miller, Administrative Assistant to the Secretary of the Army, Office of the Administrative Assistant to the Secretary of the Army, Washington, DC
50. Mr. Jonathan Moak, Principal Deputy Assistant Secretary of the Army (Controls), Office of the Assistant Secretary of the Army (Financial Management & Comptroller), Washington, DC
51. Dr. Eric Moore, Director, Chemical and Biological Center, Combat Capabilities Development Command, U.S. Army Futures Command,, Aberdeen Proving Ground, MD
52. LTG John Morrison, Jr., Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–6, Washington, DC
53. Mr. Larry Muzzelo, Deputy to the Commanding General, U.S. Army Communications-Electronics Command, U.S. Army Materiel Command, Aberdeen Proving Ground, MD
54. Mr. Levator Norsworthy, Jr., Deputy General Counsel (Acquisition), Office of the General Counsel, Washington, DC
55. Ms. Karen Pane, Director of Human Resources, U.S. Army Corps of Engineers, Washington, DC
56. MG Paul Pardew, Commanding General, U.S. Army Contracting Command, U.S. Army Materiel Command, Redstone Arsenal, AL
57. Ms. Michelle Pearce, Principal Deputy General Counsel, Office of the General Counsel, Washington, DC
58. Mr. Philip Perconti, Deputy Assistant Secretary of the Army (Research and Technology) & Chief Scientist, Office of the Assistant Secretary of the Army (Acquisition, Logistics & Technology), Washington, DC
59. Mr. Barry Pike, Director, Weapons Development and Integration, Combat Capabilities Development Command, U.S. Army Futures Command, Austin, TX
60. LTG Walter E. Piatt, Director of the Army Staff, Office of the Director of the Army Staff, Washington, DC
61. Dr. David Pittman, Director, Research and Development, U.S. Army Corps of Engineers, Vicksburg, MS
62. Mr. Ronald Pontius, Deputy to the Commanding General, U.S. Army Cyber Command, Fort Belvoir, VA
63. LTG Leopoldo Quintas, Jr., Deputy Commanding General, U.S. Army Forces Command, Fort Bragg, NC
64. Ms. Diane Randon, Assistant Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–2, Washington, DC
65. Dr. Peter Reynolds, Senior Research Scientist (Physical Sciences), Combat Capabilities Development Command, U.S. Army Futures Command, Durham, NC
66. Ms. Anne Richards, The Auditor General, U.S. Army Audit Agency, Fort Belvoir, VA
67. LTG James Richardson, Deputy Commanding General, U.S. Army Futures Command, Austin, TX
68. LTG Laura Richardson, Deputy Commanding General, U.S. Army North, San Antonio, TX
69. Mr. J. Randall Robinson, Executive Deputy to the Commanding General, U.S. Army Installation and Management Command, Fort Sam Houston, TX
70. Dr. Dawn Rosarius, Principal Assistant for Acquisition, U.S. Army Medical Command, Fort Detrick, MD
71. Dr. Robert Sadowski, Senior Research Scientist (Robotics), Combat Capabilities Development Command, U.S. Army Futures Command, Warren, MI
72. Mr. Bryan Samson, Deputy to the Commanding General, U.S. Army Contracting Command, U.S. Army Materiel Command, Redstone Arsenal, AL
73. Mr. Craig Schmauder, Deputy General Counsel (Installations, Environment and Civil Works), Office of the General Counsel, Washington, DC
74. Ms. Lauri Snider, Senior Advisor (Counter Intelligence, Disclosure, and

Security), Office of the Deputy Chief of Staff, G–2, Washington, DC
75. LTG Scott Spellmon, Chief of Engineers & Commanding General, U.S. Army Corps of Engineers, Washington, DC
76. Mr. Thomas Steffens, Director of Resource Management, U.S. Army Corps of Engineers, Washington, DC
77. Mr. Vance Stewart, Deputy Assistant Secretary of the Army (Management and Budget), Office of the Assistant Secretary of the Army (Civil Works), Washington, DC
78. Mr. Robin Swan, Director, Office of Business Transformation, Washington, DC
79. Mr. Roy Wallace, Assistant Deputy Chief of Staff, Office of the Deputy Chief of Staff, G–1, Washington, DC
80. HON Casey Wardynski, Jr., Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), Washington, DC
81. Dr. Bruce West, Senior Research Scientist (Mathematical Sciences), Combat Capabilities Development Command, U.S. Army Futures Command, Durham, NC
82. Mr. Marshall Williams, Principal Deputy Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), Washington, DC
83. Mr. John Willison, Deputy to the Commanding General, Combat Capabilities Development Command, U.S. Army Futures Command, Aberdeen Proving Ground, MD
84. Ms. Kathryn Yurkanin, Principal Deputy Chief, Office of the Chief Legislative Liaison, Washington, DC

James W. Satterwhite Jr.,

Alternate, Federal Register Liaison Officer.

[FR Doc. 2020–24890 Filed 11–9–20; 8:45 am]

BILLING CODE 5061–AP–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0093]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: The OSD is modifying the system of records, ''Employer Support of the Guard and Reserve Member Management System (MMS),'' DHRA 17 DoD. The MMS allows the Employer Support of the Guard and Reserve (ESGR) to maintain a roster of and facilitate communication between ESGR members, as well as track individual training and volunteer efforts. Volunteer leadership can securely access training records of members to adjust resources as necessary to ensure adequate training among volunteer team members. This system of records notice (SORN) is being revised to expand the category of individuals covered by the system. Additional administrative changes were made to update the SORN in accordance with the OMB's requirements.

DATES: This system of records modification is effective upon publication; however, comments on the Routine Uses will be accepted on or before December 10, 2020. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: https://www.regulations.gov.*

Follow the instructions for submitting comments.

* *Mail:* The Department of Defense (DoD) cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Lyn Kirby, Defense Privacy, Civil Liberties, and Transparency Division, Directorate for Oversight and Compliance, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil*; (703) 571–0070.

SUPPLEMENTARY INFORMATION: The ESGR maintains individual voluntary service records for all statutory volunteers within the MMS. The system facilitates communication between the volunteers, tracks training records, and maintains emergency contact information. The ESGR is a DoD program that develops and promotes supportive work environments for Service members in the Reserve Components through outreach, recognition, and educational opportunities that increase awareness of applicable laws.

The DoD notices for systems of records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

In accordance with 5 U.S.C. 552a(r) and Office of Management and Budget (OMB) Circular No. A–108, the DoD has provided a report of this system of records to the OMB and to Congress.

Dated: November 5, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Employer Support of the Guard and Reserve Member Management System (MMS), DHRA 17 DoD.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Information Systems Agency (DISA), Computing Directorate Mechanicsburg, 5450 Carlisle Pike, Mechanicsburg, PA 17050–2411.

SYSTEM MANAGER(S):

Executive Director, Headquarters, Employer Support of the Guard and Reserve, 4800 Mark Center Drive, Alexandria, VA 22350–1200, Email: *OSD.ESGRITSupport@mail.mil.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 1588, Authority to Accept Certain Voluntary Services; DoD Instruction (DoDI) 1205.22, Employer Support of the Guard and Reserve; DoDI 1100.21, Voluntary Services in the Department of Defense; and DoDI 3001.02, Personnel Accountability in Conjunction With Natural or Manmade Disasters.

PURPOSE(S) OF THE SYSTEM:

To maintain a roster of and facilitate communication between Employer Support to the Guard and Reserve (ESGR) members; and track ESGR-related training, awards, and hours donated by ESGR Department of Defense (DoD) volunteer staff. To maintain personnel accountability and ESGR DoD volunteer emergency contact information for accountability during manmade disasters and other emergencies.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD-affiliated personnel to include: Military Service members (active duty, Guard/Reserve and the Coast Guard personnel), civilian employees (including non-appropriate fund employees); and other individuals working for or affiliated with ESGR.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name; home and work address; phone numbers (home, work, and mobile); email addresses (work and personal); position/title; assigned military unit and rank; official report and departure date;

ESGR affiliation (State Committee region or headquarters); military base for volunteer activity; ESGR-related training completed; and emergency contact information to include name, phone number, and relationship.

Additional information collected on DoD volunteers include: Volunteer hours performed; awards; mentor/mentee assignments; military experience (component, rank, status, and years of service); civilian work experience (industry and position type); special skills or qualifications; shirt size; and form of DoD identification (where applicable).

RECORD SOURCE CATEGORIES:

The individual.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a (b) of the Privacy Act of 1974, as amended, these records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To contractors, grantees, experts, consultants, students, and others responsible for performing or working on contracts for the DoD when necessary to accomplish an agency function related to this System of Records.

b. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

c. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

d. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

e. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

f. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

g. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the System of Records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

h. To another Federal agency or Federal entity, when the DoD determines information from this System of Records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic storage media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by full name and ESGR affiliation.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Headquarters Personnel Records. Cut off upon employee separation or transfer. Destroy upon supersession or 1 year after cut off. Volunteer Staff Records: Cut off upon volunteer departure from program. Destroy/delete 4 years after cut off.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

All personally identifiable information (PII) is maintained in a secure, password protected electronic system. The system utilizes security hardware and software to include physical controls such as combination locks, cipher locks, key cards, identification badges, closed circuit televisions, and controlled screenings. Technical controls include the use of user identifications and passwords, intrusion detection systems, encryption, Common Access Cards (CAC), firewalls, virtual private networks, role-based access controls, and two-factor authentication. Administrative controls include periodic security audits, regular monitoring of users' security practices, methods to ensure only authorized personnel access information, encryption of backups containing sensitive data, visitor registers, and backups secured off-site.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, Office of Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155. Signed written requests should contain the individual's full name, personal contact information (home address, phone number, email), and the number and name of this system of records notice. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rules for accessing records, contesting contents, and appealing initial agency determinations are contained in 32 CFR part 310 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Executive Director, Headquarters, Employer Support of the Guard and Reserve, 4800 Mark Center Drive, Alexandria, VA 22350–1200. Signed written requests should contain the individual's full name, ESGR affiliation, and personal contact information (home address, phone number, and email).

In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

81 FR 37585, June 10, 2016.

[FR Doc. 2020–24934 Filed 11–9–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0092]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Acquisition and Sustainment announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by January 11, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Department of Defense Office of Economic Adjustment, 2231 Crystal Drive, Suite 520, Arlington, Virginia, 22202–3711, ATTN: Ms. Elizabeth Chimienti, or call 703–697–2075.

SUPPLEMENTARY INFORMATION: *Title; associated form; and omb number:* Revitalizing Base Closure Communities, Economic Development Conveyance Annual Financial Statement; OMB Control Number 0790–0004.

Needs and uses: The information collection requirement is necessary to verify that Local Redevelopment Authority (LRA) recipients of Economic Development Conveyances (EDCs) are in compliance with the requirement that the LRA reinvest proceeds from the use of EDC property for seven years.

Affected public: Business or other for-profit; Not-for-profit institutions.

Annual burden hours: 960.

Number of Respondents: 24.

Responses per respondent: 1.

Annual responses: 24.

Average burden per response: 40 hours.

Frequency: Annually.

Respondents are LRAs that have executed EDC agreements with a Military Department that transferred property from a closed military installation. As provided by 32 CFR 174.9, such agreements require that the LRA reinvest the proceeds from any sale, lease or equivalent use of EDC property (or any portion thereof) during at least the first seven years after the date of the initial transfer of the property to support the economic redevelopment of, or related to, the installation. The Secretary of Defense may recoup from the LRA such portion of these proceeds not used to support the economic redevelopment of, or related to, the installation. LRAs are subject to this same seven-year reinvestment requirement if their EDC agreement is modified to reduce the debt owed to the Federal Government. Military Departments monitor LRA compliance with this provision by requiring an annual financial statement certified by an independent Certified Public Accountant. No specific form is required.

Dated: November 5, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–24916 Filed 11–9–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0065]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Impact Study of Federally-Funded Magnet Schools

AGENCY: Institution of Education Sciences, Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 10, 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 Meredith Bachman, 202–245–7494.

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: Impact Study of Federally-Funded Magnet Schools.

OMB Control Number: 1850–0943.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 706.

Total Estimated Number of Annual Burden Hours: 629.

Abstract: The Office of Management and Budget (OMB) package requests clearance for data collection activities to support a rigorous Impact Study of Federally-Funded Magnet Schools. The Institute of Education Sciences (IES) at the U.S. Department of Education (ED) has contracted with Mathematica Policy Research and its subcontractor, Social Policy Research Associates (SPR), to conduct this evaluation (ED–IES–17–C–0066). The evaluation included an initial feasibility assessment and determined that a rigorous impact study can be conducted.

The impact study would collect survey data from principals and district administrative records on admissions lotteries and student progress. The study would use these data to estimate the impacts of magnet schools on student achievement and diversity and to describe whether particular features of magnet schools are associated with greater success. The study would also collect survey data from charter schools on their admissions practices to provide context for the impact study findings.

Dated: November 5, 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. 2020–24918 Filed 11–9–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0170]

Evaluating the DC Opportunity Scholarship Program After the 2017 Reauthorization; Correction

AGENCY: Department of Education (ED), Institute for Education Sciences (IES).

ACTION: Notice; Correction.

SUMMARY: On November 5, 2020, the U.S. Department of Education published a 60-day comment period notice in the **Federal Register** with FR DOC# 2020–24608 (Page 70596, First Column, Second Column; Page 70597, First Column) seeking public comment for an information collection entitled, ''Evaluating the DC Opportunity Scholarship Program After the 2017 Reauthorization.'' The docket number is incorrect. The correct docket number is ED–2020–SCC–0173.

The PRA Coordinator, Strategic Collections and Clearance, Office of the Chief Data Officer, Office of Planning, Evaluation and Policy Development, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: November 3, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Office of the Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–24953 Filed 11–9–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0141]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; 21st CCLC 4201(b)(1) Waiver Request

AGENCY: Office of Elementary and Secondary Education, Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 10, 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 Miriam Lund, 202–401–2871.

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: 21st CCLC 4201(b)(1) Waiver Request.

OMB Control Number: 1810–0746.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 53.

Total Estimated Number of Annual Burden Hours: 159.

Abstract: The Nita M. Lowey 21st Century Community Learning Centers (21st CCLC) grant program intends to offer a waiver available to State education agencies (SEAs) based on section 8401 [20 U.S.C. 7861] of the Elementary and Secondary Education Act, as reauthorized by the Every Student Succeeds Act (ESSA) in 2015 to allow SEAs to waive the definition of Community Learning Center(s) for implementation of services during ''nonschool hours or periods when school is not in session (such as before and after school or during summer recess)'' per section 4201 (b)(1)(A) [20 U.S.C. 7171] for 21st CCLC programs in school year 2020–2021. The purpose for this new collection is to collect waiver requests from each State wishing to take advantage of the waiver.

Dated: November 4, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–24867 Filed 11–9–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Record of Decision for Final Environmental Impact Statement for Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory, California

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Record of decision for groundwater remediation, Area IV, Santa Susana Field Laboratory.

SUMMARY: The U.S. Department of Energy (DOE) announces its decision to initiate groundwater remediation in Area IV of the Santa Susana Field Laboratory (SSFL). DOE–EM will implement the preferred alternatives for groundwater remediation identified in the SSFL Area IV Final Environmental Impact Statement (EIS), with the exception of Building 4100/Building 56 Landfill Trichloroethylene (TCE) Plume, for which DOE will implement monitored natural attenuation. This alternative is a combination of the Treatment Alternative and the Monitored Natural Attenuation Alternative. This action will be taken in accordance with applicable federal, state, and local laws and regulations, and approvals made by the California Department of Toxic Substances Control (DTSC). This action will also be taken consistent with agreements and decisions resulting from interagency consultations conducted in accordance with applicable federal, state, and local laws and regulations, including the Programmatic Agreement executed with the California State Historic Preservation Officer pursuant to the National Historic Preservation Act and the Biological Opinion issued by the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act.

ADDRESSES: This Record of Decision (ROD), the SSFL Area IV Final EIS, and related National Environmental Policy Act (NEPA) documents are available at the DOE SSFL Area IV website (*http://etec.energy.gov*) and the DOE NEPA website (*http://energy.gov/nepa*).

FOR FURTHER INFORMATION CONTACT: For further information on the SSFL Area IV Final EIS, the ROD, and DOE cleanup actions within Area IV of SSFL, please contact, Mr. John Jones, Energy Technology Engineering Center (ETEC) Federal Project Director, U.S. Department of Energy at *john.jones@emcbc.doe.gov.* For general information on DOE's NEPA process, please contact Mr. Bill Ostrum, NEPA Compliance Officer, U.S. Department of Energy, Office of Environmental Management, 1000 Independence Avenue SW, Washington, DC 20585–0103; Telephone: (202) 586–2513; or Email: *william.ostrum@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background

DOE prepared the SSFL Area IV Final EIS (DOE/EIS–0402) in accordance with NEPA (42 U.S.C 4321 *et seq.*), Council on Environmental Quality (CEQ) NEPA regulations (40 CFR parts 1500–1508), and DOE's NEPA Implementing Procedures (10 CFR part 1021).[1] DOE announced its intent to prepare an EIS on May 16, 2008, (73 FR 28437) and conducted public scoping. DOE prepared a Draft EIS and distributed it to interested parties. Following the U.S. Environmental Protection Agency (EPA) notice of availability of the SSFL Area IV Draft EIS (82 FR 4336; January 13, 2017), DOE conducted public hearings and invited comment on the Draft EIS. After considering comments received on the Draft EIS, DOE addressed the comments and prepared a Final EIS that was issued with EPA's Notice of Availability (83 FR 67282; December 28, 2018). On September 27, 2019, DOE announced its decision to demolish the 18 buildings it owns in Area IV of the SSFL and to dispose of or recycle the resulting building materials off-site (84 FR 51149; September 27, 2019).

The California Department of Toxic Substances Control (DTSC) is in the process of completing its *Program Environmental Impact Report for the Santa Susana Field Laboratory, Ventura County, California* (SSFL EIR), prepared under the California Environmental Quality Act (CEQA). The DTSC SSFL EIR also assesses proposed groundwater remediation actions at SSFL. Should DTSC—in its CEQA Findings of Fact and/or Resource Conservation and Recovery Act (RCRA) Statement of Basis for groundwater cleanup—make a decision inconsistent with the DOE NEPA EIS and this ROD, DOE will confer with DTSC and determine whether modifications or additional actions related to groundwater cleanup in Area IV and the Northern Buffer Zone (NBZ) are required.

SSFL, located on approximately 2,850 acres in the hills between Chatsworth and Simi Valley, California, was developed as a remote site to test rocket engines and conduct nuclear research. Rocket engine testing by North American Aviation (later Rockwell International [Rocketdyne]) began in 1947. In the mid-1950s, the Atomic Energy Commission (AEC), a predecessor agency to DOE, funded nuclear research on a 90-acre parcel within Area IV of SSFL. The Energy Technology Engineering Center (ETEC) was established on this parcel as a ''center of excellence'' for liquid metals research. A total of 10 small reactors were built and operated as part of nuclear research that ended in 1982. DOE-directed liquid metals research continued until 1988.

DOE initiated the investigation of groundwater at Area IV in 1986 when the first monitoring well was installed. Since that time DOE has installed more than 130 monitoring wells to identify the presence and type of groundwater contamination. The investigation work was summarized in the *Final RCRA Facility Groundwater Remedial Investigation Report, Area IV* (August 2019). The groundwater investigation work involved the 14 solid waste management units assigned to DOE in the DTSC 2007 Consent Order for Corrective Action (2007 CO) and areas adjacent to these units including the NBZ and the Brandeis property. The investigation identified seven areas in Area IV with differing groundwater impact issues related to solvents,

[1] The CEQ published on July 16, 2020 the ''Final Rule Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act''. The SSFL Area IV EIS was started prior to September 14, 2020 (the effective date for CEQ's updated NEPA regulations). DOE completed the EIS and is issuing this ROD pursuant to DOE's NEPA regulations and the 1978 CEQ regulations.

metals, and radionuclides, released from the years of energy and liquid metals research. Proposed groundwater remedies were identified in the Area IV groundwater corrective measures study that was conducted at the same time the Final EIS was developed. Impacts of implementing the measures are described in the Final EIS.

The DOE/ETEC SSFL Area IV locations with impacted groundwater are:

- Former Sodium Disposal Facility (FSDF) Volatile Organic Compound (VOC) Plume
- Building 4100/Building 56 Landfill Trichloroethylene (TCE) Plume
- Building 4057 Tetrachloroethylene (PCE) Plume
- Hazardous Materials Storage Area (HMSA) TCE Plume
- Building 4010 Tritium Plume
- Radioactive Materials Handing Facility (RMHF) Leach Field (Strontium 90 and TCE)
- Metals Clarifier/DOE Leach Field 3 TCE Plume

Purpose and Need for Agency Action

The DOE Office of Environmental Management's (DOE–EM) purpose and need for action remains as stated in the SSFL Area IV Final EIS. DOE–EM needs to complete remediation of Area IV and the NBZ to comply with applicable requirements for cleanup of radiological and hazardous substances. Pursuant to this ROD, and upon consideration by DTSC of the Groundwater Corrective Measures Implementation Plan (CMIP), DOE–EM will initiate remediation of groundwater in a manner that is protective of the environment and the health and safety of the public and its workers.

Proposed Action

DOE–EM's proposed action is to remediate groundwater at seven locations in Area IV. DOE will also continue the ongoing groundwater monitoring of other locations in Area IV and the NBZ in accordance with the 2007 CO to confirm no groundwater contamination. The final groundwater cleanup goals will be established by DTSC as it evaluates the corrective measures and reaches its conclusions in the RCRA Statement of Basis. DTSC will confer with DOE regarding DTSC's decisions regarding groundwater remediation.

This ROD addresses only DOE's decision for groundwater remediation. DOE previously announced its decision to demolish the 18 buildings it owns in Area IV of the SSFL and dispose of or recycle the resulting building materials off-site (84 FR 51149; September 27, 2019). DOE will issue subsequent ROD(s) to document its decision for soil remediation.

The actions DOE will undertake to remediate groundwater are presented below.

FSDF VOC Plume

The FSDF groundwater is impacted by VOCs (chlorinated solvents) and metals contained in bedrock fractures primarily between 15 feet and 60 feet below ground surface. In November 2017 DOE initiated an interim measure to extract groundwater from the fractures. The interim action reduced VOC concentrations from 10,000 micrograms per liter (μg/L) to approximately 1,000 μg/L. The maximum contaminant level (MCL) for TCE is 5 μg/L. DOE plans to continue the action of dewatering the fractures and evaluating bedrock back-diffusion effects for 5 years. Extracted groundwater will be temporarily stored in an on-site tank and then transported off-site for treatment and disposal. After 5 years of action, DOE will evaluate the effectiveness of the fracture dewatering, and then evaluate additional actions if necessary, based on the effectiveness of the remedy at reducing chemical concentrations, and the assessment of the back-diffusion rate of the contaminants from bedrock into the fracture groundwater.

Building 56 Landfill

One well at the landfill is impacted by TCE above 5 μg/L. Trend data for the last six years demonstrates a continued decline of TCE concentration at the well from 56 μg/L in 2015 to 22 μg/L in 2020. DOE's evaluation of data for the landfill area indicates that the landfill is not the source for the TCE. The decline in TCE at the landfill also indicates that the observed contamination reflects the presence of a leading edge of a plume, originating upgradient to the landfill. DOE proposes to continue monitoring the impacted well to confirm the decline in TCE at the landfill site.

Building 4057 PCE Impacted Groundwater

One well in the vicinity of Building 4057 is impacted by the chlorinated solvent PCE. DOE proposes to install additional extraction wells near the impacted well and pump the water for temporary storage into an on-site tank. The impacted groundwater will be transported off-site for treatment and disposal. The effectiveness of the remedy in reducing chemical concentrations will be evaluated on a five-year basis. If the pumping remedy is determined to not be effective, DOE will assess the need for an alternative remedy.

HMSA TCE Plume

The HMSA represents the largest groundwater impact in Area IV. TCE is present in alluvium and weathered bedrock material and in competent bedrock. DOE is considering two remediation options for the MHSA: Pump and treat and in situ chemical/biological oxidation. Due to the large volume of impacted groundwater, DOE will determine whether it is possible to reuse the treated groundwater (such as for dust control) or discharge it locally. If reuse or discharge is not feasible, DOE proposes conducting a pilot study to assess whether the plume can be treated in situ by chemical and/or biological means to reduce the TCE levels. If successful, the in-situ treatment would be extended to address the entire area of impacted groundwater. The success of in situ treatment would be assessed on a five-year basis.

Building 4010 Tritium Plume

An area of groundwater in the north central portion of SSFL Area IV is impacted by the radioactive isotope of hydrogen, termed tritium. Seven wells in this area have been sampled for tritium for 16 years and the concentrations of tritium have declined from 119,000 picocuries per liter (pCi/L) in 2004 to 26,000 pCi/L in 2020. Only two wells remain above the MCL of 20,000 pCi/L. This decline is consistent with the 12.5-year half-life of tritium. The wells with the highest tritium concentrations are within Area IV and the leading edge of the plume at about 1,000 pCi/L is observed in the NBZ. Due to the tight bedrock conditions, groundwater flow is slow in this area and the plume has moved less than 1,000 feet since its release 30 years ago. DOE proposes to continue to monitor the natural attenuation of the tritium in groundwater through annual sampling of several wells. Concentrations of tritium are anticipated to be below the drinking water standard (MCL) of 20,000 pCi/L within the next 10 years.

RMHF TCE and Strontium 90 Impacted Groundwater

A small area north of the RMHF exhibits TCE contamination near the applicable MCL of 5 μg/L. DOE proposes to continue to monitor the natural attenuation of TCE concentrations at this location; data collected from wells at this location show a decline of TCE from 20 μg/L in 1998 to 5.4 μg/L in 2020. Bedrock beneath the former RMHF leach field is impacted by the radionuclide Strontium-90. When

groundwater elevation rises in wet rainfall years, the groundwater comes into contact with the impacted bedrock. DOE proposes to excavate for off-site disposal at a mixed low-level waste facility the bedrock containing the Strontium-90. Monitoring wells installed near the former leach field site will then be sampled to demonstrate the effectiveness of the bedrock removal in protecting groundwater.

Metals Clarifier/DOE Leach Field 3 TCE

A small area in the south-central portion of Area IV is impacted by TCE near the applicable 5 μg/L MCL. This area has been monitored for 20 years and the data demonstrate a continued decline in TCE levels. DOE proposes to continue monitoring the wells with TCE to provide data demonstrating the continued attenuation of TCE at this location (Monitored Natural Attenuation).

Alternatives

In the SSFL Area IV Draft and Final EIS, DOE–EM evaluated No Action, monitored natural attenuation, pump and treat, bedrock vapor extraction, source isolation, and bedrock removal as groundwater remediation alternatives. In the Area IV Corrective Measures Study, DOE evaluated these technologies plus in situ groundwater treatment using biological and chemical oxidation, thermal remediation, and bedrock fracturing.

Potential Environmental Impacts

In the SSFL Area IV Final EIS DOE–EM analyzed environmental issues and the potential impacts related to land resources, geology and soils, surface water, groundwater, biology, air quality and climate change, noise, transportation and traffic, human health, waste management, cultural resources, socioeconomics, environmental justice, and sensitive-aged populations. DOE–EM also evaluated the potential impacts of the irreversible and irretrievable commitment of resources, the short-term uses of the environment, and the maintenance and enhancement of long-term productivity. These analyses and results are described in the SSFL Area IV Final EIS, including the Summary and Section 2.8.

In identifying the preferred alternative for groundwater remediation, for each of the impacted areas, and in making the decisions announced in this ROD, DOE–EM considered the potential impacts that would result from the groundwater pumping, in situ treatment, bedrock removal, and monitored attenuation actions. Table S–9 of the SSFL Area IV Final EIS Summary provides a summary and comparison of potential environmental consequences associated with each groundwater remediation alternative. The impacts of all preferred groundwater remediation alternatives to the physical, social, and natural environments will be minimal and manageable.

Environmentally Preferable Alternatives

The environmentally preferable alternatives are the groundwater Treatment Alternatives, Bedrock Removal, and Monitored Natural Attenuation. Groundwater pumping and in situ treatment technologies, and monitored natural attenuation have the least severe environmental impacts compared with other alternatives considered for each impact area at most locations. Bedrock excavation reduces by approximately 150 years groundwater monitoring, groundwater control, and investigation work at the former RMHF leach field site.

Permits, Consultations, and Notifications

DOE–EM will implement the proposed groundwater remediation activities in accordance with the Groundwater CMIP to be approved by California DTSC. If local discharge of treated groundwater is considered, DOE will coordinate water release with the Los Angeles Regional Water Quality Control Board. DOE will obtain necessary permits for any potential installation and operation of groundwater treatment systems. DOE–EM is complying with Section 106 of the National Historic Preservation Act through completion and implementation of the Programmatic Agreement (PA) with the California State Historic Preservation Officer (September 13, 2019). DOE will follow the requirements of the PA as it develops and eventually implements the Groundwater CMIP. DOE also consulted with the U.S. Fish and Wildlife Service (USFWS) for compliance with Section 7 of the Endangered Species Act. Area IV of SSFL includes federally designated critical habitat for the endangered Braunton's milk-vetch. USFWS issued its Biological Opinion related to DOE's proposed actions on August 28, 2018. (*http://www.ssflareaiveis.com/documents/feis/Biological%20Opinion.pdf*).

Public and Agency Involvement

Following the 2007 federal court decision resulting from a legal challenge to the DOE 2003 Environmental Assessment (EA) and its subsequent Finding of No Significant Impact (FONSI), DOE published in the **Federal Register** an Advanced Notice of Intent (ANOI) to prepare an EIS (72 FR 58834; October 17, 2007). The ANOI was issued to request early comments and to obtain input on the scope of the EIS. The NOI to prepare an EIS and to announce scoping meetings was published in the **Federal Register** on May 16, 2008 (73 FR 28437). The public scoping period started on May 16, 2008, and continued through August 14, 2008. Scoping meetings were held in Simi Valley, California (July 22, 2008), Northridge, California (July 23, 2008), and Sacramento, California (July 24, 2008).

Preparation of the Draft EIS was delayed due to the need to collect soil and groundwater characterization data for Area IV and the NBZ. The lack of characterization data was an issue raised in EPA's and the State of California's comments on the 2003 EA. EPA collected characterization data for radionuclides from October 2010 to December 2012. DOE (under DTSC oversight) collected characterization data for chemicals from October 2010 to June 2014. While the characterization data were being collected, DOE ETEC continued public involvement through release of newsletters and conducting Community Alternatives Development Workshops in 2012. Due to the length of time between the 2008 NOI and completion of characterization, DOE ETEC published in the **Federal Register** on February 7, 2014, an Amended NOI for the SSFL Area IV EIS (79 FR 7439). Additional scoping meetings were held in Simi Valley, California on February 27, 2014, and in Agoura Hills/Calabasas, California on March 1, 2014. The scoping period ended on March 10, 2014. The Notice of Availability of the SSFL Area IV Draft EIS was published in the **Federal Register** on January 13, 2017 (82 FR 4336). An Amended Notice Extending the Comment Period to April 13, 2017 was published in the **Federal Register** on March 17, 2017 (82 FR 14218).

Comments Received on the Final Environmental Impact Statement for Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory

The Notice of Availability of the SSFL Area IV Final EIS was published in the **Federal Register** on December 28, 2018 (83 FR 67282). DOE–EM distributed the SSFL Area IV Final EIS to Congressional members, State and local governments; other federal agencies; culturally affiliated American Indian tribal governments; non-governmental organizations; and other stakeholders,

including members of the public who requested the document. Also, the SSFL Area IV Final EIS was made available via the internet (*http://www.SSFLAreaIVEIS.com*). In the SSFL Area IV Final EIS, DOE–EM announced the preferred alternatives for groundwater remediation as a combination of the Treatment Alternative and the Monitored Natural Attenuation Alternative. Preferred treatment technologies included groundwater pump and treat, bedrock removal, and monitored natural attenuation.

DOE–EM received 885 letters or emails regarding the SSFL Area IV Final EIS. DOE–EM considered all comments contained in the letters and emails received during the review period. Some of the comments reiterated issues raised during the comment period on the SSFL Area IV Draft EIS. DOE previously evaluated all comments submitted on the SSFL Area IV Draft EIS and provided responses to those comments in the SSFL Area IV Final EIS, Volume 3, Comment Response Document. The ROD for Building Demolition (84 FR 51149) addressed the general comment issues (as well as those specific to building demolition) received on the Final EIS. Comments related to groundwater remediation are summarized.

DOE–EM received comment letters from EPA, Region IX; DTSC; The Boeing Company; City of Los Angeles; Natural Resources Defense Council/Committee to Bridge the Gap; Physicians for Social Responsibility—Los Angeles; Rocketdyne Cleanup Coalition; Southern California Federation of Scientists; and the SSFL Community Advisory Group. DOE–EM also received 876 comment emails from individuals. DOE reviewed and responded to all comments received through March 28, 2019. There were no comments received after that date.

Active Remediation Comment—Commenters alleged that DOE was not proposing active groundwater remediation and was planning to leave groundwater with contaminants above permissible levels.

Response—The commenters misstated DOE's proposed groundwater actions presented in the Final EIS. The Final EIS states that the maximum contaminant level (MCL or drinking water standard) would be the goal for locations requiring active remediation. The Final EIS states that active remediation is proposed to address contamination for the FSDF, PCE Plume, HMSA, and RMHF Strontium-90 bedrock. The cleanup actions would be continued until concentrations reach the cleanup goal.

Monitored Natural Attenuation Comment—Commenters also objected to DOE's proposal to use monitored natural attenuation as a process for groundwater remediation.

Response—In the Final EIS DOE states that monitored natural attenuation would be considered only for those locations with concentrations near the contaminant's MCL and with data demonstrating continued decline in concentration. The Final EIS states that monitored natural attenuation would be considered for the Tritium Plume, RMHF TCE Plume, and the Metals Clarifier TCE Plume as contaminants at those locations are either at or near their MCLs and are anticipated to be at MCLs within 10 years.

Compliance with the 2007 CO—Commenters stated that DOE was not following the 2007 CO. The commenters did not state what aspects of the 2007 CO were not being met.

Response—DOE has been compliant with the 2007 CO, working in coordination with California DTSC. This includes the sampling of Area IV monitoring wells in accordance with the *SSFL Water Quality Sampling and Analysis Plan* (SSFL WQSAP; Haley and Aldrich, 2010). DOE developed and DTSC approved the work plan for groundwater characterization. DOE implemented the work plan installing 33 new wells, bringing the total number of monitoring wells in Area IV to over 130 wells. This network is adequate to assess groundwater remedies for each location of Area IV. As DOE designs the groundwater remedies to be described in the Groundwater CMIP, DOE will be identifying additional locations for new monitoring wells to be installed in Area IV. In compliance with a directive from DTSC, DOE implemented the groundwater interim measure at the FSDF, which is already reducing VOC concentrations. DOE collected over 500 groundwater samples during the last five years consistent with the 2007 CO requirements. The results of the efforts were reported in the *RCRA Facility Groundwater Remedial Investigation Report* (August 2019), reviewed by and conditionally approved by DTSC. Finally, in accordance with the 2007 CO, DOE prepared the Area IV Groundwater Corrective Measures Study Report, which has been reviewed by DTSC. With the issuance of this ROD, DOE will prepare the Groundwater CMIP which will describe the technical details of the groundwater remedies identified herein. DTSC in turn will review and comment on the Groundwater CMIP.

Groundwater Remedy Changes Since the Final EIS

The Final EIS DOE identified pump and treat as the preferred treatment technology for the Building 56 Landfill TCE Plume. Data collected since issuance of the Final EIS has determined that the Building 56 Landfill is not the source of observed TCE contamination. The source appears to be upgradient of the landfill. The groundwater data for the landfill location show a continuous decline in TCE concentrations, indicative of the leading edge from a plume from another location. DOE will continue to monitor the declining TCE concentrations at the landfill site. Under these conditions, continued groundwater monitoring near the landfill would have less environmental impact than a pump and treat action, which could draw additional contaminants from the source to the landfill.

DOE Comment Review and Changes Conclusion

DOE has considered the above mentioned comments and changes and concludes that they do not present ''significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts'' within the meaning of 40 CFR 1502.9(c) and 10 CFR 1021.314(a) and therefore does not require preparation of a supplement analysis or a supplemental EIS.

Decision

DOE–EM has decided to implement pump and treat for the FSDF VOC and Building 4057 PCE plumes; conduct an in situ treatment pilot study for the HMSA TCE plume; perform a bedrock removal action for RMHF Strontium-90 impacted bedrock; and implement monitored natural attenuation for the Building 56 Landfill, Tritium Plume, RMHF Leach Field TCE, and Metals Clarifier/DOE Leach Field 3 Plume. These actions reflect DOE's Preferred Alternatives for groundwater remediation as described in the SSFL Area IV Final EIS, with the one exception of the change to the Building 56 Landfill noted above. Under this alternative, DOE–EM will prepare a Groundwater CMIP describing for each groundwater impact area the details for each remedial action, handling and disposal of treatment residuals created during the actions, monitoring requirements, and the goal for completion of the actions.

The DOE Groundwater CMIP will be subject to DTSC review under the CEQA. In October 2017, DTSC released

a draft Programmatic Environmental Impact Report (EIR) describing cleanup actions for the entirety of SSFL. Approval of remedies and selection of goals will be identified in the DTSC RCRA Statement of Basis. DOE–EM will implement the groundwater actions consistent with DTSC's EIR findings and approval of the Groundwater CMIP. DOE will continue to perform interim monitored natural attenuation, which does not require a final EIR, of the FSDF plume, metals clarifier plume, tritium plume, and building 56 landfill plume, until final remedies are concurred upon with DTSC. Other actions, such as the Sr-90 removal of bedrock, will not be performed until the final EIR is published.

In reaching this decision, DOE–EM balanced the environmental information in the Final EIS with potential environmental impacts of groundwater remediation, current and future mission needs, technical and security considerations, availability of resources, and public comments on the SSFL Area IV Draft and Final EIS. Groundwater remediation supports DOE–EM's program initiatives for site cleanup and closure. Groundwater contaminant concentrations exceed levels considered safe for human health and ecological receptors. The current and future land use of the Area IV property is open space/recreational in accordance with the *Grant Deed of Conservation Easement and Agreement* (Ventura County 2017) and the Ventura County General Plan. The groundwater remediation actions presented in this ROD are consistent with the current and future land use. Implementing the Preferred Alternative will allow DOE–EM to continue its progress of cleaning up and eliminating liabilities for legacy nuclear research properties.

Mitigation Measures

The installation of monitoring wells has the potential for temporary air quality emissions from diesel powered equipment. The transport of treatment residuals and extracted groundwater also has the potential for diesel exhaust emissions. Temporary water storage and treatment systems will be installed in already disturbed areas and operations are anticipated to be powered by solar systems. Overall, the groundwater remediation impacts are anticipated to be minimal. This decision adopts the mitigation and monitoring measures relevant to groundwater remediation that are identified in Chapter 6 of the Final EIS, the Programmatic Agreement, and the Biological Opinion. Practicable means to avoid or minimize environmental harm from the selected alternatives have been, or will be, adopted. Prior to active groundwater remediation, DOE–EM will prepare a mitigation and monitoring plan that will address how DOE–EM will minimize air emissions. Diesel emissions will be controlled using well installation and bedrock removal equipment and highway trucks fitted with pollution control equipment maintained to manufacturer specifications. Hazardous chemicals and radionuclides captured in treatment media will be packaged to prevent releases during transport. Occupational safety risks to workers will be minimized by adherence to federal and state occupational safety laws, and DOE requirements, regulations, and orders. Workers will also be protected by use of engineering and administrative controls. Emergency preparedness will also include an Accident Preparedness Program to address protection of the public during transport of groundwater treatment residuals. Stormwater control best management practices will be implemented to prevent surface water runoff from demolition sites. The plan will also incorporate by reference the monitoring and mitigation measures relevant to groundwater remediation established in the Programmatic Agreement and Biological Opinion.

Signing Authority

This document of the Department of Energy was signed on November 2, 2020, by William I. White, Senior Advisor for Environmental Management to the Under Secretary for Science, Office of Environmental Management, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with the requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy.

The administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 5, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–24908 Filed 11–9–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Monday, November 30, 2020; 1:00 p.m.–4:00 p.m.

ADDRESSES: Online Virtual Meeting. To attend, please send an email to: *srscitizensadvisoryboard@gmail.com* by no later than 4:00 p.m. ET on Wednesday, November 25, 2020.

To submit public comments: Public comments will be accepted via email prior to and after the meeting. Comments received by no later than 4:00 p.m. ET on Wednesday, November 25, 2020 will be read aloud during the virtual meeting. Comments will also be accepted after the meeting, by no later than 4:00 p.m. ET on Monday, December 7, 2020. Please submit comments to *srscitizensadvisoryboard@gmail.com.*

FOR FURTHER INFORMATION CONTACT: Amy Boyette, Office of External Affairs, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC, 29802; Phone: (803) 952–6120; email: *amy.boyette@srs.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

—Meeting Rules and Agenda Review
—Opening and Chair Update
—Agency Updates
—Break
—Committee Round Robin:
- Facilities Disposition & Site Remediation Committee
- Nuclear Materials Committee
- Strategic & Legacy Management Committee
- Waste Management Committee
- Administrative & Outreach Committee

—Break
—Potential Draft Recommendation Discussion

—Reading of Public Comments
—Potential Voting on Draft Recommendations
—Adjourn

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting as there will not be opportunities for live public comment during this online virtual meeting. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should email them as directed above.

Minutes: Minutes will be available by writing or calling Amy Boyette at the address or telephone number listed above. Minutes will also be available at the following website: *https://cab.srs.gov/srs-cab.html.*

Signed in Washington, DC, on November 5, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–24909 Filed 11–9–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP20–1252–001.
Applicants: Rover Pipeline LLC.
Description: Compliance filing Compliance with RP20–1252 Order Fuel Filing to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5087.
Comments Due: 5 p.m. ET 11/6/20.

Docket Numbers: RP21–177–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rate—Morgan Stanley 8947599 Release eff 11–1–2020 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5027.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–178–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Expired Negotiated Rate Agreements—12/03/2020 to be effective 12/3/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5032.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–179–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements—11/1/2020 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5033.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–180–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rate—Range Resources 910916 Release eff 11–1–2020 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5034.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–181–000.
Applicants: Rover Pipeline LLC.
Description: § 4(d) Rate Filing: Summary of Negotiated Rate Capacity Release Agreements on 11–2–20 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5048.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–182–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate—Yankee Gas 510802 Release eff 11–3–2020 to be effective 11/3/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5058.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–183–000.
Applicants: Interstate Gas Supply, Inc., Dominion Energy Solutions, Inc.
Description: Joint Petition For Limited Waiver, et al. of Interstate Gas Supply, Inc., et al. under RP21–183.
Filed Date: 10/30/20.
Accession Number: 20201030–5412.
Comments Due: 5 p.m. ET 11/12/20.

Docket Numbers: RP21–184–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate—Various Releases eff 11–1–20 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5152.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–185–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Rate Schedules GSS, LSS & SS–2 Tracker eff 11/1/2020—Dominion & National Fuel to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5153.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–186–000.
Applicants: Texas Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Kaiser 35448 to Koch 38818) to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5154.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–187–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Osaka 46429 to Texla 53267) to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5155.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–188–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: Amendment to a Negotaited Rate Agreement—Macquarie to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5164.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–189–000.
Applicants: Chesapeake Energy Marketing, L.L.C.
Description: Petition For Limited Waiver, et al. of Chesapeake Energy Marketing, L.L.C. under RP21–189.
Filed Date: 11/2/20.
Accession Number: 20201102–5188.
Comments Due: 5 p.m. ET 11/9/20.

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: November 3, 2020..

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24862 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC21–16–000.
Applicants: CPV Fairview, LLC, CPV Keenan II Renewable Energy Company, LLC, CPV Maryland, LLC, CPV Shore, LLC, CPV Towantic, LLC, CPV Valley, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of CPV Fairview, LLC, et. al.
Filed Date: 10/29/20.
Accession Number: 20201029–5276.
Comments Due: 5 p.m. ET 11/19/20.

Docket Numbers: EC21–17–000.
Applicants: Deuel Harvest Wind Energy LLC, SP Deuel Harvest Wind Energy Holdings, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Deuel Harvest Wind Energy LLC, et. al.
Filed Date: 10/30/20.
Accession Number: 20201030–5430.
Comments Due: 5 p.m. ET 11/20/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1484–022; ER12–2381–008; ER13–1069–011.
Applicants: Shell Energy North America (US), L.P., MP2 Energy LLC, MP2 Energy NE LLC.
Description: Notice of Non-Material Change in Status of Shell Energy North America (US), L.P., et. al.
Filed Date: 10/29/20.
Accession Number: 20201029–5279.
Comments Due: 5 p.m. ET 11/19/20.

Docket Numbers: ER17–256–013; ER17–242–012; ER17–243–012; ER17–245–012; ER17–652–012.
Applicants: Darby Power, LLC, Gavin Power, LLC, Lawrenceburg Power, LLC, Lightstone Marketing LLC, Waterford Power, LLC.
Description: Notice of Non-Material Change in Status of Darby Power, LLC, et. al.
Filed Date: 10/30/20.
Accession Number: 20201030–5436.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER20–924–004.
Applicants: PacifiCorp.
Description: Compliance filing: OATT Queue Reform—Directive 10/5/2020 to be effective 4/1/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5054.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER20–1851–002.
Applicants: Whitetail Solar 3, LLC.
Description: Tariff Amendment: Response to Deficiency Letter in Docket ER20–1851 to be effective 7/18/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5000.
Comments Due: 5 p.m. ET 11/12/20.

Docket Numbers: ER20–2451–001.
Applicants: Basin Electric Power Cooperative.
Description: Compliance filing: Basin Electric Compliance Filing in Docket No. ER20–2451 to be effective 9/16/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5106.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER20–2590–000.
Applicants: Basin Electric Power Cooperative.
Description: Supplement to July 31, 2020 Market Based Rate Application of Basin Electric Power Cooperative.
Filed Date: 10/30/20.
Accession Number: 20201030–5416.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER20–2722–001.
Applicants: CO Buffalo Flats, LLC.
Description: Notice of Non-Material Change in Status of CO Buffalo Flats, LLC.
Filed Date: 10/30/20.
Accession Number: 20201030–5437.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER20–2916–001.
Applicants: Alabama Power Company.
Description: Tariff Amendment: Amendment to Bird Dog Solar LGIA Termination Filing to be effective 9/18/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5165.
Comments Due: 5 p.m. ET 11/23/20.

Docket Numbers: ER21–82–001.
Applicants: Soldier Creek Wind, LLC.
Description: Tariff Amendment: Amendment to Soldier Creek Wind, LLC & Irish Creek Wind SIFCA to be effective 10/24/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5113.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER21–304–000.
Applicants: Cherokee County Cogeneration Partners, LLC.
Description: § 205(d) Rate Filing: Reactive Power Rate Schedule Filing to be effective 1/1/2021.
Filed Date: 11/2/20.
Accession Number: 20201102–5171.
Comments Due: 5 p.m. ET 11/23/20.

Docket Numbers: ER21–305–000
Applicants: Duke Energy Carolinas, LLC.
Description: § 205(d) Rate Filing: DEF Schedule 2 Revisions—Removal of Avon Park Units 1 and 2 to be effective 11/1/2020.
Filed Date: 11/2/20.
Accession Number: 20201102–5185.
Comments Due: 5 p.m. ET 11/23/20.

Docket Numbers: ER21–306–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 5841; Queue No. AF2–151 to be effective 10/9/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5009.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER21–308–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3246R2 Tenaska Power/Montana-Dakota Utilities Att AO Cancel to be effective 10/1/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5039.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER21–309–000.
Applicants: Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, Entergy Texas, Inc.
Description: Entergy Services, LLC, on behalf of the Entergy Operating Companies, submits a depreciation analysis and updated depreciation rates for Transmission Plant and General Plant.
Filed Date: 10/30/20.
Accession Number: 20201030–5427.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER21–310–000.
Applicants: Startrans IO, LLC.
Description: § 205(d) Rate Filing: TRBAA 2021 Update to be effective 1/1/2021.
Filed Date: 11/3/20.
Accession Number: 20201103–5055.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER21–311–000.
Applicants: Green Mountain Power Corporation.
Description: Order No. 864 Compliance Filing of Green Mountain Power Corporation.
Filed Date: 10/30/20.
Accession Number: 20201030–5428.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER21–312–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: OATT Reconciliation (Second) to be effective 6/27/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5063.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: ER21–313–000.

Applicants: GridLiance West LLC.
Description: § 205(d) Rate Filing: GLW TRBAA 2021 Annual Update Filing to be effective 1/1/2021.
Filed Date: 11/3/20.
Accession Number: 20201103–5112.
Comments Due: 5 p.m. ET 11/24/20.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES21–9–000.
Applicants: Altavista Solar, LLC.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities for Altavista Solar, LLC.
Filed Date: 10/29/20.
Accession Number: 20201029–5278.
Comments Due: 5 p.m. ET 11/19/20.

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: November 3, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24864 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Number: PR20–73–002.
Applicants: DTE Gas Company.
Description: Tariff filing per 284.123(b), (e)/: DTE Gas GSA Errata Filing to be effective 10/1/2020.
Filed Date: 11/3/2020.
Accession Number: 202011035068.
Comments/Protests Due: 5 p.m. ET 11/13/2020.

Docket Numbers: RP21–190–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2020–11–03 GT&C Section 13 Revisions to be effective 12/3/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5057.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–191–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate—Yankee Gas 510802 Release eff 11–4–2020 to be effective 11/4/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5064.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–192–000
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (EOG Nov. 20) to be effective 11/4/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5099.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–193–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Contract Adjustments eff 11–01–2020 to be effective 11/1/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5117.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–194–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20201103 Negotiated Rate to be effective 11/3/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5122.
Comments Due: 5 p.m. ET 11/16/20.

Docket Numbers: RP21–195–000.
Applicants: Enable Mississippi River Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Filing—SES 6129 to be effective 11/1/2020.
Filed Date: 11/3/20.
Accession Number: 20201103–5135.
Comments Due: 5 p.m. ET 11/16/20.

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 date(s). 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: November 4, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24924 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9000–006]

STS Hydropower, LLC; Notice of Application Accepted For Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Temporary variance of lake level elevation.
b. *Project No.:* 9000–006.
c. *Date Filed:* September 21, 2020 and supplemented October 20, 2020.
d. *Applicant:* STS Hydropower, LLC.
e. *Name of Project:* Morrow Dam Hydroelectric Project.
f. *Location:* The project is located on the Kalamazoo River in Kalamazoo County, Michigan.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).
h. *Applicant Contact:* Ms. Jody J. Smet, STS Hydropower, LLC, 116 N. State Street, P.O. Box 167, Neshkoro, WI, 85260, (804) 739–0654.
i. *FERC Contact:* Jennifer Polardino, (202) 502–6437, *Jennifer.Polardino@ferc.gov.*
j. Deadline for filing comments, motions to intervene, and protests is 20 days from the issuance of this notice. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/doc-sfiling/ecomment.asp.* You must include your name and contact information at the end

of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may send a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–9000–006. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The exemptee requests a temporary variance from Article 2 of the project's exemption (exemption issued July 26, 1985) to lower the project's reservoir elevation to repair damages to the trunnion arms on two Tainter gates at the Morrow Hydroelectric Project No. 9000. The exemptee initiated a controlled drawdown of the reservoir by 9 feet for this repair and public safety in October 2019. The exemptee proposes to complete the work on the Tainter gates by December 31, 2020 and says it would refill the reservoir 6 inches per day. The exemptee proposes to completely refill the project's reservoir by no later than April 1, 2020. During this time, the exemptee proposes to mitigate impacts to water quality, sedimentation, turbidity, cultural resources, and recreation as a result of the reservoir drawdown in consultation with the resource agencies and stakeholders.

l. *Locations of the Applications:* 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 website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. Agencies may obtain copies of the application directly from the applicant. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov or call toll free,* (866) 208–3676 or TTY, (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Motions to Intervene, or Protests:* Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, motions to intervene, or protests must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title COMMENTS, MOTION TO INTERVENE, or PROTEST as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: November 4, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24929 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–2647–001.
Applicants: Morgantown Steam, LLC.
Description: Tariff Amendment: Response to Commission Staff Request for Information to be effective 8/4/2020.
Filed Date: 11/4/20.
Accession Number: 20201104–5065.
Comments Due: 5 p.m. ET 11/25/20.

Docket Numbers: ER21–314–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Cost Responsibility Agreement, SA No. 5840; Non-Queue No. NQ166 to be effective 10/21/2020.
Filed Date: 11/4/20.
Accession Number: 20201104–5045.
Comments Due: 5 p.m. ET 11/25/20.

Docket Numbers: ER21–315–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: 2020–11–04–NSPM–OTP–CAPX–BSSB-Rev TCEA–596–0.1.0-Filing to be effective 1/4/2021.
Filed Date: 11/4/20.
Accession Number: 20201104–5067
Comments Due: 5 p.m. ET 11/25/20.

Docket Numbers: ER21–316–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA SA No. 5844; Queue No. AF1–299 to be effective 10/5/2020.
Filed Date: 11/4/20.
Accession Number: 20201104–5073.
Comments Due: 5 p.m. ET 11/25/20.

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: November 4, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24930 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL17–89–000; EL19–60–000]

American Electric Power Service Corporation v. Midcontinent Independent System Operator, Inc. Southwest Power Pool, Inc.; City of Prescott, Arkansas v. Southwestern Electric Power Company Midcontinent Independent System Operator, Inc.; Supplemental Notice of Technical Conference

By order dated August 27, 2020,[1] the Commission directed Commission staff to convene a technical conference regarding issues raised in these dockets about the extent of overlapping congestion charges assessed on pseudo-tie transactions at the Midcontinent Independent System Operator, Inc. (MISO)/Southwest Power Pool, Inc. (SPP) interface and possible measures that could be taken to eliminate any such overlapping charges. As announced in the Notice of Technical Conference issued on October 1, 2020, Commission staff will hold this technical conference remotely, as further described below, on Tuesday, November 10, 2020, beginning at 9:00 a.m. (Eastern Time). Commissioners may participate in the technical conference.

The conference will include discussions between Commission staff and panelists representing MISO, SPP, American Electric Power Service Corporation, and the City of Prescott, Arkansas. These panelists should be prepared to discuss the record in this proceeding, particularly the questions posed in the August 2020 Further Briefing Order and the briefs responding thereto. If time permits, there may be an opportunity for other attendees to the technical conference to submit questions for discussion among the parties during the technical conference. Following the technical conference, parties to these proceedings may submit written post-technical conference comments on or before December 8, 2020, which will be included in the formal record of the proceeding.

The technical conference is open to the public by using the WebEx platform for those who have registered pursuant to the requirements of the October 1, 2020 Notice in these dockets. The agenda and information about the technical conference is posted on the Events Calendar available at the following link: *https://www.ferc.gov/news-events/events.* The agenda is also attached to this Notice. Procedures to be followed at the technical conference and any changes to the proposed agenda will be announced by staff at the opening of the technical conference. The technical conference will be transcribed.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY); or send a fax to 202–208–2106 with the required accommodations.

For more information about this technical conference, please contact Yasmine Jamnejad, *yasmine.jamnejad@ferc.gov* for technical information, and Colin Beckman, *colin.beckman@ferc.gov,* for legal information. For information related to logistics, please contact Sarah McKinley, 202–502–8368, *sarah.mckinley@ferc.gov.*

Dated: November 4, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24927 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

[1] *Am. Elec. Power Serv. Corp.* v. *Midcontinent Indep. Sys. Operator, Inc.,* 172 FERC ¶ 61,163 (2020) (August 2020 Further Briefing Order).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12532–006]

Pine Creek Mine, LLC; Notice of Effectiveness of Withdrawal of Petition for Declaratory Order

On February 12, 2016, Pine Creek Mine, LLC (PCM) filed an application for an original license to construct, operate, and maintain the proposed 1.5-megawatt Pine Creek Mine Tunnel Hydroelectric Project in Inyo County, California. On June 4, 2020, PCM filed a petition for an order declaring that the California State Water Resources Control Board waived its authority to issue water quality certification for the project under Section 401 of the Clean Water Act, 33 U.S.C. 1341(a)(1). On September 29, 2020, PCM filed a letter notifying the Commission that it was withdrawing its petition for declaratory order.

No motion in opposition to the notice of withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Accordingly, pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure,[1] withdrawal of the petition became effective on October 14, 2020, and this proceeding is hereby terminated.

Dated: November 3, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24861 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. AD21–6–000;AD20–6–000]

RTO/ISO Credit Principles and Practices Request for Technical Conference and Petition for Rulemaking; Notice of Technical Conference

Take notice that Federal Energy Regulatory Commission (Commission) staff will convene a technical conference to discuss principles and best practices for credit risk management in organized wholesale electric markets. The conference may address the following aspects of credit policy: The credit and risk management infrastructure of the Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs); best practices and principles underlying capitalization requirements, financial security requirements, and unsecured credit allowances; the applicability of Know Your Customer protocols and other counterparty risk management tools; considerations for implementing Financial Transmission Right-specific credit policies, such as a mark-to-auction mechanism; and the relationship between credit policy and wholesale electric market design. Commissioners may participate in the technical conference.

The technical conference will be held on Thursday and Friday, February 25–26, 2021 from approximately 9:00 a.m. to 5:00 p.m. Eastern Time. The technical conference will be held either in-person at the Commission's headquarters at 888 First Street NE, Washington, DC 20426 in the Commission Meeting Room (with a WebEx option available) or solely via teleconference (over WebEx) and broadcast on the Commission's website.

[1] 18 CFR 385.216(b) (2020).

The conference will be open for the public to attend, and there is no fee for attendance. Supplemental notice(s) will be issued prior to the technical conference with further details regarding the agenda and organization of the conference. Information on this technical conference will also be posted on the Calendar of Events on the Commission's website, *www.ferc.gov,* prior to the event.

Individuals interested in participating as panelists should self-nominate through the Webex registration form by 5:00 p.m. on Friday, December 11, 2020 at: *https://ferc.webex.com/ferc/onstage/g.php?MTID=e2b36f2a0411532188b8cd973144668ff.*

For more information about this technical conference, please contact Michael Hill, 202–502–8703, *michael.hill@ferc.gov* for technical questions or Sarah McKinley, 202–502–8368, *sarah.mckinley@ferc.gov* for logistical issues.

Dated: November 4, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–24928 Filed 11–9–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10016–76–OW]

Meeting of the National Drinking Water Advisory Council

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a public meeting.

SUMMARY: The U.S. Environmental Protection Agency's (EPA) Office of Ground Water and Drinking Water is announcing a virtual meeting of the National Drinking Water Advisory Council (NDWAC or Council) as authorized under the Safe Drinking Water Act (SDWA). The purpose of the meeting is to allow EPA to present an overview of Safe Drinking Water Act programs for fiscal year 2021 and to receive input from Council members. Additional details will be provided in the meeting agenda, which will be posted on EPA's website at *https://www.epa.gov/ndwac* prior to the meeting.

DATES: The meeting will be held on December 2, 2020, from 1 p.m. to 5 p.m., eastern time.

ADDRESSES: This will be a virtual meeting. There will be no in-person gathering for this meeting.

FOR FURTHER INFORMATION CONTACT: Elizabeth Corr, NDWAC Designated Federal Officer, Office of Ground Water and Drinking Water (Mail Code 4601), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–3798; email address: *corr.elizabeth@epa.gov.*

SUPPLEMENTARY INFORMATION:

Attending the Meeting: The meeting will be open to the general public. The meeting agenda and information on how to register for and attend the meeting online will be provided on EPA's website at *https://www.epa.gov/ndwac* prior to the meeting.

Oral Statements: EPA will allocate 25 minutes for the public to present oral comments during the meeting. Oral statements will be limited to five minutes per person during the public comment period. It is preferred that only one person present a statement on behalf of a group or organization. Persons interested in presenting an oral statement should send an email to Elizabeth Corr, at *corr.elizabeth@epa.gov* by noon, eastern time, on November 24, 2020.

Written Statements: Any person who wishes to file a written statement can do so before or after the Council meeting. Send written statements by email to *corr.elizabeth@epa.gov* or see the **FOR FURTHER INFORMATION CONTACT** section if sending statements by mail. Written statements received by noon, eastern time, on November 24, 2020, will be distributed to all members of the Council prior to the meeting. Statements received after that time will become part of the permanent file for the meeting and will be forwarded to the Council members after conclusion of the meeting.

Accessibility: For information on access or services for individuals with disabilities, or to request accommodations for a disability, please contact Elizabeth Corr by email at *corr.elizabeth@epa.gov,* or by phone at (202) 564–3798, preferably at least 10 days prior to the meeting to allow as much time as possible to process your request.

National Drinking Water Advisory Council: The NDWAC was created by Congress on December 16, 1974, as part of the Safe Drinking Water Act (SDWA) of 1974, Public Law 93–523, 42 U.S.C. 300j–5, and is operated in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The NDWAC was established to advise, consult with, and make recommendations to the EPA Administrator on matters relating to activities, functions, policies, and regulations under the SDWA. General information concerning the NDWAC is available at: *https://www.epa.gov/ndwac.*

Jennifer L. McLain,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 2020–24895 Filed 11–9–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0441; FRS 17224]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 11, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0441.

Title: Section 90.621, Selection and Assignment of Frequencies and Section 90.693, Grandfathering Provisions for Incumbent Licensees.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 50 respondents; 50 responses.

Estimated Time per Response: 1.5 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154(i) and 309(j).

Total Annual Burden: 75 hours.

Total Annual Cost: $6,250.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 90.621(b)(4) allows stations to be licensed at distances less than those prescribed in the Short-Spacing Separation Table where applicants ''secure a waiver.'' Applicants seeking a waiver in these circumstances are still required to submit with their application an interference analysis, based upon any of the generally-accepted terrain-based propagation models, demonstrating that co-channel stations would receive the same or greater interference protection than provided in the Short-Spacing Separation Table.

Section 90.621(b)(5) permits stations to be located closer than the required separation, so long as the applicant provides letters of concurrence indicating that the applicant and each co-channel licensee within the specified separation agree to accept any interference resulting from the reduced separation between systems. Applicants are still required to file such concurrence letters with the Commission. Additionally, the Commission did not eliminate filings required by provisions such as international agreements, its environmental (National Environmental Protection Act (NEPA)) rules, its antenna structure registration rules, or quiet zone notification/filing procedures.

Section 90.693 requires that 800 MHz incumbent Specialized Mobile Radio (SMR) service licensees ''notify the Commission within 30 days of any changes in technical parameters or additional stations constructed that fall within the short-spacing criteria.'' It has been standard practice for incumbents to notify the Commission of all changes and additional stations constructed in cases where such stations are in fact located less than the required 70 mile distance separation, and are therefore technically ''short-spaced,'' but are in fact fully compliant with the parameters of the Commission's Short-Spacing Separation Table.

The Commission uses this information to determine whether to grant licenses to applicants making ''minor modifications'' to their systems which do not satisfy mileage separation requirements pursuant to the Short-Spacing Separation Table.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–24896 Filed 11–9–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Privacy Act of 1974; System of Records

AGENCY: Federal Maritime Commission.

ACTION: Rescindment of a system of records notice.

SUMMARY: FMC–40 The Service Contract Filing System (SERVCON) is the Federal Maritime Commission's (Commission's) automated filing system for service contracts. Shippers or vessel-operating common carriers (VOCCs) are required to file service contracts with the Commission on form FMC–83. This system is not being discontinued, however, SERVCON does not meet the requirements of a Privacy Act System of Records as it does not maintain ''records'' as defined under the Privacy Act (PA), that are ''about'' an individual.

DATES: This rescindment is effective upon publication.

ADDRESSES: Submit written comments to Rachel E. Dickon, Secretary, Federal Maritime Commission, 800 N Capitol Street NW, Washington, DC 20573–0001; or, email comments to: *Secretary@fmc.gov* (email comments as an attachment in MS Word or PDF). Include in the Subject Line: Comments on Systems of Records Notice FMC–40.

FOR FURTHER INFORMATION CONTACT: Office of Service Contracts & Tariffs (SCT), Gary Kardian, 800 N Capitol Street NW, Suite 940, Washington, DC 20573–0001, (202) 523–5796, *tradeanalysis@fmc.gov.*

SUPPLEMENTARY INFORMATION: The FMC SERVCON system does not meet the requirements of a Privacy Act System of Records because it does not maintain ''records'' as defined under the Privacy Act (PA), that are ''about'' an individual. The PA states ''no agency shall disclose any record which is contained in a system of records . . .'' 5 U.S.C. 552a(b). The term ''record'' as used in the PA, means ''any item, collection, or grouping of information *about* an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;'' 5 U.S.C.552a(4). (Emphasis added).

The purpose of the FMC SERVCON system is to ''record, review, and manage contractual arrangements by organizations performing services as registered VOCCs and non-vessel-operating common carriers in order to ensure legal operating requirements are met.'' FMC SERVCON Privacy Impact Statement (PIA), *available at: https://www.fmc.gov/wp-content/uploads/2018/10/SERVCONPIA-2013.pdf.* There are no reports in SERVCON produced on individuals.

SERVCON, however does have information protected by statute and possibly business confidential information. All SERVCON system protections will continue to be maintained in accordance with the security and privacy protections in place for the FMC's General Support System and the FMC SQL Database, within which SERVCON is operated.

SYSTEM NAME AND NUMBER:

FMC–40 SERVCON

HISTORY:

78 FR 55699

Rachel Dickon,

Secretary.

[FR Doc. 2020–24923 Filed 11–9–20; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than November 25, 2020.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Susan Holmes Parker, as trustee of the Susan P. Mittasch Family Trust, both previously approved as members of the Parker Family Group, and both of Perry, Oklahoma;* to acquire voting shares of Cleo Bancshares, Inc., and thereby indirectly acquire voting shares of Cleo State Bank, both of Cleo Springs, Oklahoma.

Board of Governors of the Federal Reserve System, November 5, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–24939 Filed 11–9–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0135; Docket No. 2020–0053; Sequence No. 7]

Submission for OMB Review; Prospective Subcontractor Requests for Bonds

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision and renewal of a previously approved information collection requirement regarding prospective subcontractor requests for bonds.

DATES: Submit comments on or before December 10, 2020.

ADDRESSES: Written comments and recommendations for this 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 Review—Open for Public Comments'' or by using the search function.

Additionally submit a copy to GSA 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.

Instructions: All items submitted must cite OMB Control No. 9000–0135, Prospective Subcontractor Requests for Bonds. 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. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

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)

9000–0135, Prospective Subcontractor Requests for Bonds.

B. Need and Uses

Part 28 of the Federal Acquisition Regulation (FAR) contains guidance related to obtaining financial protection against losses under Federal contracts (*e.g.,* bonds, bid guarantees, etc.). Part 52 contains the corresponding provisions and clauses. These collectively implement the statutory requirement for Federal contractors to furnish payment bonds under construction contracts subject to 40 U.S.C. chapter 31, subchapter III, Bonds.

This information collection is mandated by section 806(a)(3) of Public Law 102–190, as amended by sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994 (10 U.S.C. 2302 note) (Pub. L. 103–335). Accordingly, the clause at 52.228–12, Prospective Subcontractor Requests for Bonds, requires prime contractors to promptly provide a copy of a payment bond, upon the request of a prospective subcontractor or supplier offering to furnish labor or material under a construction contract for which a payment bond has been furnished pursuant to 40 U.S.C. chapter 31.

C. Common Form

This information collection is being converted into a common form. The General Services Administration is the sponsor agency of this common form. All executive agencies covered by the Federal Acquisition Regulation will use this common form. Each executive agency will report their agency burden separately, and the reported information will be available at *Reginfo.gov.*

D. Annual Burden

General Services Administration

Respondents: 565.

Total Annual Responses: 1,412.

Total Burden Hours: 480.

E. Public Comment

A 60-day notice was published in the **Federal Register** at 85 FR 55289 on September 4, 2020. No comments were received.

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. 9000–0135, Prospective Subcontractor Requests for Bonds.

William F. Clark,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2020–24931 Filed 11–9–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0011; Docket No. 2020–0053; Sequence No. 8]

Submission for OMB Review; Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision and renewal of a previously approved information collection requirement regarding preaward survey forms.

DATES: Submit comments on or before December 10, 2020.

ADDRESSES: Written comments and recommendations for this 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 Review—Open for Public Comments'' or by using the search function.

Additionally submit a copy to GSA 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.

Instructions: All items submitted must cite OMB Control No. 9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408). 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. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

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)

9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408).

B. Needs and Uses

Contracting officers, prior to award, must make an affirmative determination that the prospective contractor is responsible, *i.e.,* capable of performing the contract. Before making such a determination, the contracting officer must have or obtain sufficient information to establish that the prospective contractor: Has adequate financial resources; or the ability to obtain such resources; is able to comply with required delivery schedule; has a satisfactory record of performance; has a satisfactory record of integrity; and is otherwise qualified and eligible to receive an award under appropriate laws and regulations. If such information is not readily available to the contracting officer, it is obtained through a preaward survey conducted by the contract administration office or another organization designated by the agency to conduct the surveys. The necessary data is collected from available data or through plant visits, phone calls, and correspondence in detail commensurate with the dollar value and complexity of the procurement. This clearance covers the information that prospective contractors must provide to ensure proper completion of the following preaward survey forms prescribed by the Federal Acquisition Regulation (FAR):

- Standard Form 1403 Preaward Survey of Prospective Contractor (General)
- Standard Form 1404 Preaward Survey of Prospective Contractor (Technical)
- Standard Form 1405 Preaward Survey of Prospective Contractor (Production)
- Standard Form 1406 Preaward Survey of Prospective Contractor (Quality Assurance)
- Standard Form 1407 Preaward Survey of Prospective Contractor (Financial Capability)
- Standard Form 1408 Preaward Survey of Prospective Contractor (Accounting System)

C. Common Form

This information collection is being converted into a common form. The General Services Administration is the sponsor agency of this common form. All executive agencies covered by the Federal Acquisition Regulation will use this common form. Each executive agency will report their agency burden separately, and the reported information will be available at *Reginfo.gov.*

D. Annual Burden

General Services Administration

Respondents: 107.
Total Annual Responses: 107.
Total Burden Hours: 2,568.

E. Public Comment

A 60-day notice was published in the **Federal Register** at 85 FR 55290 on September 4, 2020. No comments were received.

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. 9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408).

William F. Clark,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2020–24932 Filed 11–9–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–2552–10]

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 January 11, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–2552–10 Hospital and Health Health Care Complex Cost Report

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:* Hospital and Health Health Care Complex Cost Report; *Use:* CMS requires the Form CMS–2552–10 to determine a hospital's reasonable cost incurred in furnishing medical services to Medicare beneficiaries and calculate the hospital reimbursement. Hospitals paid under a prospective payment system (PPS) may receive reimbursement in addition to the PPS for hospital-specific adjustments such as Medicare reimbursable bad debts, disproportionate share, uncompensated care, direct and indirect medical education costs, and organ acquisition costs.

CMS uses the Form CMS–2552–10 for rate setting; payment refinement activities, including developing a hospital market basket; and Medicare Trust Fund projections; and to support program operations. Additionally, the Medicare Payment Advisory Commission (MedPAC) uses the hospital cost report data to calculate Medicare margins (a measure of the relationship between Medicare's payments and providers' Medicare costs) and analyze data to formulate Medicare Program recommendations to Congress.

We welcome comments on our burden estimates for the information collection request. *Form Number:* CMS–2552–10 (OMB control number: 0938–0050); *Frequency:* Occasionally; *Affected Public:* Private Sector; Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 6.013; *Total Annual Responses:* 6,013; *Total Annual Hours:* 4,173,022. (For policy questions regarding this collection contact Gail Duncan at 410–786–7278.)

Dated: November 4, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–24948 Filed 11–9–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–1264]

Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Designs; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled ''Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Designs.'' This guidance recommends approaches that sponsors of clinical trials intended to support a new drug application or a biologics license application can take to increase enrollment of underrepresented populations in their clinical trials. This guidance is being issued, in part, to satisfy the mandates of the FDA Reauthorization Act of 2017 (FDARA). This guidance finalizes the draft guidance of the same title issued on June 7, 2019.

DATES: The announcement of the guidance is published in the **Federal Register** on November 10, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the

instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–D–1264 for ''Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Designs.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this 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 guidance document.

FOR FURTHER INFORMATION CONTACT: Dat Doan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3334, Silver Spring, MD 20993, 240–402–8926, *Dat.Doan@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Designs.'' In issuing this guidance, FDA is satisfying the mandates under section 610(a)(3) of FDARA (Pub. L. 115–52).

One objective of eligibility criteria is to help protect participants by excluding people for whom the risk of an adverse event from participation is not likely to be reasonable in relation to any potential benefit and the importance of the knowledge that may be expected to result. FDA recognizes that certain exclusions are appropriate when necessary to help protect these individuals. For example, patients with varying degrees of kidney or liver impairment are often excluded early in drug development programs because adequate information is not available on how to adjust doses for such patients or whether these patients could be more vulnerable to certain risks. Medically complex patients with certain concomitant illnesses or those taking particular drugs may also be excluded from drug development programs. As data on excretory and metabolic pathways and drug-drug interactions become available during the drug development program, allowing appropriate dose adjustments, exclusions related to concomitant medications or comorbidities should be narrowed. Similarly, as the safety experience with a product increases, eligibility criteria should be broadened to include more medically complex participants; any remaining exclusions should be justified. This guidance provides recommendations on broadening eligibility criteria in clinical trials through inclusive trial practices, trial designs, and methodological approaches.

Beyond the limitations in participation imposed by narrow eligibility criteria, potential participants may face additional challenges to enrolling in clinical trials. A trial requiring participants to make frequent visits to specific sites may result in an added burden for participants, especially the elderly, children, disabled, and cognitively impaired individuals who require transportation or caregiver assistance, or participants who live far from research facilities, such as those in rural or remote locations. Financial costs (*e.g.,* travel, missing work, dependent care) may also impede participation, and study visits may interfere with jobs and/or family and community obligations. Moreover,

for individuals under current clinical care on a regularly scheduled basis (*e.g.,* individuals with multiple chronic conditions), additional clinical trial study visits may be psychologically, physically, and financially burdensome and a disincentive for enrollment. This guidance provides recommendations on how sponsors can improve the diversity of enrolled participants by accounting for logistical and other participant-related factors that could limit participation in clinical trials.

Clinical trials of investigational drugs intended to treat rare diseases or conditions present a unique set of challenges. Because of the limited numbers of patients, maximum participation in clinical trials is essential for successful trial completion and interpretation. Rare diseases often affect small, geographically dispersed patient populations with disease-related travel limitations, so special efforts may be necessary to enroll and retain these participants to ensure that a broad spectrum of the patient population is represented. This guidance provides recommendations on broadening clinical trial eligibility criteria for clinical trials of investigational drugs intended to treat rare diseases and recommendations on improving the enrollment and retention of participants with rare diseases.

This guidance finalizes the draft guidance of the same title issued on June 7, 2019 (84 FR 26687). FDA considered comments received on the draft guidance as the guidance was finalized. Changes to the guidance include additional recommendations on broadening eligibility criteria, such as the use of real-world data to find trial participants and the use of mobile medical professionals to visit participants at their locations instead of requiring participants to visit distant clinical trial sites. FDA added information on the inclusion of racial and ethnic minorities, with recommendations included from FDA's draft guidance entitled ''Collection of Race and Ethnicity Data in Clinical Trials.'' FDA also added recommendations on fostering community engagement and making recruitment events more accessible as well as information on how to reach participants with little or no internet access. In addition, editorial changes were made to improve clarity.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Enhancing the Diversity of Clinical Trial Populations—Eligibility Criteria, Enrollment Practices, and Trial Designs.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014.

III. Electronic Access

Persons with access to the internet may obtain the 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/biologics-guidances,* or *https://www.regulations.gov.*

Dated: November 4, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–24881 Filed 11–9–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–4792]

Regulatory Considerations for Microneedling Products; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Regulatory Considerations for Microneedling Products.'' This guidance is being issued to assist industry in understanding when a microneedling product is a device as defined in the Federal Food, Drug, and Cosmetic Act (FD&C Act). This document also provides information on the regulatory pathway to market for microneedling devices for aesthetic use.

DATES: The announcement of the guidance is published in the **Federal Register** on November 10, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–4792 for ''Regulatory Considerations for Microneedling Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Regulatory Considerations for Microneedling Products'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Kimberly Ferlin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4522, Silver Spring, MD 20993–0002, 240–402–1834.

SUPPLEMENTARY INFORMATION:

I. Background

''Microneedling products'' is a generic term that encompasses instruments with common technological features that include an array of needles, ''micro-protrusion'' tips, or pins, which can be blunt or sharp, and of varying lengths. This document discusses when a microneedling product is a device as defined under section 201(h) of the FD&C Act (21 U.S.C. 321(h)), and is, therefore, subject to the device requirements under the FD&C Act and its implementing regulations.[1] This guidance also provides clarity on the regulatory pathway to market for microneedling devices for aesthetic use, resulting in more transparency and predictability to firms and stakeholders, which may translate into more efficient device development and patient access to such devices. The scope of this guidance document does not include microneedling combination products, acupuncture needles, hypodermic needles or other needles for injection, tattoo machine needles, needle probes that emit any type of energy (*e.g.,* radio-frequency needles) or deliver any type of energy to a patient (*e.g.,* LASER, ultrasound), or dermabrasion devices. FDA considered comments received on the draft guidance that appeared in the **Federal Register** of September 15, 2017 (82 FR 43383). FDA revised the guidance as appropriate in response to the comments. Further, the guidance was revised to account for a De Novo request that was granted since issuance of the draft, which classified microneedling devices for aesthetic use into class II subject to premarket notification requirements under section 510(k) of the FD&C Act ((21 U.S.C. 360(k)) and special controls. The classification is codified at 21 CFR 878.4430.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Regulatory Considerations for Microneedling Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This guidance document is also available at *https://www.regulations.gov* and at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Regulatory Considerations for Microneedling Products'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1500036 to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part; guidance; or FDA form	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120

[1] On September 23, 2020, FDA published a proposed rule to amend its intended use regulations for medical products (21 CFR 201.128 and 801.4) to better reflect the Agency's current practices in evaluating whether a product is intended for use as a drug or device. As described in the proposed rule, FDA's longstanding position is that, in evaluating a product's intended use, any relevant source of evidence may be considered, including a variety of direct and circumstantial evidence. 85 FR 59718, 59721 (Sept. 23, 2020).

21 CFR part; guidance; or FDA form	Topic	OMB control No.
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''	De Novo classification process	0910–0844
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-submissions	0910–0756
800, 801, and 809	Medical Device Labeling Regulations	0910–0485

Dated: November 5, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–24943 Filed 11–9–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5913]

Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017; Revised Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a revised final guidance for industry entitled ''Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017,'' which supersedes the now withdrawn final guidance issued in May 2018 (May 2018 guidance). This revised final guidance concerns FDA's implementation of the Prescription Drug User Fee Amendments of 2017. In particular, this revised final guidance removes section VI.B. contained in the May 2018 guidance, regarding the ''same product as another product'' prescription drug program fee exception for certain prescription drug products under the Federal Food, Drug, and Cosmetic Act.

DATES: The announcement of the guidance is published in the **Federal Register** on November 10, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–5913 for ''Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the revised 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 to 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 two self-addressed adhesive labels to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Peter Chen, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Rm. 2185, Silver Spring, MD 20993, 301–796–7900, *CDERCollections@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a revised guidance for industry entitled ''Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017.'' We are issuing this revised final guidance consistent with our good guidance practices (GGP) regulation (§ 10.115 (21 CFR 10.115)). We are implementing this revised guidance without prior public comment because we have determined that prior public participation is not feasible or appropriate (§ 10.115(g)(2)). The change reflected in the revised guidance needs to be implemented and communicated in a timely manner in light of the ongoing user fee billing process. Although this revised guidance document is immediately in effect, it remains subject to comment in accordance with FDA's GGP regulation.

In May 2018, FDA issued guidance concerning the Agency's implementation of the Prescription Drug User Fee Amendments of 2017 (PDUFA VI) and clarifying certain changes in policies and procedures surrounding its application (83 FR 19564). Section VI.B. of the May 2018 guidance provided an interpretation of the term ''same product'' as it is used in the prescription drug program fee exception for certain prescription drug products under section 736(a)(2)(B)(ii) (21 U.S.C. 379h(a)(2)(B)(ii)) of the Federal Food, Drug, and Cosmetic Act. After further consideration of the issue, we have decided to withdraw the interpretation in our May 2018 guidance and return to our prior practice. Accordingly, for FY 2020 and FY 2021 billing we are considering drug products to be the ''same product'' if they were pharmaceutically equivalent to a prescription drug product as determined through the process for assigning therapeutic equivalence codes. Therefore, this revised guidance removes section VI.B. as described in the May 2018 guidance. There are no other changes to the guidance.

This revised guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The revised guidance represents the current thinking of FDA on Assessing User Fees Under the Prescription Drug User Fee Amendments of 2017. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

III. Electronic Access

Persons with access to the internet may obtain the document at *https://www.fda.gov/RegulatoryInformation/Guidances/default.htm, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances* or *https://www.regulations.gov.* Use the FDA website listed in the previous sentence to find the most current version of the guidance.

Dated: November 5, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–24941 Filed 11–9–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–1997–D–0444]

Special Considerations, Incentives, and Programs To Support the Approval of New Animal Drugs for Minor Uses and for Minor Species; Draft Guidance for Industry; Availability; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice of availability that appeared in the **Federal Register** of July 15, 2020. In that notice, FDA requested comments on draft guidance for industry (GFI) #61 entitled ''Special Considerations, Incentives, and Programs to Support the Approval of New Animal Drugs for Minor Uses and for Minor Species.'' FDA is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period announced in the notice of availability published July 15, 2020 (85 FR 42876). Submit either electronic or written comments by January 11, 2021, to ensure that the Agency considers your comments on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–1997–D–0444 for ''Special Considerations, Incentives, and Programs to Support the Approval of

New Animal Drugs for Minor Uses and for Minor Species.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Margaret Oeller, Center for Veterinary Medicine (HFV–50), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0566, *margaret.oeller@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 15, 2020, FDA published a notice announcing the availability of draft GFI #61 entitled ''Special Considerations, Incentives, and Programs to Support the Approval of New Animal Drugs for Minor Uses and for Minor Species'' with a 120-day comment period.

Interested persons were originally given until November 12, 2020, to comment on the draft guidance. The Agency received a request to allow interested persons additional time to comment. The request conveyed concern that the initial 120-day comment period did not allow sufficient time to develop a comprehensive response. FDA believes that an extension of 60 days allows adequate time for interested persons to submit comments.

Dated: November 5, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–24970 Filed 11–9–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NICHD.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH & HUMAN DEVELOPMENT, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NICHD.

Date: December 4, 2020.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: A report by the Acting Scientific Director, NICHD, on the status of the NICHD Division of Intramural Research; current organizational structure; to review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, 31 Center Drive, Bethesda, MD 20892 (Video-Assisted Meeting).

Contact Person: Mary C. Dasso, Ph.D., Acting Scientific Director, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, NIH, 9000 Rockville Pike, Building 31A, Room 2A46, Bethesda, MD 20892, (301) 594–5984, *dassom@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/meetings/Pages/index.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: November 4, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–24870 Filed 11–9–20; 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: December 18, 2020.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G53, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Konrad J. Krzewski, 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 3G53, Rockville, MD

20852, (240) 747–7526, *konrad.krzewski@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: November 4, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–24873 Filed 11–9–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6237–N–02]

Notice of a Federal Advisory Committee Meeting Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Notice of Federal Advisory Committee Meetings: Manufactured Housing Consensus Committee (MHCC).

SUMMARY: This notice sets forth the schedule and proposed agenda for the Technical System Subcommittee teleconference meeting of the MHCC. The meeting is open to the public. The agenda for the meeting provides an opportunity for citizens to comment on the business before the MHCC Subcommittee.

DATES: The Technical Systems Subcommittee meeting will be held on December 8, 2020, 10:00 a.m. to 4:00 p.m. Eastern Standard Time (EST). The teleconference number is: 301–715–8592 or 646–558–8656 and the Meeting ID is: 96243433408. To access the webinar, use the following link: *https://zoom.us/j/96243433408.*

FOR FURTHER INFORMATION CONTACT: Teresa B. Payne, Administrator, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 7th Street SW, Room 9166, Washington, DC 20410, telephone 202–402–2698 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: Notice of these meetings are provided in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2) through implementing regulations at 41 CFR 102–3.150. The MHCC was established by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5403(a)(3), as amended by the Manufactured Housing Improvement Act of 2000, (Pub. L. 106–569, Sec. 601, *et seq.*). According to 42 U.S.C. 5403, as amended, the purposes of the MHCC are to:

- Provide periodic recommendations to the Secretary to adopt, revise, and interpret the Federal manufactured housing construction and safety standards in accordance with this subsection;
- Provide periodic recommendations to the Secretary to adopt, revise, and interpret the procedural and enforcement regulations, including regulations specifying the permissible scope and conduct of monitoring in accordance with subsection (b); and
- Be organized and carry out its business in a manner that guarantees a fair opportunity for the expression and consideration of various positions and for public participation.

The MHCC is deemed an advisory committee not composed of Federal employees.

Public Comment: Citizens wishing to make comments on the business of the MHCC must register in advance by contacting the Administering Organization (AO), Home Innovation Research Labs; Attention: Kevin Kauffman, 400 Prince Georges Blvd., Upper Marlboro, MD 20774, or email to *mhcc@homeinnovation.com*, or call 888–602–4663. With advance registration, members of the public will have an opportunity to provide written comments relative to agenda topics for the Subcommittee's consideration. All written comments must be provided to *mhcc@homeinnovation.com.* Written comments must be provided no later than December 3, 2020. Please note, written comments submitted will not be read during the meeting but will be provided to the Subcommittee members prior to the meeting. The MHCC will also provide an opportunity for oral public comments on specific matters before the Subcommittee. The total amount of time for oral comments will be 30 minutes, in two 15-minute periods, with each commenter limited to two minutes to ensure pertinent Subcommittee business is completed and all public comments can be expressed. The Subcommittee will not respond to individual written or oral statements; however, it will take all public comments into account in its deliberations. The MHCC strives to accommodate citizen comments to the extent possible within the time constraints of the meeting agenda.

Tentative Agenda for Technical Systems Subcommittee Teleconference

Tuesday, December 8, 2020—10 a.m. to 4 p.m. EST

I. Call to Order—Subcommittee Chair & Designated Federal Officer (DFO) Roll Call—AO
II. Opening Remarks—Subcommittee Chair & DFO
III. Approval of minutes from the October 30, 2019, Technical Systems Subcommittee Meeting Occurring as Part of the MHCC Annual Meeting
IV. Public Comment Period—15 minutes
V. Assigned Proposed Change Review
Proposed Changes Log:
- LOG 211, LOG 212, LOG 216, LOG 219, LOG 222, and LOG 223 (These log items can be viewed through the following web address: *https://www.hud.gov/sites/dfiles/images/ProposedChanges2020-21Cycle.pdf*)

VI. Lunch from 12:30 p.m. to 1:30 p.m.
VII. Assigned Proposed Change Review Continued
VIII. Public Comment Period—15 minutes
IX. Wrap Up—DFO & AO
X. Adjourn

Dana T. Wade,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 2020–24940 Filed 11–9–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of two petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below.

DATES: All comments on the petitions must be received by MSHA's Office of Standards, Regulations, and Variances on or before December 10, 2020.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452, Attention: Roslyn

B. Fontaine, Deputy Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9557 (voice), *Noe.Song-Ae.A@dol.gov* (email), or 202–693–9441 (facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations Part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2020–032–C.

Petitioner: Canyon Fuel Company, LLC, HC 35 Box 380, Helper, UT 84526.

Mine: Skyline Mine, MSHA I.D. No. 42–01566, located in Carbon County, Utah.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner is applying to use various non-MSHA approved Powered Air Purifying Respirators (PAPRs) equipment in lieu of the current standard, in or inby the last open crosscut.

The petitioner states that:

(a) The modification to the current standard is requested to allow for an alternative method of respiratory protection for longwall miners.

(b) The current 3M Airstream PAPR, the Mining Headgear-Mounted model, is approved by MSHA but is being discontinued by the manufacturer, 3M. The 3M Airstream model allows for constantly filtered air to flow, reducing exposure to respirable dust. There are no other MSHA-approved PAPRs.

(c) The petitioner is applying to allow for non-MSHA approved PAPRs to protect miners from exposure to respirable dust during regular mining operations in or inby the last open crosscut.

(d) This petition will allow longwall miners to use PAPRs in MMU 001–0 and MMU 007–0, giving miners the opportunity to reduce dust exposure, decreasing health risks.

As an alternative to the existing standard, the petitioner proposes the following:

(a) The petitioner proposes using the following intrinsically safe models:

(1) CleanSpace EX—full or half mask;

(2) CleaSpace2—Full or half mask, this is NIOSH approved and intrinsically safe;

(3) 3M Versaflo TR–800—certified under ANSI/UL 60079–11 standard for hazardous locations, it is intrinsically safe; and

(4) Non-battery powered 3M Ultimate FX full facepiece respirator mask.

(b) CleanSpace respirators use an air filtering, fan assisted pressure mask, which can be used in high dust environments. They are light and compact, require no servicing, are intrinsically safe, and have few parts. The 3M Versaflo TR–800 allows for increased movement in tight spaces, while protecting against airborne contaminates. It is easy to use, has interchangeable components for specific application, is intrinsically safe, has audible and visual alarms, multi-speed blower, long battery run times, charges quickly and is ANSI/UL 60079–11 certified, allowing it to be used in hazardous locations. The 3M Ultimate FX respirator utilizes a scotchguard protection lens, allowing liquids to bead up and be removed easily, a large lens provides visibility, it is comfortable and easy to use, the 3M cool flow valve allows for easier breathing, and particle filters help filter out various particulates.

(c) When not in operation, batteries for the PAPR models will be charged outby the last open crosscut.

(d) The following battery charger products will be used: 3M battery charger TR–641N or 3M 4-station battery charger TR–644–N.

(e) The 3M Versaflo TR–800 PAPR will exclusively use the 3M TR–830 battery pack.

(f) Miners will be trained on how to safely use and take care of PAPR units, per manufacturer instructions.

(g) The above instruments will be assessed for physical damage as well as the integrity of the case.

(h) If methane levels go above 1.0 percent, 30 CFR 57.22234 procedures will be followed.

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the standard.

Docket Number: M–2020–033–C.

Petitioner: Canyon Fuel Company, LLC, HC 35 Box 380, Helper, UT 84526.

Mine: Skyline Mine, MSHA I.D. No. 42–01566, located in Carbon County, Utah.

Regulation Affected: 30 CFR 75.507–1 (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner is applying to use various non-MSHA approved Powered Air Purifying Respirators (PAPRs) equipment in lieu of the current standard, in return air and outby the last open crosscut.

The petitioner states that:

(a) The modification to the current standard is requested to allow for an alternative method of respiratory protection for longwall miners.

(b) The current 3M Airstream PAPR, the Mining Headgear-Mounted model, is approved by MSHA but is being discontinued by the manufacturer, 3M. The 3M Airstream model allows for constantly filtered air to flow, reducing exposure to respirable dust. There are no other MSHA-approved PAPRs.

(c) The petitioner is applying to allow for non-MSHA approved PAPRs to protect miners from exposure to respirable dust during regular mining operations in return air and outby the last open crosscut.

(d) This petition will allow longwall miners to use PAPRs in MMU 001–0 and MMU 007–0, giving miners the opportunity to reduce dust exposure, decreasing health risks.

As an alternative to the existing standard, the petitioner proposes the following:

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(4) Non-battery powered 3M Ultimate FX full facepiece respirator mask.

(b) CleanSpace respirators use an air filtering, fan assisted pressure mask, which can be used in high dust environments. They are light and compact, require no services, are intrinsically safe, and have few parts. The 3M Versaflo TR–800 allows for increased movement in tight spaces, while protecting against airborne contaminates. It is easy to use, has interchangeable components for specific application, is intrinsically safe, has audible and visual alarms, multi-speed blower, long battery run times, charges quickly and is ANSI/UL 60079–11 certified, allowing it to be used in hazardous locations. The 3M Ultimate FX respirator utilizes a scotchguard protection lens, allowing liquids to bead up and be removed easily, a large lens provides visibility, it is comfortable and easy to use, the 3M cool flow valve allows for easier breathing, and particle filters help filter out various particulates.

(c) When not in operation, batteries for the PAPR models will be charged outby the last open crosscut.

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(e) The 3M Versaflo TR–800 PAPR will exclusively use the 3M TR–830 battery pack.

(f) Miners will be trained on how to safely use and take care of PAPR units, per manufacturer instructions.

(g) The above instruments will be assessed for physical damage as well as the integrity of the case.

(h) If methane levels go above 1.0 percent, 30 CFR 57.22234 procedures will be followed.

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the standard.

Roslyn Fontaine,

Deputy Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2020–24898 Filed 11–9–20; 8:45 am]

BILLING CODE 4520–43–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 meeting:

Name and Committee Code: Proposal Review Panel for Division of Physics (1208), Center for the Physics of Biological Function (CBPF).

Date and Time:

December 7, 2020 10:00 a.m.–6:30 p.m.
December 8, 2020 10:00 a.m.–5:00 p.m.
December 9, 2020 10:00 a.m.–1:00 p.m.

Place: Princeton University, 1 Nassau Hall, Princeton, NJ 08544.

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

December 7, 2020; 10:00 a.m.–06:30 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.–03:00 p.m.
Science Talks—Session 2
03:30 p.m.–04:30 p.m.
Executive Session (CLOSED)
Questions delivered to PIs
04:30 p.m.–06:30 p.m.
Poster Session

December 8, 2020; 10:00 a.m.–05:00 p.m.

10:00 a.m.–12:00 p.m.
Education/Outreach/Diversity
12:00 p.m.–01:00 p.m.
Lunch
01:00 p.m.–02:00 p.m.
Directors Conclusion and Plans for Coming Year
02:00 p.m.–03:00 p.m.
University Administrators
03:00 p.m.–04:30 p.m.
Executive Session (CLOSED)
04:30 p.m.–05:00 p.m.
Questions delivered to PIs

December 9, 2020; 10:00 a.m.–01:00 p.m.

10:00 a.m.–11:00 a.m.
Responses to Questions
11:00 a.m.–01:00 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: November 5, 2020.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2020–24949 Filed 11–9–20; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of November 9, 16, 23, 30, December 7, 14, 2020.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of November 9, 2020

There are no meetings scheduled for the week of November 9, 2020.

Week of November 16, 2020—Tentative

Wednesday, November 18, 2020

10:00 a.m. Meeting with the Advisory Committee on the Medical Uses of Isotopes (Public Meeting) (Contact: Kellee Jamerson: 301–415–7408)

Additional Information: Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the Web address—*https://www.nrc.gov/.*

Week of November 23, 2020—Tentative

There are no meetings scheduled for the week of November 23, 2020.

Week of November 30, 2020—Tentative

Friday, December 4, 2020

10:00 a.m. Meeting with Advisory Committee on Reactor Safeguards (Public Meeting) (Contact: Larry Burkhart: 301–287–3775)

Additional Information: Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the Web address—*https://www.nrc.gov/.*

Week of December 7, 2020—Tentative

There are no meetings scheduled for the week of December 7, 2020.

Week of December 14, 2020—Tentative

There are no meetings scheduled for the week of December 14, 2020.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.* The

schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or by email at *Tyesha.Bush@nrc.gov* or *Marcia.Pringle@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: November 6, 2020.

For the Nuclear Regulatory Commission.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2020–25026 Filed 11–6–20; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–003, 50–247, and 50–286; NRC–2020–0239]

Holtec Decommissioning International, LLC; Indian Point Nuclear Generating Unit Nos. 1, 2, and 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption in response to the February 12, 2020, request from Holtec Decommissioning International, LLC (HDI) related to Indian Point Nuclear Generating Unit Nos. 1, 2, and 3 (referred to individually as IP1, IP2, and IP3, respectively, and collectively as the Indian Point Energy Center or IPEC), located in Westchester County, New York. The exemption would permit HDI to use funds from the IP1, IP2, and IP3 nuclear decommissioning trusts (NDTs) for spent fuel management and site restoration activities for IP1, IP2, and IP3, respectively. The exemption would also allow such withdrawals without prior notification to the NRC. The NRC staff is issuing an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) associated with the proposed exemption.

DATES: The EA and FONSI referenced in this document are available on November 10, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0239 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0239. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the AVAILABILITY OF DOCUMENTS section of this document.
- *Attention:* The PDR, where you may examine and purchase copies of public documents, is currently closed. You may submit your request to the PDR by email to *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: Richard V. Guzman, Office of Nuclear Reactor Regulation; U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1030; email: *Richard.Guzman@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering issuance of an exemption from sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) of title 10 of the *Code of Federal Regulations* (10 CFR) to HDI for Provisional Operating License No. DPR–5 and Renewed Facility Operating License Nos. DPR–26 and DPR–64 for IP1, IP2, and IP3, respectively, located in Westchester County, New York. HDI requested the exemption by letter dated February 12, 2020 (ADAMS Accession No. ML20043C539). The exemption would permit HDI to use funds from the IP1, IP2, and IP3 NDTs for spent fuel management and site restoration activities for IP1, IP2, and IP3, respectively, in the same manner that funds from the NDTs are used under 10 CFR 50.82(a)(8) for decommissioning activities. HDI submitted the exemption request based on its analysis of the expected IP1, IP2, and IP3 decommissioning costs, spent fuel management costs, and site restoration costs, as provided in the IPEC Post-Shutdown Decommissioning Activities Report (PSDAR) using the prompt decontamination and dismantlement (DECON) method submitted by HDI to the NRC on December 19, 2019 (ADAMS Accession No. ML19354A698).

By letter dated November 21, 2019 (ADAMS Accession No. ML19326B953), Entergy Nuclear Operations, Inc. (ENOI), on behalf of itself, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Holtec International (Holtec), and HDI (collectively, the applicants), requested that the NRC consent to the transfer of control of Provisional Operating License No. DPR–5 and Renewed Facility Operating License Nos. DPR–26 and DPR–64 for IP1, IP2, and IP3, respectively, as well as the general license for the IPEC Independent Spent Fuel Storage Installation. Specifically, the applicants requested that the NRC consent to the transfer of ENOI's operating authority under these licenses to HDI and the ownership of the IP1 and IP2 licenses to the Holtec subsidiary Holtec Indian Point 2, LLC and the ownership of the IP3 license to the Holtec subsidiary Holtec Indian Point 3, LLC. The requested exemption would only apply following an NRC approval of this license transfer application and the consummation of the transfer transaction.

In accordance with 10 CFR 51.21, the NRC prepared the following EA that analyzes the environmental impacts of the proposed action. Based on the results of this EA, which are provided in Section II, and in accordance with 10

CFR 51.31(a), the NRC has determined not to prepare an environmental impact statement for the proposed licensing action and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would partially exempt HDI from the requirements set forth in 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv). Specifically, the proposed action would allow HDI to use funds from the NDTs for spent fuel management and site restoration activities not associated with radiological decommissioning activities and would exempt HDI from the requirement for prior notification to the NRC for these activities.

The proposed action is in accordance with HDI's application dated February 12, 2020.

Need for the Proposed Action

By letter dated February 8, 2017 (ADAMS Accession No. ML17044A004), ENOI submitted to the NRC a certification in accordance with 10 CFR 50.82(a)(1)(i), stating its determination to permanently cease power operations at IP2 and IP3 by April 30, 2020, and April 30, 2021, respectively, subject to operating extensions through, but not beyond, 2024 and 2025, respectively. ENOI permanently ceased power operations at IP2 on April 30, 2020, and permanently defueled IP2 on May 12, 2020 (ADAMS Accession No. ML20133J902).

As required by 10 CFR 50.82(a)(8)(i)(A), decommissioning trust funds may be used by the licensee if the withdrawals are for legitimate decommissioning activity expenses, consistent with the definition of decommissioning in 10 CFR 50.2. This definition addresses radiological decommissioning and does not include activities associated with spent fuel management or site restoration. Similarly, the requirements of 10 CFR 50.75(h)(1)(iv) restrict the use of decommissioning trust fund disbursements (other than for ordinary and incidental expenses) to decommissioning expenses until final decommissioning has been completed. Therefore, exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) is needed to allow HDI to use funds from the NDTs for spent fuel management and site restoration activities.

HDI stated that Tables 1, 2, and 3 of the exemption request demonstrate that the NDTs contain the amount needed to cover the estimated costs of IP1, IP2, and IP3 radiological decommissioning, as well as spent fuel management and site restoration activities. The adequacy of funds in the NDTs to cover the costs of activities associated with spent fuel management, site restoration, and radiological decommissioning through license termination is supported by the HDI IPEC DECON PSDAR. HDI stated that it needs access to the funds in the NDTs in excess of those needed for radiological decommissioning to support spent fuel management and site restoration activities not associated with radiological decommissioning.

The requirements of 10 CFR 50.75(h)(1)(iv) further provide that, except for withdrawals being made under 10 CFR 50.82(a)(8) or for payments of ordinary administrative costs and other incidental expenses of the NDTs in connection with the operation of the NDTs, no disbursement may be made from the NDTs without written notice to the NRC at least 30 working days in advance. Therefore, an exemption from 10 CFR 50.75(h)(1)(iv) is also needed to allow HDI to use funds from the NDTs for spent fuel management and site restoration activities without prior NRC notification.

In summary, by letter dated February 12, 2020, HDI requested an exemption to allow NDT withdrawals, without prior written notification to the NRC, for spent fuel management and site restoration activities.

Environmental Impacts of the Proposed Action

The proposed action involves an exemption from regulatory requirements that are of a financial or administrative nature and that do not have an impact on the environment. The NRC has completed its evaluation of the proposed action and concludes that there is reasonable assurance that adequate funds are available in the NDTs to complete all activities associated with radiological decommissioning as well as spent fuel management and site restoration. There is no decrease in safety associated with the use of the NDTs to also fund activities associated with spent fuel management and site restoration. Section 50.82(a)(8)(v) of 10 CFR requires a licensee to submit a financial assurance status report annually between the time of submitting its site-specific decommissioning cost estimate and submitting its final radiation survey and demonstrating that residual radioactivity has been reduced to a level that permits termination of its license. Section 50.82(a)(8)(vi) of 10 CFR requires that if the sum of the balance of any remaining decommissioning funds, plus expected rate of return, plus any other financial surety mechanism does not cover the estimated cost to complete radiological decommissioning, additional financial assurance must be provided to cover the cost of completion. These annual reports provide a means for the NRC to continually monitor the adequacy of available funding. Since the exemption would allow HDI to use funds from the NDTs that are in excess of those required for radiological decommissioning, the adequacy of the funds dedicated for radiological decommissioning are not affected by the proposed exemption. Therefore, there is reasonable assurance that there will be no environmental impact due to lack of adequate funding for radiological decommissioning.

The proposed action will not significantly increase the probability or consequences of radiological accidents. The NRC staff has concluded that the proposed action has no direct radiological impacts. There would be no change to the types or amounts of radiological effluents that may be released; therefore, there would be no change in occupational or public radiation exposure from the proposed action. There are no materials or chemicals introduced into the plant that could affect the characteristics or types of effluents released offsite. In addition, the method of operation of waste processing systems would not be affected by the exemption. The proposed action will not result in changes to the design basis requirements of structures, systems, and components (SSCs) that function to limit or monitor the release of effluents. All the SSCs associated with limiting the release of effluents will continue to be able to perform their functions. Moreover, no changes would be made to plant buildings or the site property from the proposed action. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action would have no direct impacts on land use or water resources, including terrestrial and aquatic biota, as it involves no new construction or modification of plant operational systems. There would be no changes to the quality or quantity of non-radiological effluents and no changes to the plant's National Pollutant Discharge Elimination System permits would be needed. In addition, there would be no noticeable effect on socioeconomic conditions in the region, no environment justice impacts, no air

quality impacts, and no impacts to historic and cultural resources from the proposed action. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Denial of the proposed action would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies or Persons Consulted

No additional agencies or persons were consulted regarding the environmental impact of the proposed action. On October 28, 2020, the NRC notified the State of New York representative of the EA and FONSI.

III. Finding of No Significant Impact

The requested exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow HDI to use funds from the NDTs for spent fuel management and site restoration activities, without prior written notification to the NRC. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or non-radiological impacts. The reason the human environment would not be significantly affected is that the proposed action involves an exemption from requirements that are of a financial or administrative nature and that do not have an impact on the human environment. Consistent with 10 CFR 51.21, the NRC conducted the EA for the proposed action, and this FONSI incorporates by reference the EA included in Section II of this document. Therefore, the NRC concludes that the proposed action will not have significant effects on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

Other than HDI's letter dated February 12, 2020, there are no other environmental documents associated with this review. This document is available for public inspection as indicated in Section I.

Previous considerations regarding the environmental impacts of operating IPEC are described in NUREG–1437, Supplement 38, Volume 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3—Final Report, Main Report and Comment Responses,'' dated December 2010 (ADAMS Accession No. ML103350405), and Volume 5, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3—Final,'' dated April 2018 (ADAMS Accession No. ML18107A759).

IV. Availability of Documents

Date	Title	ADAMS Accession No.
5/12/2020	Letter from ENOI to NRC, ''Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel, Indian Point Nuclear Generating Unit No. 2''.	ML20133J902.
2/12/2020	Letter from HDI to NRC, ''Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv)''.	ML20043C539.
12/19/2019	Letter from HDI to NRC, ''Post Shutdown Decommissioning Activities Report including Site-Specific Decommissioning Cost Estimate for Indian Point Nuclear Generating Units 1, 2, and 3''.	ML19354A698.
11/21/2019	Letter from ENOI to NRC, ''Application for Order Consenting to Transfers of Control of Licenses and Approving Conforming License Amendments''.	ML19326B953.
4/2018	NUREG–1437, Supplement 38, Volume 5, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3—Final''.	ML18107A759.
2/8/2017	Letter from ENOI to NRC, ''Notification of Permanent Cessation of Power Operations, Indian Point Nuclear Generating Unit Nos. 2 and 3''.	ML17044A004.
12/2010	NUREG–1437, Supplement 38, Volume 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3—Final Report, Main Report and Comment Responses''.	ML103350405.

Dated: November 5, 2020.

For the Nuclear Regulatory Commission.

Richard V. Guzman,

Senior Project Manager, Plant Licensing Branch I, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90333; File No. SR–CBOE–2020–105]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule in Connection With Migration

November 4, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 23, 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 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 the Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

its Fees Schedule in connection with migration. The text of the proposed rule change is provided in Exhibit 5.[3]

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

In 2016, the Exchange's parent company, Cboe Global Markets, Inc. (formerly named CBOE Holdings, Inc.) (''Cboe Global''), which is also the parent company of Cboe C2 Exchange, Inc. (''C2''), acquired Cboe EDGA Exchange, Inc. (''EDGA''), Cboe EDGX Exchange, Inc. (''EDGX'' or ''EDGX Options''), Cboe BZX Exchange, Inc. (''BZX'' or ''BZX Options''), and Cboe BYX Exchange, Inc. (''BYX'' and, together with Cboe Options, C2, EDGX, EDGA, and BZX, the ''Affiliated Exchanges''). The Cboe Affiliated Exchanges recently aligned certain system functionality, including with respect to connectivity, retaining only intended differences between the Affiliated Exchanges, in the context of a technology migration. The Exchange migrated its trading platform to the same system used by the Affiliated Exchanges, which the Exchange completed on October 7, 2019 (the ''migration''). As a result of this migration, the Exchange's pre-migration connectivity architecture was rendered obsolete, and as such, the Exchange now offers new functionality, including new logical connectivity, and therefore proposes to adopt corresponding fees.[4] In determining the proposed fee changes, the Exchange assessed the impact on market participants to ensure that the proposed fees would not create an undue financial burden on any market participants, including smaller market participants. While the Exchange has no way of predicting with certainty the impact of the proposed changes, the Exchange had anticipated its post-migration connectivity revenue[5] to be approximately 1.75% lower than connectivity revenue pre-migration.[6] In addition to providing a consistent technology offering across the Cboe Affiliated Exchanges, the migration also provided market participants a latency equalized infrastructure, improved system performance, and increased sustained order and quote per second capacity, as discussed more fully below. Accordingly, in connection with the migration and in order to more closely align the Exchange's fee structure with that of its Affiliated Exchanges, the Exchange intends to update and simplify its fee structure with respect to access and connectivity and adopt new access and connectivity fees.

The Exchange initially filed the proposed fee changes on October 1, 2019 (SR–CBOE–2019–077) (the ''Original Filing'').[7] The Commission received only one comment letter on the Original Filing, six days after the comment period deadline ended.[8] On November 29, 2019, the Exchange withdrew the Original Filing and submitted SR–CBOE–2019–111 (''Second Proposed Rule Change'').[9] Among other things, the Second Proposed Rule Change was filed in response to, and addressed, the Commission's request for inclusion of the following information: Clarity as to what revenue streams are included in the Exchange's calculation of

[3] The Exchange notes that subsequent to the Original Filing that proposed these changes on October 1 and 2, 2019 (SR–CBOE–2019–077 and SR–CBOE–2019–082) and subsequent to the Second Proposed Rule Change and Third Proposed Rule Change Filings that proposed these changes on November 29, 2019 (SR–CBOE–2019–111) and January 28, 2020 (SR–CBOE–2020–005), the Exchange submitted SR–CBOE–2020–021 which adopted Footnote 12. Footnote 12 governs pricing changes in the event the Exchange trading floor becomes inoperable and is appended to the Market-Maker Tier Appointment Fees and Floor Broker Trading Permit Sliding Scales tables. Additionally, subsequent to the Fourth Proposed Rule Change filed on March 27, 2020 (SR–CBOE–2020–028), the Exchange submitted SR–CBOE–2020–044, which appended Footnotes 41 to the Market maker Tier Appointment Fees table and the Floor Broker Trading Surcharge. Subsequent to the Exchange's Fifth Proposed Rule Change filed on May 22, 2020 (SR–CBOE–2020–48), the Exchange submitted (1) SR–CBOE–2020–058, which adopted new Footnote 24, appended Footnote 24 in the Market-Maker Tier Appointment Fees table and Floor Trading Permit Sliding Scales Table, as well as added language to the Floor Broker ADV Discount Table and (2) SR–CBOE–2020–061 which added further language in Footnote 24. Lastly, subsequent to the Seventh Proposed Rule Change filed on September 2, 2020, the Exchange submitted SR–CBOE–2020–097 which amended language in Footnote 24. The additions proposed by filings SR–CBOE–2020–021, SR–CBOE–2020–044, SR–CBOE–2020–058, SR–CBOE–2020–061 and SR–CBOE–2020–097 are double underlined in Exhibit 5A.

[4] As of October 7, 2019, market participants no longer have the ability to connect to the old Exchange architecture.

[5] Connectivity revenue post-migration includes revenue from physical port fees (other than for disaster recovery), Cboe Data Services Port Fee, logical port fees, Trading Permit Fees, Market-Maker EAP Appointment Unit fees, Tier Appointment Surcharges and Floor Broker Trading Surcharges, less the Floor Broker ADV discounts and discounts on BOE Bulk Ports via the Affiliate Volume Plan and the Market-Maker Access Credit program.

[6] For February 2020, the Exchange's connectivity revenue was approximately 2.5% higher than connectivity revenue pre-migration. For purposes of a fair comparison of the Exchange's initial projection of post-migration connectivity revenue to realized post-migration revenue connectivity, the Exchange excluded from the February 2020 calculation revenue from a Trading Permit Holder who became a Market-Maker post October 7, 2019, a Trading Permit Holder that grew it's footprint on the Exchange significantly, and revenue derived from incremental usage in light of the extreme volatility and volume experienced in February, as such circumstances were not otherwise anticipated or incorporated into the Exchange's original projection. As noted, the Exchange had no way of predicting with certainty the impact of the proposed changes, nor control over choices market participants ultimately decided to make. The Exchange notes connectivity revenue was higher than anticipated in part due to (1) a higher number of 10 Gb Physical Ports being maintained by TPHs than expected (although 34% of Trading Permit Holders maintained the same number of 10 Gb Physical and 44% reduced the amount of 10 Gb Physical Ports maintained), (2) a higher quantity of BOE/FIX Logical Ports being purchased than predicted, and (3) a significantly higher quantity of the optional Drop, GRP, Multicast PITCH/Top Spin Server Ports and Purge Ports being purchased than predicted. For April 2020, the Exchange's connectivity revenue was approximately 21.97% *less* than connectivity revenue pre-migration using the same calculation. For May 2020, the Exchange's connectivity revenue was approximately 22.32% *less* than connectivity revenue pre-migration using the same calculation. The Exchange notes that due to the closure of its trading floor on March 16, 2020 through June 15, 2020, it adopted a number of corresponding temporary pricing changes, including waiving floor Trading Permit fees. *See* Cboe Options Fees Schedule. The Exchange also notes that it has provided the dollar amounts of the Exchange's monthly connectivity revenue to the Securities and Exchange Commission (the ''Commission'') for the months of February–June 2020 with a confidential treatment request. The Exchange also intends to provide further information to the Commission relating to monthly connectivity revenue for additional months, which will also be subject to a confidential treatment request.

[7] On business date October 2, 2019, due to a technical error, the Exchange withdrew that filing and submitted SR–CBOE–2019–082. *See* Securities Exchange Act Release No. 87304 (October 15, 2019), 84 FR 56240, (October 21, 2019) (''Original Filing'').

[8] *See* Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association (''Healthy Markets''), to Vanessa Countryman, Secretary, Commission, dated November 18, 2019.

[9] *See* Securities Exchange Act Release No. 87727 (December 12, 2019), 84 FR 69428 (December 18, 2019).

''connectivity'' revenue; an update on post-migration connectivity revenue;[10] further information regarding the Exchange's new latency equalized infrastructure including additional detail regarding the benefits of such structure; clarity on how the Cboe Data Services Port fee is applied; data regarding the number of market participants that connect directly versus indirectly and the volume attributed to each; enhanced discussion regarding products that compete with exclusively listed products; an update on whether any market participant terminated their direct connectivity or membership post-migration (and whether it was because of the fee changes); and generally provide an update on various projections made in the filing, including how many ports market participants purchased post-migration, how many Trading Permit Holders were paying higher or lower fees, and how many Trading Permit Holders achieved proposed incentive tiers. The Commission received no comment letters on the Second Proposed Rule Change.

On January 28, 2020, the Exchange withdrew the Second Proposed Rule Change filing and submitted SR–CBOE–2020–005 (''Third Proposed Rule Change'').[11] The Third Proposed Rule Change was filed in response to, and addressed, the Commission's request for further discussion regarding how competitive forces constrained fees, further detail on potential substitute products for the Exchange's exclusively listed products, updated data on the number of ports purchased post-migration and an update on the projected post-migration connectivity revenue.[12] The Exchange also provided updated data on how many Trading Permit Holders connected directly versus indirectly to the Exchange and the volume attributed to each. The Commission received no comment letters on the Third Proposed Rule Change.

On March 27, 2020, the Exchange submitted SR–CBOE–2020–028 (''Fourth Proposed Rule Change'').[13] The Fourth Proposed Rule Change was filed in response to the Commission's sole request to update the connectivity revenue collected in February 2020, as the transition of physical ports had been completed. The Commission received only one comment letter on the Fourth Proposed Rule Change.[14]

On May 21, 2020, the Exchange withdrew that filing and submitted SR–CBOE–20202–048 (''Fifth Proposed Rule Change'').[15] The Fifth Proposed Rule Change was filed in response to the Commission's request for (1) updated connectivity revenue for April 2020, (2) examples of alternative products to VIX and (3) any further evidence the Exchange had to support its argument that competitive forces constrain pricing. The Commission received no comments letters on the Fifth Proposed Rule Change.

On July 2, 2020, the Exchange withdrew the Fifth Proposed Rule Change and submitted SR–CBOE–2020–064 (''Sixth Proposed Rule Change'').[16] The Sixth Proposed Rule Change was filed to respond to the Commission's request for another update on the Exchange's post-migration connectivity revenue and to provide further data demonstrating competition in the marketplace. The Commission again received no negative comments letters on the Sixth Proposed Rule Change. Notably however, the Exchange did receive three positive comment letters on the Sixth Proposed Rule Change (one from a market-maker TPH and two from floor broker TPHs), each noting that the TPHS believes the proposed fees are reasonable and encouraging the Commission to allow the fees to remain effective and avoid an unnecessary suspension and disapproval proceeding.[17]

On August 31, 2020, the Exchange withdrew the Sixth Proposed Rule Change and submitted SR–CBOE–2020–083 (''Seventh Proposed Rule Change'').[18] The Seventh Proposed Rule Change was filed in order to respond to an additional request from the Commission for further information and dialog. The Commission received only one comment letter on the Seventh Proposed Rule Change, which was submitted from the same industry participant that commented on this proposed rule change on two previous occasions and that frequently submits negative comment letters on exchange fee filings.[19]

Today, the Exchange is withdrawing the Seventh Proposed Rule change and submitting this filing (''Eighth Proposed Rule Change''), as part of its ongoing efforts to adopt the post-migration connectivity fees and to respond to the Commission's most recent and most extensive request for further information, including among other things: (1) Total connectivity and access fee revenues over a period of time, (2) data relating to each TPH that has connected directly to the Exchange over a period of time (including contract volume and access and connectivity fees paid on a month-by-month and firm-by-firm basis), (3) information relating to previous access and connectivity pricing changes that have been proposed; and (4) information relating to the Exchange's profit margins and return on assets for each of Cboe's business lines.[20]

The Exchange notes the proposed fees have been effective, and thus have been paid by Trading Permit Holders, for over

[10] Many market participants were still transitioning to the new connectivity structure at that time and as such, the Exchange noted it did not expect its connectivity revenue projections regarding port purchases to be realized prior to February 2020.

[11] *See* Securities Exchange Act Release No. 88164 (February 11, 2020), 85 FR 8897, (February 18, 2020).

[12] Many market participants were still transitioning to the new connectivity structure at that time and as such, the Exchange again noted it did not expect its connectivity revenue projections regarding port purchases to be realized prior to February 2020.

[13] *See* Securities Exchange Act Release No. 88586 (April 8, 2020), 85 FR 20773, (April 14, 2020).

[14] *See* Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association (''Healthy Markets''), to Vanessa Countryman, Secretary, Commission, dated May 5, 2020, which letter mischaracterized the Exchange's proposed fees as linking market data costs to trading volume, among other factual inaccuracies.

[15] The Exchange refiled the Fifth Proposed Rule Change on May 22, 2020 due to a technical error (SR–CBOE–2020–048). *See* Securities Exchange Act Release No. 88984 (June 1, 2020), 85 FR 34670, (June 6, 2020).

[16] *See* Securities Exchange Act Release No. 89239 (July 7, 2020), 85 FR 42042, (July 13, 2020).

[17] *See* Letters from Steve Crutchfield, Head of Market Structure, Chicago Trading Company (''CTC'') and William Ellington, Managing Member/CEO, X-Change Financial Access (''XFA'') to Vanessa Countryman, Secretary, Commission, dated August 27, 2020. *See also* Letter from Lakeshore Securities to Vanessa Countryman, Secretary, Commission, dated August 31, 2020.

[18] The Exchange refiled the Seventh Proposed Rule Change on September 2, 2020 due to a technical error (SR–CBOE–2020–086). *See* Securities Exchange Act Release No. 89826 (September 10, 2020), 85 FR 57900, (September 16, 2020).

[19] *See* Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association (''Healthy Markets''), to Vanessa Countryman, Secretary, Commission, dated September 30, 2020, which letter, like the first two Healthy Markets comment letters, consists of a number of conclusory statements and mischaracterizes the Exchange's proposed fees as linking market data costs to trading volume, among other factual inaccuracies.

[20] Data responsive to the Commission's request for additional information is being provided to the Commission with a confidential treatment request. The Exchange notes that it is unable to provide data addressing the Commission's request for information relating to its profit margins and return on assets, as its costs are not kept in the disaggregated manner requested by the Commission. The Exchange notes that to disaggregate its cost in that way would require an artificial and arbitrary division resulting in inaccurate and potentially meaningless data. Moreover, the Exchange notes that it did not raise any arguments relating to its profitability nor is it required to do so in order to demonstrate that its fees are reasonable and consistent with the Act.

one year. The Exchange believes it is notable that during this time no other industry group or exchange, and particularly no market participants who connect to the Exchange, have claimed in comment letters to the Commission that the Exchange's new fee structure is unreasonable. The Exchange also believes it's significant and notable that, in addition to positive feedback regarding the improved connectivity under the new structure, it received feedback from a number of market participants that the Exchange's proposed fee changes are regarded as reasonable, both informally via conversations with the firms and formally via the comment letters submitted in support of this fee change.

As discussed herein, the Exchange believes that the proposed changes are consistent with the Act because they are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition, as they are are supported by evidence (including data and analysis) and are constrained by significant competitive forces. The Exchange also believes the proposed fees are reasonable as they are in line with the amounts assessed by other exchanges for similar connectivity offerings. Additionally, the Exchange believes the proposed changes are consistent with the SEC Division of Trading and Markets (the ''Division'') issued non-rulemaking fee filing guidance titled ''Staff Guidance on SRO Rule Filings Relating to Fees'' (''Fee Guidance'') issued on May 21, 2020.[21] Accordingly, the Exchange believes that the Commission should find that the Proposed Fee Increases are consistent with the Act. The proposed rule change is immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.

Physical Connectivity

A physical port is utilized by a Trading Permit Holder (''TPH'') or non-TPH to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses fees for Network Access Ports for these physical connections to the Exchange. Specifically, TPHs and non-TPHs can elect to connect to Cboe Options' trading system via either a 1 gigabit per second (''Gb'') Network Access Port or a 10 Gb Network Access Port. Pre-migration the Exchange assessed a monthly fee of $1,500 per port for 1 Gb Network Access Ports and a monthly fee of $5,000 per port for 10 Gb Network Access Ports for access to Cboe Options primary system. Through January 31, 2020, Cboe Options market participants will continue to have the ability to connect to Cboe Options' trading system via the current Network Access Ports. As of October 7, 2019, in connection with the migration, TPHs and non-TPHs may alternatively elect to connect to Cboe Options via new latency equalized Physical Ports.[22] The new Physical Ports similarly allow TPHs and non-TPHs the ability to connect to the Exchange at the data center where the Exchange's servers are located and TPHs and non-TPHs have the option to connect via 1 Gb or 10 Gb Physical Ports. As noted above, both the new 1 Gb and 10 Gb Physical Ports provide latency equalization, meaning that each market participant will be afforded the same latency for 1 Gb or 10 Gb Physical Ports in the primary data center to the Exchange's customer-facing switches regardless of location of the market participant's cage[23] in the primary data center relative to the Exchange's servers. Conversely, the legacy Network Access Ports are not latency equalized, meaning the location of a market participant's cage within the data center may affect latency. For example, in the legacy system, a cage located further from the Exchange's servers may experience higher latency than those located closer to the Exchange's servers.[24] As such, the proposed Physical Ports ensure all market participants connected to the Exchange via the new Physical Ports will receive the same respective latency for each port size and ensure that no market participant has a latency advantage over another market participant within the primary data center.[25] Additionally, the new infrastructure utilizes new and faster switches resulting in lower overall latency.

The Exchange proposes to assess the following fees for any physical port, regardless of whether the TPH or non-TPH connects via the current Network Access Ports or the new Physical Ports. Specifically, the Exchange proposes to continue to assess a monthly fee of $1,500 per port for 1 Gb Network Access Ports and new Physical Ports and increase the monthly fee for 10 Gb Network Access Ports and new Physical Ports to $7,000 per port. Physical port fees will be prorated based on the remaining trading days in the calendar month. The proposed fee for 10 Gb Physical Ports is in line with the amounts assessed by other exchanges for similar connections by its Affiliated Exchanges and other Exchanges that utilize the same connectivity infrastructure.[26]

In addition to the benefits resulting from the new Physical Ports providing latency equalization and new switches (*i.e.,* improved latency), TPHs and non-TPHs may be able to reduce their overall physical connectivity fees. Particularly, Network Access Port fees are assessed for unicast (orders, quotes) and multicast (market data) connectivity separately. More specifically, Network Access Ports may only receive one type of connectivity each (thus requiring a market participant to maintain two ports if that market participant desires both types of connectivity). The new Physical Ports however, allow access to both unicast and multicast connectivity with a single physical connection to the

[21] Where possible, the Exchange is including numerical examples and percentages, including with respect to revenue impact. In addition, the Exchange is providing data to the Commission in support of its arguments herein, which is consistent with the Fee Guidance. The non-rulemaking Fee Guidance covers all aspects of a fee filing, but as acknowledged by the Commission, has ''no legal force or effect'', is ''not a rule, regulation or statement of the Commission'', does not ''alter or amend applicable law'' and ''creates no new or additional obligations for SROs and the Commission.'' *See* Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance, June 12, 2019. The Exchange nonetheless has extensively addressed the Fee Guidance throughout this filing and prior versions of this filing.

[22] As previously noted, market participants will continue to have the option of connecting to Cboe Options via a 1 Gbps or 10 Gbps Network Access Port at the same rates as proposed, respectively.

[23] A market participant's ''cage'' is the cage within the data center that contains a market participant's servers, switches and cabling.

[24] The Exchange equalizes physical connectivity in the data center for its primary system by taking the farthest possible distance that a Cboe market participant cage may exist from the Exchange's customer-facing switches and using that distance as the cable length for any cross-connect.

[25] The Exchange notes that 10 Gb Physical Ports have an 11 microsecond latency advantage over 1 Gb Physical Ports. Other than this difference, there are no other means to receive a latency advantage as compared to another market participant in the new connectivity structure.

[26] *See* Cboe EDGA U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe EDGX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe BZX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe BYX U.S. Equities Exchange Fee Schedule, Physical Connectivity Fees; Cboe EDGX Options Exchange Fee Schedule, Physical Connectivity Fees; and Cboe BZX Options Exchange Fee Schedule, Physical Connectivity Fees (collectively, ''Affiliated Exchange Fee Schedules''). *See e.g.,* Nasdaq PHLX and ISE Rules, General Equity and Options Rules, General 8. Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection. *See also* Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. *See also* NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit.

Exchange. Therefore, TPHs and non-TPHs that currently purchase two legacy Network Access Ports for the purpose of receiving each type of connectivity now have the option to purchase only one new Physical Port to accommodate their connectivity needs, which may result in reduced costs for physical connectivity.[27]

Cboe Data Services—Port Fees

The Exchange proposes to amend the ''Port Fee'' under the Cboe Data Services (''CDS'') Fees Schedule. Currently, the Port Fee is payable by any Customer[28] that receives data through two types of sources; a direct connection to CDS (''direct connection'') or through a connection to CDS provided by an extranet service provider (''extranet connection''). The Port Fee applies to receipt of any Cboe Options data feed but is only assessed once per data port. The Exchange proposes to amend the monthly CDS Port Fee to provide that it is payable ''per source'' used to receive data, instead of ''per data port''. The Exchange also proposes to increase the fee from $500 per data port/month to $1,000 per data source/month.[29] The Exchange notes the proposed change in assessing the fee (*i.e.,* per source vs per port) and the proposed fee amount are the same as the corresponding fee on its affiliate C2.[30]

In connection with the proposed change, the Exchange also proposes to rename the ''Port Fee'' to ''Direct Data Access Fee''. As the fee will be payable ''per data source'' used to receive data, instead of ''per data port'', the Exchange believes the proposed name is more appropriate and that eliminating the term ''port'' from the fee will eliminate confusion as to how the fee is assessed.

Logical Connectivity

Next, the Exchange proposes to amend its login fees. By way of background, Cboe Options market participants were able to access Cboe Command via either a CMI or a FIX Port, depending on how their systems are configured. Effective October 7, 2019, market participants are no longer able to use CMI and FIX Login IDs. Rather, the Exchange utilizes a variety of logical connectivity ports as further described below. Both a legacy CMI/FIX Login ID and logical port represent a technical port established by the Exchange within the Exchange's trading system for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Market participants that wish to connect directly to the Exchange can request a number of different types of ports, including ports that support order entry, customizable purge functionality, or the receipt of market data. Market participants can also choose to connect indirectly through a number of different third-party providers, such as another broker-dealer or service bureau that the Exchange permits through specialized access to the Exchange's trading system and that may provide additional services or operate at a lower mutualized cost by providing access to multiple members. In light of the discontinuation of CMI and FIX Login IDs, the Exchange proposes to eliminate the fees associated with the CMI and FIX login IDs and adopt the below pricing for logical connectivity in its place.

Service	Cost per month
Logical Ports (BOE, FIX) 1 to 5.	$750 per port.
Logical Ports (BOE, FIX) >5.	$800 per port.
Logical Ports (Drop) ..	$750 per port.
BOE Bulk Ports 1 to 5.	$1,500 per port.
BOE Bulk Ports 6 to 30.	$2,500 per port.
BOE Bulk Ports >30 ..	$3,000 per port.
Purge ports	$850 per port.
GRP Ports	$750/primary (A or C Feed).
Multicast PITCH/Top Spin Server Ports.	$750/set of primary (A or C feed).

The Exchange proposes to provide for each of the logical connectivity fees that new requests will be prorated for the first month of service. Cancellation requests are billed in full month increments as firms are required to pay for the service for the remainder of the month, unless the session is terminated within the first month of service. The Exchange notes that the proration policy is the same on its Affiliated Exchanges.[31]

Logical Ports (BOE, FIX, Drop): The new Logical Ports represent ports established by the Exchange within the Exchange's system for trading purposes. Each Logical Port established is specific to a TPH or non-TPH and grants that TPH or non-TPH the ability to operate a specific application, such as order/quote[32] entry (FIX and BOE Logical Ports) or drop copies (Drop Logical Ports). Similar to CMI and FIX Login IDs, each Logical Port will entitle a firm to submit message traffic of up to specified number of orders per second.[33] The Exchange proposes to assess $750 per port per month for all Drop Logical Ports and also assess $750 per port per month (which is the same amount currently assessed per CMI/FIX Login ID per month), for the first 5 FIX/BOE Logical Ports and thereafter assess $800 per port, per month for each additional FIX/BOE Logical Port. While the proposed ports will be assessed the same monthly fees as current CMI/FIX Login IDs (for the first five logical ports), the proposed logical ports provide for significantly more message traffic (and thus cost less per message sent) as shown below:

[27] The Exchange proposes to eliminate the current Cboe Command Connectivity Charges table in its entirety and create and relocate such fees in a new table in the Fees Schedule that addresses fees for physical connectivity, including fees for the current Network Access Ports, the new Physical Ports and Disaster Recovery (''DR'') Ports. The Exchange notes that it is not proposing any changes with respect to DR Ports other than renaming the DR ports from ''Network Access Ports'' to ''Physical Ports'' to conform to the new Physical Port terminology. The Exchange also notes that subsequent to the initial filings that proposed these fee changes on October 1 and 2, 2019 (SR–CBOE–2019–077 and SR–CBOE–2019–082), the Exchange amended the proposed port fees to waive fees for ports used for PULSe in filing No. SR–CBOE–2019–105. The additions proposed by filing SR–CBOE–2019–105 are double underlined in Exhibit 5A and the deletions are doubled bracketed in Exhibit 5A.

[28] A Customer is any person, company or other entity that, pursuant to a market data agreement with CDS, is entitled to receive data, either directly from CDS or through an authorized redistributor (*i.e.,* a Customer or extranet service provider), whether that data is distributed externally or used internally.

[29] For example, under the pre-migration ''per port'' methodology, if a TPH maintained 4 ports that receive market data, that TPH would be assessed $2,000 per month (*i.e.,* $500 × 4 ports), regardless of how many sources it used to receive data. Under the proposed ''per source'' methodology, if a TPH maintains 4 ports that receive market data, but receives data through only one source (*e.g.,* a direct connection) that TPH would be assessed $1,000 per month (*i.e.,* $1000 × 1 source). If that TPH maintains 4 ports but receives data from both a direct connection and an extranet connection, that TPH would be assessed $2,000 per month (*i.e.,* $1,000 × 2 sources). Similarly, if that TPH maintains 4 ports and receives data from two separate extranet providers, that TPH would be assessed $2,000 per month (*i.e.,* $1,000 × 2).

[30] *See* Cboe C2 Options Exchange Fee Schedule, Cboe Data Services, LLC Fees, Section IV, Systems Fees.

[31] *See* Affiliated Exchange Fee Schedules, Logical Port Fees.

[32] As of October 7, 2019, the definition of quote in Cboe Options Rule 1.1 means a firm bid or offer a Market-Maker (a) submits electronically as an order or bulk message (including to update any bid or offer submitted in a previous order or bulk message) or (b) represents in open outcry on the trading floor.

[33] Login Ids restrict the maximum number of orders and quotes per second in the same way logical ports do, and Users may similarly have multiple logical ports as they may have Trading Permits and/or bandwidth packets to accommodate their order and quote entry needs.

[34] Each Login ID has a bandwidth limit of 80,000 quotes per 3 seconds. However, in order to place such bandwidth onto a single Login ID, a TPH or non-TPH would need to purchase a minimum of 15

	CMI/FIX login Ids		BOE/FIX logical ports
	Quotes	Orders	Quotes/orders
Bandwidth Limit per login	5,000 quotes/3 sec[34]	30 orders/sec	15,000 quotes/orders/3 sec.
Cost	$750 each	$750 each	$750/$800 each.
Cost per Quote/Order Sent @Limit	$0.15 per quote/3 sec	$25.00 per order/sec	$0.05/$0.053 per quote/order/3 sec.

Logical Port fees will be limited to Logical Ports in the Exchange's primary data center and no Logical Port fees will be assessed for redundant secondary data center ports. Each BOE or FIX Logical Port will incur the logical port fee indicated in the table above when used to enter up to 70,000 orders per trading day per logical port as measured on average in a single month. Each incremental usage of up to 70,000 per day per logical port will incur an additional logical port fee of $800 per month. Incremental usage will be determined on a monthly basis based on the average orders per day entered in a single month across all of a market participant's subscribed BOE and FIX Logical Ports. The Exchange believes that the pricing implications of going beyond 70,000 orders per trading day per Logical Port encourage users to mitigate message traffic as necessary. The Exchange notes that the proposed fee of $750 per port is the same amount assessed not only for current CMI and FIX Login Ids, but also similar ports available on an affiliate exchange.[35]

The Exchange also proposes to provide that the fee for one FIX Logical Port connection to PULSe and one FIX Logical Port connection to Cboe Silexx will be waived per TPH. The Exchange notes that only one FIX Logical Port connection is required to support a firm's access through each of PULSe and Cboe Silexx FLEX.

BOE Bulk Logical Ports: The Exchange also offers BOE Bulk Logical Ports, which provide users with the ability to submit single and bulk order messages to enter, modify, or cancel orders designated as Post Only Orders with a Time-in-Force of Day or GTD with an expiration time on that trading day. While BOE Bulk Ports will be available to all market participants, the Exchange anticipates they will be used primarily by Market-Makers or firms that conduct similar business activity, as the primary purpose of the proposed bulk message functionality is to encourage market-maker quoting on exchanges. As indicated above, BOE Bulk Logical Ports are assessed $1,500 per port, per month for the first 5 BOE Bulk Logical Ports, assessed $2,500 per port, per month thereafter up to 30 ports and thereafter assessed $3,000 per port, per month for each additional BOE Bulk Logical Port. Like CMI and FIX Login IDs, and FIX/BOX Logical Ports, BOE Bulk Ports will also entitle a firm to submit message traffic of up to specified number of quotes/orders per second.[36] The proposed BOE Bulk ports also provide for significantly more message traffic (and thus cost less per message sent) as compared to current CMI/FIX Login IDs, as shown below:

	CMI/FIX Login Ids	BOE Bulk Ports
	Quotes	Quotes[37]
Bandwidth Limit	5,000 quotes/3 sec[38]	225,000 quotes 3 sec.
Cost	$750 each	$1,500/$2,500/$3,000 each.
Cost per Quote/Order Sent @Limit	$0.15 per quote/3 sec	$0.006/$0.011/$0.013 per quote/3 sec.

Each BOE Bulk Logical Port will incur the logical port fee indicated in the table above when used to enter up to 30,000,000 orders per trading day per logical port as measured on average in a single month. Each incremental usage of up to 30,000,000 orders per day per BOE Bulk Logical Port will incur an additional logical port fee of $3,000 per month. Incremental usage will be determined on a monthly basis based on the average orders per day entered in a single month across all of a market participant's subscribed BOE Bulk Logical Ports. The Exchange believes that the pricing implications of going beyond 30,000,000 orders per trading day per BOE Bulk Logical Port encourage users to mitigate message traffic as necessary. The Exchange notes that the proposed BOE Bulk Logical Port fees are similar to the fees assessed for these ports by BZX Options.[39]

Purge Ports: As part of the migration, the Exchange introduced Purge Ports to provide TPHs additional risk management and open order control functionality. Purge ports were designed to assist TPHs, in the management of, and risk control over, their quotes, particularly if the TPH is dealing with a large number of options. Particularly, Purge Ports allow TPHs to submit a cancelation for all open orders, or a subset thereof, across multiple sessions under the same Executing Firm ID (''EFID''). This would allow TPHs to seamlessly avoid unintended executions, while continuing to evaluate the direction of the market. While Purge Ports are available to all market participants, the Exchange anticipates they will be used primarily by Market-Makers or firms that conduct similar business activity and are therefore

Market-Maker Permits or Bandwidth Packets (each Market-Maker Permit and Bandwidth Packet provides 5,000 quotes/3 sec). For purposes of comparing ''quote'' bandwidth, the provided example assumes only 1 Market-Maker Permit or Bandwidth Packet has been purchased.

[35] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[36] The Exchange notes that while technically there is no bandwidth limit per BOE Bulk Port, there may be possible performance degradation at 15,000 messages per second (which is the equivalent of 225,000 quotes/orders per 3 seconds). As such, the Exchange uses the number at which performance may be degraded for purposes of comparison.

[37] *See* Cboe Options Rule 1.1.

[38] Each Login ID has a bandwidth limit of 80,000 quotes per 3 seconds. However, in order to place such bandwidth onto a single Login ID, a TPH or non-TPH would need to purchase a minimum of 15 Market-Maker Permits or Bandwidth Packets (each Market-Maker Permit and Bandwidth Packet provides 5,000 quotes/3 sec). For purposes of comparing ''quote'' bandwidth, the provided example assumes only 1 Market-Maker Permit or Bandwidth Packet has been purchased.

[39] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

exposed to a large amount of risk across a number of securities. The Exchange notes that market participants are also able to cancel orders through FIX/BOE Logical Ports and as such a dedicated Purge Port is not required nor necessary. Rather, Purge Ports were specially developed as an optional service to further assist firms in effectively managing risk. As indicated in the table above, the Exchange proposes to assess a monthly charge of $850 per Purge Port. The Exchange notes that the proposed fee is in line with the fee assessed by other exchanges, including its Affiliated Exchanges, for Purge Ports.[40]

Multicast PITCH/Top Spin Server and GRP Ports: In connection with the migration, the Exchange also offers optional Multicast PITCH/Top Spin Server (''Spin'') and GRP ports and proposes to assess $750 per month, per port. Spin Ports and GRP Ports are used to request and receive a retransmission of data from the Exchange's Multicast PITCH/Top data feeds. The Exchange's Multicast PITCH/Top data feeds are available from two primary feeds, identified as the ''A feed'' and the ''C feed'', which contain the same information but differ only in the way such feeds are received. The Exchange also offers two redundant feeds, identified as the ''B feed'' and the ''D feed.'' All secondary feed Spin and GRP Ports will be provided for redundancy at no additional cost. The Exchange notes a dedicated Spin and GRP Port is not required nor necessary. Rather, Spin ports enable a market participant to receive a snapshot of the current book quickly in the middle of the trading session without worry of gap request limits and GRP Ports were specially developed to request and receive retransmission of data in the event of missed or dropped message. The Exchange notes that the proposed fee is in line with the fee assessed for the same ports on BZX Options.[41]

Access Credits

The Exchange next proposes to amend its Affiliate Volume Plan (''AVP'') to provide Market-Makers an opportunity to obtain credits on their monthly BOE Bulk Port Fees.[42] By way of background, under AVP, if a TPH Affiliate[43] or Appointed OFP[44] (collectively, an ''affiliate'') of a Market-Maker qualifies under the Volume Incentive Program (''VIP'') (*i.e.,* achieves VIP Tiers 2–5), that Market-Maker will also qualify for a discount on that Market-Maker's Liquidity Provider (''LP'') Sliding Scale transaction fees and Trading Permit fees. The Exchange proposes to amend AVP to provide that qualifying Market-Makers will receive a discount on Bulk Port fees (instead of Trading Permits) where an affiliate achieves VIP Tiers 4 or 5. As discussed more fully below, the Exchange is amending its Trading Permit structure, such that off-floor Market-Makers no longer need to hold more than one Market-Maker Trading Permit. As such, in place of credits for Trading Permits, the Exchange will provide credits for BOE Bulk Ports.[45] The proposed credits are as follows:

Market Maker affiliate access credit	VIP tier	Percent credit on monthly BOE bulk port fees
Credit Tier	1	0
	2	0
	3	0
	4	15
	5	25

The Exchange believes the proposed change to AVP continues to allow the Exchange to provide TPHs that have both Market-Maker and agency operations reduced Market-Maker costs via the credits, albeit credits on BOE Bulk Port fees instead of Trading Permit fees. AVP also continues to provide incremental incentives for TPHs to strive for the higher tier levels, which provide increasingly higher benefits for satisfying increasingly more stringent criteria.

In addition to the opportunity to receive credits via AVP, the Exchange proposes to provide an additional opportunity for Market-Makers to obtain credits on their monthly BOE Bulk Port fees based on the previous month's make rate percentage. By way of background, the Liquidity Provider Sliding Scale Adjustment Table provides that Taker fees be applied to electronic ''Taker'' volume and a Maker rebate be applied to electronic ''Maker'' volume, in addition to the transaction fees assessed under the Liquidity Provider Sliding Scale.[46] The amount of the Taker fee (or Maker rebate) is determined by the Liquidity Provider's percentage of volume from the previous month that was Maker (''Make Rate'').[47] Market-Makers are given a Performance Tier based on their Make Rate percentage which currently provides adjustments to transaction fees. Thus, the program is designed to attract liquidity from traditional Market-Makers. The Exchange proposes to now also provide BOE Bulk Port fee credits if Market-Makers satisfy the thresholds of certain Performance Tiers. Particularly, the Performance Tier earned will also determine the percentage credit applied to a Market-Maker's monthly BOE Bulk Port fees, as shown below:

[40] *See e.g.,* Nasdaq ISE Options Pricing Schedule, Section 7(C), Ports and Other Services. *See also* Cboe EDGX Options Exchange Fee Schedule, Options Logical Port Fees; Cboe C2 Options Exchange Fee Schedule, Options Logical Port Fees and Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[41] *See* Cboe BZX Options Exchange Fee Schedule, Options Logical Port Fees.

[42] As noted above, while BOE Bulk Ports will be available to all market participants, the Exchange anticipates they will be used primarily by Market Makers or firms that conduct similar business activity.

[43] For purposes of AVP, ''Affiliate'' is defined as having at least 75% common ownership between the two entities as reflected on each entity's Form BD, Schedule A.

[44] *See* Cboe Options Fees Schedule Footnote 23. Particularly, a Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP.

[45] The Exchange notes that Trading Permits currently each include a set bandwidth allowance and 3 logins. Current logins and bandwidth are akin to the proposed logical ports, including BOE Bulk Ports which will primarily be used by Market-Makers.

[46] *See* Cboe Options Exchange Fees Schedule, Liquidity Provider Sliding Scale Adjustment Table.

[47] More specifically, the Make Rate is derived from a Liquidity Provider's electronic volume the previous month in all symbols excluding Underlying Symbol List A using the following formula: (i) The Liquidity Provider's total electronic automatic execution (''auto-ex'') volume (*i.e.,* volume resulting from that Liquidity Provider's resting quotes or single sided quotes/orders that were executed by an incoming order or quote), divided by (ii) the Liquidity Provider's total auto-ex volume (*i.e.,* volume that resulted from the Liquidity Provider's resting quotes/orders and volume that resulted from that LP's quotes/orders that removed liquidity). For example, a TPH's electronic Make volume in September 2019 is 2,500,000 contracts and its total electronic auto-ex volume is 3,000,000 contracts, resulting in a Make Rate of 83% (Performance Tier 4). As such, the TPH would receive a 40% credit on its monthly Bulk Port fees for the month of October 2019. For the month of October 2019, the Exchange will be billing certain incentive programs separately, including the Liquidity Provider Sliding Scale Adjustment Table, for the periods of October 1–October 4 and October 7–October 31 in light of the migration of its billing system. As such, a Market-Maker's Performance Tier for November 2019 will be determined by the Market-Maker's percentage of volume that was Maker from the period of October 7–October 31, 2019.

Market Maker access credit	Liquidity provider sliding scale adjustment performance tier	Make Rate(% based on prior month)	Percent credit on monthly BOE bulk port fees
Credit Tier	1	0%–50%	0
	2	Above 50%–60%	0
	3	Above 60%–75%	0
	4	Above 75%–90%	40
	5	Above 90%	40

The Exchange believes the proposal mitigates costs incurred by traditional Market-Makers that focus on adding liquidity to the Exchange (as opposed to those that provide and take, or just take). The Exchange lastly notes that both the Market-Maker Affiliate Access Credit under AVP and the Market-Maker Access Credit tied to Performance Tiers can both be earned by a TPH, and these credits will each apply to the total monthly BOE Bulk Port Fees including any incremental BOE Bulk Port fees incurred, before any credits/adjustments have been applied (*i.e.* an electronic MM can earn a credit from 15% to 65%).

Bandwidth Packets

As described above, post-migration, the Exchange utilizes a variety of logical ports. Part of this functionality is similar to bandwidth packets that were previously available on the Exchange. Bandwidth packets restricted the maximum number of orders and quotes per second. Post-migration, market participants may similarly have multiple Logical Ports and/or BOE Bulk Ports as they may have had bandwidth packets to accommodate their order and quote entry needs. As such, the Exchange proposes to eliminate all of the current Bandwidth Packet fees.[48] The Exchange believes that the proposed pricing implications of going beyond specified bandwidth described above in the logical connectivity fees section will be able to otherwise mitigate message traffic as necessary.

CAS Servers

By way of background, in order to connect to the legacy Cboe Command, which allowed a TPH to trade on the Cboe Options System, a TPH had to connect via either a CMI or FIX interface (depending on the configuration of the TPH's own systems). For TPHs that connected via a CMI interface, they had to use CMI CAS Servers. In order to ensure that a CAS Server was not overburdened by quoting activity for Market-Makers, the Exchange allotted each Market-Maker a certain number of CASs (in addition to the shared backups) based on the amount of quoting bandwidth that the Market-Maker had. The Exchange no longer uses CAS Servers, post-migration. In light of the elimination of CAS Servers, the Exchange proposes to eliminate the CAS Server allotment table and extra CAS Server fee.

Trading Permit Fees

By way of background, the Exchange may issue different types of Trading Permits and determine the fees for those Trading Permits.[49] Pre-migration, the Exchange issued the following three types of Trading Permits: (1) Market-Maker Trading Permits, which were assessed a monthly fee of $5,000 per permit; (2) Floor Broker Trading Permits, which were assessed a monthly fee of $9,000 per permit; and (3) Electronic Access Permits (''EAPs''), which were assessed a monthly fee of $1,600 per permit. The Exchange also offered separate Market-Maker and Electronic Access Permits for the Global Trading Hours (''GTH'') session, which were assessed a monthly fee of $1,000 per permit and $500 per permit respectively.[50] For further color, a Market-Maker Trading Permit entitled the holder to act as a Market-Maker, including a Market-Maker trading remotely, DPM, eDPM, or LMM, and also provided an appointment credit of 1.0, a quoting and order entry bandwidth allowance, up to three logins, trading floor access and TPH status.[51] A Floor Broker Trading Permit entitled the holder to act as a Floor Broker, provided an order entry bandwidth allowance, up to 3 logins, trading floor access and TPH status.[52] Lastly, an EAP entitled the holder to electronic access to the Exchange. Holders of EAPs must have been broker-dealers registered with the Exchange in one or more of the following capacities: (a) Clearing TPH, (b) TPH organization approved to transact business with the public, (c) Proprietary TPHs and (d) order service firms. The permit did not provide access to the trading floor. An EAP also provided an order entry bandwidth allowance, up to 3 logins and TPH status.[53] The Exchange also provided an opportunity for TPHs to pay reduced rates for Trading Permits via the Market Maker and Floor Broker Trading Permit Sliding Scale Programs (''TP Sliding Scales''). Particularly, the TP Sliding Scales allowed Market-Makers and Floor Brokers to pay reduced rates for their Trading Permits if they committed in advance to a specific tier that includes a minimum number of eligible Market-Maker and Floor Broker Trading Permits, respectively, for each calendar year.[54]

As noted above, Trading Permits were tied to bandwidth allocation, logins and appointment costs, and as such, TPH organizations may hold multiple Trading Permits of the same type in order to meet their connectivity and appointment cost needs. Post-Migration, bandwidth allocation, logins and appointment costs are no longer tied to a Trading Permit, and as such, the Exchange proposes to modify its Trading Permit structure. Particularly, in connection with the migration, the Exchange adopted separate on-floor and off-floor Trading Permits for Market-Makers and Floor Brokers, adopted a new Clearing TPH Permit, and proposes to modify the corresponding fees and discounts. As was the case pre-migration, the proposed access fees discussed below will continue to be non-refundable and will be assessed through the integrated billing system during the first week of the following month. If a Trading Permit is issued during a calendar month after the first trading day of the month, the access fee for the Trading Permit for that calendar month is prorated based on the remaining trading days in the calendar month. Trading Permits will be renewed

[48] *See* Cboe Options Fees Schedule, Bandwidth Packet Fees.

[49] *See* Cboe Options Rules 3.1(a)(iv)–(v).

[50] The fees were waived through September 2019 for the first Market-Maker and Electronic Access GTH Trading Permits.

[51] *See* Cboe Options Fees Schedule.

[52] Id.

[53] Id.

[54] Due to the October 7 migration, the Exchange had amended the TP Sliding Scale Programs to provide that any commitment to Trading Permits under the TP Sliding Scales shall be in place through September 2019, instead of the calendar year. *See* Cboe Options Fees Schedule, Footnotes 24 and 25.

automatically for the next month unless the Trading Permit Holder submits written notification to the Membership Services Department by 4 p.m. CT on the second-to-last business day of the prior month to cancel the Trading Permit effective at or prior to the end of the applicable month. Trading Permit Holders will only be assessed a single monthly fee for each type of electronic Trading Permit it holds.

First, TPHs no longer need to hold multiple permits for each type of electronic Trading Permit (*i.e.,* electronic Market-Maker Trading Permits and/or and Electronic Access Permits). Rather, for electronic access to the Exchange, a TPH need only purchase one of the following permit types for each trading function the TPH intends to perform: Market-Maker Electronic Access Permit (''MM EAP'') in order to act as an off-floor Market-Maker and which will continue to be assessed a monthly fee of $5,000, Electronic Access Permit (''EAP'') in order to submit orders electronically to the Exchange [55] and which will be assessed a monthly fee of $3,000, and a Clearing TPH Permit, for TPHs acting solely as a Clearing TPH, which will be assessed a monthly fee of $2,000 (and is more fully described below). For example, a TPH organization that wishes to act as a Market-Maker and also submit orders electronically in a non-Market Maker capacity would have to purchase one MM EAP and one EAP. TPHs will be assessed the monthly fee for each type of Permit once per electronic access capacity.

Next, the Exchange proposes to adopt a new Trading Permit, exclusively for Clearing TPHs that are approved to act solely as a Clearing TPH (as opposed to those that are also approved in a capacity that allows them to submit orders electronically). Currently any TPH that is registered to act as a Clearing TPH must purchase an EAP, whether or not that Clearing TPH acts solely as a Clearing TPH or acts as a Clearing TPH and submits orders electronically. The Exchange proposes to adopt a new Trading Permit, for any TPH that is registered to act solely as Clearing TPH at a discounted rate of $2,000 per month.[56]

Additionally, the Exchange proposes to eliminate its fees for Global Trading Hours Trading Permits. Particularly, the Exchange proposes to provide that any Market-Maker EAP, EAP and Clearing TPH Permit provides access (at no additional cost) to the GTH session.[57] Additionally, the Exchange proposes to amend Footnote 37 of the Fees Schedule regarding GTH in connection with the migration. Currently Footnote 37 provides that separate access permits and connectivity is needed for the GTH session. The Exchange proposes to eliminate this language as that is no longer the case post-migration (*i.e.,* an electronic Trading Permits will grant access to both sessions and physical and logical ports may be used in both sessions, eliminating the need to purchase separate connectivity). The Exchange also notes that in connection with migration, the Book used during Regular Trading Hours (''RTH'') will be the same Book used during GTH (as compared to pre-migration where the Exchange maintained separate Books for each session). The Exchange therefore also proposes to eliminate language in Footnote 37 stating that GTH is a segregated trading session and that there is no market interaction between the two sessions.

The Exchange next proposes to adopt MM EAP Appointment fees. By way of background, a registered Market-Maker may currently create a Virtual Trading Crowd (''VTC'') Appointment, which confers the right to quote electronically in an appropriate number of classes selected from ''tiers'' that have been structured according to trading volume statistics, except for the AA tier.[58] Each Trading Permit historically held by a Market-Maker had an appointment credit of 1.0. A Market-Maker could select for each Trading Permit the Market-Maker held any combination of classes whose aggregate appointment cost did not exceed 1.0. A Market-Maker could not hold a combination of appointments whose aggregate appointment cost was greater than the number of Trading Permits that Market-Maker held.[59]

As discussed, post-migration, bandwidth allocation, logins and appointment costs are no longer tied to a single Trading Permit and therefore TPHs no longer need to have multiple permits for each type of electronic Trading Permit. Market-Makers must still select class appointments in the classes they seek to make markets electronically.[60] Particularly, a Market-Maker firm will only be required to have one permit and will thereafter be charged for one or more ''Appointment Units'' (which will scale from 1 ''unit'' to more than 5 ''units''), depending on which classes they elect appointments in. Appointment Units will replace the standard 1.0 appointment cost, but function in the same manner. Appointment weights (formerly known as ''appointment costs'') for each appointed class will be set forth in Cboe Options Rule 5.50(g) and will be summed for each Market-Maker in order to determine the total appointment units, to which fees will be assessed. This was the manner in which the tier costs per class appointment were summed to meet the 1.0 appointment cost, the only difference being that if a Market-Maker exceeds this ''unit'', then their fees will be assessed under the ''unit'' that corresponds to the total of their appointment weights, as opposed to holding another Trading Permit because it exceeded the 1.0 ''unit''. Particularly, the Exchange proposes to adopt a new MM EAP Appointment Sliding Scale. Appointment Units for each assigned class will be aggregated for each Market-Maker and Market-Maker affiliate. If the sum of appointments is a fractional amount, the total will be rounded up to the next highest whole Appointment Unit. The following lists the progressive monthly fees for Appointment Units: [61]

Market-Maker EAP appointments	Quantity	Monthly fees (per unit)
Appointment Units	1	$0
	2	6,000
	3 to 5	4,000
	>5	3,100

As noted above, upon migration the Exchange required separate Trading Permits for on-floor and off-floor activity. As such, the Exchange

[55] EAPs may be purchased by TPHs that both clear transactions for other TPHs (*i.e.,* a ''Clearing TPH'') and submit orders electronically.

[56] Cboe Option Rules provides the Exchange authority to issue different types of Trading Permits which allows holders, among other things, to act in one or more trading functions authorized by the Rules. *See* Cboe Options Rule 3.1(a)(iv). The Exchange notes that currently 17 out of 38 Clearing TPHs are acting solely as a Clearing TPH on the Exchange.

[57] The Exchange notes that Clearing TPHs must be properly authorized by the Options Clearing Corporation (''OCC'') to operate during the Global Trading Hours session and all TPHs must have a Letter of Guarantee to participate in the GTH session (as is the case today).

[58] *See* Cboe Options Rule 5.50 (Appointment of Market-Makers).

[59] For example, if a Market-Maker selected a combination of appointments that has an aggregate appointment cost of 2.5, that Market-Maker must hold at least 3 Market-Maker Trading Permits.

[60] *See* Cboe Options Rule 5.50(a).

[61] For example, if a Market-Maker's total appointment costs amount to 3.5 unites, the Market-Maker will be assessed a total monthly fee of $14,000 (1 appointment unit at $0, 1 appointment unit at $6,000 and 2 appointment units at $4,000) as and for appointment fees and $5,000 for a Market-Maker Trading Permit, for a total monthly sum of $19,000, where a Market-Maker currently (*i.e.,* prior to migration) with a total appointment cost of 3.5 would need to hold 4 Trading Permits and would therefore be assessed a monthly fee of $20,000.

proposes to maintain a Floor Broker Trading Permit and adopt a new Market-Maker Floor Permit for on-floor Market-Makers. In addition, RUT, SPX, and VIX Tier Appointment fees will be charged separately for Permit, as discussed more fully below.

As briefly described above, the Exchange currently maintains TP Sliding Scales, which allow Market-Makers and Floor Brokers to pay reduced rates for their Trading Permits if they commit in advance to a specific tier that includes a minimum number of eligible Market-Maker and Floor Broker Trading Permits, respectively, for each calendar year. The Exchange proposes to eliminate the current TP Sliding Scales, including the requirement to commit to a specific tier, and replace it with new TP Sliding Scales as follows: [62]

Floor TPH permits	Current permit qty	Current monthly fee (per permit)	Proposed permit qty	Proposed monthly fee (per permit)
Market-Maker Floor Permit	1–10	$5,000	1	$6,000
	11–20	3,700	2 to 5	4,500
	21 or more	1,800	6 to 10	3,500
			>10	2,000
Floor Broker Permit	1	9,000	1	7,500
	2–5	5,000	2 to 3	5,700
	6 or more	3,000	4 to 5	4,500
			>5	3,200

Floor Broker ADV Discount

Footnote 25, which governs rebates on Floor Broker Trading Permits, currently provides that any Floor Broker that executes a certain average of customer or professional customer/voluntary customer (collectively ''customer'') open-outcry contracts per day over the course of a calendar month in all underlying symbols excluding Underlying Symbol List A (except RLG, RLV, RUI, and UKXM), DJX, XSP, and subcabinet trades (''Qualifying Symbols''), will receive a rebate on that TPH's Floor Broker Trading Permit Fees. Specifically, any Floor Broker Trading Permit Holder that executes an average of 15,000 customer (''C'' origin code) and/or professional customer and voluntary customer (''W'' origin code) open-outcry contracts per day over the course of a calendar month in Qualifying Symbols will receive a rebate of $9,000 on that TPH's Floor Broker Trading Permit fees. Additionally, any Floor Broker that executes an average of 25,000 customer open-outcry contracts per day over the course of a calendar month in Qualifying Symbols will receive a rebate of $14,000 on that TPH's Floor Broker Trading Permit fees. The Exchange proposes to maintain, but modify, its discount for Floor Broker Trading Permit fees. First, the measurement criteria to qualify for a rebate will be modified to only include customer (''C'' origin code) open-outcry contracts executed per day over the course of a calendar month in all underlying symbols, while the rebate amount will be modified to be a percentage of the TPH's Floor Broker Permit total costs, instead of a straight rebate.[63] The criteria and corresponding percentage rebates are noted below.[64]

Floor broker ADV discount tier	ADV	Floor broker permit rebate (percent)
1	0 to 99,999	0
2	100,000 to 174,999	15
3	>174,999	25

Next, the Exchange proposes to modify its SPX, VIX and RUT Tier Appointment Fees. Currently, these fees are assessed to any Market-Maker TPH that either (i) has the respective SPX, VIX or RUT appointment at any time during a calendar month and trades a specified number of contracts or (ii) trades a specified number of contracts in open outcry during a calendar month. More specifically, the Fees Schedule provides that the $3,000 per month SPX Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an SPX Tier Appointment at any time during a calendar month and trades at least 100 SPX contracts while that appointment is active or (ii) conducts any open outcry transaction in SPX or SPX Weeklys at any time during the month. The $2,000 per month VIX Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an SPX Tier Appointment at any time during a calendar month and trades at least 100 VIX contracts while that appointment is active or (ii) conducts at least 1000 open outcry transaction in VIX at any time during the month. Lastly, the $1,000 RUT Tier Appointment is assessed to any Market-Maker Trading Permit Holder that either (i) has an RUT Tier Appointment at any time during a calendar month and trades at least 100 RUT contracts while that appointment is active or (ii) conducts at least 1000 open outcry transaction in RUT at any time during the month.

Because the Exchange is separating Market-Maker Trading Permits for electronic and open-outcry market-making, the Exchange will be assessing separate Tier Appointment Fees for each type of Market-Maker Trading Permit. The Exchange proposes that a MM EAP will be assessed the Tier Appointment Fee whenever the Market-Maker executes the corresponding specified number of contracts, if any. The Exchange also proposes to modify the threshold number of contracts a Market-Maker must execute in a month to trigger the fee for SPX, VIX and RUT. Particularly, for SPX, the Exchange proposes to eliminate the 100 contract threshold for electronic SPX executions.[65] The Exchange notes that

[62] In light of the proposed change to eliminate the TP Sliding Scale, the Exchange proposes to eliminate Footnote 24 in its entirety.

[63] As is the case today, the Floor Broker ADV Discount will be available for all Floor Broker Trading Permits held by affiliated Trading Permit Holders and TPH organizations.

[64] In light of the proposal to eliminate the TP Sliding Scales and the Floor Broker rebates currently set forth under Footnote 25, the Exchange proposes to eliminate Footnote 25 in its entirety.

[65] The Exchange notes that subsequent to the Original Filing that proposed these changes on October 1 and 2, 2019 (SR–CBOE–2019–077 and SR–CBOE–2019–082), and subsequent to the Second Proposed Rule Change filing that proposed these changes on November 29, 2019 (SR–CBOE–2019–111), the Exchange amended the proposed Market-Maker Tier Appointment fees to provide that the SPX Tier Appointment Fee will be assessed to any Market-Maker EAP that executes at least 1,000 contracts in SPX (including SPXW) excluding contracts executed during the opening rotation on the final settlement date of VIX options and futures with the expiration used in the VIX settlement calculation in filing No. SR–CBOE–2019–124. The additions proposed by filing SR–CBOE–2019–124 are double underlined in Exhibit 5A and the deletions are doubled bracketed in Exhibit 5A.

historically, all TPHs that trade SPX electronically executed more than 100 contracts electronically each month (*i.e.,* no TPH electronically traded between 1 and 100 contracts of SPX). As no TPH would currently be negatively impacted by this change, the Exchange proposes to eliminate the threshold for SPX and align the electronic SPX Tier Appointment Fee with that of the floor SPX Tier Appointment Fee, which is not subject to any executed volume threshold. For the VIX and RUT Tier appointments, the Exchange proposes to increase the threshold from 100 contracts a month to 1,000 contracts a month. The Exchange notes the Tier Appointment Fee amounts are not changing.[66] In connection with the proposed changes, the Exchange proposes to relocate the Tier Appointment Fees to a new table and eliminate the language in the current respective notes sections of each Tier Appointment Fee as it is no longer necessary.

Trading Permit Holder Regulatory Fee

The Fees Schedule provides for a Trading Permit Holder Regulatory Fee of $90 per month, per RTH Trading Permit, applicable to all TPHs, which fee helps more closely cover the costs of regulating all TPHs and performing regulatory responsibilities. In light of the changes to the Exchange's Trading Permit structure, the Exchange proposes to eliminate the TPH Regulatory Fee. The Exchange notes that there is no regulatory requirement to maintain this fee.

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.[67] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[68] 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 Section 6(b)(4) of the Act,[69] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[70] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange first stresses that the proposed changes were not designed with the objective to generate an overall increase in access fee revenue, as demonstrated by the anticipated loss of revenue discussed above. Rather, the proposed changes were prompted by the Exchange's technology migration and the adoption of a new (and improved) connectivity infrastructure, rendering the pre-migration structure obsolete. Such changes accordingly necessitated an overhaul of the Exchange's previous access fee structure and corresponding fees. Moreover, the proposed changes more closely align the Exchange's access fees to those of its Affiliated Exchanges, and reasonably so, as the Affiliated Exchanges offer substantially similar connectivity and functionality and are on the same platform that the Exchange has now migrated to.

The Exchange also operates in a highly competitive environment. The SEC Division of Trading and Markets' Fee Guidance provides that in determining whether a proposed fee is constrained by significant competitive forces, the Commission will consider whether there are reasonable substitutes for the product or service that is the subject of a proposed fee. As described in further detail below, the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options, some of which have similar or lower connectivity fees.[71] Based on publicly available information, no single options exchange has more than 17% of the market share as of October 21, 2020.[72] Further, low barriers to entry mean that new exchanges may rapidly and inexpensively enter the market and offer additional substitute platforms to further compete with the Exchange. For example, there have been 4 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Cboe EDGX Inc., Nasdaq MRX, LLC, MIAX Pearl, LLC and MIAX Emerald LLC).

There is also no regulatory requirement that any market participant connect to any one options exchange, that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a TPH broker.[73] Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. In fact, the Exchange believes that as of October 21, 2020, only 3 broker-dealers out of approximately 250 broker-dealers that are members of at least one exchange that lists options for trading were members of all 16 options exchanges.[74] Additionally, several broker-dealers are members of only a single exchange that lists options for trading.[75] The Exchange has also identified numerous broker-dealers that are members of other options exchanges, but not the Exchange. For example, the Exchange has identified approximately 25 broker-dealers that are members of Nasdaq ISE, LLC (an exchange that lists only options), but not Cboe Exchange, Inc

[66] Floor Broker Trading Surcharges for SPX/SPXW and VIX are also not changing. The Exchange however, is creating a new table for Floor Broker Trading Surcharges and relocating such fees in the Fees Schedule in connection with the proposal to eliminate fees currently set forth in the ''Trading Permit and Tier Appointment Fees'' Table.

[67] 15 U.S.C. 78f(b).

[68] 15 U.S.C. 78f(b)(5).

[69] 15 U.S.C. 78f(b)(4).

[70] 15 U.S.C. 78f(b)(5).

[71] *See e.g.,* Affiliated Exchange Fee Schedules. *See also e.g.,* BOX Options Fees Schedule, Section VI (Technology Fees) and Section IX (Participant Fees).

[72] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 21, 2020), available at *https://markets.cboe.com/us/options/market_statistics/.*

[73] Such market participant would be subject to the fees of that broker. The Exchange notes that such broker is not required to publicize, let alone justify or file with the Commission its fees, and as such could charge the market participant any fees it deems appropriate, even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[74] *See* SEC October 2020 Active Broker Dealer Report, provided by the SEC Office of Managing Executive on October 8, 2020.

[75] *Id.* Approximately 7 broker-dealers are members of the Cboe Exchange, Inc. only, approximately 7 broker-dealers are members of only Nasdaq PHLX LLC, and approximately 3 broker-dealers are members of only Nasdaq ISE, Inc.

(which also lists only options).[76] Similarly, the Exchange has identified at least 4 broker-dealers that trade options and are members of one or more of the Exchange's affiliated options exchanges, but not Cboe Exchange, Inc. Indeed, the number of members at each exchange that trades options varies greatly. Particularly, the number of members of exchanges that trade options vary between approximately 9 and 171 broker-dealers.[77] Even the number of members between the Exchange and its 3 other options exchange affiliates vary. Particularly, while the Exchange currently has 92 members, Cboe C2 has 54 members, Cboe EDGX has 52 members that trade options and Cboe BZX has 66 members that trade options.

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements.[78] Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.

The Exchange is also not aware of any reason why any particular market participant could not simply drop its connections and cease being a TPH of the Exchange if the Exchange were to establish ''unreasonable'' and uncompetitive price increases for its connectivity alternatives. As further evidence of the fact that market participants can and do disconnect from exchanges based on connectivity pricing, R2G Services LLC (''R2G'') filed a comment letter after BOX Exchange LLC (''BOX'') proposed rule changes to increase its connectivity fees (SR–BOX–2018–24, SRBOX–2018–37, and SR–BOX–2019–04).[79] The R2G Letter stated, ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' Accordingly, this example shows that if an exchange sets too high of a fee for connectivity and/or market data services for its relevant marketplace, market participants can choose to disconnect from the Exchange. Moreover, the Exchange does not assess any termination fee for a market participant to drop its connectivity or membership, nor is the Exchange aware of any other costs that would be incurred by a market participant to do so. The Exchange notes that in fact, a number of firms currently do not participate on the Exchange or participate on the Exchange though sponsored access arrangements with other broker-dealers rather than by becoming a member. Additionally, as noted above, only 3 broker-dealers are currently members of all 16 options exchanges, which the Exchange believes further demonstrates that, in addition to the absence of a rule requirement to connect to every option exchange, there is no prevailing business model that would practically require a broker-dealer to connect to every single options exchange.[80] Moreover, of these 3 broker-dealers, only 1 such broker-dealer connects directly to the Exchange and that broker-dealer does not provide connectivity to any other TPH.

Additionally, the Exchange notes that non-TPHs such as Service Bureaus and Extranets resell Cboe Options connectivity.[81] This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-TPHs and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of TPHs that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[82] Moreover, the Exchange has seen an increase in the number of resellers since pre-migration, adding to the pool of potential competitors. In sum, the Exchange believes this creates and fosters a competitive environment and subjects the Exchange to competitive forces in pricing its connectivity. Particularly, in the event that a market participant

[76] *Id.* The Exchange notes this is an increase since June 2020, when approximately 20 broker-dealers were members of ISE but not Cboe Options. *See* SEC June 2020 Active Broker Dealer Report.

[77] *See e.g.,* SEC June 2020 Active Broker Dealer Report. More specifically, 1 exchange had 9 members, 4 exchanges had between 36–50 members, 5 exchanges had between 50–100 members, 4 exchanges had between 100–150 members and 2 exchanges had more than 150 members. The Exchange notes however that some of these exchanges also trade equities and the Exchange is therefore unable to determine how many members at each exchange trade options.

[78] The Exchange notes this discussion is consistent with the Fee Guidance suggestion that any discussion of alternatives should ''include a discussion of how regulatory requirements, particularly best execution obligations, Regulation NMS Rule 611 (the Order Protection Rule), and/or the Options Order Protection and Locked/Crossed Market Plan (Options Linkage Plan), as applicable, affect the competitive analysis.''

[79] See Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Commission, dated March 27, 2019 (the ''R2G Letter'').

[80] The Exchange further notes that these 3 broker-dealers represent different market participants. Particularly, 1 of these broker-dealers is a bulge bracket bank, 1 is a brokerage firm and 1 is a clearing firm.

[81] Prior to migration, there were 13 firms that resold Cboe Options connectivity. Post-migration, the Exchange anticipated that there would be 19 firms that resell Cboe Options connectivity (both physical and logical) and as of October 2020 there are 17 firms that resell Cboe Options connectivity. The Exchange does not have specific knowledge as to what latency a market participant may experience using an indirect connection versus a direct connection and notes it may vary by the service provided by the extranet provider and vary between extranet providers. The Exchange believes however, that there are extranet providers able to provide connections with a latency that is comparable to latency experienced using a direct connection.

[82] The Exchange notes that resellers are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

views the Exchange's direct connectivity and access fees as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 options markets. For example, two TPHs that connected directly to the Exchange pre-migration, began connecting indirectly via an extranet provider shortly after the October 2019 migration and currently still connect via extranets. An additional four TPHs transitioned to indirect connectivity from direct connectivity in or around February 2020, which was the first month after the legacy Network Access Ports were decommissioned. The Exchange notes that it has not received any comments that, and has no evidence to suggest, the six total TPHs that transitioned from direct connections to an indirect connections post-migration were the result of an undue financial burden resulting from the proposed fee changes.[83] Rather, the Exchange believes the transitions demonstrate that indirect connectivity is in fact a viable option for market participants, therefore reflecting a competitive environment that the Exchange must be mindful of when determining its connectivity fees.[84] It further demonstrates the manner in which market participants connect to the Exchange is entirely within the discretion of market participants, who can consider the fees charged by the Exchange and by resellers when making decisions.

Additionally, pre-migration, in August 2019, the Exchange had 97 members (TPH organizations), of which nearly half connected indirectly to the Exchange.[85] Similarly, in December 2019, after a new broker-dealer became a member of the Exchange in late November 2019,[86] the Exchange had 97 members, of which nearly half of the participants connected indirectly to the Exchange. More specifically, in December 2019, 47 TPHs connected directly to the Exchange and accounted for approximately 66% of the Exchange's volume, 46 TPHs connected indirectly to the Exchange and accounted for approximately 29% of the Exchange's volume and 4 TPHs utilized both direct and indirect connections and accounted for approximately 5% of the Exchange's volume.[87] In December 2019, TPHs that connected directly to the Exchange purchased a collective 179 physical ports (including legacy physical ports), 144 of which were 10 Gb ports and 35 of which were 1 Gb ports.[88] The Exchange notes that of those market participants that do connect to the Exchange, it is the individual needs of each market participant that determine the amount and type of Trading Permits and physical and logical connections to the Exchange.[89] With respect to physical connectivity, many TPHs were able to purchase small quantities of physical ports. For example, approximately 36% of TPHs that connected directly to the Exchange purchased only one to two 1 Gb ports, approximately 40% purchased only one to two 10 Gb ports, and approximately 40% had purchased a combined total of one to two ports (for both 1 Gb and 10 Gb). Further, no TPHs that connected directly to the Exchange had more than five 1 Gb ports, and only 8.5% of TPHs that connected directly to the Exchange had between six and ten 10 GB ports and only 8.5% had between ten and fourteen 10 Gb ports. There were also a combined total of 41 ports used for indirect connectivity (twenty-one 1 Gb ports and twenty 10 Gb ports).[90] The Exchange notes that all types of members connected indirectly to the Exchange including Clearing firms, Floor Brokers, order flow providers, and on-floor and off-floor Market-Makers, further reflecting the fact that each type of market participant has the option to participate on an exchange without direct connectivity. Indeed, market participants choose if and how to connect to a particular exchange and because it is a choice, the Exchange must set reasonable connectivity pricing, otherwise prospective members would not connect and existing members would disconnect or connect through a third-party reseller of connectivity.[91]

Moreover, the Exchange notes that the Commission itself has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [92] The number of available exchanges to connect to ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees for access to its market. The Exchange is also not aware of any evidence that has been offered or demonstrated that a market share of approximately 17% provides the Exchange with anti-competitive pricing power. Indeed, the Exchange believes for all the reasons articulated above, that its market share does not provide it with anti-competitive pricing power. Moreover, the Exchange believes the fact that it can lose, and has lost, market share demonstrates the competitive forces to which the Exchange is subject. For example, in 2019 and through March 2020, the Exchange generally had a market share percentage in the low to mid 20s. Since March 2020, the Exchange's market share has generally been in the mid to high teens.[93] Furthermore, the Exchange's affiliated options exchanges have substantially similar physical and logical connectivity fees, notwithstanding a much lower market share ranging from approximately

[83] The Exchange notes that TPHs are not required to specify to the Exchange why it opts to no longer be a TPH, or why it cancels its ports, nor is a non-TPH market participating required to specify to the Exchange why it opts to not be a TPH and directly connect to the Exchange.

[84] In the post-migration period between February 2020 and June 2020, approximately 38 TPHs on average were directly connected to the Exchange each month, which is notably fewer than the approximately 45 TPHs that were directly connected each month during the pre-migration period between June 2017 through September 2019.

[85] The Exchange notes that one firm terminated in late September 2019, but that it believes it was unrelated to the migration and the proposed fee changes.

[86] In February 2020, such member also became a member of the Exchange's affiliated options exchanges, which have similar physical and logical connectivity fees to the proposed fees in this filing.

[87] Between June 2017 and December 2019, the number of TPHs that connected directly to the Exchange ranged from 43 to 47 TPHs and on average, accounted for an average of approximately 61% of the Exchange's total volume each month.

[88] Of the 4 TPHs that connected both directly and indirectly to the Exchange, 1 TPH had two 1 Gb Ports and the remaining 3 TPHs had a combined total of six 10 Gb ports.

[89] To assist market participants that are connected or considering connecting to the Exchange, the Exchange provides detailed information and specifications about its available connectivity alternatives in the Cboe C1 Options Exchange Connectivity Manual, as well as the various technical specifications. *See http://markets.cboe.com/us/options/support/technical/.*

[90] The Exchange notes that it does not know how many, and which kind of, connections each TPH that indirectly connects to the Exchange has.

[91] As shown above, the availability of 15 alternative options exchanges in addition to the viable option of indirect connectivity demonstrates that substitute connectivity products and services do exist, supporting the assertion the proposed fees are constrained by competitive forces.

[92] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[93] *See* The Options Clearing Corporation, Market Data, Daily Volume, available at *https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Daily-Volume.*

2.5%–9%.[94] As discussed extensively, if an exchange sets too high of a fee for connectivity and/or market data services for its relevant marketplace, market participants can choose to disconnect from the Exchange.

The Exchange also believes that competition in the marketplace constrains the ability of exchanges to charge supracompetitive fees for access to its market, even if such market, like the Exchange, offers proprietary products exclusive to that market. Notably, just as there is no regulatory requirement to become a member of any one options exchange, there is also no regulatory requirement for any market participant to trade any particular product, nor is there any requirement that any Exchange create or indefinitely maintain any particular product.[95] The Exchange also highlights that market participants may trade an Exchange's proprietary products through a third-party without directly or indirectly connecting to the Exchange. Additionally, market participants may trade any options product, including proprietary products, in the unregulated Over-the-Counter (OTC) markets for which there is no requirement for fees related to those markets to be public. Given the benefits offered by trading options on a listed exchange, such as increased market transparency and heightened contra-party creditworthiness due to the role of the Options Clearing Corporation as issuer and guarantor, the Exchange generally seeks to incentivize market participants to trade options on an exchange, which further constrains connectivity pricing. Market participants may also access other exchanges to trade other similar or competing proprietary or multi-listed products. Alternative products to the Exchange's proprietary products may include other options products, including options on ETFs or options futures, as well as particular ETFs or futures. For example, exclusively listed SPX options may compete with the following products traded on other markets: Multiply-listed SPY options (options on the ETF), E-mini S&P 500 Options (options on futures), and E-Mini S&P 500 futures (futures on index). Additionally, exclusively listed VIX options may compete with the following products traded on other markets: Multiply-listed VXX options (options on the ETF) and exclusively listed SPIKES options on the Miami International Securities Exchange, LLC (''MIAX'').[96] Other options exchanges are also not precluded from creating new proprietary products that may achieve similar objectives to (and therefore compete with) the Exchange's existing proprietary products. For example, Nasdaq PHLX exclusively lists options on the Nasdaq-100, which options, like index options listed on the Exchange, offer investors an alternative method to manage and hedge portfolio exposure to the U.S. equity markets. Indeed, even though exclusively listed proprietary products may not be offered by competitors, a competitor could create similar products if demand were adequate. As noted above for example, MIAX created its exclusive product SPIKES specifically to compete against VIX options.[97] In connection with a recently proposed amendment to the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[98] the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. Specifically, the Commission contemplated the possibility of a forced exit by an exchange as a result of a proposed amendment that could reduce the amount of CAT funding a participant could recover if certain implementation milestones were missed. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[99] The Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.''[100] The Commission further recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[101] Similarly, although the Exchange may have proprietary products not offered by other competitors, not unlike unique business models, a competitor could create similar products to an existing proprietary product if demand were adequate. As noted above, other exchanges, that have comparable connectivity fees, also currently offer exclusively listed products.[102] As such, the Exchange is still very much subject to competition and does not possess anti-competitive pricing power, even with its offering of proprietary products. Rather, the Exchange must still set reasonable connectivity pricing, otherwise prospective members would not connect, and existing members would disconnect or connect through a third-party reseller of connectivity, regardless of what products its offers.

Recently, on October 16, 2020, the Commission approved a proposal by NYSE National, Inc. (''NYSE National'') to adopt fees for the NYSE National Integrated Feed (a NYSE National-only market data feed), finding that NYSE National provided sufficient information to demonstrate that it was subject to significant substitution-based competitive forces in setting the proposed fees.[103] In the approval order,

[94] *See* Cboe Global Markets U.S. Options Market Volume Summary (August 31, 2020), available at *https://markets.cboe.com/us/options/market_statistics/.*

[95] If an option class is open for trading on another national securities exchange, the Exchange may delist such option class immediately. For proprietary products, the Exchange may determine to not open for trading any additional series in that option class; may restrict series with open interest to closing transactions, provided that, opening transactions by Market-Makers executed to accommodate closing transactions of other market participants and opening transactions by TPH organizations to facilitate the closing transactions of public customers executed as crosses pursuant to and in accordance with Rule 6.74(b) or (d) may be permitted; and may delist the option class when all series within that class have expired. *See* Cboe Rule 4.4, Interpretations and Policies .11.

[96] MIAX has described SPIKES options as ''designed specifically to compete head-to-head against Cboe's proprietary VIX® product.'' *See* MIAX Press Release, *SPIKES Options Launched on MIAX,* February 21, 2019, *available at https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_02212019.pdf.*

[97] *Id.*

[98] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See e.g.,* Nasdaq PHLX LLC Rules, (Options 7 Pricing Schedule), Section 8A (Permit and Registration Fees) which provide for floor permit fees between $4,000 to $6,000 per permit and Section 9B (Port Fees), which provides various port fees ranging from $500 to $1,250 per port. *See also* Nasdaq PHLX LLC Rules, General 8 Connectivity, which provides for monthly physical connectivity fees including fees for 1 Gb physical connections priced at $2,500 per port and for 10 Gb physical connections starting at $10,000 per port and *see* MIAX Options Fees Schedule, Section 3b (Membership Fees, Monthly Trading Permit Fee), which provides for trading permit fees ranging from $1,500 to $22,000 per permit (which may include market-maker appointment costs) and Section 5 (System Connectivity Fees) which provides for monthly physical connectivity fees including fees for 1 Gb physical connections priced at $1,400 per port and for 10 Gb physical connections priced at $6,100 per port.

[103] *See* Securities Exchange Act Release No. 90217 (October 16, 2020) (SR–NYSENAT–2020–

Continued

the Commission cited NetCoalition I, in which the D.C. Circuit in vacating the Commission's 2008 ArcaBook Approval Order, stated ''the existence of a substitute does not necessarily preclude market power,'' that ''whether a market is competitive notwithstanding potential alternatives depends on factors such as the number of buyers who consider other products interchangeable and at what prices,'' and that ''[t]he inquiry into whether a market for a product is competitive . . . focuses on . . . the product's elasticity of demand.'' [104] The Commission also noted that the court found that the Commission's analysis of alternatives in the 2008 ArcaBook Approval Order did not reveal the number of potential users of the data or how they might react to a change in price.[105] The court also stated that there was no information regarding how many traders accessed NYSE Arca's depth-of-book data during the period it was offered without charge (and thus how many traders might have been interested in paying for NYSE Arca's depth-of-book data), or whether the traders who wanted depth-of-book data would have declined to purchase it if met with a supracompetitive price.[106] In contrast to the facts in the 2008 ArcaBook Approval Order, the Commission pointed out in the NYSE National Approval Order that NYSE National had in fact provided information regarding potential users of the proposed data feed, along with information regarding the reactions of users to the change in price. The Commission also cited information that was provided to show that market participants did not subscribe to the data feed, even when the fee was offered for free. The Commission ultimately relied on, in part, this information in making its determination that NYSE National was subject to significant competitive forces in pricing their product.

The Exchange points out that it too has provided similar types of information to the Commission and believes such information supports the finding that the Exchange is subject to significant substitution-based competitive forces in pricing its connectivity and access fees. For instance, the Exchange noted there are approximately 250 broker-dealers that are potential ''users'' of the Exchange's services (*i.e.,* broker-dealers who are members of at least one options exchange and may become a member of, and/or connect directly to, the Exchange). Additionally, the Exchange provided the number of broker-dealers that are members of the Exchange (approximately 92—which is less than half of the potential user base) and the number of members that have connected directly to the Exchange (approximately 38—which is less than half of the Exchange's members). The Exchange also provided information demonstrating that market participants have access to one or more substitutes to (i) trade options without becoming a member of the Exchange (*e.g.,* the availability of 15 other options exchanges, the ability to trade through a third-party, and the ability to trade options products in the OTC market) and (ii) connect indirectly to the Exchange (*e.g.,* the ability to connect indirectly through one of 17 third-party resellers). The Exchange also cited to data demonstrating TPHs can, and have, transitioned their direct access to indirect access (6 TPHs transitioned to indirect connectivity subsequent to this proposed rule change).[107] Furthermore, the Exchange provided information relating to the number of market participants that are either not members of the Exchange (at least 25 broker-dealers [108]) or that do not or did not connect directly to the Exchange both after and before the fee change (approximately 38). Lastly, the Exchange has described the reactions of TPHs to the price change, received both informally and formally, and which again, were notably positive. The Exchange stresses that the proof of competitive constraints does not depend on showing that members walked away, or threatened to walk away, from a product due to a pricing change. Rather, the very absence of such negative feedback (in and of itself, and particularly when coupled with positive feedback) is indicative that the proposed fees are, in fact, reasonable and consistent with the Exchange being subject to competitive forces in setting fees. Accordingly, the Exchange believes the Commission has a sufficient basis to determine that the Exchange was subject to significant competitive forces in setting the terms of its proposed fees. Moreover, the Commission has found that, if an exchange meets the burden of demonstrating it was subject to significant competitive forces in setting its fees, the Commission ''will find that its fee rule is consistent with the Act unless ''there is a substantial countervailing basis to find that the terms'' of the rule violate the Act or the rules thereunder.'' [109] The Exchange is not aware of, nor has the Commission articulated, a substantial countervailing basis for finding the proposal violates the Act or the rules thereunder.

In addition to all the reasons discussed above, the Exchange believes its proposed fees are reasonable in light of the numerous benefits the new connectivity infrastructure provides market participants. As described, the post-migration connectivity architecture provides for a latency equalized infrastructure, improved system performance, and increased sustained order and quote per second capacity. As such, even where a fee for a particular type or kind of connectivity may be higher than it was to its pre-migration equivalent, such increase is reasonable given the increased benefits market participants are getting for a similar or modestly higher price. Moreover, as noted above, the objective of the proposed fee changes was not to generate an overall increase in access fee revenue, but rather adopt fees in connection with a new (and improved) connectivity infrastructure. Indeed, the Exchange tried to the best of its ability to approximate the overall connectivity revenue generated by the Exchange's pre-migration fees. Notably, the Exchange's pre-migration access fees were previously filed with the Commission and not suspended nor disapproved.[110] The Exchange further

005) (order approving proposed fees for NYSE National Integrated Feed) (''NYSE National Approval Order'').

[104] See NetCoalition v. SEC, 615 F.3d 525, 542 (D.C. Cir. 2010) (''NetCoalition I'') (internal quotation marks omitted).

[105] *Id.*

[106] *Id.*

[107] The Exchange again notes however that the TPHs did not explain to the Exchange as to why they terminated their direct connectivity in favor of connecting indirectly to the Exchange.

[108] As discussed, the Exchange identified approximately 25 broker-dealers that are members of Nasdaq ISE, LLC (an exchange that lists only options) and not members the Exchange. The Exchange believes there are additional broker-dealers that trade options but do not trade on the Exchange, but uses the ISE comparison as an example.

[109] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order'') (approving proposed rule change to establish fees for a depth-of-book market data product).

[110] Although the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended 19(b) of the Exchange Act to provide that SROs' fee changes become immediately effective on filing, the legislative history makes clear that while Congress intended to streamline SROs' rule filing procedures, the proposed change did not ''[diminish]the SEC's authority to reject an improperly filed rule, disapprove a rule that is not consistent with the Exchange Act or [diminish] the applicable public notice and comment period.'' *See* S. Rep 111–176, at 106 (2010). The Commission therefore had every right to pursue a suspension and disapproval order of prior rule filings that adopted or amended connectivity fees that were in place prior to the migration if it had believed any proposed fees in those rule filings were not consistent with the

believes that the reasonableness of its proposed connectivity fees is demonstrated by the very fact that such fees are in line with, and in some cases lower than, the costs of connectivity at other Exchanges,[111] including its own affiliated exchanges which have the same connectivity infrastructure as the Exchange currently does since migration.[112] The Exchange notes these fees were similarly filed with the Commission and not suspended nor disapproved.[113] Particularly, the Exchange's affiliate C2, previously migrated to the same trading platform to which the Exchange has now migrated. In that connection, C2 overhauled its connectivity structure and adopted similar connectivity fees under similar circumstances as those proposed herein.[114] The Commission did not suspend that C2 proposed rule change and did not contend that C2 had failed to demonstrate its proposal was reasonable, equitable and not unfairly discriminatory. The C2 migration filing was filed subsequent to the D.C. Circuit decision in Susquehanna Int'l Grp., LLC v. SEC, 866 F.3d 442 (D.C. Cir. 2017), meaning that such filing was subject to the same (and current) standard for SEC review and approval as the standard to which this filing is subject.

Furthermore, in determining the proposed fee changes discussed above, the Exchange reviewed the current competitive landscape, considered the fees historically paid by market participants for connectivity to the pre-migration system, and also assessed the impact on market participants to ensure that the proposed fees would not create an undue financial burden on any market participants, including smaller market participants. Indeed, the Exchange received no comments from any TPH suggesting that it was unduly burdened by the proposed changes described herein, which were first announced via Exchange Notice nearly two months in advance of the migration (now over one year ago),[115] nor were any timely comment letters received by the Commission by the comment period submission deadline of November 12, 2019. The Exchange again underscores the fact that no comment letters were received in response to its Second, Third, Fifth or Sixth Proposed Rule Change, and that no individual market participant has provided any written comments specifically suggesting that the Exchange has failed to provide sufficient information in the Original, Second, Third, Fourth, Fifth, or Sixth Proposed Rule Change to meets its burden to demonstrate its proposed fees are consistent with the requirements of the Exchange Act. As discussed, the three comment letters the Exchange did receive on its Original Filing and the Fourth and Seventh Proposed Rule Changes were all submitted by the same industry participant and consisted of conclusory statements and factual inaccuracies. More importantly, the Exchange received three *positive* comment letters from members (which the Exchange believes is rare with respect to fees), all of which expressed their support for the proposed fees; noting the belief that the fees were reasonable and encouraging the Commission to allow the fees to remain effective.[116]

Furthermore, the Exchange wishes to highlight that at least two market participants have in fact expanded their connectivity footprint since the implementation of the proposed fee changes. One of those market participants was a TPH that had discussed terminating its membership from the Exchange altogether prior to migration. However, after that TPH reviewed the notice the Exchange issued describing the proposed post-migration fees, the TPH relayed to the Exchange that it would instead remain a member and add logical connectivity in light of the cost savings it expected to realize due to the proposed changes. The Exchange believes this further demonstrates competition within the market for exchange connectivity, which as a result constrains fees the Exchange may charge for that connectivity. Another TPH, that prior to migration acted only as a proprietary trading firm, added the trading function as a Market-Maker on the Exchange (which required the purchase of additional trading permits and connectivity). The Exchange also notes that since migration, one TPH terminated its membership with the Exchange but retained its membership with 10 other SROs.[117] The Exchange believes the fact that only one TPH terminated in the past eleven months but retained its memberships at other options exchanges demonstrates the proposed fees are appropriate and reasonable and not unduly burdensome. While the TPH that did terminate did not specify to the Exchange why it ended its membership, if it had in fact determined that the Exchange's proposed connectivity fees did not make business sense for itself, for all the reasons discussed above, it was free to leave the Exchange at no cost and retain its membership with other SROs and/or pursue new memberships.

The proposed connectivity structure and corresponding fees, like the pre-migration connectivity structure and fees, continue to provide market participants flexibility with respect to how to connect to the Exchange based on each market participants' respective business needs. For example, the amount and type of physical and logical ports are determined by factors relevant and specific to each market participant, including its business model, costs of connectivity, how its business is segmented and allocated and volume of messages sent to the Exchange. Moreover, the Exchange notes that it

Exchange Act. Additionally, the Commission did not request additional data or discussion in connection with prior rule filings regarding connectivity fees, as it has with respect to the proposed fees in this filing (and its previous versions). In the absence of such an order, the Exchange presumes that its pre-migration fees were reasonable and consistent with the Exchange Act.

[111] *See e.g.,* Nasdaq PHLX and ISE Rules, General Equity and Options Rules, General 8. Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection. *See also* Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. *See also* NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit.

[112] *See e.g.,* Affiliated Exchange Fee Schedules, Physical Connectivity Fees. For example, Cboe BZX, Cboe EDGX and C2 each charge a monthly fee of $2,500 for each 1Gb connection and $7,500 for each 10Gb connection.

[113] For the same reason noted above, the Exchange presumes that the fees of other exchanges, including its affiliates, are reasonable, as required by the Exchange Act in the absence of any suspension or disapproval order by the Commission providing otherwise.

[114] *See* Securities Exchange Act Release No. 83201 (May 9, 2018), 83 FR 22546 (May 15, 2018) (SR–C2–2018–006).

[115] *See* Exchange Notice ''Cboe Options Exchange Access and Capacity Fee Schedule Changes Effective October 1, 2019 and November 1, 2019'' Reference ID C2019081900.

[116] *See* Letters from Steve Crutchfield, Head of Market Structure, Chicago Trading Company (''CTC'') and William Ellington, Managing Member/CEO, X-Change Financial Access (''XFA'') to Vanessa Countryman, Secretary, Commission, dated August 27, 2020. *See also* Letter from Lakeshore Securities to Vanessa Countryman, Secretary, Commission, dated August 31, 2020.

[117] Two other Trading Permit Holders also terminated their respective memberships in the first quarter of 2020. The Exchange notes, however, that one TPH consolidated its membership with an affiliate and another TPH no longer appears to be a registered broker-dealer. In the second quarter, another TPH terminated its membership with the Exchange but similarly merged its business with another TPH. In August 2020, a TPH terminated its membership with the Exchange, along with all of its other SRO memberships as well. Lastly, in September 2020, two TPHs terminated their membership with the Exchange. One of those TPHs merged with another TPH and the other terminated its memberships with other options exchanges at the same time it terminated its membership with the Exchange.

does not have unlimited system capacity to support an unlimited number of order and quote entry per second. Accordingly, the proposed connectivity fees, and connectivity structure are designed to encourage market participants to be efficient with their respective physical and logical port usage. While the Exchange has no way of predicting with certainty the amount or type of connections market participants will in fact purchase, if any, the Exchange anticipates that like today, some market participants will continue to decline to connect and participate on the Exchange, some will participate on the Exchange via indirect connectivity, some will only purchase one physical connection and/or logical port connection, and others will purchase multiple connections.

In sum, the Exchange believes the proposed fees are reasonable and reflect a competitive environment, as the Exchange seeks to amend its access fees in connection with the migration of its technology platform, while still attracting market participants to continue to be, or become, connected to the Exchange.

Physical Ports

The Exchange believes increasing the fee for the new 10 Gb Physical Port is reasonable because unlike, the current 10 Gb Network Access Ports, the new Physical Ports provides a connection through a latency equalized infrastructure with faster switches and also allows access to both unicast order entry and multicast market data with a single physical connection. As discussed above, legacy Network Access Ports do not permit market participants to receive unicast and multicast connectivity. As such, in order to receive both connectivity types pre-migration, a market participant needed to purchase and maintain at least two 10 Gb Network Access Ports. The proposed Physical Ports not only provide latency equalization (*i.e.,* eliminate latency advantages between market participants based on location) as compared to the legacy ports, but also alleviate the need to pay for two physical ports as a result of needing unicast and multicast connectivity. Accordingly, market participants who historically had to purchase two separate ports for each of multicast and unicast activity, will be able to purchase only one port, and consequently pay lower fees overall. For example, pre-migration if a TPH had two 10 Gb legacy Network Access Ports, one of which received unicast traffic and the other of which received multicast traffic, that TPH would have been assessed $10,000 per month ($5,000 per port). Under the proposed rule change, using the new Physical Ports, that TPH has the option of utilizing one single port, instead of two ports, to receive both unicast and multicast traffic, therefore paying only $7,000 per month for a port that provides both connectivity types. The Exchange notes that pre-migration, approximately 50% of TPHs maintained two or more 10 Gb Network Access Ports. While the Exchange has no way of predicting with certainty the amount or type of connections market participants will in fact purchase post-migration, the Exchange anticipated approximately 50% of the TPHs with two or more 10 Gb Network Access Ports to reduce the number of 10 Gb Physical Ports that they purchase and expected the remaining 50% of TPHs to maintain their current 10 Gb Physical Ports, but reduce the number of 1 Gb Physical Ports. Particularly, pre-migration, a number of TPHs maintained two 10 Gb Network Access Ports to receive multicast data and two 1 Gb Network Access Ports for order entry (unicast connectivity). As the new 10 Gb Physical Ports are able to accommodate unicast connectivity (order entry), TPHs may choose to eliminate their 1 Gb Network Access Ports and utilize the new 10 Gb Physical Ports for both multicast and unicast connectivity. The Exchange notes that in February 2020, approximately 78% of TPHs that maintained a 1 Gb Network Access Port pre-migration, no longer maintained a 1 Gb Physical Port. Additionally, as of February 2020, approximately 44% reduced the quantity of 10 Gb Physical Ports they maintained as compared to pre-migration.

As discussed above, if a TPH deems a particular exchange as charging excessive fees for connectivity, such market participants may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for physical connectivity. The Exchange also notes that the proposal represents an equitable allocation of reasonable dues, fees and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives, as discussed above. The proposed amounts are in line with, and in some cases lower than, the costs of physical connectivity at other Exchanges,[118] including the Cboe Affiliated Exchanges, which have the same connectivity infrastructure the Exchange has migrated to and some of which also offer exclusive products.[119] The Exchange does not believe it is unreasonable to assess fees that are in line with fees that have already been established for the same physical ports used to connect to the same connectivity infrastructure and common platform. The Exchange believes the proposed Physical Port fees are equitable and not unreasonably discriminatory as the connectivity pricing is associated with relative usage of the various market participants (including smaller participants) and the Exchange has not been presented with any evidence to suggest its proposed fee changes would impose a barrier to entry for participants, including smaller participants. In fact, as noted above, the Exchange is unaware of any market participant that has terminated direct connectivity solely as a result of the proposed fee changes. The Exchange also believes increasing the fee for 10 Gb Physical Ports and charging a higher fee as compared to the 1 Gb Physical Port is equitable as the 1 Gb Physical Port is 1/10th the size of the 10 Gb Physical Port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb Physical Ports utilize the most bandwidth and therefore consume the most resources from the

[118] *See e.g.,* Nasdaq PHLX and ISE Rules, General Equity and Options Rules, General 8. Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection. *See also* Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. *See also* NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit.

[119] *See e.g.,* Affiliated Exchange Fee Schedules, Physical Connectivity Fees. For example, Cboe BZX, Cboe EDGX and C2 each charge a monthly fee of $2,500 for each 1Gb connection and $7,500 for each 10Gb connection.

network. As such, the Exchange believes the proposed fees for the 1 and 10 Gb Physical Ports, respectively are reasonably and appropriately allocated.

Data Port Fees

The Exchange believes assessing the data port fee per data source, instead of per port, is reasonable because it may allow for market participants to maintain more ports at a lower cost and applies uniformly to all market participants. The Exchange believes the proposed increase is reasonable because, as noted above, market participants may pay lower fees as a result of charging per data source and not per data port. Indeed, while the Exchange has no way of predicting with certainty the impact of the proposed changes, the Exchange had anticipated approximately 76% of the 51 market participants who pay data port fees to pay the same or lower fees upon implementation of the proposed change. As of December 2019, 46 market participants [120] pay the proposed data port fees, of which approximately 78% market participants are paying the same or lower fees in connection with the proposed change. Monthly savings for firms paying lower fees range from $500 to $6,000 per month. The Exchange also anticipated that 19% of TPHs who pay data port fees would pay a modest increase of only $500 per month. In December 2019, approximately 22% market participants paid higher fees, with the majority of those market participants paying a modest monthly increase of $500 and only 3 firms paying either $1,000 or $1,500 more per month. Additionally, as discussed above, the Exchange's affiliate C2 has the same fee which is also assessed at the proposed rate and assessed by data source instead of per port. The proposed name change is also appropriate in light of the Exchange's proposed changes and may alleviate potential confusion.

Logical Connectivity

Port fees

The Exchange believes it's reasonable to eliminate certain fees associated with legacy options for connecting to the Exchange and to replace them with fees associated with new options for connecting to the Exchange that are similar to those offered at its Affiliated Exchanges. In particular, the Exchange believes it's reasonable to no longer assess fees for CMI and FIX Login IDs because the Login IDs were retired and rendered obsolete upon migration and because the Exchange is proposing to replace them with fees associated with the new logical connectivity options. The Exchange believes that it is reasonable to harmonize the Exchange's logical connectivity options and corresponding connectivity fees now that the Exchange is on a common platform as its Affiliated Exchanges. Additionally, the Exchange notes the proposed fees are the same as, or in line with, the fees assessed on its Affiliated Exchanges for similar connectivity.[121] The proposed logical connectivity fees are also equitable and not unfairly discriminatory because the Exchange will apply the same fees to all market participants that use the same respective connectivity options.

The Exchange believes the proposed Logical Port fees are reasonable as it is the same fee for Drop Ports and the first five BOE/FIX Ports that is assessed for CMI and FIX Logins, which the Exchange is eliminating in lieu of logical ports. Additionally, while the proposed ports will be assessed the same monthly fees as current CMI/FIX Login IDs, the proposed logical ports provide for significantly more message traffic. Specifically, the proposed BOE/FIX Logical Ports will provide for 3 times the amount of quoting [122] capacity and approximately 165 times order entry capacity. Similarly, the Exchange believes the proposed BOE Bulk Port fees are reasonable because while the fees are higher than the CMI and FIX Login Id fees and the proposed Logical Port fees, BOE Bulk Ports offer significantly more bandwidth capacity than both CMI and FIX Login Ids and Logical Ports. Particularly, a single BOE Bulk Port offers 45 times the amount of quoting bandwidth than CMI/FIX Login Ids [123] and 5 times the amount of quoting bandwidth than Logical Ports will offer. Additionally, the Exchange believes that its fees for logical connectivity are reasonable, equitable, and not unfairly discriminatory as they are designed to ensure that firms that use the most capacity pay for that capacity, rather than placing that burden on market participants that have more modest needs. Although the Exchange charges a ''per port'' fee for logical connectivity, it notes that this fee is in effect a capacity fee as each FIX, BOE or BOE Bulk port used for order/quote entry supports a specified capacity (*i.e.,* messages per second) in the matching engine, and firms purchase additional logical ports when they require more capacity due to their business needs.

An obvious driver for a market participant's decision to purchase multiple ports will be their desire to send or receive additional levels of message traffic in some manner, either by increasing their total amount of message capacity available, or by segregating order flow for different trading desks and clients to avoid latency sensitive applications from competing for a single thread of resources. For example, a TPH may purchase one or more ports for its market making business based on the amount of message traffic needed to support that business, and then purchase separate ports for proprietary trading or customer facing businesses so that those businesses have their own distinct connection, allowing the firm to send multiple messages into the Exchange's trading system in parallel rather than sequentially. Some TPHs that provide direct market access to their customers may also choose to purchase separate ports for different clients as a service for latency sensitive customers that desire the lowest possible latency to improve trading performance. Thus, while a smaller TPH that demands more limited message traffic may connect through a service bureau or other service provider, or may choose to purchase one or two logical ports that are billed at a rate of $750 per month each, a larger market participant with a substantial and diversified U.S. options business may opt to purchase additional ports to support both the volume and types of activity that they conduct on the Exchange. While the Exchange has no way of predicting with certainty the amount or type of logical ports market participants will in fact purchase post-migration, the Exchange anticipated approximately 16% of TPHs to purchase one to two logical ports, and approximately 22% of TPHs to not purchase any logical ports. In December 2019, 13% of TPHs purchased one to two logical ports and 27% have not purchased any logical ports. At the same time, market participants that desire more total capacity due to their business needs, or that wish to segregate order flow by purchasing separate capacity allocations to reduce latency or for other operational reasons, would be permitted to choose to purchase such additional capacity at the same marginal cost. The Exchange believes the proposal to assess an additional Logical and BOE Bulk port fee for incremental usage per logical port is reasonable because the proposed

[120] The Exchange notes the reduction in market participants that pay the data port fee is due to firm consolidations and acquisitions.

[121] *See* Affiliated Exchange Fee Schedules, Logical Port Fees.

[122] Based on the purchase of a single Market-Maker Trading Permit or Bandwidth Packet.

[123] Based on the purchase of a single Market-Maker Trading Permit or Bandwidth Packet.

fees are modestly higher than the proposed Logical Port and BOE Bulk fees and encourage users to mitigate message traffic as necessary. The Exchange notes one of its Affiliated Exchanges has similar implied port fees.[124]

In sum, the Exchange believes that the proposed BOE/FIX Logical Port and BOE Bulk Port fees are appropriate as these fees would ensure that market participants continue to pay for the amount of capacity that they request, and the market participants that pay the most are the ones that demand the most resources from the Exchange. The Exchange also believes that its logical connectivity fees are aligned with the goals of the Commission in facilitating a competitive market for all firms that trade on the Exchange and of ensuring that critical market infrastructure has ''levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.'' [125]

The Exchange believes waiving the FIX/BOE Logical Port fee for one FIX Logical Port used to access PULSe and Silexx (for FLEX Trading) is reasonable because it will allow all TPHs using PULSe and Silexx to avoid having to pay a fee that they would otherwise have to pay. The waiver is equitable and not unfairly discriminatory because TPHs using PULSe are already subject to a monthly fee for the PULSe Workstation, which the Exchange views as inclusive of fees to access the Exchange. Moreover, while PULSe users today do not require a FIX/CMI Login Id, post-migration, due to changes to the connectivity infrastructure, PULSe users will be required to maintain a FIX Logical Port and as such incur a fee they previously would not have been subject to. Similarly, the Exchange believes that the waiver for Silexx (for FLEX trading) will encourage TPHs to transact business using FLEX Options using the new Silexx System and encourage trading of FLEX Options. Additionally, the Exchange notes that it currently waives the Login Id fees for Login IDs used to access the CFLEX system.

The Exchange believes its proposed fee for Purge Ports is reasonable as it is also in line with the amount assessed for purge ports offered by its Affiliated Exchanges, as well as other exchanges.[126] Moreover, the Exchange believes that offering purge port functionality at the Exchange level promotes robust risk management across the industry, and thereby facilitates investor protection. Some market participants, and, in particular, larger firms, could build similar risk functionality on their trading systems that permit the flexible cancellation of orders entered on the Exchange. Offering Exchange level protections however, ensures that such functionality is widely available to all firms, including smaller firms that may otherwise not be willing to incur the costs and development work necessary to support their own customized mass cancel functionality. The Exchange operates in a highly competitive market in which exchanges offer connectivity and related services as a means to facilitate the trading activities of TPHs and other participants. As the proposed Purge Ports provide voluntary risk management functionality, excessive fees would simply serve to reduce demand for this optional product. The Exchange also believes that the proposed Purge Port fees are not unfairly discriminatory because they will apply uniformly to all TPHs that choose to use dedicated Purge Ports. The proposed Purge Ports are completely voluntary and, as they relate solely to optional risk management functionality, no TPH is required or under any regulatory obligation to utilize them. The Exchange believes that adopting separate fees for these ports ensures that the associated costs are borne exclusively by TPHs that determine to use them based on their business needs, including Market-Makers or similarly situated market participants. Similar to Purge Ports, Spin and GRP Ports are optional products that provide an alternative means for market participants to receive multicast data and request and receive a retransmission of such data. As such excessive fees would simply serve to reduce demand for these products, which TPHs are under no regulatory obligation to utilize. All TPHs that voluntarily select these service options (*i.e.,* Purge Ports, Spin Ports or GRP Ports) will be charged the same amount for the same respective services. All TPHs have the option to select any connectivity option, and there is no differentiation among TPHs with regard to the fees charged for the services offered by the Exchange.

Access Credits

The Exchange believes the proposal to adopt credits for BOE Bulk Ports is reasonable, equitable and not unfairly discriminatory because it provides an opportunity for TPHs to pay lower fees for logical connectivity. The Exchange notes that the proposed credits are in lieu of the current credits that Market-Makers are eligible to receive today for Trading Permits fees. Although only Market-Makers may receive the proposed BOE Bulk Port credits, Market-Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. For example, Market-Makers have a number of obligations, including quoting obligations and fees associated with appointments that other market participants do not have. The Exchange also believes that the proposals provide incremental incentives for TPHs to strive for the higher tier levels, which provide increasingly higher benefits for satisfying increasingly more stringent criteria, including criteria to provide more liquidity to the Exchange. The Exchange believes the value of the proposed credits is commensurate with the difficulty to achieve the corresponding tier thresholds of each program.

First, the Exchange believes the proposed BOE Bulk Port fee credits provided under AVP will incentivize the routing of orders to the Exchange by TPHs that have both Market-Maker and agency operations, as well as incent Market-Makers to continue to provide critical liquidity notwithstanding the costs incurred with being a Market-Maker. More specifically, in the options industry, many options orders are routed by consolidators, which are firms that have both order router and Market-Maker operations. The Exchange is aware not only of the importance of providing credits on the order routing side in order to encourage the submission of orders, but also of the operations costs on the Market-Maker side. The Exchange believes the proposed change to AVP continues to allow the Exchange to provide relief to the Market-Maker side via the credits, albeit credits on BOE Bulk Port fees instead of Trading Permit fees. Additionally, the proposed credits may incentivize and attract more volume and liquidity to the Exchange, which will benefit all Exchange participants through increased opportunities to trade as well as enhancing price discovery. While the Exchange has no way of

[124] *See e.g.,* Cboe C2 Options Exchange Fees Schedule, Logical Connectivity Fees.

[125] *See* Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7–01–13) (Regulation SCI Adopting Release).

[126] *See* Affiliated Exchange Fee Schedules, Logical Port Fees. *See also,* Nasdaq ISE Pricing Schedule, Section 7(C). ISE charges a fee of $1,100 per month for SQF Purge Ports.

predicting with certainty how many and which TPHs will satisfy the required criteria to receive the credits, the Exchange had anticipated approximately two TPHs (out of approximately 5 TPHs that are eligible for AVP) to reach VIP Tiers 4 or 5 and consequently earn the BOE Bulk Port fee credits for their respective Market-Maker affiliate. For the month of October 2019, two TPHs received access credits under Tier 5 and no TPHs received credits under Tier 4. The Exchange notes that it believes its reasonable, equitable and not unfairly discriminatory to no longer provide access credits for Market-Makers whose affiliates achieve VIP Tiers 2 or 3 as the Exchange has adopted another opportunity for all Market-Makers, not just Market-Makers that are part of a consolidator, to receive credits on BOE Bulk Port fees (*i.e.,* credits available via the proposed Market-Maker Access Credit Program). More specifically, limiting the credits under AVP to the top two tiers enables the Exchange to provide further credits under the new Market-Maker Access Credit Program. Furthermore, the Exchange notes that it is not required to provide any credits at any tier level.

The Exchange believes the proposed BOE Bulk Port fee credits available for TPHs that reach certain Performance Tiers under the Liquidity Provider Sliding Scale Adjustment Table is reasonable as the credits provide for reduced connectivity costs for those Market-Makers that reach the required thresholds. The Exchange believe it's reasonable, equitable and not unfairly discriminatory to provide credits to those Market-Makers that primarily provide and post liquidity to the Exchange, as the Exchange wants to continue to encourage Market-Makers with significant Make Rates to continue to participate on the Exchange and add liquidity. Greater liquidity benefits all market participants by providing more trading opportunities and tighter spreads.

Moreover, the Exchange notes that Market-Makers with a high Make Rate percentage generally require higher amounts of capacity than other Market-Makers. Particularly, Market-Makers with high Make Rates are generally streaming significantly more quotes than those with lower Make Rates. As such, Market-Makers with high Make Rates may incur more costs than other Market-Makers as they may need to purchase multiple BOE Bulk Ports in order to accommodate their capacity needs. The Exchange believes the proposed credits for BOE Bulk Ports encourages Market-Makers to continue to provide liquidity for the Exchange, notwithstanding the costs incurred by purchasing multiple ports. Particularly, the proposal is intended to mitigate the costs incurred by traditional Market-Makers that focus on adding liquidity to the Exchange (as opposed to those that provide and take, or just take). While the Exchange cannot predict with certainty which Market-Makers will reach Performance Tiers 4 and 5 each month, based on historical performance it anticipated approximately 10 Market-Makers would achieve Tiers 4 or 5. In October 2019, 12 Market-Makers achieved Tiers 4 or 5. Lastly, the Exchange notes that it is common practice among options exchanges to differentiate fees for adding liquidity and fees for removing liquidity.[127]

Bandwidth Packets and CMI CAS Server Fees

The Exchange believes it's reasonable to eliminate Bandwidth Packet fees and the CMI CAS Server fee because TPHs will not pay fees for these connectivity options and because Bandwidth Packets and CAS Servers have been retired and rendered obsolete as part of the migration. The Exchange believes that even though it will be discontinuing Bandwidth Packets, the proposed incremental pricing for Logical Ports and BOE Bulk Ports will continue to encourage users to mitigate message traffic. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

Access Fees

The Exchange believes the restructuring of its Trading Permits is reasonable in light of the changes to the Exchange's connectivity infrastructure in connection with the migration and the resulting separation of bandwidth allowance, logins and appointment costs from each Trading Permit. The Exchange also believes that it is reasonable to harmonize the Exchange's Trading Permit structure and corresponding connectivity options to more closely align with the structures offered at its Affiliated Exchanges once the Exchange is on a common platform as its Affiliated Exchanges.[128] The proposed Trading Permit structure and corresponding fees are also in line with the structure and fees provided by other exchanges. The proposed Trading Permit fees are also equitable and not unfairly discriminatory because the Exchange will apply the same fees to all market participants that use the same type and number of Trading Permits.

With respect to electronic Trading Permits, the Exchange notes that TPHs previously requested multiple Trading Permits because of bandwidth, login or appointment cost needs. As described above, in connection with migration, bandwidth, logins and appointment costs are no longer tied to Trading Permits or Bandwidth Packets and as such, the need to hold multiple permits and/or Bandwidth Packets is obsolete. As such, the Exchange believes the structure to require only one of each type of applicable electronic Trading Permit is appropriate. Moreover, the Exchange believes offering separate marketing making permits for off-floor and on-floor Market-Makers provides for a cleaner, more streamlined approach to trading permits and corresponding fees. Other exchanges similarly provide separate and distinct fees for Market-Makers that operate on-floor vs off-floor and their corresponding fees are similar to those proposed by the Exchange.[129]

The Exchange believes the proposed fee for its MM EAP Trading Permits is reasonable as it is the same fee it assesses today for Market-Maker Trading Permits (*i.e.,* $5,000 per month per permit). Additionally, the proposed fee is in line with, and in some cases even lower than, the amounts assessed for similar access fees at other exchanges, including its affiliate C2.[130] The Exchange believes the proposed EAP fee is also reasonable, and in line with the fees assessed by other Exchanges for non-Market-Maker electronic access.[131] The Exchange notes that while the Trading Permit fee is increasing, TPHs overall cost to

[127] *See e.g.,* MIAX Options Fees Schedule, Section 1(a), Market Maker Transaction Fees.

[128] For example, the Exchange's affiliate, C2, similarly provides for Trading Permits that are not tied to connectivity, and similar physical and logical port options at similar pricings. *See* Cboe C2 Options Exchange Fees Schedule. Physical connectivity and logical connectivity are also not tied to any type of permits on the Exchange's other options exchange affiliates.

[129] *See e.g.,* PHLX Section 8A, Permit and Registration Fees. *See also,* BOX Options Fee Schedule, Section IX Participant Fees; NYSE American Options Fees Schedule, Section III(A) Monthly ATP Fees and NYSE Arca Options Fees and Charges, OTP Trading Participant Rights. For similar Trading Floor Permits for Floor Market Makers, Nasdaq PHLX charges $6,000; BOX charges up to $5,500 for 3 registered permits in addition to a $1,500 Participant Fee, NYSE Arca charges up to $6,000; and NYSE American charges up to $8,000.

[130] *See e.g.,* Cboe C2 Options Exchange Fees Schedule. *See also,* NYSE Arca Options Fees and Charges, General Options and Trading Permit (OTP) Fees, which assesses up to $6,000 per Market Maker OTP and NYSE American Options Fee Schedule, Section III. Monthly ATP Fees, which assess up to $8,000 per Market Maker ATP. *See also,* PHLX Section 8A, Permit and Registration Fees, which assesses up to $4,000 per Market Maker Permit.

[131] *See e.g.,* PHLX Section 8A, Permit and Registration Fees, which assesses up to $4,000 per Permit for all member and member organizations other than Floor Specialists and Market Makers.

access the Exchange may be reduced in light of the fact that a TPH no longer must purchase multiple Trading Permits, Bandwidth Packets and Login Ids in order to receive sufficient bandwidth and logins to meet their respective business needs. To illustrate the value of the new connectivity infrastructure, the Exchange notes that the cost that would be incurred by a TPH today in order to receive the same amount of order capacity that will be provided by a single Logical Port post-migration (*i.e.,* 5,000 orders per second), is approximately 98% higher than the cost for the same capacity post-migration. The following examples further demonstrate potential cost savings/value added for an EAP holder with modest capacity needs and an EAP holder with larger capacity needs:

TPH THAT HOLDS 1 EAP, NO BANDWIDTH PACKETS AND 1 CMI LOGIN

	Current fee structure	Post-migration fee structure
EAP	$1,600	$3,000.
CMI Login/Logical Port	$750	$750.
Bandwidth Packets	0	N/A.
Total Bandwidth Available	30 orders/sec	5,000 orders/sec.
Total Cost	$2,350	$3,750.
Total Cost per message	$78.33/order/sec	$0.75/order/sec.

TPH THAT HOLDS 1 EAP, 4 BANDWIDTH PACKETS AND 15 CMI LOGINS

	Current fee structure	Post-migration fee structure
EAP	$1,600	$3,000.
CMI Login/Logical Port	$11,250 (15@750)	$750.
Bandwidth Packets	$6,400 (4@$1,600)	N/A.
Total Bandwidth Available	150 orders/sec	5,000 orders/sec.
Total Cost	$19,250	$3,750.
Total Cost per message	$128.33/order/sec	$0.75/order/sec.

The Exchange believes the proposal to adopt a new Clearing TPH Permit is reasonable because it offers TPHs that only clear transactions of TPHs a discount. Particularly, Clearing TPHs that also submit orders electronically to the Exchange would purchase the proposed EAP at $3,000 per permit. The Exchange believe it's reasonable to provide a discount to Clearing TPHs that only clear transactions and do not otherwise submit electronic orders to the Exchange. The Exchange notes that another exchange similarly charges a separate fee for clearing firms.[132]

The Exchange believes the proposed fee structure for on-floor Market-Makers is reasonable as the fees are in line with those offered at other Exchanges.[133] The Exchange believes that the proposed fee for MM Floor Permits as compared to MM EAPs is reasonable because it is only modestly higher than MM EAPs and Floor MMs don't have other costs that MM EAP holders have, such as MM EAP Appointment fees.

The Exchange believes its proposed fees for Floor Broker Permits are reasonable because the fees are similar to, and in some cases lower than, the fees the Exchange currently assesses for such permits. Specifically, based on the number of Trading Permits TPHs held upon migration, 60% of TPHs that hold Floor Broker Trading Permits will pay lower Trading Permit fees. Particularly, any Floor Broker holding ten or less Floor Broker Trading Permits will pay lower fees under the proposed tiers as compared to what they pay today. While the remaining 40% of TPHs holding Floor Broker Trading Permits (who each hold between 12–21 Floor Broker Trading Permits) will pay higher fees, the Exchange notes the monthly increase is de minimis, ranging from an increase of 0.6%–2.72%.[134]

The Exchange believes the proposed ADV Discount is reasonable because it provides an opportunity for Floor Brokers to pay lower FB Trading Permit fees, similar to the current rebate program offered to Floor Brokers. The Exchange notes that while the new ADV Discount program includes only customer volume (''C'' origin code) as compared to Customer and Professional Customer/Voluntary Professional, the amount of Professional Customer/Voluntary Professional volume was de minimis and the Exchange does not believe the absence of such volume will have a significant impact.[135] Additionally, the Exchange notes that while the ADV requirements under the proposed ADV Discount program are higher than are required under the current rebate program, the proposed ADV Discount counts volume from all products towards the thresholds as compared to the current rebate program which excludes volume from Underlying Symbol List A (except RLG, RLV, RUI, and UKXM), DJX, XSP, and subcabinet trades. Moreover, the ADV Discount is designed to encourage the execution of orders in all classes via open outcry, which may increase volume, which would benefit all market participants (including Floor Brokers who do not hit the ADV thresholds) trading via open outcry (and indeed, this increased volume could make it possible for some Floor Brokers to hit the ADV thresholds). The Exchange believes the proposed discounts are equitable and not unfairly discriminatory because all Floor Brokers are eligible. While the Exchange has no way of predicting with certainty how many and which TPHs will satisfy the various thresholds under the ADV Discount, the Exchange anticipated approximately 3 Floor Brokers to receive a rebate under the program. In December 2019, 2 Floor Brokers received a rebate under the program.

The Exchange believes its proposed MM EAP Appointment fees are reasonable in light of the Exchange's elimination of appointment costs tied to Trading Permits. Other exchanges also

[132] *See e.g.,* NYSE Arca Options Fees and Charges, General Options and Trading Permit (OTP) Fees and NYSE American Options Fee Schedule, Section III. Monthly ATP Fees.

[133] *See e.g.,* PHLX Section 8A, Permit and Registration Fees, which assesses $6,000 per permit for Floor Specialists and Market Makers.

[134] The Floor Brokers whose fees are increasing have each committed to a minimum number of permits and therefore currently receive the rates set forth in the current Floor Broker TP Sliding Scale.

[135] Furthermore, post-migration the Exchange will not have Voluntary Professionals.

offer a similar structure with respect to fees for appointment classes.[136] Additionally, the proposed MM EAP Appointment fee structure results in approximately 36% electronic MMs paying lower fees for trading permit and appointment costs. For example, in order to have the ability to make electronic markets in every class on the Exchange, a Market-Maker would need 1 Market-Maker Trading Permit and 37 Appointment Units post-migration. Under, the current pricing structure, in order for a Market-Maker to quote the entire universe of available classes, a Market-Maker would need 33 Appointment Credits, thus necessitating 33 Market-Maker Trading Permits. With respect to fees for Trading Permits and Appointment Unit Fees, under the proposed pricing structure, the cost for a TPH wishing to quote the entire universe of available classes is approximately 29% less (if they are not eligible for the MM TP Sliding Scale) or approximately 2% less (if they are eligible for the MM TP Sliding Scale). To further demonstrate the potential cost savings/value added, the Exchange is providing the following examples comparing current Market-Maker connectivity and access fees to projected connectivity and access fees for different scenarios. The Exchange notes that the below examples not only compare Trading Permit and Appointment Unit costs, but also the cost incurred for logical connectivity and bandwidth. Particularly, the first example demonstrates the total minimum cost that would be incurred today in order for a Market-Maker to have the same amount of capacity as a Market-Maker post-migration that would have only 1 MM EAP and 1 Logical Port (*i.e.,* 15,000 quotes/3 sec). The Exchange is also providing examples that demonstrate the costs of (i) a Market-Maker with small capacity needs and appointment unit of 1.0 and (ii) a Market-Maker with large capacity needs and appointment cost/unit of 30.0:

MARKET-MAKER THAT NEEDS CAPACITY OF 15,000/QUOTES/3 SECONDS

	Current fee structure	Post-migration fee structure
MM Permit/MM EAP	$5,000	$5,000.
Appointment Unit Cost	N/A (1 appointment cost)	$0 (1 appointment unit).
CMI Login/Logical Port	$750 [137]	$750.
Bandwidth Packets	$5,500 (2@$2,750)	N/A.
Total Bandwidth Available	15,000 quotes/3 sec	15,000 quotes/3 sec.
Total Cost	$11,250	$5,750.
Total Cost per message allowed	$0.75/quote/3 sec	$0.38/quote/3 sec.

MARKET MAKER THAT NEEDS CAPACITY OF NO MORE THAN 5,000 QUOTES/3 SECS

	Current fee structure	Post-migration fee structure
MM Permit/MM EAP	$5,000	$5,000.
Appointment Unit Cost	N/A (1 appointment cost)	$0 (1 appointment unit).
CMI Login/Logical Port	$750	$750.
Bandwidth Packets	0	N/A.
Total Bandwidth Available	5,000 quotes/3 sec	15,000 quotes/3 sec.
Total Cost	$5,750	$5,750.
Total Cost per message allowed	$1.15/quote/3 sec	$0.38/quote/3 sec.

MARKET-MAKER THAT NEEDS 30 APPOINTMENT UNITS AND CAPACITY OF 300,000 QUOTES/3 SEC

	Current fee structure	Post-migration fee structure
MM Permits/MM EAP	$105,000 (30 MM Permits assumes eligible for MM TP Sliding Scale) [138].	$5,000.
Appointment Units Cost	N/A (30 appointment costs)	$95,500 (30 appointment units).
CMI Logins/BOE Bulk Port	$3,000 (4@$750) [139]	$3,000 (2 BOE Bulk@$1,500).
Bandwidth Packets	$82,500 (30@$2750)	N/A.
Total Bandwidth Available	300,000 quotes/3 sec	* 450,000 quotes/3 sec.
Total Cost	$190,500	$103,500.
Total Cost per message allowed	$0.63/quotes/3 sec	$0.23/quote/3 sec.

* Possible performance degradation at 15,000 messages per second.

The Exchange believes its proposal to provide separate fees for Tier Appointments for MM EAPs and MM Floor Permits as the Exchange will be issuing separate Trading Permits for on-floor and off-floor market making as discussed above. The proposal to eliminate the volume threshold for the electronic SPX Tier Appointment fee is reasonable as no TPHs in the past several months have electronically traded more than 1 SPX contract or less than 100 SPX contracts per month and therefore will not be negatively impacted by the proposed change, and because it aligns the electronic SPX Tier Appointment with the floor SPX Tier Appointment, which has no volume

[136] *See e.g.,* PHLX Section 8. Membership Fees, B, Streaming Quote Trader (''SQT'') Fees and C. Remote Market Maker Organization (RMO) Fee.

[137] The maximum quoting bandwidth that may be applied to a single Login Id is 80,000 quotes/3 sec.

[138] For simplicity of the comparison, this assumes no appointments in SPX, VIX, RUT, XEO or OEX (which are not included in the TP Sliding Scale).

[139] Given the bandwidth limit per Login Id of 80,000 quotes/3 sec, example assumes Market-Maker purchases minimum amount of Login IDs to accommodate 300,000 quotes/3 sec.

threshold. The Exchange believes the proposal to increase the electronic volume thresholds for VIX and RUT are reasonable as those that do not regularly trade VIX or RUT in open-outcry will continue to not be assessed the fee. In fact, any TPH that executes more than 100 contracts but less than 1,000 in the respective classes will no longer have to pay the proposed Tier Appointment fee. As noted above, the Exchange is not proposing to change the amounts assessed for each Tier Appointment Fee. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

Trading Permit Holder Regulatory Fee

The Exchange believes it's reasonable to eliminate the Trading Permit Holder Regulatory fee because TPHs will not pay this fee and because the Exchange is restructuring its Trading Permit structure. The Exchange notes that although it will less closely be covering the costs of regulating all TPHs and performing its regulatory responsibilities, it still has sufficient funds to do so. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs.

The Exchange believes corresponding changes to eliminate obsolete language in connection with the proposed changes described above and to relocate and reorganize its fees in connection with the proposed changes maintain clarity in the Fees Schedule and alleviate potential confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

With respect to 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. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can buy the less expensive 1 Gb Physical Port and utilize only one Logical Port. Moreover, the pricing for 1 Gb Physical Ports and FIX/BOE Logical Ports are no different than are assessed today (*i.e.,* $1,500 and $750 per port, respectively), yet the capacity and access associated with each is greatly increasing. While pricing may be increased for larger capacity physical and logical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed in the Statutory Basis section above, options market participants are not forced to connect to (or purchase market data from) all options exchanges, as shown by the number of TPHs at Cboe and shown by the fact that there are varying number of members across each of Cboe's Affiliated Exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and connectivity is constrained by competition among exchanges and third parties. As discussed, there are other options markets of which market participants may connect to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange or reseller to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [140] and paragraph (f) of Rule 19b–4 [141] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–105 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–2020–105. 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

[140] 15 U.S.C. 78s(b)(3)(A).

[141] 17 CFR 240.19b–4(f).

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 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–2020–105, and should be submitted on or before December 1, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[142]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24884 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[142] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90339; File No. SR–Phlx–2020–50]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Equity 7, Section 3

November 4, 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 26, 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, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Equity 7, Section 3, as discussed below.

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 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

During the week of October 26–30, 2020, the Exchange will temporarily relocate its place of primary operations from Carteret, New Jersey to Chicago, Illinois. The purpose of this temporary relocation is to demonstrate that the Exchange is capable of and willing to operate outside of the State of New Jersey in the event that the New Jersey State Government enacts pending legislation that would impose a tax on securities transactions processed within the State. If enacted, the tax would be prohibitively expensive and onerous, not only for the Exchange, but also for its member organizations and ultimately for investors, and the Exchange likely would have no option but to relocate permanently outside of New Jersey.

Although the Exchange believes that its member organizations will maintain their ordinary trading activity during the relocation period, the Exchange also recognizes the possibility that some of its member organizations will adjust their trading behavior during this time, and that if they do so, they may fail to qualify for credits or discounted charges that the Exchange would otherwise provide to them if they were to achieve certain threshold levels of total Consolidated Volume[3] on the Exchange during the month.

To help minimize any adverse impact of the temporary relocation on member organizations, Exchange proposes to amend its pricing schedule at Equities 7, Section 3 to state that for purposes of determining which of the execution charges and credits listed therein a member organization qualifies for during the month of October 2020, the Exchange will calculate the member organization's total Consolidated Volume on the Exchange for the full month of October as well as for the month of October excluding the week of October 26–30, 2020. Furthermore, the Exchange proposes to state that it will then assess which total Consolidated Volume calculations would qualify the member organization for the most advantageous credits and charges for the month of October and then it will apply those credits and charges to the member organization. Thus, if but for the relocation, a member organization would qualify for a higher credit or a lower fee tier in October, then the Exchange will apply that higher credit or lower fee tier to the member organization's trading activity during the month.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal is reasonable and equitable because in its absence, member organizations may fail to qualify for certain volume-based credits or charges in October should they determine to alter their trading behavior when the Exchange relocates to Chicago during the week of October 26–30, 2020. The Exchange does not wish to penalize these member organizations for altering their trading behavior in response to the Exchange's decision to relocate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As set forth in Equity 7, Section 3(a)(1), the term ''Consolidated Volume'' means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

temporarily. The proposed rule would seek to avoid such a penalty by calculating a member organization's total Consolidated Volume on the Exchange, both for the full month of October and for the month excluding October 26–30 to determine which of those two calculations would result in the member organization qualifying for credits and charges that are most advantageous to it, and then applying those most advantageous credits and charges to the member organization.

The Exchange notes that other exchanges have taken similar steps to avoid penalizing their members for exchange outages that would otherwise cause members to fail to qualify for volume-based tiered pricing.[6]

The Exchange believes that the proposed rule change is an equitable allocation and is not unfairly discriminatory because the Exchange intends for it to ensure that no member organization suffers adverse pricing impacts because of the temporary relocation of the Exchange to Chicago. That is, the Exchange does not intend for the proposal to advantage any particular member organization; rather, it intends for the proposal to avoid disadvantaging any member organization.

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. In terms of inter-market competition, 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, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed fee change does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

If anything, the Exchange believes that the proposal is pro-competitive in that it will help the Exchange to maintain its competitive standing vis-a-vis other trading venues that are not planning a similar operational move during this month.

Similarly, the Exchange does not believe that the proposal will burden intra-market competition. As noted above, the proposal will simply help to ensure that no participant suffers a pricing disadvantage as a result of the Exchange's decision to operate from Chicago during the last week of October. It is not intended to provide a competitive advantage to any particular member organization.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[7]

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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–2020–50 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–2020–50. 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–2020–50 and should be submitted on or before December 1, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier.

Assistant Secretary.

[FR Doc. 2020–24887 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[6] *See, e.g.,* Securities Exchange Act Release No. 34–85025 (Jan 1, 2019), 84 FR 2611 (February 7, 2019) (ISE–2018–102).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90335; File No. SR–FINRA–2020–031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Adopt FINRA Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Delete the Rules Related to the OTC Bulletin Board Service

November 4, 2020.

On September 24, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 delete the rules related to the OTC Bulletin Board Service and cease its operation and to adopt FINRA Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems). The proposed rule change was published for comment in the **Federal Register** on October 7, 2020.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 21, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 5, 2021 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–FINRA–2020–031).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24886 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90067 (October 1, 2020), 85 FR 63314. Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-finra-2020-031/srfinra2020031.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90334; File No. SR–NYSEArca–2020–97]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Fees and Charges To Adopt an Alternative Method To Qualify for the Tier 2 Pricing Tier

November 4, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 2, 2020, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (''Fee Schedule'') to adopt an alternative method to qualify for the Tier 2 pricing tier. The Exchange proposes to implement the fee change effective November 2, 2020. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt an alternative method to qualify for the Tier 2 pricing tier.

The proposed change responds to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing orders by offering further incentives for ETP Holders [4] to send additional liquidity to the Exchange.

The Exchange proposes to implement the fee change effective November 2, 2020.

Background

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.'' [5]

While Regulation NMS has enhanced competition, it has also fostered a ''fragmented'' market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that ''such competition can lead to the fragmentation of order flow in that stock.'' [6] Indeed, equity trading is

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] All references to ETP Holders in connection with this proposed fee change include Market Makers.

[5] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7–10–04) (Final Rule) (''Regulation NMS'').

[6] *See* Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7–02–10) (Concept Release on Equity Market Structure).

currently dispersed across 16 exchanges,[7] numerous alternative trading systems,[8] and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 18% market share.[9] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 10% market share of executed volume of equities trading.[10]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide liquidity on an Exchange against which market makers can quote, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

In response to the competitive environment described above, the Exchange has established incentives for ETP Holders who submit orders that provide liquidity on the Exchange. The proposed fee change is designed to attract additional order flow to the Exchange by offering an alternative method to qualify for the Tape 2 fees and credits to incentivize ETP Holders to direct their liquidity-providing orders in Tapes A, B and C securities.

Proposed Rule Change

Currently, ETP Holders qualify for Tier 2 fees and credits by providing liquidity an average daily share volume per month of 0.30% or more, but less than 0.70% of US consolidated average daily volume (''US CADV'').[11]

The Exchange proposes to permit ETP Holders to alternatively qualify for Tier 2 fees and credits if they (a) provide liquidity an average daily share volume per month of 0.25% or more, but less than 0.70% of the US CADV, (b) execute removing volume in Tape B Securities equal to at least 0.40% of US Tape B CADV, and (c) are affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted Customer and Professional Customer executions in all issues on NYSE Arca Options (excluding mini options) of at least 0.25% of total Customer equity and ETF option ADV as reported by The Options Clearing Corporation (''OCC''). The Exchange is not proposing any change to the level of fees and credits applicable under Tier 2.

The purpose of this proposed rule change is to incentivize ETP Holders to increase the liquidity-providing orders they send to the Exchange, which would support the quality of price discovery on the Exchange and provide additional liquidity for incoming orders. The Exchange believes that the proposal would create an added incentive for ETP Holders to bring additional order flow to a public market while also providing an alternative method for ETP Holders to qualify for Tier 2 fees and credits. The Exchange further believes that providing fees and credits to ETP Holders that are affiliated with an OTP Holder or OTP Firm could lead to increased trading on the Exchange's equities and options markets.[12] As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. Because the proposed alternative method requires that an ETP Holder, in addition to providing liquidity at a level below the current requirement under Tier 2, also remove liquidity in Tape B securities coupled with the required minimum of options volume, the Exchange believes that the proposed change would provide an incentive for a greater number of ETP Holders to send additional liquidity to the Exchange in order to qualify for the Tier 2 fees and credits.

The Exchange believes that, by providing for an additional method of qualifying for Tier 2, this proposed change will provide a greater incentive to attract additional liquidity from additional ETP Holders so as to qualify for the Tier 2 fees and credits. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. The Exchange anticipates, based on their current trading profile, that a small number of ETP Holders could qualify for Tier 2 under the proposed alternative method if they so choose. However, without having a view of ETP Holders' activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder directing orders to the Exchange in order to qualify for Tier 2 under the proposed alternative method.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[14] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Fee Change is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [15]

[7] *See* Cboe Global Markets, U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.*

[8] *See* FINRA ATS Transparency Data, *available at https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

[9] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

[10] *See id.*

[11] US CADV means the United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape, excluding odd lots through January 31, 2014 (except for purposes of Lead Market Maker pricing), and excludes volume on days when the market closes early and on the date of the annual reconstitution of the Russell Investments Indexes. Transactions that are not reported to the Consolidated Tape are not included in US CADV. *See* Fee Schedule, footnote 3.

[12] There are currently 53 firms that are both ETP Holders and OTP Holders.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) and (5).

[15] *See* Regulation NMS, 70 FR at 37499.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders that provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange. In particular, the Exchange believes the proposed amendment to Tier 2 is reasonable because it provides ETP Holders affiliated with an OTP Holder or OTP Firm with an additional way to qualify for the Tier 2 fees and credits through equity and options orders. The Exchange believes that the proposed alternative to qualify for the pricing tier utilizing a lower equity adding volume requirement coupled with a minimum equity removing volume requirement and a minimum options volume requirement is reasonable because the proposal provides firms with greater flexibility to reach volume tiers across asset classes, thereby creating an added incentive for ETP Holders to bring additional order flow to a public exchange, thereby encouraging greater participation and liquidity.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are available to all ETP Holders on an equal basis. They also provide additional benefits or discounts that are reasonably related to the value of the Exchange's market quality and associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is one of many venues and off-exchange venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based on members achieving certain volume thresholds. Moreover, the Exchange believes the proposed amendment to Tier 2 is a reasonable means to encourage ETP Holders to increase their liquidity on the Exchange and their participation on NYSE Arca Options. The Exchange believes amending the current pricing tier by adopting an alternative requirement may encourage those ETP Holders who could not previously achieve the pricing tier to increase their order flow on both the Exchange and on NYSE Arca Options. Increased liquidity benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Proposed Fee Change is an Equitable Allocation of Fees and Credits

The Exchange believes the proposed rule change to adopt an alternative way to qualify for the Tier 2 fees and credits equitably allocates its fees and credits among market participants because it is reasonably related to the value of the Exchange's market quality associated with higher equities and options volume. Additionally, a number of ETP Holders have a reasonable opportunity to satisfy the tier's criteria.[16]

The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. The proposed alternative method to qualify for the Tier 2 fees and credits would be available to all ETP Holders that are affiliated with OTP Holders or OTP Firms. There are currently 3 ETP Holders that qualify for the Tier 2 fees and credits. And as noted above, there are 53 firms that are both ETP Holders and OTP Holders and a number of such firms could qualify for Tier 2 pricing tier under the proposed alternative method. However, without having a view of an ETP Holder's activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder affiliated with an OTP Holder or OTP Firm to increase participation in the Exchange's equities and options markets to qualify for the Tier 2 fees and credits. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity. The Exchange believes the proposed amended tier could provide an incentive for other ETP Holders to submit additional liquidity on the Exchange and on NYSE Arca Options to qualify for the Tier 2 fees and credits. To the extent an ETP Holder participates on the Exchange but not on NYSE Arca Options, the Exchange believes that the proposal is still reasonable, equitable and not unfairly discriminatory with respect to such ETP Holder based on the overall benefit to the Exchange resulting from the success of NYSE Arca Options. In particular, such success would allow the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on NYSE Arca Options or not.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. Rather, should an ETP Holder not meet the proposed criteria, the ETP Holder can still qualify for the same credit by meeting the current criteria which does not require it to have any affiliation with an OTP Holder or OTP Firm and conduct options trading on NYSE Arca Options.

The Proposed Fee Change is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The Exchange believes it is not unfairly discriminatory to provide an alternative way to qualify for per share fees and credits, as each would be provided on an equal basis to all ETP Holders that are affiliated with an OTP Holder or OTP Firm that meet the proposed alternative requirement of Tier 2. Further, the Exchange believes the proposed alternative requirement would incentivize ETP Holders that are affiliated with an OTP Holder or OTP Firm to send their options orders to the Exchange to qualify for the pricing tier. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume.

The proposal to amend the volume requirement to qualify for the Tier 2 fees and credits neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the amended threshold would be applied to all similarly situated ETP Holders, who would all be eligible for

[16] *See supra* note 12.

the same fees and credits on an equal basis. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by this allocation of fees.

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. 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,[17] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for ETP Holders. 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.'' [18]

Intramarket Competition. The proposed change is designed to attract additional equities and options order flow to the Exchange. The Exchange believes that the proposed amendment to the volume requirement under Tier 2 would continue to incentivize market participants to direct providing displayed order flow to the Exchange and greater participation on NYSE Arca Options. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages ETP Holders to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The proposed volume requirement would be applicable to all similarly-situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As such, the Exchange believes the proposed amendments to its Fee Schedule would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) is currently less than 10%. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, 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:

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–2020–97 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–2020–97. 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-2020–97, and

[17] 15 U.S.C. 78f(b)(8).

[18] *See* Regulation NMS, 70 FR at 37498–99.

[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).

should be submitted on or before December 1, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24885 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90344; File No. SR–FINRA–2020–039]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend FINRA Rules To Reflect Name Changes to Two FINRA Departments: The Office of Dispute Resolution and the Department of Registration and Disclosure

November 4, 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 29, 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, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as concerned solely with the administration of the self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(3) thereunder,[4] 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 amend FINRA rules to reflect name changes to two FINRA departments: (1) The Office of Dispute Resolution and (2) the Department of Registration and Disclosure. Specifically, the proposed rule change would amend the General Standards, the Code of Arbitration Procedure, the Code of Arbitration Procedure for Customer Disputes, the Code of Arbitration Procedure for Industry Disputes, and the Code of Mediation Procedure to replace any references to ''Office of Dispute Resolution'' with ''FINRA Dispute Resolution Services.'' The proposed rule change would also amend the Books, Records and Reports, the Code of Procedure, and the Funding Portal Rules to replace any references to ''Department of Registration and Disclosure'' (also referred to as ''RAD'' in FINRA rules) with ''Credentialing, Registration, Education and Disclosure'' (also referred to as ''CRED'' in FINRA rules). The proposed rule change would also replace any references to ''RAD'' with ''CRED.''

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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In March 2017, FINRA launched FINRA360, a comprehensive self-evaluation and organizational improvement initiative to ensure that FINRA is operating as the most effective self-regulatory organization it can be, working to protect investors and promote market integrity in a manner that supports strong and vibrant capital markets. In connection with this ongoing initiative, FINRA has sought feedback from its members, as well as investors, investor advocates, regulators, trade associations and FINRA employees. FINRA has analyzed the feedback received from these stakeholders and as a result has made significant changes across the organization.[5]

The Office of Dispute Resolution administers an arbitration and mediation forum for investors and brokerage firms and their registered employees while RAD manages, among other matters, the registration of these firms and their employees. As part of FINRA360, FINRA refined the name of its arbitration and mediation forum to FINRA Dispute Resolution Services to more closely describe its key functions, to highlight the customer service it provides, and to feature the independence and impartiality of the forum. FINRA also refined the name of RAD to Credentialing, Registration, Education and Disclosure to better describe the totality of functions it performs on behalf of FINRA for its stakeholders.

The proposed rule change would amend FINRA rules to reflect these name changes.

Proposed Amendments

The proposed rule change would amend FINRA Rules 0160 (Definitions), 10308 (Selection of Arbitrators), 10312 (Disclosures Required of Arbitrators and Director's Authority to Disqualify), 10314 (Initiation of Proceedings), 12100 (Definitions), 12103 (Director of Office of Dispute Resolution), 12701 (Settlement), 13100 (Definitions), 13103 (Director of Office of Dispute Resolution), 13701 (Settlement) and 14100 (Definitions) to replace references to ''Office of Dispute Resolution'' with ''FINRA Dispute Resolution Services.''

The proposed rule change would also amend FINRA Funding Portal Rule 900 (Code of Procedure) and FINRA Rules 4530 (Reporting Requirements), 9521 (Purpose and Definitions), 9522 (Initiation of Eligibility Proceeding: Member Regulation Consideration), and 9524 (National Adjudicatory Council Consideration) to replace references to ''Department of Registration and Disclosure'' with ''Credentialing, Registration, Education and Disclosure'' and any references to ''RAD'' with ''CRED.''

FINRA has filed the proposed rule change for immediate effectiveness. The effective date will be the date of the filing.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] 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, and, in

[22] 17 CFR 200.30–3(a)(12).

[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)(3).

[5] *See* FINRA, Progress Report on FINRA360 (June 2019), *https://www.finra.org/sites/default/files/finra360-progress-report.pdf.*

[6] 15 U.S.C. 78*o*–3(b)(6).

general, to protect investors and the public interest. The proposed rule change will update FINRA rules to reflect recent name changes to two FINRA departments, thereby bringing clarity and consistency to FINRA rules.

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. The proposed rule change would bring clarity and consistency to FINRA rules without affecting the numerous services and benefits provided by the forum or the cost to any party to use it.

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and paragraph (f)(3) of Rule 19b–4 thereunder.[8] 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–FINRA–2020–039 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–2020–039. 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–2020–039 and should be submitted on or before December 1, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24889 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(3).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34086; File No. 812–15083]

Principal Diversified Select Real Asset Fund, et al.

November 4, 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 investment companies and business development companies to co-invest in portfolio companies with affiliated investment funds.

Applicants: Principal Diversified Select Real Asset Fund (''Existing Regulated Fund''), Principal Global Investors, LLC (''PGI''), Principal Life Insurance Company (''PLIC''), Principal Real Estate Strategic Debt Fund I, LP (''Existing Affiliated Fund''), and Principal Real Estate Investors, LLC (''PrinREI'').

Filing Dates: The application was filed on December 12, 2019, and amended on April 1, 2020, June 16, 2020, August 18, 2020, August 31, 2020, and October 22, 2020.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 30, 2020, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Attn: John L. Sullivan, *Sullivan.john.l@principal.com.*

FOR FURTHER INFORMATION CONTACT: Joseph Toner, Senior Counsel, at (202) 551–7595, or David Nicolardi, Branch Chief, at (202) 551–6825 (Chief Counsel's Office, Division of Investment Management).

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. Applicants request an order of the Commission under Sections 17(d) and 57(i) and Rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other Regulated Funds and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub) [3] 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.[4] For the avoidance of doubt, investment opportunities that are sourced by sub-advisers that are not Advisers are excluded from the definitions of Potential Co-Investment Transaction. Only investment opportunities that are sourced by Advisers will be considered Potential Co-Investment Transactions.

Applicants

2. The Existing Regulated Fund is a Delaware statutory trust that is registered with the Commission under the Act as a closed-end, diversified management investment company. The Existing Regulated Fund relies on Rule 23c–3 under the Act and operates as an interval fund. The Existing Regulated Fund's Board [5] is comprised of a majority of members who are Independent Trustees.[6]

3. PGI is a Delaware limited liability company that is registered under the Advisers Act. PGI serves as the investment adviser to the Existing Affiliated Funds and to certain asset classes of the PFG Accounts.

4. PLIC is a stock life insurance company incorporated in Iowa. PLIC operates as an indirect wholly-owned subsidiary of PFG and, with respect to certain asset classes, is advised by PGI and PrinREI pursuant to an investment advisory agreement.

5. PrinREI is a Delaware limited liability company that is registered under the Advisers Act and (i) serves as the investment manager of the Existing Affiliated Fund and (ii) serves as an investment sub-adviser to the Existing Regulated Fund, and to certain asset classes of the PFG Accounts.

6. The Existing Affiliated Fund is a Delaware limited partnership. Applicants represent that the Existing Affiliated Fund is a separate and distinct legal entity and it would be an investment company but for Section 3(c)(7) of the Act.

7. Each of Applicants may be deemed to be directly or indirectly controlled by PFG. Additionally, PGI is an indirect wholly-owned subsidiary of PFG. Thus, PFG may be deemed to control the Regulated Funds and the Affiliated Funds. Applicants state that PFG, however, does not currently offer investment advisory services to any person and is not expected to do so in the future. Applicants state that as a result, PFG has not been included as an Applicant.

8. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs. 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 represent that this treatment is justified because a Wholly-Owned Investment Sub would have no purpose other than serving as a holding vehicle for the Regulated Fund's investments and, therefore, no conflicts of interest could arise between the parent Regulated Fund and the Wholly-Owned Investment Sub. Applicants represent that the Board of the parent Regulated Fund would make all relevant determinations under the Conditions with regard to a Wholly-Owned Investment Sub's participation in a Co-Investment Transaction, and the Board would be informed of, and take into consideration, any proposed use of a Wholly-Owned Investment Sub in the Regulated Fund's place. If the parent Regulated Fund proposes to participate in the same Co-Investment Transaction with any of its Wholly-Owned Investment Subs, Applicants represent that the Board of the parent Regulated Fund will also be informed of, and take into consideration, the relative participation of the Regulated Fund and the Wholly-Owned Investment Sub.

[1] ''Regulated Funds'' means the Existing Regulated Fund 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, (b) whose investment adviser (and sub-adviser(s), if any) is an Adviser (defined below), and (c) that intends to participate in the Co-Investment Program (defined below). ''Adviser'' means (a) PGI, (b) PrinREI, and (c) any future investment adviser that (i) controls, is controlled by or is under common control with PGI and (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. An Adviser will not rely on the requested Order with respect to any investment vehicles it manages that have a sub-adviser other than to the extent those vehicles are sub-advised by an Adviser. ''Co-Investment Program'' means the proposed co-investment program that would permit one or more Regulated Funds and/or one or more Affiliated Funds to participate in the same investment opportunities where such participation would otherwise be prohibited under Section 57(a)(4) and Rule 17d–1 by (a) co-investing with each other in securities issued by issuers in private placement transactions in which an Adviser negotiates terms in addition to price, and (b) making Follow-On Investments (defined below). The term ''private placement transactions'' means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act of 1933 (the ''Securities Act'').

[2] ''Affiliated Fund'' means the Existing Affiliated Fund, the PFG Accounts (defined below), and any entity (a) whose investment adviser (and sub-adviser(s), if any) is an Adviser, (b) that either (x) would be an investment company but for Section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act or (y) relies on Rule 3a–7 under the Act, and (c) that intends to participate in the Co-Investment Program. ''PFG Accounts'' means PLIC, and any future direct or indirect wholly-owned or majority-owned subsidiaries Principal Financial Group, Inc. (''PFG'') that intend to participate in Co-Investment Transactions.

[3] ''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, 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; (iii) with respect to which such Regulated Fund's Board (defined below) has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that would either (a) be an investment company but for Section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act, or (b) relied on Rule 3a–7 under the Act.

[4] All existing entities that currently intend to rely on the Order have been named as Applicants and any existing or future entities that may rely on the Order in the future will comply with its terms and Conditions set forth in the application.

[5] ''Board'' means the board of trustees (or the equivalent) of a Regulated Fund.

[6] ''Independent Trustee'' 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 Trustee 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.

Applicants' Representations

A. Allocation Process

9. Applicants state that each of PGI and PrinREI are presented with a substantial number of investment opportunities each year on behalf of its clients and must determine how to allocate those opportunities in a manner that, over time, is fair and equitable to all of its clients. Such investment opportunities may be Potential Co-Investment Transactions.

10. Applicants represent that the each of PGI and PrinREI has established rigorous 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.

11. Applicants represent that PGI and PrinREI are, and any future Adviser will be, organized and managed such that the relevant portfolio management teams (''Investment Teams'') responsible for evaluating investment opportunities and making investment decisions on behalf of client assets managed by that Adviser are promptly notified of the opportunities made available to the Advisers. If the requested Order is granted, the Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that, when such opportunities arise, the Advisers to the relevant Regulated Funds are promptly notified and receive the same information about the opportunity as any other Advisers considering the opportunity for their clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [7] and any Board-Established Criteria [8] of a Regulated Fund, the policies and procedures will require that the relevant Investment Team responsible for that Regulated Fund receive sufficient information to allow the Regulated Fund's Adviser to make its independent determination and recommendations under the Conditions.

12. 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 such Potential Co-Investment Transaction to be appropriate, it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

13. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the applicable Investment Team will approve the investment and the investment amount, and will coordinate an order submission process with a designated representative of each applicable Investment Team of a Regulated Fund and Affiliated Fund. Applicants state further that, at this stage, each proposed order or investment amount may be reviewed and adjusted, in accordance with the applicable Adviser's written allocation policies and procedures.[9] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The final Internal Order will be submitted for approval by the Required Majority of any participating Regulated Fund in accordance with the Conditions.[10]

14. 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.[11] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[12]

B. Follow-On Investments

15. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments [13] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or

[7] ''Objectives and Strategies'' means 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 or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders.

[8] ''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 Trustees. The Independent Trustees of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[9] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of the Advisers.

[10] ''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).

[11] 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 (defined below) with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under Section 57(o) of the Act.

[12] However, if the size of the opportunity is decreased such that the aggregate of the original Internal Orders would exceed the amount of the remaining investment opportunity, then upon submitting any revised order amount to the Board of a Regulated Fund for approval, the Adviser to the Regulated Fund will also notify the Board promptly of the amount that the Regulated Fund would receive if the remaining investment opportunity were allocated pro rata on the basis of the size of the original Internal Orders. The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with Conditions 2, 6, 7, 8 or 9, as applicable.

[13] ''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.

Affiliated Funds previously have invested.

16. 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.[14] If such Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If such Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

17. 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[15] or (ii) a Non-Negotiated Follow-On Investment.[16] 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

18. Applicants propose that Dispositions[17] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions requirements 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 requirements described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6.[18]

19. 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[19] or (ii) the securities are Tradable Securities[20] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

20. Applicants represent that 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

21. 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

[14] ''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.

[15] 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).

[16] 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 Staff No-Action Letter (pub. avail. Sept. 5, 1995) and *Massachusetts Mutual Life Insurance Company,* SEC Staff No-Action Letter (pub. avail. June 7, 2000).

[17] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[18] 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.

[19] 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.

[20] ''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.

voting shares (the ''Shares'') of a Regulated Fund, then the Holders will vote such Shares as required under Condition 15; provided however, that Condition 15 will not apply to a Regulated Fund during any time which the Holders in the aggregate own 100% of the Shares of such Regulated Fund.

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 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) PrinREI manages, and may be deemed to control, the Existing Affiliated Fund; (ii) each of PGI and PrinREI manages, and may be deemed to control, certain asset classes of the PFG Accounts; (iii) PGI is the investment adviser to, and may be deemed to control the Existing Regulated Fund, and an Adviser will be the investment adviser or sub-adviser to, and may be deemed to control, any Future Regulated Fund; and (iv) the Advisers (including PGI and PrinREI) are under common control. Thus, each of the Affiliated Funds could be deemed to be a person related to the Regulated Funds in a manner described by Section 57(b) and related to the other Regulated Funds in a manner described by Rule 17d–1; and therefore the prohibitions of Rule 17d–1 and Section 57(a)(4) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds.

4. In passing upon applications under Rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by Rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. Identification and Referral of Potential Co-Investment Transactions

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. Board Approvals of Co-Investment Transactions

(a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the 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 [21] 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,[22] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[23]

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 will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated 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; [24] (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

[21] 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.

[22] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[23] ''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.

[24] 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.

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 Conditions 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 [25] 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,[26] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as 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

[25] 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.

[26] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

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.

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 Trustees, 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 Trustees 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 Trustee 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.*[27] 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 trustees; (2) the removal of one or more trustees; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election; provided however, that this Condition 15 will not apply to a Regulated Fund during any time which the Holders in the aggregate own 100% of the Shares of such Regulated Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24879 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[27] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90340; File No. SR–NASDAQ–2020–062]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Listing Rules Applicable to Special Purpose Acquisition Companies Whose Business Plan Is To Complete One or More Business Combinations

November 4, 2020.

On September 3, 2020, The Nasdaq Stock Market LLC (''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 listing rules applicable to companies whose business plan is to complete one or more business combinations. The proposed rule change was published for comment in the **Federal Register** on September 22, 2020.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 6, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates December 21, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2020–062).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24888 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89897 (September 16, 2020), 85 FR 59574.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90346]

Public Availability of the Securities and Exchange Commission's FY 2016 and FY 2017 Service Contract Inventory

AGENCY: Securities and Exchange Commission.

ACTION: Notice.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), SEC is publishing this notice to advise the public of the availability of the FY2017 Service Contract Inventory (SCI) and the FY2016 SCI Analysis along with the FY2018 Service Contract Inventory (SCI) and the FY2017 SCI Analysis.

The SCI provides information on FY2016 and FY2017 actions over $150,000 for service contracts. The inventory organizes the information by function to show how SEC distributes contracted resources throughout the agency. SEC developed the inventory per the guidance issued on January 17, 2017 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/service_contract_inventories.pdf.*

The Service Contract Inventory Analysis for FY2016 provides information based on the FY 2016 Inventory and the Service Contract Inventory Analysis for FY2017 provides information based on the FY 2017 Inventory. Please note that the SEC's FY 2016 and FY 2017 Service Contract Inventory data is now included in government-wide inventory available on *www.acquisition.gov.* The government-wide inventory can be filtered to display the inventory data for the SEC. The SEC has posted its FY 2017 and FY2018 plans for analyzing data, a link to the FY 2017 and 2018 government-wide Service Contract Inventory, the FY 2016 SCI Analysis, and the FY 2017 SCI Analysis on the SEC's homepage at *http://www.sec.gov/about/secreports.shtml* and *http://www.sec.gov/open.*

FOR FURTHER INFORMATION CONTACT: Direct questions regarding the service contract inventory to Vance Cathell, Director Office of Acquisitions 202.551.8385 or *CathellV@sec.gov.*

Dated: November 4, 2020.

Vanessa Countryman,

Secretary.

[FR Doc. 2020–24880 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90332; File No. SR–CBOE–2020–107]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

November 4, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 28, 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 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 its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://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 its Fees Schedule in connection with Compression, or Position Compression Cross (''PCC''), orders, effective October 29, 2020.

By way of background, the Exchange has historically permitted open outcry compression forums which allow Trading Permit Holders (''TPHs'') to reduce open interest in SPX options. Footnote 41 of the Fees Schedule currently provides a rebate of transaction fees, including the Index License Surcharge, for closing transactions involving SPX and SPXW compression-list positions executed in a compression forum. From March 16 to June 12, 2020, the Exchange's trading floor was closed due to the coronavirus pandemic. During that time, the Exchange operated in an all-electronic configuration, which would have prevented market participants from reducing open SPX interest in open outcry compression forums. As a result, the Exchange adopted Rule 5.24(e)(1)(E) to permit TPHs to reduce open interest in SPX options in electronic compression forums in the same manner as an open outcry compression forum (as set forth in Rule 5.88) while the trading floor was inoperable.[3] Footnote 12 of the Fees Schedule was also amended to provide a waiver for all transaction fees, including any applicable surcharges (*e.g.,* Index License Surcharge and SPX/SPXW Execution Surcharges), for closing transactions involving SPX and SPXW compression-list positions executed in an electronic compression forum, like that of the waiver provided in footnote 41 for open outcry compression forums.[4] The Exchange recently adopted Compression, or ''PCC'', orders that can be executed electronically or in open outcry on a permanent basis, and, as a result, removed Rule 5.24(e)(1)(E), as well as relocated and amended Rule 5.88.[5] The Exchange notes that PCC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Release No. 88490 (March 26, 2020), 85 FR 18318 (April 1, 2020) (SR–CBOE–2020–026).

[4] *See* Securities Exchange Release No. 88678 (April 17, 2020), 85 FR 22770 April 23, 2020) (SR–CBOE–2020–033).

[5] *See* Securities Exchange Release Nos. 89707 (August 28, 2020), 85 FR 55040 (September 3, 2020) (SR–CBOE–2020–074) (Notice of Filing of a Proposed Rule Change Relating To Adopt

Continued

orders may be comprised of opening and closing positions. The Exchange plans to launch PCC order functionality on October 29, 2020.

The Exchange proposes to amend the Fees Schedule in light of the adoption of PCC orders (*i.e.,* compression orders) on a permanent basis. As noted above, footnote 12 currently provides that the Exchange shall waive transaction fees, including the Index License Surcharge and SPX/SPXW Execution Surcharge, for closing transactions involving SPX and SPXW compression-list positions executed in a compression forum (pursuant to Rule 5.24) when the trading floor is inoperable. In order to receive a waiver of fees for compression forum transactions, a TPH must mark its orders in a form and manner determined by the Exchange to identify them as eligible for the compression rebates. Likewise, footnote 41 currently provides that the Exchange shall rebate transaction fees, including the Index License Surcharge, for closing transactions involving SPX and SPXW compression-list positions executed in a compression forum (pursuant to Rule 5.88). In order to receive either rebate, a TPH must mark its orders in a form and manner determined by the Exchange to identify them as eligible for the compression rebates. Pursuant to both footnote 12 and 41, orders identified as compression trades do not count towards any volume thresholds.[6]

The Exchange notes that the proposed rule change does not alter the current waiver already in place pursuant to footnote 12 for transactions in temporary electronic compression forums (when the Exchange's trading floor is inoperable) or rebate in place pursuant to footnote 41 for transactions in open outcry compression forums. Instead, the proposed rule change removes the electronic compression forum waiver language in footnote 12 and relocates it to footnote 41, as the waiver will now apply at all times, as PCC orders will be available at all times rather than only when the trading floor is inoperable. The proposed rule change updates and streamlines the compression waiver language in footnote 41 by replacing the language describing the prior compression forum process with ''PCC orders'', clarifying that the waiver will apply to PCC orders executed both electronically and in open outcry, removing references to closing transactions (as PCC orders may now be comprised of opening and closing positions) and removing references to prior Rules 5.24 and 5.88. Specifically, the proposed language in footnote 41 provides that the Exchange shall waive transaction fees, including the Index License Surcharge and SPX/SPXW Execution Surcharge, for PCC transactions executed electronically or in open outcry, as applicable.[7] A PCC order submitted for execution in open outcry must be marked as ''compression'' in order to receive waiver of fees for PCC orders. PCC transactions will not to count towards any volume thresholds. The Exchange notes that the proposed language provides for a waiver of transaction fees for all PCC orders, as is currently the case for electronic compression trades, instead of the rebate currently provided for compression trades in open outcry. This proposed rule change does not alter the ultimate amount charged or benefit provided to a TPH for compression transactions in open outcry, but instead removes the extra reimbursement step in the billing process and provides uniformity for the billing process across electronic and open outcry compression trades by waiving all compression transaction fees. Finally, the proposed rule change removes the requirement that in order to receive a waiver of fees for compression forum transactions, a TPH must mark its orders (for both electronic execution and open outcry) in a form and manner determined by the Exchange to identify them as eligible for the compression rebates. It replaces this former requirement with the requirement that only PCC orders submitted for execution in open outcry must be marked as ''compression'', as the System will now be able to automatically determine electronic PCC orders as ''compression'' without any other marking.

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.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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 Section 6(b)(4) of the Act,[10] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes the proposed rule change is consistent with the Act, in that, it is reasonable, equitable and not unfairly discriminatory. The proposed rule change is reasonable because it does not alter the transaction fee waiver currently available for compression trades, but merely updates the waiver language to appropriately reflect its application to the permanent electronic compression orders (*i.e.,* PCC orders) recently adopted by the Exchange and clarifies that only open outcry compression orders must be marked for open outcry execution. All compression transactions will continue not to count toward volume thresholds. Additionally, the Exchange notes that the proposed change to update the rebate applied to open outcry compression trades to a fee waiver is reasonable as it does not change the ultimate amount charged or benefit currently provided to a TPH for compression transactions, but instead removes the extra reimbursement step in the billing process and provides uniformity for the billing process across electronic and open outcry compression trades by waiving all compression transaction fees. Also, the Exchange believes that, generally, the transaction fee waiver in place for compression orders is reasonable and equitable because the compression of these positions would improve market liquidity by freeing capital currently tied up in positions for which there is a minimal chance that a significant loss would occur. Finally, the Exchange

Compression Orders); and 90179 (October 14, 2020), 85 FR 66590 (October 20, 2020) (SR–CBOE–2020–074) (Order Granting Approval of a Proposed Rule Change To Adopt Position Compression Cross (''PCC'') Orders for SPX).

[6] This includes the following programs: (1) SPX Liquidity Provider Sliding Scale, (2) Clearing Trading Permit Holder Proprietary Products Sliding Scale, (3) Select Customer Options Reduction (''SCORe'') Program, (4) SPX/SPXW Market-Maker Tier Appointment Fees, (5) SPX/SPXW Floor Broker Trading Surcharge, (6) Floor Broker ADV Discount, (7) Floor Brokerage Fees Discount, and (8) Frequent Trader Program. *See also* Securities Exchange Release No. 88836 (May 7, 2020), 85 FR 28669 (May 13, 2020) (SR–CBOE–2020–044).

[7] The proposed rule change also appends footnote 41 to the surcharges in the Fees Schedule to which the compression waiver for Rule 5.24 electronic compression trades applied, as the waiver will continue to apply for electronic PCC orders.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(4).

believes that the proposed rule change is equitable and not unfairly discriminatory because the fee waiver will continue to apply in the same uniform manner for the same transactions, both electronically and in open outcry,[11] for all TPHs that submit compression orders to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

Exchange does not believe that the proposed rule change will impose any burden on intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the compression transaction fee waiver will apply to all TPHs that submit compression orders to the Exchange, as it does today and will to compression orders executed electronically and in open outcry. 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 because the transaction fee waiver will continue to apply to compression orders available only for Exchange proprietary products, SPX/SPXW.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and paragraph (f) of Rule 19b–4[13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–107 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–2020–107. 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–2020–107 and should be submitted on or before December 1, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24883 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[11] *See supra* note 7.

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA–5622]

Notice of Intention To Cancel Registration Pursuant to the Investment Advisers Act of 1940

November 5, 2020.

Notice is given that the Securities and Exchange Commission (the ''Commission'') intends to issue an order, pursuant to section 203(h) of the Investment Advisers Act of 1940 (the ''Act''), cancelling the registration of Ann T. Coffey Wealth Management LLC [File No. 801–77092], hereinafter referred to as the ''*registrant.*''

Section 203(h) of the Act provides, in pertinent part, that if the Commission finds that any person registered under section 203 of the Act, or who has pending an application for registration filed under that section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment adviser under section 203A of the Act, the Commission shall by order, cancel the registration of such person.

The registrant indicated on its most recent Form ADV annual amendment that it is no longer eligible to remain registered with the Commission as an investment adviser but has not filed Form ADV–W to withdraw its registration.[1] Furthermore, the registrant has not filed a Form ADV amendment annually with the Commission as required by rule 204–1 under the Act; therefore, it appears that the registrant is not in existence or otherwise not engaged in business as an investment adviser.[2] Accordingly, the Commission believes that reasonable grounds exist for a finding that the registrant is no longer eligible to be registered with the Commission as an investment adviser and that the registration should be cancelled pursuant to section 203(h) of the Act.

[1] The registrant filed its most recent Form ADV annual amendment on March 27, 2018.

[2] Rule 204–1 under the Act requires any adviser that is required to complete Form ADV to amend the form at least annually and to submit the amendments electronically through the Investment Adviser Registration Depository.

Notice is also given that any interested person may, by November 30, 2020, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the cancellation, accompanied by a statement as to the nature of his or her interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, and he or she may request that he or she be notified if the Commission should order a hearing thereon. Any such communication should be emailed to the Commission's Secretary at *Secretarys-Office@sec.gov.*

At any time after November 30, 2020, the Commission may issue an order cancelling the registration, upon the basis of the information stated above, unless an order for a hearing on the cancellation shall be issued upon request or upon the Commission's own motion. Persons who requested a hearing, or who requested to be advised as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. Any adviser whose registration is cancelled under delegated authority may appeal that decision directly to the Commission in accordance with rules 430 and 431 of the Commission's rules of practice (17 CFR 201.430 and 431).

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.*

FOR FURTHER INFORMATION CONTACT: Alexis Palascak, Senior Counsel at 202–551–6999; SEC, Division of Investment Management, Investment Adviser Regulation Office, 100 F Street NE, Washington, DC 20549–8549.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.[3]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24938 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[3] 17 CFR 200.30–5(e)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90331; File No. SR–NASDAQ–2020–057]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, To Allow Companies To List in Connection With a Direct Listing With a Primary Offering in Which the Company Will Sell Shares Itself in the Opening Auction on the First Day of Trading on Nasdaq and To Explain How the Opening Transaction for Such a Listing Will Be Effected

November 4, 2020.

On September 4, 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 allow companies to list in connection with a direct listing with a primary offering in which the company will sell shares itself in the opening auction in the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected. The proposed rule change was published for comment in the **Federal Register** on September 21, 2020.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 5, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates December 20, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2020–057).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–24882 Filed 11–9–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020). Comments received on the proposed rule change available at: *https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16694 and #16695; NEW YORK Disaster Number NY–00198]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of New York

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of NEW YORK (FEMA–4567–DR), dated 10/02/2020.

Incident: Tropical Storm Isaias.

Incident Period: 08/04/2020.

DATES: Issued on 11/03/2020.

Physical Loan Application Deadline Date: 12/01/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 07/02/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of NEW YORK, dated 10/02/2020, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Putnam, Queens, Richmond, Rockland, Westchester.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–24869 Filed 11–9–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Military Reservist Economic Injury Disaster Loans; Interest Rate for First Quarter FY 2021

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of the Military Reservist Economic Injury Disaster Loans interest rate for loans approved on or after October 30, 2020.

DATES: Issued on 11/04/2020.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The Small Business Administration publishes an interest rate for Military Reservist Economic Injury Disaster Loans (13 CFR 123.512) on a quarterly basis. The interest rate will be 3.000 for loans approved on or after October 30, 2020.

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–24875 Filed 11–9–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice 11229]

60-Day Notice of Proposed Information Collection: FLO Professional Development Fellowship (PDF) Application

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 *January 11, 2021.*

ADDRESSES: You may submit comments by the following method:

- *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–2020–0043'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* FLO Professional Development Fellowship (PDF) Application.
- *OMB Control Number:* 1405–0229.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Global Talent Management, Family Liaison Office (GTM/FLO).
- *Form Number:* DS–4297.
- *Respondents:* The PDF program is open to spouses and partners of direct-hire U.S. government employees from all agencies serving overseas under Chief of Mission authority.
- *Estimated Number of Respondents:* 260.
- *Estimated Number of Responses:* 260.
- *Average Time per Response:* 2.75 hours.
- *Total Estimated Burden Time:* 715 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Required to Obtain 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 for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Family Liaison Office (FLO) needs the information collected in the PDF application to determine who will receive a Professional Development Fellowship. The information is provided to selection committees that use a set of criteria to score the applications. Respondents are spouses and partners of direct-hire U.S. government employees from all agencies serving overseas under Chief of Mission who want to develop, maintain, and/or refresh their professional skills while overseas. The information is sought pursuant to 22 U.S.C § 2651a—Organization of Department of State, 22 U.S.C § 3921—Management of the Foreign Service.

Methodology

Applicants will email the completed application to FLO's PDF program manager.

Zachary Parker,

Director.

[FR Doc. 2020–24893 Filed 11–9–20; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Burlington International Airport, South Burlington VT; FAA Approval of Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by the City of Burlington, Vermont under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979. These findings are made in recognition of the description of federal and non-federal responsibilities in Senate Report No. 96–52 (1980). On October 14, 2020, the Airports Division Deputy Director approved the Burlington International Airport noise compatibility program. This supersedes the approval issued August 27, 2020. All of the proposed program elements were approved.

DATES: The date of the FAA's approval of the Burlington International Airport noise compatibility program is October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Federal Aviation Administration, New England Region, Airports Division, 1200 District Avenue,

Burlington, Massachusetts 01803. Telephone (781) 238–7613. Email: *richard.doucette@faa.gov.* Documents reflecting this FAA action may be obtained from the same individual. The Noise Compatibility Plan and supporting information can also be found at *www.btvsound.com.*

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the Burlington International Airport noise compatibility program, effective October 14, 2020.

Under Section 104 (a) of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter the Act), an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the noise exposure maps.

The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with 14 CFR part 150 is a local program, not a federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of the Part 150 program recommendations is measured according to the standards expressed in Part 150 and the Act, and is limited to the following determinations:

(a) The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

(b) Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

(c) Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the federal government; and

(d) Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator as prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in Part 150, Section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute a FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action.

Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA under the Airport and Airway Improvement Act of 1982. Where Federal funding is sought, requests for project grants must be submitted to the FAA Regional Office in Burlington, Massachusetts.

The Burlington International Airport study contains a proposed noise compatibility program comprised of actions designed for implementation by airport management and adjacent jurisdictions. The Burlington International Airport, South Burlington, Vermont requested that the FAA evaluate and approve this material as a noise compatibility program as described in Section 104(b) of the Act. The FAA began its review of the program on April 15, 2020, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such a program within the 180-day period shall be deemed to be an approval of such a program.

The submitted program contained 9 noise mitigation measures, including 2 to be removed. The FAA completed its review and determined that the procedural and substantive requirements of the Act and Part 150 have been satisfied. All 7 recommended measures were approved, and 2 recommended for removal were approved for removal. The new program will de-emphasize land acquisition in lieu of sound insulation, as the primary noise mitigation measure.

The Airports Division originally approved the program on August 27, 2020. After issuance of the Record of Approval, the FAA discussed its implementation with the City of Burlington. Based on this discussion, the FAA made two small revisions to the Record of Approval and issued a revised approval on October 14, 2020. These revisions clarify FAA funding of the Purchase Assurance and Sales Assistance programs (measures #6 and #7). That prior approval is superseded by issuance of a new Record of Approval on October 14, 2020.

FAA's determinations are set forth in detail in a Record of Approval approved on October 14, 2020. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of Burlington International Airport, South Burlington, Vermont.

Issued in Burlington, Massachusetts, on October 14, 2020.

Julie Seltsam-Wilps,

Airports Division Deputy Director, FAA New England Region.

[FR Doc. 2020–23279 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0993]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed; Approval of Information Collection: General Aviation and Part 135 Activity Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FAA's primary requirement is for annual hours flown, optimal determination of sample size is based on flight time variation by state and aircraft type, and a sampling fraction is determined for each cell with a no-zero population. Sample units are selected randomly within each stratum. Respondents to this survey are owners of general aviation aircraft.

This information is used by FAA, NTSB, and other government agencies, the aviation industry, and others for safety assessment, planning, forecasting, cost/benefit analysis, and to target areas for research.

DATES: Written comments should be submitted by January 11, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket: *www.regulations.gov* (Enter docket number into search field).

By mail: N/A.

By fax: N/A.

FOR FURTHER INFORMATION CONTACT: [Shane Bertish] by email at: *Shane.Bertish@faa.gov;* phone: N/A.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–6160.

Title: General Aviation and Part 135 Activity Survey.

Form Numbers: 1800–54.

Type of Review: Renewal.

Background: Title 49, United States Code, empowers the Secretary of Transportation to collect and disseminate information relative to civil aeronautics, to study the possibilities for development of air commerce and the aeronautical industries, and to make long-range plans for, and formulate policy with respect to, the orderly development and use of the navigable airspace, radar installations and all other aids for air navigation. These data are necessary to assess performance of the Department of Transportation in meeting the strategic goal for General Aviation safety as described in the Destination 2025 Strategic Plan.

The agency and the National Transportation Safety Board (NTSB) use the exposure data, both by itself and in conjunction with aircraft age, to calculate accident rates, which are used to compare safety over time and safety performance among different aircraft types and configurations.

The agency and the NTSB will use the exposure data for public use aircraft to calculate accident rates for those aircraft. The NTSB is now required to investigate accidents involving public use aircraft. This is a responsibility assigned by Public Law 103–411.

Respondents: Owners of general aviation aircraft.

Frequency: Annual.

Estimated Average Burden per Response: 20 minutes.

Estimated Total Annual Burden: 39,000 responses; 13,000 hours.

Issued in Washington, DC, on November 4, 2020.

Parasha Vincent Flowers,

Program Manager, Program Management & Development Branch, AVP–220, Office of Accident Investigation & Prevention.

[FR Doc. 2020–24874 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–30]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On August 24, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before December 10, 2020.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division, Federal Railroad Administration, telephone (202) 493–0440, email: *Hodan.Wells@dot.gov.*

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On August 24, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 52190. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Track Safety Standards; Concrete Crossties.

OMB Control Number: 2130–0592.

Abstract: In 2011, FRA mandated specific requirements for effective concrete crossties, for rail fastening systems connected to concrete crossties, and for automated inspections of track constructed with concrete crossties. FRA uses the information collected under 49 CFR 213.234 to ensure automated track inspections of track constructed with concrete crossties are carried out as specified in the rule to supplement visual inspections by Class I and Class II railroads, intercity passenger railroads, and commuter railroads.

Type of Request: Extension with change (revised estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 30 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 2,405.

Total Estimated Annual Burden: 279 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $19,888.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2020–24947 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0109 and NHTSA–2018–0074; Notice 1]

Consolidated Glass & Mirror, LLC, Receipt of Petitions for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petitions.

SUMMARY: Consolidated Glass & Mirror, LLC (CGM), a subsidiary of Guardian Industries Corporation (Guardian), has determined that certain laminated glass parts do not fully comply with Federal motor vehicle safety standard (FMVSS) No. 205, *Glazing Materials.* Guardian filed two noncompliance reports dated April 15, 2020 and December 14, 2018 CGM petitioned NHTSA on May 23, 2018, and December 20, 2018, for a decision that the subject noncompliances are inconsequential as they relate to motor vehicle safety. This document announces receipt of CGM's petitions.

DATES: The closing date for comments on the petition is December 10, 2020.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number(s) and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID numbers for these petitions are shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview

CGM has determined that certain laminated glass parts do not fully comply with paragraph S6 of FMVSS No. 205, *Glazing Materials* (49 CFR 571.205). On May 23, 2018, Guardian petitioned NHTSA for an inconsequential safety decision (49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*) without initially filing a noncompliance report (49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*). Although NHTSA could have properly rejected this petition, it did not and prompted Guardian to file the required noncompliance report. Guardian finally did so on April 15, 2020. Guardian filed another noncompliance report dated December 14, 2018 and subsequently filed a second petition on December 20, 2018, for a decision that this second noncompliance is inconsequential as they relate to motor vehicle safety. Because the two petitions address similar issues, this document announces the receipt of the two CGM's petitions.

This notice of receipt of CGM's petitions is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercises of judgment concerning the merits of the petition.

II. Equipment Involved

Approximately 223 laminated windshields manufactured on March 8, 2018, and shipped to IC Corp Tulsa Bus Plant for installation into Navistar buses are potentially involved.

Approximately 1,390 bus door window panes, manufactured between November 1, 2017 and March 29, 2018 are potentially involved. The window panes were sold to Vapor Bus for use in the fabrication of bus doors. Vapor Bus subsequently shipped the bus doors to Nova Bus for installation in their buses.

III. Noncompliance

CGM explained that the noncompliance is that the markings on the subject laminated glass panes do not fully meet the requirements specified in paragraph S6 of FMVSS No. 205. Specifically, the laminated glass panes shipped to IC Corp Tulsa Bus Plant were marked AS–2, when they should have been marked AS–1 and the bus window panes sold to Nova Bus were marked AS–S, when they should have been marked AS–2.

IV. Rule Requirements

Paragraph S6 of FMVSS No. 205 includes the requirements relevant to this petition. A manufacturer or distributor who cuts a section of glazing material, to which FMVSS No. 205 applies, for use in a motor vehicle or

camper, must mark that material in accordance with section 7 of ANSI/SAE Z26.1–1996.

V. Summary of CGM's Petitions

The following views and arguments presented in this section, V. Summary of CGM's Petitions, are the views and arguments provided by CGM. They have not been evaluated by the Agency and do not reflect the views of the Agency. The petitioner described the subject noncompliances and stated their belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of their petitions, CGM submitted the following reasoning:

1. The laminated glass parts are affixed with the CGM trademark and the correct DOT number and M number.

2. Although the laminated glass parts are affixed with the misprinted AS number, the glass construction from which the laminated glass parts were fabricated is in full compliance with the technical requirements that 49 CFR 571.205 as it currently applies to laminated glass for use in a motor vehicle. In no way is the actual safety aspect of the laminated glass compromised by the misprinted AS number.

3. Despite the misprinted AS number being affixed to the laminated glass parts described herein, the correct parts were sold and shipped to Navistar and Nova Bus for use as windscreens and door windows.

4. CGM asserts that the noncompliance reported herein could not result in the wrong part being used in an OEM application, given that the part would be ordered by its unique part number and not the ''M number'' (which corresponds to the glass construction from which the part is fabricated). The parts are also easily traceable back to CGM via their unique DOT number.

CGM concluded by expressing the belief that the subject noncompliances are inconsequential as they relate to motor vehicle safety, and that their petitions to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

CGM's complete petitions and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: *https://www.regulations.gov* and following the online search instructions to locate the docket numbers listed in the title of this notice.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on these petitions only applies to the subject equipment that CGM no longer controlled at the time it determined that the noncompliances existed. However, any decision on these petitions does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant equipment under their control after CGM notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–24825 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2017–0097; Notice 2]

General Motors, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: General Motors, LLC (GM), has determined that the seat belt assemblies in certain model year (MY) 2017–2018 Chevrolet Silverado heavy duty and GMC Sierra heavy duty motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 209, *Seat Belt Assemblies.* GM filed a noncompliance report dated September 14, 2017, and later amended it on September 22, 2017. GM also petitioned NHTSA on October 6, 2017, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces the denial of GM's petition.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Hench, Office of Chief Counsel, telephone 202–366–2262, facsimile 202–366–3820, or Mr. Jack Chern, Office of Vehicle Safety Compliance, NHTSA, telephone 202–366–0661, facsimile 202–366–3081.

SUPPLEMENTARY INFORMATION:

I. Overview:

GM has determined that the seat belt assemblies in certain MY 2017–2018 Chevrolet Silverado heavy duty and GMC Sierra heavy duty motor vehicles do not fully comply with paragraphs S4.4(b)(5) of FMVSS No. 209, *Seat Belt Assemblies* (49 CFR 571.209). GM filed a noncompliance report dated September 14, 2017, and amended it on September 22, 2017, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* GM also petitioned NHTSA on October 6, 2017, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

Notice of receipt of GM's petition was published, with a 30-day public comment period, on January 10, 2018, in the **Federal Register** (83 FR 1282). No comments were received. To view the petition and all supporting documents, log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2017–0097.''

II. Vehicles Involved

This petition concerns approximately 38,048 MY 2017–2018 Chevrolet Silverado heavy duty and GMC Sierra heavy duty (Gross Vehicle Weight Rating (GVWR) of 9,300–13,400 lbs) motor vehicles, manufactured between July 18, 2016, and August 7, 2017. The double cab versions of the subject vehicles are not included in this petition.

III. Noncompliance

GM explains the noncompliance as seat belt assemblies that do not conform to the upper-torso seat belt elongation requirements specified in paragraph S4.4(b)(5) of FMVSS No. 209. Specifically, the seat belt assemblies were built with load-limiting torsion bars measuring 9.5 mm in diameter on the driver side and 8.0 mm on the passenger side, instead of 12 mm for both sides as specified by GM.

IV. Rule Requirements

Paragraph S4.4(b)(5) of FMVSS No. 209, includes the requirements relevant to this petition. Except as provided in paragraph S4.5 of FMVSS No. 209, when tested by the procedure specified in paragraph S5.3(b), the length of the upper torso restraint between anchorages shall not increase more than 508 mm when subjected to a force of 11,120 N.

V. Summary of GM's Petition

GM stated that smaller diameter torsion bars in the noncompliant trucks are regularly used in retractor assemblies in other full-size trucks, including variants of the subject vehicles. Due to their smaller size and weight rating, these similar variants are subject to S5.1 of FMVSS No. 208, and exempt from S4.4(b)(5) of FMVSS No. 209.[1] GM contends that the seat belt retractors with undersized torsion bars inadvertently installed in the subject vehicles provide at least the same level of occupant protection in frontal crashes while optimizing belt force-deflection characteristics. However, the subject vehicles were not certified to S5.1 of FMVSS No. 208 and, accordingly, were not intended to be equipped with these smaller diameter torsion bars because they were required to meet the elongation requirements of S4.4(b)(5) of FMVSS No. 209.

GM described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety. In support of its petition, GM submitted the following reasoning:

1. GM Indicates the Subject Vehicles Meet the Belted Frontal Crash Performance Testing Requirements of S5.1 of FMVSS No. 208

GM has conducted dynamic frontal crash testing on 2500 series vehicles that it describes as substantially similar to the subject vehicles and equipped with the same load-limiting seat belt retractors with the lower-diameter torsion bars (the ''Tested Vehicles'').[2] According to GM, the tested vehicles comply with the belted frontal crash performance testing requirements under S5.1.1(a) of FMVSS No. 208.[3] The petition also states that the tested vehicles performed below the injury assessment reference limits specified in S5.1.1(a) even when tested at 35 mph, which subjects the vehicle to 36 percent more energy than at the 30 mph testing standard provided in the regulation. GM contends that the tested vehicles were also rated by NHTSA with an overall 4-Star NCAP score.

GM expects that the subject vehicles will perform nearly the same as the tested vehicles in dynamic frontal crash testing and would therefore also meet all of the belted barrier test requirements specified by S5.1.1(a) of FMVSS No. 208.

GM cites statements made by NHTSA in prior rulemaking notices[4] to support its position that the dynamic belted frontal barrier crash testing of S5.1.1(a) of FMVSS No. 208 is a more appropriate means to evaluate occupant protection than the static seat belt elongation testing requirements of S4.4(b)(5) of FMVSS No. 209 for vehicles with seat belts equipped with load limiters.

2. GM Believes the Subject Vehicles Will Provide No Less Protection to Occupants in a Frontal Crash Than Vehicles Equipped With Seat Belt Retractors Utilizing the 12 mm Torsion Bars

GM believes that replacing the retractors installed in the subject vehicles with retractors that have the larger torsion bars would not result in an added safety benefit to the occupants of these vehicles in frontal crashes. The petition contends that the subject vehicles will provide no less occupant protection than vehicles built with the larger 12 mm diameter torsion bars that meet the elongation requirements of S4.4(b)(5) of FMVSS No. 209. Further, GM states that seat belt retractors equipped with the lower-diameter torsion bars may reduce upper torso injury potential in frontal crashes as compared to retractors with the larger-diameter torsion bars.

3. GM Believes NHTSA Precedent Supports Granting the Petition

GM states that NHTSA has previously ruled that failure to comply with certain FMVSS No. 209 static testing requirements can be inconsequential to motor vehicle safety, where the manufacturer demonstrates by dynamic testing that the noncompliant seat belt assembly performs similarly to a compliant assembly. On May 3, 2002, GM submitted an inconsequentiality petition to NHTSA relating to certain trucks and SUVs that were built with damaged and inoperative ''vehicle-sensitive'' emergency-locking retractors (ELRs), which lock the seat belts under rapid deceleration. Notwithstanding the noncompliance with FMVSS No. 209 caused by this condition, GM asserted that the failure was inconsequential to vehicle safety because the ELRs in these vehicles also had a redundant ''webbing-sensitive'' mechanism, which locks the belts when the webbing is rapidly extracted. GM contends it presented dynamic testing data (including some data developed using the test procedures set forth in FMVSS No. 208) demonstrating that the webbing-sensitive system ''offered a level of protection nearly equivalent to that provided by a compliant ELR.''

GM states that NHTSA granted GM's petition, in part, and ruled the noncompliance in certain of the vehicles subject to the petition was inconsequential to motor vehicle safety:

> On the basis of the sled test and simulation data provided by GM, the agency has concluded that GM has adequately demonstrated that the potential safety consequences of the failure of the vehicle-sensitive locking mechanisms in the ELRs in the C/K vehicles to function properly are inconsequential. While the webbing-sensitive systems in these vehicles do allow slightly increased belt payout compared to a functional vehicle-sensitive system, and lock slightly later in crash event, these differences do not appear to expose a vehicle occupant to a significantly greater risk of injury.

General Motors Corporation, Ruling on Petition for Determination of Inconsequential Noncompliance, 69 FR 19897, 19900 (April 14, 2004). In its decision, NHTSA also noted that ''the dummy injury measurements did not increase significantly and were well below the maximum values permitted under FMVSS No. 208.''

[1] S4.5 of FMVSS No. 209 exempts load-limited seat belts installed at a designated seating position subject to S5.1 of FMVSS No. 208 from the elongation requirements.

[2] The subject vehicles and tested vehicles share the same frame, body structure, powertrains and under-hood crush space; instrument panel, steering column and wheel, seats, seat-belt anchorages, and general interior vehicle layout/spatial relationships; and driver and passenger frontal airbags. In similar configurations, the subject vehicles and test vehicles have similar mass.

[3] S5.1.1(a) of FMVSS No. 208 specifies the belted barrier test requirements for certain vehicles not certified to S14 of FMVSS No. 208 (*i.e.,* those with a GVW >8,500 lbs. or an unloaded weight >5,500 lbs).

[4] In its 1991 rulemaking modifying FMVSS No. 209 to exclude certain dynamically tested seat belts from some of the static seat-belt testing requirements, NHTSA acknowledged that it ''has long believed it more appropriate to evaluate the occupant protection afforded by vehicles by conducting dynamic testing . . .'' versus static tests such as the elongation requirements in S4.4(b)(5) of FMVSS No. 209. Final Rule, 56 FR 15295, 15295 (April 16, 1991). Further, ''[s]ince the dynamic test measures the actual occupant protection which the belt provides during a crash, there is no apparent need to subject that belt to static testing procedures that are surrogate and less direct measures of the protection which the belt would provide to its occupant during a crash.'' Notice of Proposed Rulemaking, 55 FR 1681 (January 18, 1990). GM believes NHTSA's rationale for creating these exemptions applies to the subject vehicles even though they may not all technically be ''subject to'' S5.1 of FMVSS No. 208 and therefore exempt from FMVSS No. 209's elongation requirements.

Here, GM argues that the subject vehicles will provide no less protection to occupants in the designated seating positions in frontal crashes than vehicles equipped with seat belt retractors conforming to S4.4(b)(5) of FMVSS No. 209.

4. GM Is Not Aware of any Injuries or Customer Complaints Associated With the Condition

As of September 22, 2017, after searching VOQ, TREAD and internal GM databases, GM stated it was not aware of any crashes, injuries, or customer complaints associated with this condition.

5. GM Has Corrected the Noncompliance in Production Vehicles and Service Part Inventory

GM states that it has corrected the noncompliance in production. According to GM, vehicles produced after August 7, 2017, have seat belt assemblies containing retractor torsion bars that meet GM's original specifications and comply with S4.4(b)(5) of FMVSS No. 209. The petition also states that retractor assemblies with this condition that were manufactured as service parts are no longer available for sale and all affected inventory has been purged. Further, GM contends that any such seat belt assembly previously sold as a service part could only have been installed on a subject vehicle because these seat belt assemblies are not compatible with prior model year (*i.e.,* 2015 or 2016) versions of the Silverado or Sierra HD, due to a different type of wiring connector used.

GM concludes by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

VI. NHTSA's Analysis

1. General Principles

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (the ''Safety Act'') with the express purpose of reducing motor vehicle accidents, deaths, injuries, and property damage. 49 U.S.C. 30101. To this end, the Safety Act empowers the Secretary of Transportation to establish and enforce mandatory FMVSS 49 U.S.C. 30111. The Secretary has delegated this authority to NHTSA. 49 CFR 1.95.

NHTSA adopts an FMVSS only after the agency has determined that the performance requirements are objective, practicable, and meet the need for motor vehicle safety. *See* 49 U.S.C. 30111(a). Thus, there is a general presumption that the failure of a motor vehicle or item of motor vehicle equipment to comply with an FMVSS increases the risk to motor vehicle safety beyond the level deemed appropriate by NHTSA through the rulemaking process. To protect the public from such risks, manufacturers whose products fail to comply with an FMVSS are normally required to conduct a safety recall under which they must notify owners, purchasers, and dealers of the noncompliance and provide a free remedy. 49 U.S.C. 30118–30120. However, Congress has recognized that, under some limited circumstances, a noncompliance could be ''inconsequential'' to motor vehicle safety. It, therefore, established a procedure under which NHTSA may consider whether it is appropriate to exempt a manufacturer from its notification and remedy (*i.e.,* recall) obligations. 49 U.S.C. 30118(d) & 30120(h). The agency's regulations governing the filing and consideration of petitions for inconsequentiality exemptions are set out at 49 CFR part 556.

Under the Safety Act and Part 556, inconsequentiality exemptions may be granted only in response to a petition from a manufacturer, and then only after notice in the **Federal Register** and an opportunity for interested members of the public to present information, views, and arguments on the petition. In addition to considering public comments, the agency will draw upon its own understanding of safety-related systems and its experience in deciding the merits of a petition. An absence of opposing argument and data from the public does not require NHTSA to grant a manufacturer's petition.

Neither the Safety Act nor Part 556 defines the term ''inconsequential.'' The agency determines whether a particular noncompliance is inconsequential to motor vehicle safety based upon the specific facts before it in a particular petition. In some instances, NHTSA has determined that a manufacturer met its burden of demonstrating that a noncompliance is inconsequential to safety. For example, a label intended to provide safety advice to an owner or occupant may have a misspelled word, or it may be printed in the wrong format or the wrong type size. Where a manufacturer has shown that the discrepancy with the safety requirement should not lead to any misunderstanding, NHTSA has granted an inconsequentiality exemption, especially where other sources of correct information are available. *See, e.g.,* General Motors, LLC, Grant of Petition for Decision of Inconsequential Noncompliance, 81 FR 92963 (Dec. 20, 2016).

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.[5] Potential performance failures of safety-critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA's prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.[6] NHTSA also does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. ''Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.''[7] ''[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.''[8]

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.[9] Similarly, NHTSA has

[5] *Cf. Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

[6] *See Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

[7] *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21666 (Apr. 12, 2016).

[8] *United States* v. *Gen. Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it ''results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future'').

[9] *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance,* 66 FR 38342 (July 23, 2001)

Continued

rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.[10] These considerations are also relevant when considering whether a defect is inconsequential to motor vehicle safety.

Response to GM's Arguments

NHTSA has considered GM's arguments and determined that the load-limiting retractor installed with torsion bars measuring 9.5 mm in diameter on the driver side and 8.0 mm on the passenger side, instead of 12 mm as specified by GM, is not inconsequential to motor vehicle safety. NHTSA, therefore, denies GM's request for an inconsequentiality determination, for the following reasons:

a. NHTSA Does Not Find the Dynamic Testing of Similar Vehicles Compelling in This Case

GM believes that the noncompliance of load limiters, mistakenly installed with torsion bars measuring 9.5 and 8.0 mm in diameter on the driver and passenger side instead of 12 mm as specified by GM, is inconsequential to motor vehicle safety. A load limiter is a seat belt assembly component that controls tension on the seat belt and modulates the forces imparted to a vehicle occupant during a crash. Load limiters are intended primarily to reduce upper torso injuries caused by the compressive force applied by the relatively narrow seat belt. They may work in concert with an air bag system to optimize occupant protection in a crash and provide overall crash energy management. Section S4.5 of FMVSS No. 209 exempts a belt with a load limiter from the standard's elongation requirements if it is installed at a seating position subject to the requirements of S5.1 of Standard No. 208—that is, ''subject to'' a belted crash test specified in FMVSS No. 208.

GM argues that the crash testing it performed on the 2500 series vehicles that were substantially similar to the subject vehicles and were equipped with the same load-limiting seat belt retractors with the lower-diameter torsion bars shows that the noncompliant seat belts in the subject vehicles will provide no less protection to occupants in the designated seating positions in frontal crashes than vehicles equipped with seat belt retractors conforming to S4.5 of FMVSS No. 209. GM also cites a prior grant of an inconsequentiality petition for certain of the FMVSS No. 209 static requirements based, in part, on dynamic test data.

The agency disagrees with GM's assessment. NHTSA has more recently considered this issue, its putative inconsequentiality, and whether testing supporting compliance with FMVSS No. 208 may support finding a noncompliance with FMVSS No. 209 inconsequential. *See* BMW of North America, LLC; Jaguar Land Rover North America, LLC; and Autoliv, Inc.; Decisions of Petitions for Inconsequential Noncompliance, 84 FR 19994 (May 7, 2019). In any case, the petition cited by GM as precedent, General Motors Corporation, Ruling on Petition for Determination of Inconsequential Noncompliance, 69 FR 19897, 19900 (April 14, 2004), concerns a different requirement in FMVSS No. 209: Lock up within 25 mm versus elongation. The petition states that ''GM expects that the Subject Vehicles will perform nearly the same as the Tested Vehicles in dynamic frontal crash testing, and would therefore also meet all of the belted barrier test requirements specified by S5.1.1 (a) of FMVSS No. 208.'' However, whether the subject vehicles would be capable of meeting the test requirements of FMVSS No. 208 S5.1.1(a) is not at issue. This is not a compliance requirement or option for the front outboard seats in the subject vehicles. Rather, the issue is whether the subject vehicles' noncompliance with FMVSS No. 209 S4.4(b)(5) is inconsequential to safety. We do not agree that the test results for the tested vehicles are sufficient for this showing. We explain our reasoning below.

The subject vehicles were neither subject to, nor tested to, S5.1.1(a) of FMVSS No. 208. GM contends, however, that the belted frontal barrier impact data used to certify compliance of certain variants of the 2500 vehicles is a valid surrogate for the subject vehicles with the smaller diameter torsion bars. GM indicated that the tested vehicles were ''substantially similar'' to the subject vehicles. However, a simple examination of the GVWR comparison between the two sets of vehicles indicates that this is a questionable conclusion. The tested vehicles were 2500 series and the subject vehicles were 2500, 3500, and 3600 series. As reported by GM, the 2500 series have a GVWR range of 9,300–10,000 lbs. The 3500 and 3600 are encompassed in a GVWR range of 10,000–13,400 lbs.

GM's argument seems to be predicated on the assumption that if the subject vehicles were tested using the FMVSS No. 208 procedure, the tested weight of the subject vehicles would be similar to the tested weight of the tested vehicles. We have no reason to believe that GM has not optimized the sharing of the occupant restraint contribution from the seat belt for the tested vehicles to the parameters required by the FMVSS No. 208 barrier impacts. However, just as important for the agency's consideration of this issue is the difference in the GVWR range for the subject and tested vehicles. GM contends that ''[t]he primary difference between the Subject Vehicles and Tested Vehicles is that the Subject Vehicles have increased capacity suspension components, which do not affect the vehicles' crash performance.'' This statement seems to ignore that with these differences in the subject vehicles comes the much greater GVWR range of subject vehicles compared to the tested vehicles. With this much greater fully loaded mass would potentially come much different frontal crash dynamics.

Although GM states the subject and tested vehicles share many of the same structural components related to crash energy management, the fact remains that the subject vehicles may require much more energy to be managed because of the GVWR differences. For example, it could be theorized that this additional mass may extend the crash pulse duration. Similarly, managing this additional energy could mean additional vehicle crush, essentially changing the shape of the crash pulse. Differences in pulse shape and duration may change the optimal sharing of restraint between the seat belt and air bag. This change in crash pulse may also affect the air bag deployment timing.

In summary, we are not convinced that the crash test data provided in the GM submission is sufficient to show that the smaller torsion bar placed in the

(rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

[10] *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999).

subject vehicles would be inconsequential to safety. In real-world frontal crashes, with subject vehicles loaded near the GVWR, we believe the crash pulse duration and shape may differ from what would be seen in an FMVSS No. 208 frontal barrier test, affecting the optimization of the occupant restraint system that includes the lower diameter torsion bars in the seat belt load limiters.

More generally, GM's assessment also ignores the crucial role that the static testing requirements of FMVSS No. 209 play in acting as a safety backstop for crash scenarios that are not accounted for in dynamic tests such as those conducted by GM. Dynamic tests are meant to assess whether a vehicle's occupant protection systems work cohesively in certain representative crashes. However, there are countless crash and pre-crash scenarios that these sorts of tests do not cover, which is why static requirements of FMVSS No. 209 are intended to ''fill in the gaps'' to ensure that the vehicle's seat belt equipment maintains a minimum level of performance in untested scenarios.

For example, dynamic tests do not account for the fact that a seat belt assembly is intended to protect occupants even when they are out-of-position. The agency believes it is essential to ensure seat belt assemblies perform their important safety function of not exceeding the permitted maximum webbing pay-out/elongation, to protect occupants who may be out-of-position during a crash, and the resulting increased risk of that occupant striking the vehicle's interior structure.

b. The Absence of Complaints Does Not Support GM's Petition

GM stated that they received no complaints and knew of no reported injuries related to the noncompliance when they filed this petition in September of 2017. NHTSA does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety; the absence of a complaint does not mean there have been no safety issues, nor that there will not be any in the future. In any event, three injuries involving 2500 series vehicles' seat belt assemblies were reported in the Early Warning Reporting database in the second quarter of 2018.

c. That GM Has Corrected the Noncompliance for Vehicles Produced After August 7, 2017, Does Not Support the Merits of Its Petition

Manufacturers are legally obligated to correct new vehicle production. *See* 49 U.S.C. 30112(a); 30115(a). A manufacturer cannot certify or manufacture for sale a vehicle it knows to be noncompliant. *Id.* The fact that new vehicle production has been corrected simply informs the agency that the noncompliance is limited to the affected vehicles described in the petition. Therefore, the fact that new vehicle production has been corrected does not factor into our analysis of whether the noncompliance is inconsequential and will not justify our granting an inconsequentiality petition.

VII. NHTSA's Decision

In consideration of the foregoing, NHTSA finds that GM has not met its burden of persuasion that the subject FMVSS No. 209 noncompliance in the subject vehicles is inconsequential to motor vehicle safety. Accordingly, NHTSA hereby denies GM's petition. GM is therefore obligated to provide notification of, and a free remedy for, that noncompliance in accordance with 49 U.S.C. 30118 through 30120.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Jeffrey Mark Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2020–24866 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0024]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Survey of Drowsy Driving Knowledge, Attitudes and Behaviors

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice and request for comments on a new information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below will be submitted to the Office of Management and Budget (OMB) for review. The ICR describes the nature of the information collection and its expected burden. The ICR is for a new information collection for a one-time voluntary survey regarding knowledge, attitudes, and behaviors associated with drowsy driving. A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on July 14, 2020. NHTSA received two comments, which we address below.

DATES: Comments must be submitted on or before December 10, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function. Comments may also be sent by mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for Department of Transportation, National Highway Traffic Safety Administration, or by email at *oira_submission@omb.eop.gov,* or fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Jordan A. Blenner, JD, Ph.D., Contracting Officer's Representative, Office of Behavioral Safety Research (NPD–320), National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, W46–470, Washington, DC 20590. Dr. Blenner's telephone number is 202–366–9982, and her email address is *jordan.blenner@dot.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). In compliance with these requirements, this notice announces that the following information collection request has been forwarded to OMB.

A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on July 14, 2020 (**Federal Register**/Vol. 85, No. 135/pp. 42486–42488). NHTSA received two comments. General Motors (GM) provided comments supportive of the proposed information collection. The American Alliance for Healthy Sleep (AAHS) also provided comments supportive of the proposed collection but expressed concerns about the collection methods.

We appreciate the comments from GM and the AAHS and thank them for thoughtfully considering the described program. The AAHS raised two areas of concern. The first is that the AAHS

''suggests that participants be contacted, and the survey completed, by electronic means instead, if possible.'' While we agree with the AAHS that electronic methods generally improve efficiency and cost-effectiveness, we chose to use an address-based sampling frame to select and contact respondents to increase representativeness of the national and State samples. Address-based samples are generally more representative of the population than email or other electronic-based samples because they allow people who do not have a way to be contacted electronically to be selected for the survey. Also, given a main purpose of the survey is to produce national and State estimates of knowledge, attitudes, and behaviors, the use of address-based sampling more readily allows for the calculation of sample weights to reflect the population since the United States Postal Service maintains a computerized list of all U.S. residential addresses from which the contractor will draw the sample. Regarding the responses, the proposed methodology is a web-based survey with a paper-based version as a back-up. The initial invitation letter and the two reminder postcards direct the respondent to the web version of the survey. The second and third invitation letters direct the respondent to the web but also provide a paper survey and Business Reply Envelope as a back-up for those without internet access. Like the sampling process, we do not want to exclude respondents who may not have easy access to the internet. The second area of concern was allowing the survey to be completed anonymously and to recognize that respondents ''may under-report or may not be willing to disclose certain behaviors.'' We agree, and the survey is anonymous in that we do not collect the names of the respondents. In addition, the invitation letters and survey instruments inform the respondents that their responses are anonymous.

Title: National Survey of Drowsy Driving Knowledge, Attitudes and Behaviors.

OMB Control Number: New.

Form No.: NHTSA Forms 1547, 1548, 1549, 1550, 1551, and 1552.

Type of Information Collection Request: Approval of a new information collection.

Type of Review Requested: Regular.

Requested Expiration Date of Approval: 3 years from date of approval.

Summary of the Collection of Information: Title 23, United States Code, Chapter 4, Section 403 gives the Secretary authorization to use funds appropriated to conduct research and development activities, including demonstration projects and the collection and analysis of highway and motor vehicle safety data and related information needed to carry out this section, with respect to all aspects of highway and traffic safety systems and conditions relating to vehicle, highway, driver, passenger, motorcyclist, bicyclist, and pedestrian characteristics; accident causation and investigations; and human behavioral factors and their effect on highway and traffic safety.

The National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation is seeking approval to collect information from a random sample of adults (18 years or older) who have driven a motor vehicle in the past month for a one-time voluntary survey to report their knowledge, attitudes, and behaviors associated with drowsy driving. This collection has two parts. The first part is a pilot test for which NHTSA will contact 1,000 households for an expected number of 163 voluntary responses. The second part is the full survey for which NHTSA will contact 81,490 households to achieve a total target of at least 15,000 complete voluntary responses, consisting of 7,000 completed instruments from a nationally representative sample and 2,000 completed instruments from each of four samples representative of States that recently have had drowsy driving law or program activities (Arkansas, Iowa, Massachusetts, and New Jersey). The total estimated burden associated with this collection is 16,323 hours—up to 10,949 hours associated with survey invitations and reminders and up to 5,374 hours associated with completing the survey. NHTSA will summarize the results of the collection using aggregate statistics in a final report to be distributed to NHTSA program and regional offices, State Highway Safety Offices, and other traffic safety stakeholders. This collection will inform the development of countermeasures, particularly in the areas of communications and outreach, for reducing fatalities, injuries and crashes associated with drowsy driving.

Description of the Need for the Information and Proposed Use of the Information: NHTSA's Congressional mandate is to reduce deaths, injuries, and economic losses resulting from motor vehicle crashes on the Nation's highways. As part of this statutory mandate, NHTSA is authorized to conduct research as a foundation for the development of traffic safety programs. See 23 U.S.C. 403; 49 U.S.C. 30101(2); 49 U.S.C. 32501. NHTSA's Fatality Analysis Reporting System (FARS) database reports that 2% of traffic fatalities were drowsy driving related in 2018.[1] However, the involvement of drowsy driving in crashes is likely underreported due to difficulty in defining and reporting drowsy driving incidents.[2] Using a multiple imputation methodology, the study estimated 21% of fatal crashes involved drowsy driving.[3] If this estimate is accurate, it suggests that more than 7,000 people die in drowsy driving related motor vehicle crashes across the United States each year. While there have been several studies of self-reported drowsy driving behavior, there is limited research about knowledge and attitudes that lead to drowsy driving. NHTSA last fielded a similar survey in 2002, and much has changed since then. The information will assist NHTSA in (a) planning drowsy driving prevention program activities; (b) supporting groups involved in improving public safety; and (c) identifying countermeasure strategies that are most acceptable and effective in reducing drowsy driving.

Respondents: Random sample of adults (18 years or older) who have driven a motor vehicle in the past month.

Estimated Number of Respondents: 82,490 Invitations/16,122 Expected Responses. The pilot study will invite one voluntary participant from 1,000 households, and the full study (national and four State surveys) will invite one voluntary participant from 81,490 households. The expected number of survey responses is 16,122 (163 for the pilot and 15,959 for the full survey).

Estimated Time per Response: The time required to participate in this survey is approximately 25 minutes for the pilot study and 28 minutes for the full study. Households selected for the pilot survey will receive two invitation letters and a reminder postcard that would take an estimated five minutes to read (2 minutes for each letter, and 1 minute for the postcard). Households selected for the full survey will receive three invitation letters and two reminder postcards that would take an estimated eight minutes to read (2

[1] National Center for Statistics and Analysis. (October 2019). *2018 Fatal Motor Vehicle Crashes: Overview,* pg. 8. (Traffic Safety Facts, Research Note, Report No. DOT HS 812 826). Washington, DC: National Highway Traffic Safety Administration.

[2] National Center for Statistics and Analysis. (October 2017). *Drowsy Driving 2015,* pg. 2 (Crash•Stats, A Brief Statistical Summary. Report No. DOT HS 812 446). Washington, DC: National Highway Traffic Safety Administration (available at *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812446*).

[3] Tefft, Brian C. (2014) *Prevalence of Motor Vehicle Crashes Involving Drowsy Drivers, United States, 2009–2013.* Washington, DC: AAA Foundation for Traffic Safety.

minutes for each letter, and 1 minute for each postcard). The estimated time to complete the survey is 20 minutes.

Total Estimated Annual Burden Hours: 16,323 hours.

The total estimated burden hours associated with this collection is 16,323 hours. The total burden hours for the respondents are derived by estimating the number of minutes each respondent would spend on each form and multiplying by the number of respondents (*i.e.,* Form 1547 invitation letter 1 for the pilot phase: 1,000 Respondents × 2 minutes ÷ 60 = 33.3 hours). This estimate includes 83 hours associated with pilot invitations and reminders (33.3 hours (Form 1547) + 16.7 hours (Form 1548) + 33.3 hours (Form 1549) = 83.3 or 83 hours), 10,866 hours associated with the full survey invitations and reminders (2,716.3 hours (Form 1547) + 1,358.2 hours (Form 1548) + 2,716.3 hours (Form 1549) + 1,358.2 hours (Form 1550) + 2,716.3 hours (Form 1551) = 10,865.3 or 10,866 hours), and up to 5,374 hours associated with completing the survey (54.3 hours (pilot) + 5,319.7 hours (full) = 5,374 hours). The details are presented in Table 1 below.

TABLE 1—BURDEN HOURS BY FORM

Form	Description	Respondents	Est. minutes per respondent	Total burden hours per form per phase	Total burden hours per form
Form 1547	Invitation Letter 1—Pilot Survey	1,000	2	33.3	2,749.6
	Invitation Letter 1—Full Survey	81,490	2	2,716.3	
Form 1548	Reminder Postcard 1—Pilot Survey	1,000	1	16.7	1,374.9
	Reminder Postcard 1—Full Survey	81,490	1	1,358.2	
Form 1549	Invitation Letter 2—Pilot Survey	1,000	2	33.3	2,749.6
	Invitation Letter 2—Full Survey	81,490	2	2,716.3	
Form 1550	Reminder Postcard 2—Full Survey	81,490	1	1,358.2	1,358.2
Form 1551	Invitation Letter 3—Full Survey	81,490	2	2,716.3	2,716.3
Form 1552	Pilot Survey	163	20	54.3	5,374.0
	Full Survey	15,959	20	5,319.7	
Totals					16,322.6 or 16,323

Total Estimated Burden Cost: NHTSA estimates that there are no costs to respondents beyond the time spent completing the survey.

Frequency of Collection: The information collection will be administered a single time.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department of Transportation, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Issued in Washington, DC.

Nanda Narayanan Srinivasan,

Associate Administrator, Research and Program Development.

[FR Doc. 2020–24868 Filed 11–9–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

VA National Academic Affiliations 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 VA National Academic Affiliations Council (the Council) will meet via conference call on December 8, from 1:00 p.m. to 3:00 p.m. EST. The meeting is open to the public.

The purpose of the Council is to advise the Secretary on matters affecting partnerships between VA and its academic affiliates.

On December 8, 2020, the Council will receive briefings about health profession student debt; VA scholarship and loan repayment opportunities; status of VA's Electronic Health Record implementation; and updates from its Subcommittees. The Council will receive public comments from 2:45 p.m. to 2:55 p.m. EST.

Interested persons may attend and/or present oral statements to the Council. The dial in number to attend the conference call is: 646–828–7666. At the prompt, enter meeting ID 160 398 5160, then press #. The meeting passcode is 531119, then press #. Individuals seeking to present oral statements are invited to submit a 1–2 page summary of their comments at the time of the meeting for inclusion in the official meeting record. Oral presentations will be limited to five minutes or less, depending on the number of participants. Interested parties may also provide written comments for review by the Council prior to the meeting or at any time, by email to *Larissa.Emory@va.gov,* or by mail to Larissa A. Emory PMP, CBP, MS, Designated Federal Officer, Office of Academic Affiliations (10X1), 810 Vermont Avenue NW, Washington, DC 20420. Any member of the public wishing to participate or seeking additional information should contact Ms. Emory via email or by phone at (915) 269–0465.

Dated: November 5, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–24907 Filed 11–9–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS

Veterans' Advisory Committee on Education, 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 Veterans' Advisory Committee on Education (the Committee) will meet via conference call December 9, 2020–December 10, 2020 from 1:00 p.m. to 4:00 p.m., EST. The meeting sessions are open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of education and training programs for Veterans, Servicepersons, Reservists, and Dependents of Veterans including programs under Chapters 30, 32, 33, 35, and 36 of title 38, and Chapter 1606 of title 10, United States Code.

The purpose of the meeting is for the Committee to prioritize and modify existing recommendations not approved for action previously submitted to the Secretary, discuss proposition for establishment of subcommittees to determine new recommendations, provide information centered around the GI Bill user database, automation tools, distance education and online learning outcomes and measures, and COVID response outcomes.

Interested persons may attend. The meeting will be conducted using Microsoft Teams. Please email *Janet.Elder@va.gov* for an invitation link prior to December 9, 2020 or dial by phone 1–872–701–0185 United States, Chicago (Toll) Conference ID: 205 967 563#.

Although no time will be allotted for receiving oral presentations from the public, individuals wishing to share information with the Committee may submit written statements for the Committee's review to Ms. Debra Morgan, Designated Federal Official, Department of Veterans Affairs, by email at *EDUSTAENG.VBAVACO@va.gov*. Comments will be accepted until close of business on Monday, December 7, 2020. In the communication, the writers must identify themselves and state the organization or association they represent for inclusion in the official record. Any member of the public wishing to participate or seeking additional information should contact Janet Elder at *EDUSTAENG.VBAVACO@va.gov* or *Janet.Elder@va.gov* not later than December 8, 2020.

Dated: November 5, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–24906 Filed 11–9–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of the Treasury

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

Proposed Expansion of the Clarksburg Viticultural Area and Establishment of the Ulupalakua Viticultural Area; Proposed Rules

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2020–0013; Notice No. 198]

RIN 1513–AC62

Proposed Expansion of the Clarksburg Viticultural Area

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to expand the approximately 64,640-acre ''Clarksburg'' viticultural area by approximately 27,945 acres. The Clarksburg viticultural area is located in Sacramento, Solano, and Yolo Counties, in California, and the proposed expansion area is located in Sacramento and Solano Counties. The established Clarksburg viticultural area and the proposed expansion area are not located within any established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed amendment to its regulations.

DATES: Comments must be received by January 11, 2021.

ADDRESSES: You may electronically submit comments to TTB on this proposal, and view copies of this document, its supporting materials, and any comments TTB receives on it within Docket No. TTB–2020–0013 as posted on *Regulations.gov* (*https://www.regulations.gov*), the Federal e-rulemaking portal. Please see the ''Public Participation'' section of this document below for full details on how to comment on this proposal via *Regulations.gov* or U.S. mail and for full details on how to view or obtain copies of this document, its supporting materials, and any comments related to this proposal.

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

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

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

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

Definition

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

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing the establishment of an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Petitioners may use the same procedures to request changes involving existing AVAs. Section 9.12(c) of the TTB regulations (27 CFR 9.12(c)) prescribes standards for petitions for modifying established AVAs. Petitions to expand an established AVA must include the following:

- Evidence that the region within the proposed expansion area is nationally or locally known by the name of the established AVA;
- An explanation of the basis for defining the boundary of the proposed expansion area;
- A narrative description of the features of the proposed expansion area affecting viticulture, including climate, geology, soils, physical features, and elevation, that make the proposed expansion area similar to the established AVA and distinguish it from adjacent areas outside the established AVA boundary;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed expansion area, with the boundary of the proposed expansion area clearly drawn thereon; and
- A detailed narrative description of the proposed expansion area boundary based on USGS map markings.

Petition To Expand the Clarksburg AVA

TTB received a petition from James Reamer of Reamer Farms vineyard, submitted on behalf of himself and other wine industry members, proposing to expand the established ''Clarksburg'' AVA. The Clarksburg AVA (27 CFR 9.95) was established by T.D. ATF–166, which published in the **Federal Register** on January 23, 1984 (49 FR 2758). The Clarksburg AVA covers approximately 64,640 acres in Sacramento, Solano, and Yolo Counties in California. The Clarksburg AVA and the proposed expansion area are not located within any other AVA. Although the established Clarksburg AVA does contain the established Merritt Island AVA (27 CFR 9.68), the proposed expansion area is not adjacent to the Merritt Island AVA and therefore would not affect the boundaries of that AVA. The petition included a letter from the Clarksburg Winegrowers and Vintners Association supporting the proposed expansion.

The proposed expansion area is adjacent to the southern portion of the established AVA and entirely encompasses Grand Island and Ryer Island, which together cover approximately 27,945 acres. The petitioner states that within the proposed expansion area there are 350 acres of grapevines on Grand Island and three vineyards on Ryer Island. Unless otherwise noted, all information and data pertaining to the proposed

expansion area contained in this document come from the petition and its supporting exhibits.

Name Evidence

The expansion petition provides evidence that the name ''Clarksburg'' is used to describe a region larger than just the established Clarksburg AVA. For example, the petition included information on three limousine tour services offering tours of the Clarksburg region that each include at least one location within the proposed expansion area. Baja Limo's ''Clarksburg Wine Tour'' offers a stop at the Grand Island Vineyard's winery, which is located within the proposed expansion area on Grand Island.[1] Limousine Service Sacramento's ''Clarksburg Wine Testing Tours'' also offers a stop at the Grand Island Vineyard's tasting room and Six Hands Winery.[2] The Six Hands Winery is located on Andrus Island, which is adjacent to the eastern boundary of the proposed expansion area but outside of the established AVA. Although the winery is not within the established AVA or the proposed expansion area, its inclusion on the tour offers evidence that the region known as ''Clarksburg'' extends beyond the boundaries of the Clarksburg AVA. Finally, Exotic Limousine's ''Concord–Clarksburg Wine Tour'' travels from ''Concord and the East Bay area to [the] Clarksburg appellation,'' which includes ''some of the very best wedding venues like the Grand Island Mansion.'' [3] TTB notes that the Grand Island Mansion is a historic site located within the proposed AVA expansion area.

Other examples of the use of the name ''Clarksburg'' to describe the proposed expansion area includes a vacation rental listing. This listing is for a property on Grand Island, which is within the proposed expansion area, and is listed under the general heading of ''Clarksburg.'' [4] Grand Island Vineyards, which is within the proposed expansion area, is included in a list of Clarksburg wineries on the American Winery Guide website.[5] Finally, a map created by the Clarksburg Wine Growers and Vintners Association titled ''Clarksburg Appellation Wine Country'' shows the established AVA as well as Grand Island and Ryer Island, which are within the proposed expansion area.

Boundary Evidence

The established Clarksburg AVA is a roughly triangular region at the confluence of the Sacramento River and the San Joaquin River. The lands within the Clarksburg AVA are mostly islands surrounded by rivers and/or sloughs. The Sacramento River Deep Water Ship Channel forms the majority of the western boundary, while the eastern boundary is formed by Interstate 5, a levee, and the Sacramento River. The southern boundary is formed by the Sacramento River, Steamboat Slough, Miner Slough, and Sutter Slough. To the north of the Clarksburg AVA is the city of Sacramento, which is too heavily urbanized for commercial viticulture.

The proposed expansion area is adjacent to the southern boundary of the Clarksburg AVA and consists of Ryer Island and Grand Island. The proposed boundary expansion would begin on the current boundary at the intersection of Miner Slough and the levee connecting the slough to the Sacramento River Deep Water Ship Channel. Instead of continuing east along Miner Slough to Steamboat Slough, as the current boundary does, the proposed boundary expansion would proceed south along Miner Slough to its confluence with Cache Slough. The proposed boundary would then proceed south along the Cache Slough to its confluence with the Sacramento River and then east-northeasterly along the Sacramento River to its intersection with the Delta Cross Channel and the Southern Pacific Railroad near Walnut Grove. At this point, the proposed expansion area boundary would rejoin the current Clarksburg AVA boundary.

To the west of both the AVA and the proposed expansion area is the Yolo Bypass that diverts floodwaters away from the city of Sacramento. Because of its frequent flooding, the petition states that this region is suitable only for wildlife habitat and summer annual crops. To the east of the Clarksburg AVA and the proposed expansion area is the Central Valley. To the south of the proposed expansion area are Andrus Island and Brennan Island, both of which have a persistently high water table that makes the potential for vineyards unlikely.

Distinguishing Features

The petition states that the soils, climate, and topography of the proposed expansion area are similar to those of the established Clarksburg AVA.

Soils

T.D. ATF–166 describes the soils of the Clarksburg AVA as poorly drained clay and clay loam soils. Little information is given about the soils of the surrounding regions except that viticulture to the west of the AVA is made impossible due to the combination of soils and flooding, and that the soils to the south of the AVA contain poorly drained organic and mineral soils.

The expansion petition provides more detailed information about the soils of the Clarksburg AVA and the surrounding regions. The expansion petition states that the lands within the Clarksburg AVA and the proposed expansion area readily fall into two groups: The alluvial fan–basin group and the flood plain–basin–blackswamp group. These landform groups influenced the development of the soils in the AVA. The alluvial fan–basin group lands are found mostly in the western portion of the Clarksburg AVA. Common soils found in these lands include the Lang, Laugenour, Maria, Merritt, Sycamore, Tyndall, and Valdez series. Egbert, Omni, Sacramento, and Willows soils are also present. The eastern portion of the Clarksburg AVA is characterized by flood plain–basin–blackswamp landforms. Soils commonly found in this region include the Columbia, Consumnes, Lang, Laugenour, Sailboat, and Valpac series, as well as Clear Lake, Dierssen, and Tinnin soils.

The proposed expansion area contains both flood plain–basin–blackswamp landforms and alluvial fan–basin landforms. Grand Island, in the eastern portion of the proposed expansion area, consists mostly of flood plain–basin–blackswamp landforms. Soils found in both Grand Island and the Clarksburg AVA include the Consumnes, Egbert, Laugenour, and Sailboat series. Ryer Island, in the western portion of the proposed expansion area, contains alluvial fan–basin landforms. Soils of the Egbert, Sacramento, and Valdez series are found in both the Clarksburg AVA and Ryer Island.

The expansion petition states that all of the soils of the Clarksburg AVA and the proposed expansion area share several characteristics, including low-to-moderate levels of organic material, poor to somewhat-poor drainage, and a combination of silt, clay, sand, and loam. Because of the poor drainage quality of the soils in both the proposed expansion area and the Clarksburg AVA, a well-placed and maintained system of ditches and canals is necessary, as are tile drains in some locations. The

[1] *www.bajalimo.net/clarksburg-wine-tours.*

[2] *www.limoservicesacramento.com/clarksburg-wine-tasting-tours.*

[3] *www.limoserviceconcord.com/Concord_clarksburg_wine_tour.php.*

[4] *www.vrbo.com/1311885.*

[5] *www.americanwineryguide.com/regions/clarksburg-ava-wineries.*

drainage systems lower the water table and allow the vineyard root zones to become better aerated. As a result, a better environment is created for the bottom of the vine trunks and the major roots that originate for them. The petition states that ridges in the vine rows called berms also allow for better drainage and are common features in both the AVA and the proposed expansion area. Additionally, vineyard owners often use rootstocks with greater-than-average tolerances of wet soils in order to limit the risk of significant root dieback and root diseases.

None of the alluvial fan–basin landform soils found in the proposed expansion area and the Clarksburg AVA are found in the regions to the east and south. These regions also contain a type of marshland soil called Rindge mucky silt loam, which is not found in either the Clarksburg AVA or the proposed expansion area. Furthermore, the soils to the east and south contain greater concentrations of organic matter. To the west of the proposed expansion area and the Clarksburg AVA, the common soils include the Capay and Pescadero series, which are not found in either the proposed expansion area or the AVA.

Climate

T.D. ATF–166 included precipitation as a distinguishing feature of the Clarksburg AVA, stating that the AVA received an average of 16 inches of rain annually. The regions to the north and east were described as having higher annual rainfall amounts, while the regions to the south and west had lower annual amounts. T.D. ATF–166 also briefly discussed temperature, noting that Sacramento, which is north of the Clarksburg AVA, is generally 8 to 10 degrees warmer than the AVA in the summer.

The proposed expansion petition includes information about the average annual rainfall amounts of the Clarksburg AVA and the surrounding regions, which suggest that the Clarksburg AVA receives less rainfall annually than the surrounding regions. However, the petition did not include annual average rainfall amounts from within the proposed expansion area for comparison. The proposed expansion petition did include the growing season rainfall amounts [6] for a location on Ryer Island, within the proposed expansion area, and from within the Clarksburg AVA. The data shows that during the growing seasons from 2013 to 2017, the Ryer Island location received a total of 2.5 inches of rain, while the Clarksburg AVA location received 3.1 inches. However, the proposed expansion petition did not include growing season rainfall amounts from the surrounding regions for comparison, so TTB is unable to determine if the growing season rainfall amounts within the proposed expansion area are more similar to those of the Clarksburg AVA than to those of the surrounding regions.

The expansion petition also provides more detailed information on temperatures in the region than what was included in T.D. ATF–166. The information on the growing season mean, maximum, and minimum temperatures from within the Clarksburg AVA and the proposed expansion area is included in the following table, and suggests that the climate of the proposed expansion area is similar to that of the Clarksburg AVA. The petition states that temperature within the Clarksburg AVA and the proposed expansion area are suitable for growing a variety of wine grapes, including Pinot Noir, Pinot Gris, and Chardonnay.

TABLE—GROWING SEASON TEMPERATURE AVERAGES IN DEGREES FAHRENHEIT

Location	Mean	Maximum	Minimum
Within Clarksburg AVA			
Clarksburg [7]	67.7	85.8	52.3
Lake Winchester [8]	67.8	85.0	53.2
Within Proposed Expansion Area			
Ryer Island [9]	68.7	85.1	53.3
Grand Island [10]	67.8	83.7	53.4

The expansion petition also includes graphs showing the average growing season mean, minimum, and maximum temperatures gathered from the Western Regional Climate Center [11] for a weather station location within the Clarksburg AVA and 10 weather station locations in the surrounding regions. For each location, the data was collected from a minimum of 38 years, which provides a broad picture of the climate of the region.[12] The graphs do not include data from within the proposed expansion area. However, the other data in the petition demonstrates that the proposed expansion area has temperatures similar to the Clarksburg AVA. Therefore, TTB believes that the Clarksburg location used in the graphs is an acceptable stand-in for the proposed expansion area for the purpose of comparison to the surrounding regions.

The graphs show that the location within the Clarksburg AVA had the lowest growing season mean temperature of all the locations. Additionally, the Clarksburg location had a lower growing season maximum temperature than all but two of the locations and a lower average growing season minimum temperature than all but three of the locations. Most notably, the temperatures for the Clarksburg location were all lower than the temperatures for the two Sacramento weather stations, supporting the claim in T.D. ATF–166 that temperatures in the Clarksburg AVA are typically lower

[6] The growing season is defined as April 1 through October 31.

[7] Data source: Lodi Winegrape Commission via Western Weather Group, 2013–2017. *https://lodi.westernweathergroup.com.*

[8] Data source: Private weather station at Reamer Farms, 2012–2014, and Ranch Systems, 2016–2017.

[9] Data source: Lodi Winegrape Commission via Western Weather Group, 2013–2017. *https://lodi.westernweathergroup.com.*

[10] Data source: Private weather station at Rio Viento Vineyard, 2012–2014, and Ranch Systems, 2016–2017.

[11] *www.wrcc.dri.edu.*

[12] For a listing of all weather station locations and the period of record for each, see Exhibit 9 of the expansion petition in Docket TTB–2020–0013 at *www.regulations.gov.*

than those in Sacramento to the north of the AVA.

Topography

T.D. ATF–166, which established the Clarksburg AVA, did not consider topography to be a distinguishing feature of the Clarksburg AVA, only noting that the ''lower terraces to the east'' of the AVA are prone to flooding.[13] However, the expansion petition includes topographic information to demonstrate that the proposed expansion area is more topographically similar to the Clarksburg AVA than the surrounding regions outside the AVA. The petition includes a table of the highest and lowest elevations from locations within the Clarksburg AVA, which is north of the proposed expansion area, as well as from within the proposed expansion area and the regions to the south, west, and east.

The expansion petition states that due to the low elevations throughout the Sacramento Delta, the islands once regularly flooded. The entire delta would flood periodically during spring tides and river floods, and the islands furthest downstream would flood daily during high tides. However, a system of levees, open ditches, and canals has made viticulture possible within the Clarksburg AVA and the proposed expansion area. Within the proposed expansion area, elevations range from a lowest point of 10 feet below sea level to a highest point of 5 feet above sea level. Within the current boundaries of the Clarksburg AVA, elevations range from 10 feet below sea level to 10 feet above sea level.

By comparison, elevations in the surrounding regions are generally lower than within the Clarksburg AVA and the proposed expansion area. The region east of the proposed expansion area has elevations between 15 feet below sea level on Tyler Island and Staten Island, and 5 feet above sea level at the city of Walnut Grove and the upper portion of Andrus Island. To the south of both the AVA and proposed expansion area, elevations range from 20 feet below sea level to 0 feet above sea level. To the west of the proposed expansion area, elevations range from 5 feet below sea level on Liberty Island and the Egbert Tract Reclamation District to a high of 10 feet above sea level on the Egbert Tract. The petition states that the generally lower elevations in the surrounding regions also mean that the depths to water tables are appreciably shallower than within the AVA and the proposed expansion area. As a result, functional root zones are very shallow, and the potential for viticulture in these regions is feasible but limited.

Although topography was not considered to be a distinguishing feature of the Clarksburg AVA in T.D. ATF–166, we are including a discussion of topography in this proposed rule because TTB agrees that the range of elevations within the proposed expansion area appears to be similar to that of the Clarksburg AVA. The data in the expansion petition suggests that the regions to the south and east have lower elevations than both the proposed expansion area and the Clarksburg AVA. While the data indicates that the elevations to the west of the proposed expansion area are within the range of those of the Clarksburg AVA, the frequency of flooding in the Yolo Bypass would be a logical reason for not including it in the proposed expansion area. TTB is seeking comment on whether the topography of the proposed expansion area provides additional support for including the proposed expansion area in the established AVA.

TTB Determination

TTB concludes that the petition to expand the boundaries of the established Clarksburg AVA merits consideration and public comment, as invited in this notice of proposed rulemaking.

Boundary Description

See the narrative description of the boundary of the petitioned-for expansion area in the proposed regulatory text published at the end of this proposed rule.

Maps

The proposed boundary change to the Clarksburg AVA would affect the portion of the current AVA boundary shown on the 1:24,000 scale Liberty Island, Isleton, and Courtland quadrangle maps, and would add the 1:24,000 scale Rio Vista quadrangle map to the list of maps in the regulatory text of 27 CFR 9.95. The petitioner included copies of these maps in the expansion petition. You may also view a map of the proposed expansion of the Clarksburg AVA boundary on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

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

The approval of the proposed expansion of the Clarksburg AVA would not affect any other existing viticultural area, including the established Merritt Island AVA, which is located within the Clarksburg AVA. The proposed expansion of the Clarksburg AVA would allow vintners to use ''Clarksburg'' as an appellation of origin for wines made primarily from grapes grown within the proposed expansion area if the wines meet the eligibility requirements for the appellation. The proposed AVA expansion would not affect any vintners using ''Merritt Island'' as an appellation of origin on wine labels.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should expand the Clarksburg AVA as proposed. TTB is specifically interested in receiving comments on the similarity of the proposed expansion area to the established Clarksburg AVA, as well as the differences between the proposed expansion area and the areas outside the Clarksburg AVA. Please provide specific information in support of your comments.

Submitting Comments

You may submit comments on this notice of proposed rulemaking by using one of the following methods:

• *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice within Docket No. TTB–2020–0013 on ''*Regulations.gov*,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 198 on the TTB website at *https://www.ttb.gov/wine/wine-rulemaking.shtml.* Supplemental files may be attached to comments submitted

[13] 48 FR 2759.

via *Regulations.gov*. For complete instructions on how to use *Regulations.gov*, visit the site and click on the ''Help'' tab.

• *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 198 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and TTB considers all comments as originals.

In your comment, please clearly state if you are commenting for yourself or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name, as well as your name and position title. If you comment via *Regulations.gov*, please enter the entity's name in the ''Organization'' blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

TTB will post, and you may view, copies of this notice, selected supporting materials, and any online or mailed comments received about this proposal within Docket No. TTB–2020–0013 on the Federal e-rulemaking portal, *Regulations.gov*, at *http://www.regulations.gov.* A direct link to that docket is available on the TTB website at *https://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 198. You may also reach the relevant docket through the *Regulations.gov* search page at *http://www.regulations.gov.* For information on how to use *Regulations.gov*, click on the website's ''Help'' tab.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that the Bureau considers unsuitable for posting.

You may also obtain copies of this proposed rule, all related petitions, maps and other supporting materials, and any electronic or mailed comments that TTB receives about this proposal at 20 cents per 8.5- x 11-inch page. Please note that TTB is unable to provide copies of USGS maps or any similarly-sized documents that may be included as part of the AVA petition. Contact TTB's Regulations and Rulings Division by email using the web form at *https://www.ttb.gov/contact-rrd,* or by telephone at 202–453–1039, ext. 175, to request copies of comments or other materials.

Regulatory Flexibility Act

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

Executive Order 12866

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

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this notice of proposed rulemaking.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

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

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Section 9.95 is amended by adding paragraph (b)(9), revising paragraphs (c)(4) and (5), redesignating paragraphs (c)(6) through (12) as paragraphs (c)(7) through (13), and adding new paragraph(c)(6) to read as follows:

§ 9.95 Clarksburg.

* * * * *

(b) * * *

(9) Rio Vista, Calif., 1978 (minor revision 1993).

(c) * * *

(4) Then south along Miner Slough to the point where it joins Cache Slough.

(5) Then south along Cache Slough to the point where it joins the Sacramento River.

(6) Then east, then generally northeasterly along the meandering Sacramento River to the point where it meets the Delta Cross Channel at the Southern Pacific Railroad.

* * * * *

Signed: September 5, 2020.

Mary G. Ryan,

Administrator.

Approved: October 9, 2020.

Timothy E. Skud,

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

[FR Doc. 2020–24140 Filed 11–9–20; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2020–0014; Notice No. 199]

RIN 1513–AC65

Proposed Establishment of the Ulupalakua Viticultural Area

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the approximately 70-acre ''Ulupalakua'' viticultural area on the island of Maui, Hawaii. The proposed viticultural area is not within any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received by January 11, 2021.

ADDRESSES: You may electronically submit comments to TTB on this proposal, and view copies of this document, its supporting materials, and any comments TTB receives on it within Docket No. TTB–2020–0014 as posted on *Regulations.gov* (*https://www.regulations.gov*), the Federal e-rulemaking portal. Please see the ''Public Participation'' section of this document below for full details on how to comment on this proposal via *Regulations.gov*, or U.S. mail, and for full details on how to obtain copies of this document, its supporting materials, and any comments related to this proposal.

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

SUPPLEMENTARY INFORMATION:

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

Requirements

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

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Ulupalakua Petition

TTB received a petition from Mark Beaman, winemaker at Maui Wines, proposing the establishment of the ''Ulupalakua'' AVA. The proposed Ulupalakua AVA is located within the privately-owned, 18,000-acre Ulupalakua Ranch on the island of Maui, Hawaii. The proposed AVA contains approximately 70 acres, with approximately 16 acres of vineyards. The petition notes that an additional 5 acres of land within the proposed AVA have been prepared with trellising and irrigation in preparation for vineyard expansion. Three other parcels averaging two acres each have also been surveyed for future planting within the proposed AVA. Grape varietals grown within the proposed AVA include Gewurztraminer, Chenin Blanc, Viognier, Grenache, Malbec, and Syrah. Although there is no winery within the boundary of the proposed AVA, grapes from the proposed AVA are made into wine at the Maui Wines facility, which is a short distance south of the proposed AVA.

According to the petition, the distinguishing features of the proposed Ulupalakua AVA include its topography, soils, and climate. Unless otherwise noted, all information and data pertaining to the proposed AVA contained in this document are from the petition for the proposed Ulupalakua AVA and its supporting exhibits.

Name Evidence

The term ''Ulupalakua'' translates from the Hawaiian language as ''breadfruit ripened on the back.'' The petition states that local folklore tells how an ancient Maui chief would request breadfruit, his favorite fruit, be picked on the far eastern side of Maui and brought to his home on the western side of the island. The harvesters would gather unripe fruit, which would ripen by the time they had reached the area that came to be called Ulupalakua.

Although there is a town several miles south of the proposed AVA called Ulupalakua, the petition provided evidence that the name ''Ulupalakua'' applies to a region larger than just the town. For example, the proposed Ulupalakua AVA is located on the Ulupalakua Ranch, which the petition states was so named in 1922 to honor the land's history. In 1947, after a visit to the region, Hawaiian composer John P. Watkins was inspired to write a song called ''Ulupalakua.'' [1] A scenic overlook just north of the proposed AVA is labeled ''Ulupalakua Scenic Overlook'' on Google Maps.[2] A real estate website describes a house for sale north of both the town of Ulupalakua and the proposed AVA as ''a real Ulupalakua gem.'' [3] The petition also

[1] *www.huapala.org/UL//Ulupalakua.html.*

[2] See Figure 7 of the petition in Docket TTB–2020–0014 at *https://www.regulations.gov.*

[3] The property is no available on the real estate website, but a copy of the original real estate listing

Continued

included a Maui guidebook excerpt titled ''Keokea through Ulupalakua.'' The excerpt states, ''[b]etween Grandma's [Coffee House] and the Tedeschi Winery is the larger area called Ulupalakua.''[4] TTB notes that Grandma's Coffee House is located in Keokea, north of the proposed AVA, and the Tedeschi Winery, now called Maui Wines, is located just south of the proposed AVA and north of the town of Ulupalakua. Finally, the wine-oriented website Wine-Searcher describes Ulupalakua as ''the only wine region of Hawaii'' and notes that ''Tedeschi Vineyards' Maui winery, part of the Ulupalakua Ranch Site, * * * makes both grape and pineapple wines.''[5]

Boundary Evidence

The proposed Ulupalakua AVA is located on the southwestern slopes of Mt. Haleakala and encompasses a series of bench lands that are fully surrounded by steeper, more rugged terrain. The proposed northern and southern boundaries approximate ravines, which mark the northern and southern edges of the bench lands. The proposed eastern boundary is marked by a highway, beyond which the elevation rises steeply. The western boundary follows an elevation contour, beyond which slope angles and the number of drainage and erosional features increase.

Distinguishing Features

The distinguishing features of the proposed Ulupalakua AVA are its topography, soils, and climate.

Topography

The proposed Ulupalakua AVA contains a series of four distinct benches that are oriented to the southwest. The benches are gently sloped, with slope angles between 0 and 5 percent, and are separated by more steeply sloped erosional ravines. The petition states that the gentle slopes of the benches minimize the risk of erosion and facilitate safe agriculture. The open, less steep terrain also allows vineyards planted on the benches to receive uniform amounts of sunlight, rainfall, and temperature-moderating cloud cover.

The proposed AVA is surrounded in each direction by more steeply sloped, mountainous terrain. To the west and east of the proposed AVA, the slope angles average 17 percent. To the north and south of the proposed AVA, slope angles average about 15 percent. The regions to the north and west also contain more erosional features, such as ravines, that are less suited for viticulture than the benches of the proposed AVA. The region to the south of the proposed AVA features another ravine comprised of rugged exposed volcanic rocks, which are not well-suited for viticulture.

Soils

According to the petition, soils within the proposed Ulupalakua AVA formed from the erosion of ancient alkali lava flows from Mt. Haleakala. The most prominent soil within the proposed AVA is Kula loam, which makes up 80 percent of the soil. Kula loam is derived from weathered basic igneous rock and is well-drained and moderately rapid in permeability. The top soil is typically 8 inches deep, with subsoils reaching around 4 feet before hitting bedrock of andesite and basalt. The remaining 20 percent of the soil of the proposed AVA is comprised of the Io series. Soils of this series are silt loams that gradually acquire more clay deeper in the soil. The top soil is about 10 inches, and subsoils reach basalt and andesite bedrock at around 4 feet. The petition states that the soils of the proposed AVA are fertile enough to produce healthy vines and fruit without promoting excessive vine and leaf growth. Additionally, the uniformity of the soils within the proposed AVA results in a greater consistency in growing conditions for vineyards than can be found in the surrounding regions.

To the south of the proposed Ulupalakua AVA, the soil changes to Kula very rocky loam. This soil consist of very large volcanic rocks and boulders which would not be suitable for vineyards. To the west is a continuation of the same Kula loam that is found in the proposed AVA. However, the petition notes that the top soil in this region has been scoured by erosion and thus would be thinner and not as suitable for viticulture as the Kula loam soils of the proposed AVA. The petition did not provide information on the soils to the north and east of the proposed AVA.

Climate

The petition states that although most people would consider Hawaii to be hot, the proposed Ulupalakua AVA is cool due to its elevation and proximity to the 10,000-foot Mt. Haleakala. The proposed AVA sits at elevations between 1,560 and 1,850 feet above sea level. The petition states that temperatures in Maui typically drop 3.5 degrees Fahrenheit for every 1,000 feet of elevation gained.[6] A 2003 article about Maui Wines notes that ''[m]ornings and late afternoons tend to be cool at these elevations * * *.''[7] The petition notes that the mild temperatures of the region are even described in John Watkin's song ''Ulupalakua'', which contains the line, ''[f]amous is Ulupalakua, the pangs of cold evening air * * *.''[8]

The petition provided information on the average monthly high and low temperatures, as well as the monthly highest and lowest recorded temperatures for the proposed AVA and the region to the north.[9] Temperature data was not provided for the regions to the east, west, or south. The information is summarized in the following tables.

TABLE 1—AVERAGE MONTHLY HIGH AND LOW TEMPERATURES IN DEGREES FAHRENHEIT (F)

Month	Proposed Ulupalakua AVA		Keokea (North)	
	High	Low	High	Low
January	81	63	68	52
February	81	63	68	52
March	82	63	69	52
April	83	64	70	53
May	85	66	71	55

is available in Docket TTB–2020–0014 at *https://www.regulations.gov.*

[4] *http://mauiguidebook.com/adventures/grandmas-ulupalakua.*

[5] *www.wine-searcher.com/regions-ulupalakua.*

[6] *https://treelinebackpacker.com/2013/05/06/calculate-temperatures-change-with-elevation.*

[7] *http://napavalleyregister.com/business/maui-winemakers-make-a-splash-with-pineapple-wines-and-island/article_48281276-094c-5fec-80d9-18be5666b9cf.html.*

[8] *www.huapala.org/UL//Ulupalakua.html.*

[9] The information was collected from the almanac on The Weather Channel's website, which did not provide the period of record for the data. For Ulupalakua data, see *https://weather.com/weather/monthly/l/'Ulupalakua+USHI0343:27:US.* For Keokea data, see *https://weather.com/weather/monthly/l/USHI0220:1:US.*

TABLE 1—AVERAGE MONTHLY HIGH AND LOW TEMPERATURES IN DEGREES FAHRENHEIT (F)—Continued

Month	Proposed Ulupalakua AVA		Keokea (North)	
	High	Low	High	Low
June	87	67	73	56
July	87	68	74	57
August	88	69	75	58
September	87	69	75	58
October	87	68	74	57
November	84	67	72	56
December	82	65	69	53

TABLE 2—MAXIMUM MONTHLY HIGH AND LOW RECORDED TEMPERATURES IN DEGREES F

Month	Proposed Ulupalakua AVA		Keokea (North)	
	High	Low	High	Low
January	91	54	84	38
February	91	54	81	41
March	89	54	82	41
April	89	58	77	37
May	90	54	78	48
June	91	62	81	50
July	93	62	80	50
August	94	62	82	51
September	94	61	81	49
October	92	61	83	48
November	90	56	81	47
December	89	57	80	41

The data shows that the proposed Ulupalakua AVA has generally mild temperatures, with a 20 degree or less difference between the average high and average low temperatures for any given month. The average monthly low temperatures and lowest recorded monthly temperatures within the proposed AVA do not drop below 50 degrees F, which is generally considered to be the minimum temperature required for vine growth and fruit development.[10] By contrast, Keokea, which is located to the north of the proposed AVA and at higher elevations, recorded substantially lower temperatures than the proposed AVA for each category, including temperatures below 50 degrees F. According to the petition, the lack of extremes in temperatures within the proposed AVA protect ripening fruit against sunburn and heat stress.

The petition also included information on the average monthly precipitation amounts for the proposed Ulupalakua AVA and the regions to the east and west. Precipitation amounts were not provided for the regions to the south and north. The information is summarized in the following table.

TABLE 3—AVERAGE PRECIPITATION AMOUNTS IN INCHES [11]

Month	Proposed Ulupalakua AVA	Makena Bay (West)	Polipoli Springs (East)
January	4.9	2.8	9.8
February	3	1.4	7.5
March	3.1	1.6	4.8
April	2.5	0.7	4.7
May	1.8	0.9	3.1
June	1.4	0.4	1.6
July	1.8	0.6	2.4
August	1.7	0.6	2.6
September	2.3	0.9	2.5
October	2.2	1.6	2.9
November	2.6	1.7	3.2
December	3.4	2.9	5.6
Annual	30.7	16.1	50.6

[10] See Albert J. Winkler et al., *General Viticulture* (Berkeley: University of California Press, 2nd ed. 1974), pages 61–64.

[11] The information came from *www.weatherbase.com.* The website noted that the Makena Bay data covered a period of 30 years, the Polipoli Springs data covered a period of 47 years, and the Ulupalakua data covered a period of 56 years. However, the exact years for each location was not given.

The data in the table shows that the proposed Ulupalakua AVA receives substantially more precipitation than the region to the west and less than the region to the east. The petition notes that the differences in rainfall are due to the orographic effects of Mt. Haleakala. As the moist air moves from east to west over the mountain, locations at higher elevations, such as Polipoli Springs, receive more rainfall than regions at lower elevations, such as Makena Bay on the coast. Ulupalakua, which is located at elevations higher than Makena Bay and lower than Polipoli Springs, receives almost twice as much annual rainfall as the lower location and over half as much as the higher location. The petition states that the lower rainfall amounts within the proposed AVA, particularly during the harvest season of June through August, reduce the risk of mildew and rot.

Summary of Distinguishing Features

In summary, the topography, soils, and climate of the proposed Ulupalakua AVA distinguish it from the surrounding regions. The proposed Ulupalakua AVA is characterized by a series of four gently sloped benches comprised of Kula loam and Io soils. Average temperatures are moderate and do not drop below 50 degrees F. Annual precipitation amounts within the proposed AVA are moderate, averaging 30.7 inches.

To the north of the proposed AVA, the slopes are steeper and average about 15 percent. Average temperatures are cooler than within the proposed AVA and do drop below 50 degrees F. To the east of the proposed AVA, on the higher elevations of Mt. Haleakala, the slope angles average 17 percent. Annual precipitation amounts are significantly higher, averaging 50.6 inches. To the south of the proposed AVA, slope angles average about 15 percent, and the soil changes to Kula very rocky loam, which consists of large volcanic rocks and boulders. To the west of the proposed AVA, slope angles average 17 percent. Soils to the west of the proposed AVA are a continuation of the Kula loam soils, but much of the top soil has been scoured by erosion. Annual rainfall amounts are lower than within the proposed AVA, averaging 16.1 inches.

TTB Determination

TTB concludes that the petition to establish the 70-acre Ulupalakua AVA merits consideration and public comment, as invited in this notice of proposed rulemaking.

Boundary Description

See the narrative description of the boundary of the petitioned-for AVA in the proposed regulatory text published at the end of this proposed rule.

Maps

The petitioner provided the required maps, and they are listed below in the proposed regulatory text. You may also view the proposed Ulupalakua AVA boundary on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

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

If TTB establishes this proposed AVA, its name, ''Ulupalakua,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the proposed regulation clarifies this point. Consequently, wine bottlers using the name ''Ulupalakua'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the AVA name as an appellation of origin if this proposed rule is adopted as a final rule.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should establish the proposed Ulupalakua AVA. TTB is also interested in receiving comments on the sufficiency and accuracy of the name, boundary, soils, climate, topography, and other required information submitted in support of the petition. Please provide any available specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Ulupalakua AVA on wine labels that include the term ''Ulupalakua'' as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed AVA name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed AVA will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the proposed AVA.

Submitting Comments

You may submit comments on this notice by using one of the following two methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice within Docket No. TTB–2020–0014 on ''*Regulations.gov*,'' the Federal e-rulemaking portal, at *https://www.regulations.gov.* A direct link to that docket is available under Notice No. 199 on the TTB website at *https://www.ttb.gov/wine/wine-rulemaking.shtml.* Supplemental files may be attached to comments submitted via *Regulations.gov*. For complete instructions on how to use *Regulations.gov*, visit the site and click on the ''Help'' tab at the top of the page.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 199 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and TTB considers all comments as originals.

In your comment, please clearly state if you are commenting for yourself or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name, as well as your name and position title. If you

comment via *Regulations.gov*, please enter the entity's name in the ''Organization'' blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead. You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

TTB will post, and you may view, copies of this notice, selected supporting materials, and any online or mailed comments received about this proposal within Docket No. TTB–2020–0014 on the Federal e-rulemaking portal, *Regulations.gov*, at *https://www.regulations.gov.* A direct link to that docket is available on the TTB website at *https://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 199. You may also reach the relevant docket through the *Regulations.gov* search page at *https://www.regulations.gov.* For information on how to use *Regulations.gov*, click on the site's ''Help'' tab.

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that the Bureau considers unsuitable for posting.

You may also obtain copies of this proposed rule, all related petitions, maps and other supporting materials, and any electronic or mailed comments that TTB receives about this proposal at 20 cents per 8.5- x 11-inch page. Please note that TTB is unable to provide copies of USGS maps or any similarly-sized documents that may be included as part of the AVA petition. Contact TTB's Regulations and Rulings Division by email using the web form at *https://www.ttb.gov/contact-rrd,* or by telephone at 202–453–1039, ext. 175, to request copies of comments or other materials.

Regulatory Flexibility Act

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

Executive Order 12866

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

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this notice of proposed rulemaking.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

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

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.____ to read as follows:

§ 9.____ Ulupalakua.

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

(b) *Approved maps.* The United States Geological Survey (USGS) 1:24,000 scale topographic map used to determine the boundary of the Ulupalakua viticultural area is titled ''Makena, Hawaii, 1983.''

(c) *Boundary.* The Ulupalakua viticultural area is located on the island of Maui, in Hawaii. The boundary of the Ulupalakua viticultural area is as described below:

(1) The beginning point is on the Makena, Hawaii, map at the intersection of an unnamed, light-duty road known locally as State Highway 37 and the northernmost unnamed, unimproved road in the Palauea land division (a land division is known as an ''ahupua'a'' in Hawaii). From the beginning point, proceed south along State Highway 37 to the next unnamed, unimproved road in the Palauea land division; then

(2) Proceed west in a straight line for approximately 2,700 feet to the 1,560-foot elevation contour; then

(3) Proceed north along the 1,560-foot elevation contour to the northern boundary of the Palauea land division; then

(4) Proceed east along the northern boundary of the Palauea land division to the 1,800-foot elevation contour; then

(5) Proceed south along the 1,800-foot elevation contour for approximately 400 feet to the point where the 1,800-foot elevation contour intersects with an imaginary line drawn from the terminus of the northernmost unnamed, unimproved road in the Palauea land division; then

(6) Proceed east in a straight line for approximately 800 feet, returning to the beginning point.

Signed: August 14, 2020.

Mary G. Ryan,

Administrator.

Approved: October 9, 2020.

Timothy E. Skud,

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

[FR Doc. 2020–24143 Filed 11–9–20; 8:45 am]

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Part III

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Additional First Year Depreciation Deduction; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9916]

RIN 1545–BP32

Additional First Year Depreciation Deduction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance regarding the additional first year depreciation deduction under section 168(k) of the Internal Revenue Code (Code). These final regulations reflect and further clarify the increased deduction and the expansion of qualified property, particularly to certain classes of used property, authorized by the Tax Cuts and Jobs Act. These final regulations generally affect taxpayers who depreciate qualified property acquired and placed in service after September 27, 2017.

DATES: *Effective date:* These regulations are effective on January 11, 2021.

Applicability dates: For dates of applicability, see §§ 1.168(b)–1(b)(2)(iv), 1.168(k)–2(h), and 1.1502–68(e). See **SUPPLEMENTARY INFORMATION** for an in-depth discussion.

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.168(b)–1 and 1.168(k)–2, Elizabeth R. Binder at (202) 317–4869 or Kathleen Reed at (202) 317–4660 (not toll-free numbers); concerning § 1.1502–68, Samuel G. Trammell at (202) 317–6975 or Katherine H. Zhang at (202) 317–5363 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Applicability

A taxpayer may choose to apply §§ 1.168(k)–2 and 1.1502–68 of these final regulations, in their entirety, to depreciable property acquired and placed in service or certain plants planted or grafted, as applicable, after September 27, 2017, by the taxpayer during a taxable year ending on or after September 28, 2017, provided the taxpayer consistently applies all rules in these final regulations. However, once the taxpayer applies §§ 1.168(k)–2 and 1.1502–68 of these final regulations for a taxable year, the taxpayer must continue to apply §§ 1.168(k)–2 and 1.1502–68 of these final regulations for subsequent taxable years. Alternatively, a taxpayer may rely on the proposed regulations under section 168(k) in REG–106808–19 (84 FR 50152; 2019–41 I.R.B. 912), for depreciable property acquired and placed in service or certain plants planted or grafted, as applicable, after September 27, 2017, by the taxpayer during a taxable year ending on or after September 28, 2017, and ending before the taxpayer's first taxable year that begins on or after January 1, 2021, if the taxpayer follows the proposed regulations in their entirety, except for § 1.168(k)–2(b)(3)(iii)(B)(*5*), and in a consistent manner.

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under sections 168(k) and 1502.

Section 168(k) allows an additional first year depreciation deduction for qualified property in the property's placed-in-service year. On December 22, 2017, section 168(k) was amended by sections 12001(b)(13), 13201, and 13204 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA).

Section 13201 of the TCJA made several significant amendments to the additional first year depreciation deduction provisions in section 168(k) (additional first year depreciation deduction). First, the additional first year depreciation deduction percentage was increased from 50 to 100 percent. Second, the property eligible for the additional first year depreciation deduction was expanded, for the first time, to include certain used depreciable property and certain film, television, or live theatrical productions. Third, the placed-in-service date was extended from before January 1, 2020, to before January 1, 2027 (and from before January 1, 2021, to before January 1, 2028, for longer production period property or certain aircraft property described in section 168(k)(2)(B) or (C)). Fourth, the date on which a specified plant may be planted or grafted by the taxpayer was extended from before January 1, 2020, to before January 1, 2027. The provisions of section 168(k), as amended by the TCJA, are explained in greater detail in the preamble to the final regulations published by the Department of the Treasury (Treasury Department) and the IRS as TD 9874 on September 24, 2019 (2019 Final Regulations) in the **Federal Register** (84 FR 50108).

Section 13201(h) of the TCJA provides the effective dates of the amendments to section 168(k) made by section 13201 of the TCJA. Except as provided in section 13201(h)(2) of the TCJA, section 13201(h)(1) of the TCJA provides that these amendments apply to property acquired and placed in service after September 27, 2017. However, section 13201(h) of the TCJA also provides that property is not treated as acquired after the date on which a written binding contract is entered into for such acquisition. Section 13201(h)(2) provides that the amendments apply to specified plants planted or grafted after September 27, 2017.

Additionally, section 12001(b)(13) of the TCJA repealed section 168(k)(4), relating to the election to accelerate alternative minimum tax credits in lieu of the additional first year depreciation deduction, for taxable years beginning after December 31, 2017. Further, section 13204(a)(4)(B)(ii) repealed section 168(k)(3), so that qualified improvement property placed in service after December 31, 2017, was not eligible for the additional first year depreciation deduction. However, section 2307 of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (March 27, 2020) (CARES Act) amended section 168(e)(3)(E) to provide that qualified improvement property is classified as 15-year property, thereby providing a 15-year recovery period under section 168(c) and making qualified improvement property again eligible for the additional first year depreciation deduction, consistent with the original intent of the TCJA. Section 2307 of the CARES Act is discussed in greater detail in part II.B of the Summary of Comments and Explanation of Revisions section in this preamble.

Unless otherwise indicated, all references to section 168(k) hereinafter are references to section 168(k) as amended by the TCJA.

On August 8, 2018, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–104397–18) in the **Federal Register** (83 FR 39292) containing proposed regulations under section 168(k) (2018 Proposed Regulations). After full consideration of the comments received on the 2018 Proposed Regulations and the testimony heard at the public hearing on November 28, 2018, the Treasury Department and the IRS published the 2019 Final Regulations adopting the 2018 Proposed Regulations with modifications in response to such comments and testimony.

Concurrently with the publication of the 2019 Final Regulations, the Treasury Department and the IRS published an additional notice of proposed rulemaking (REG–106808–19) in the **Federal Register** (84 FR 50152) withdrawing certain provisions of the 2018 Proposed Regulations and proposing additional guidance under section 168(k) (2019 Proposed

Regulations). The Summary of Comments and Explanation of Revisions section of this preamble summarizes the provisions of the 2019 Proposed Regulations, which are explained in greater detail in the preamble to the 2019 Proposed Regulations.

The Treasury Department and the IRS received written and electronic comments responding to the 2019 Proposed Regulations and held a public hearing on the 2019 Proposed Regulations on November 13, 2019. After full consideration of the comments received on the 2019 Proposed Regulations and the testimony heard at the public hearing, this Treasury decision adopts the 2019 Proposed Regulations with modifications in response to certain comments and testimony, as described in the Summary of Comments and Explanation of Revisions section.

Summary of Comments and Explanation of Revisions

The Treasury Department and the IRS received written comments from five commenters in response to the 2019 Proposed Regulations. In connection with these comments, some commenters also provided comments on aspects of the 2019 Final Regulations. All comments were considered and are available at *https://www.regulations.gov* or upon request. The comments addressing the 2019 Proposed Regulations and 2019 Final Regulations are summarized in this Summary of Comments and Explanation of Revisions section.

Because of the amendments to section 168(k) by the TCJA, the 2019 Final Regulations updated existing regulations in § 1.168(k)–1 by providing a new section at § 1.168(k)–2 for property acquired and placed in service after September 27, 2017. The 2019 Final Regulations also made conforming amendments to the existing regulations. The 2019 Final Regulations described and clarified the statutory requirements that must be met for depreciable property to qualify for the additional first year depreciation deduction provided by section 168(k), and they provided guidance to taxpayers in determining the additional first year depreciation deduction and the amount of depreciation otherwise allowable for this property.

These final regulations provide taxpayers with guidance regarding issues relating to the application of section 168(k) that are not addressed in the 2019 Final Regulations, along with clarifying changes to the 2019 Final Regulations. Specifically, these final regulations provide (1) rules relevant to the definition of qualified property, (2) rules for consolidated groups, (3) rules regarding components acquired or self-constructed after September 27, 2017, for larger self-constructed property for which manufacture, construction, or production began before September 28, 2017, (4) rules regarding the application of the mid-quarter convention, as determined under section 168(d), and (5) changes to the definitions in the 2019 Final Regulations for the terms qualified improvement property, predecessor, and class of property. Also, the rules for consolidated groups have been moved from § 1.168(k)–2(b)(3)(v) of the 2019 Proposed Regulations to new § 1.1502–68 of these final regulations.

Part I of this Background section addresses operational rules. Part II of this Background section addresses definitions.

I. Operational Rules

A. Property Described in Section 168(k)(9)(B)

Section 1.168(k)–2(b)(2)(ii)(G) of the 2019 Proposed Regulations provides that, for purposes of section 168(k)(9)(B), floor plan financing interest is not taken into account for the taxable year by a trade or business that has had floor plan financing indebtedness if the sum of the amounts calculated under section 163(j)(1)(A) and (B) for the trade or business for the taxable year equals or exceeds the business interest (which includes floor plan financing interest), as defined in section 163(j)(5), of the trade or business for the taxable year. If the business interest, which includes floor plan financing interest, exceeds the sum of the amounts calculated under section 163(j)(1)(A) and (B) for the taxable year, the floor plan financing interest is taken into account for the taxable year for purposes of section 168(k)(9)(B). See *Example 7* in § 1.168(k)–2(b)(2)(iii)(G) of the 2019 Proposed Regulations. Floor plan financing indebtedness is defined in section 163(j)(9)(B) and § 1.163(j)–1(b)(18) as indebtedness that is (i) used to finance the acquisition of motor vehicles held for sale or lease; and (ii) secured by the motor vehicles so acquired. Floor plan financing interest expense is defined in section 163(j)(9)(A) and § 1.163(j)–1(b)(19) as interest paid or accrued on floor plan financing indebtedness.

A commenter on the 2019 Proposed Regulations requested that these final regulations allow a trade or business that has business interest expense, including floor plan financing interest expense, that exceeds the sum of the amounts calculated under section 163(j)(1)(A) and (B) for the taxable year, to choose to limit its interest expense deduction to the sum of the amounts under section 163(j)(1)(A) and (B), and not be precluded by section 168(k)(9)(B) from claiming the additional first year depreciation deduction. The Treasury Department and the IRS do not interpret section 163(j)(1) as allowing such an option. Consistent with the plain language of section 163(j)(1), § 1.163(j)–2(b)(1) provides that the amount allowed as a deduction for business interest expense for the taxable year generally cannot exceed the sum of (1) the taxpayer's business interest income for the taxable year, (2) 30 percent of the taxpayer's adjusted taxable income for the taxable year, and (3) the taxpayer's floor plan financing interest expense for the taxable year. Pursuant to section 2306(a) of the CARES Act, the adjusted taxable income percentage is increased from 30 to 50 percent for any taxable year beginning in 2019 or 2020, subject to certain exceptions. Because neither section 163(j)(1) nor § 1.163(j)–2(b) provide an option for a trade or business with floor plan financing indebtedness to include or exclude its floor plan financing interest expense in determining the amount allowed as a deduction for business interest expense for the taxable year, the Treasury Department and the IRS decline to adopt this comment.

The commenter also requested that the Treasury Department and the IRS provide transition relief for taxpayers that treated, on their 2018 Federal income tax returns, section 163(j)(1) as providing an option for a trade or business with floor plan financing indebtedness to include or exclude its floor plan financing interest expense in determining the amount allowed as a deduction for business interest expense for the taxable year. Further, the commenter requested transition relief for taxpayers with a trade or business with floor plan financing indebtedness that want to revoke their elections not to claim the additional first year depreciation for property placed in service during 2018 in order to rely on the 2019 Proposed Regulations. The Treasury Department and the IRS intend to issue published guidance that will address these requests.

B. Used Property

1. Depreciable Interest

a. Five-Year Safe Harbor

Section 1.168(k)–2(b)(3)(iii)(B)(*1*) of the 2019 Final Regulations provides that property is treated as used by the taxpayer or a predecessor at any time prior to acquisition by the taxpayer or

predecessor if the taxpayer or the predecessor had a depreciable interest in the property at any time prior to such acquisition, whether or not the taxpayer or the predecessor claimed depreciation deductions for the property. To determine if the taxpayer or a predecessor had a depreciable interest in the property at any time prior to acquisition, the 2019 Final Regulations also provide that only the five calendar years immediately prior to the taxpayer's current placed-in-service year of the property are taken into account (Five-Year Safe Harbor). If the taxpayer and a predecessor have not been in existence for this entire five-year period, the 2019 Final Regulations provide that only the number of calendar years the taxpayer and the predecessor have been in existence are taken into account.

Commenters requested clarification that the Five-Year Safe Harbor applies for purposes of the special rules for consolidated groups in § 1.168(k)–2(b)(3)(v) of the 2019 Proposed Regulations. A commenter also requested clarification whether ''the partnership's current year'' in § 1.168(k)–2(b)(3)(iii)(B)(*5*) of the 2019 Proposed Regulations (Partnership Lookthrough Rule) is the taxable year or the calendar year. These comments are addressed later in this Summary of Comments and Explanation of Revisions section.

In connection with comments received on the Five-Year Safe Harbor and the Partnership Lookthrough Rule, the Treasury Department and the IRS reviewed the Five-Year Safe Harbor and determined that clarification of this safe harbor would be beneficial. One commenter requested clarification of the Five-Year Safe Harbor as to: (1) Whether the ''placed-in-service year'' is the taxable year or the calendar year; and (2) whether the portion of the calendar year covering the period up to the placed-in-service date of the property is taken into account. The commenter also requested clarification regarding the application of the Five-Year Safe Harbor to situations where the taxpayer or a predecessor was not in existence during the entire 5-year lookback period. Specifically, the commenter pointed out that the safe harbor in the 2019 Final Regulations could be read to apply only to those periods in the 5-year lookback period that both the taxpayer and a predecessor are in existence, and not to those periods in the 5-year lookback period during which the taxpayer or a predecessor, or both, were in existence and had a depreciable interest in the property later acquired and placed in service by the taxpayer. The commenter suggested that the Five-Year Safe Harbor be clarified to say that the taxpayer and each predecessor is subject to a separate lookback period that begins no earlier than the date such person came into existence.

The Treasury Department and the IRS intended the ''placed-in-service year'' to be the current calendar year in which the property is placed in service by the taxpayer. Also, the Treasury Department and the IRS intended the portion of that calendar year covering the period up to the placed-in-service date of the property to be considered in determining whether the taxpayer or a predecessor previously had a depreciable interest. This approach is consistent with an exception to the de minimis use rule in § 1.168(k)–2(b)(3)(iii)(B)(*4*) of the 2019 Proposed Regulations, which is discussed in greater detail in part I.B.1.b of this Summary of Comments and Explanation of Revisions section. Pursuant to that exception, when a taxpayer places in service eligible property in Year 1, disposes of that property to an unrelated party in Year 1 within 90 calendar days of that placed-in-service date, and then reacquires the same property later in Year 1, the taxpayer is treated as having a prior depreciable interest in the property upon the taxpayer's reacquisition of the property in Year 1. This rule would be superfluous if the Five-Year Safe Harbor did not consider the portion of the calendar year covering the period up to the placed-in-service date of the property.

Accordingly, § 1.168(k)–2(b)(3)(iii)(B)(*1*) is amended to clarify that the five calendar years immediately prior to the current calendar year in which the property is placed in service by the taxpayer, and the portion of such current calendar year before the placed-in-service date of the property determined without taking into account the applicable convention, are taken into account to determine if the taxpayer or a predecessor had a depreciable interest in the property at any time prior to acquisition (lookback period). Section 1.168(k)–2(b)(3)(iii)(B)(*1*) also is amended to adopt the suggestion of the commenter that each of the taxpayer and the predecessor be subject to a separate lookback period. These final regulations clarify that if the taxpayer or a predecessor, or both, have not been in existence during the entire lookback period, then only the portion of the lookback period during which the taxpayer or a predecessor, or both, have been in existence is taken into account to determine if the taxpayer or the predecessor had a depreciable interest in the property. More examples have been added to clarify the application of the Five-Year Safe Harbor.

b. De Minimis Use

Section 1.168(k)–2(b)(3)(iii)(B)(*4*) of the 2019 Proposed Regulations provides an exception to the prior depreciable interest rule in the 2019 Final Regulations when the taxpayer disposes of property to an unrelated party within 90 calendar days after the taxpayer originally placed such property in service (De Minimis Use Rule). The 2019 Proposed Regulations also provide that the De Minimis Use Rule does not apply if the taxpayer reacquires and again places in service the property during the same taxable year the taxpayer disposed of the property. A commenter on the 2019 Proposed Regulations asked for clarification regarding the application of the De Minimis Use Rule in the following situations:

(1) The taxpayer places in service property in Year 1, disposes of that property to an unrelated party in Year 1 within 90 calendar days of that original placed-in-service date, and then reacquires and again places in service the same property later in Year 1 and does not dispose of the property again in Year 1;

(2) The taxpayer places in service property in Year 1, disposes of that property to an unrelated party in Year 2 within 90 calendar days of that original placed-in-service date, and then reacquires and again places in service the same property in Year 2 or later; and

(3) The taxpayer places in service property in Year 1 and disposes of that property to an unrelated party in Year 1 within 90 calendar days of that original placed-in-service date, then the taxpayer reacquires and again places in service the same property later in Year 1 and disposes of that property to an unrelated party in Year 2 within 90 calendar days of the subsequent placed-in-service date in Year 1, and the taxpayer reacquires and again places in service the same property in Year 4.

In situation 1, the additional first year depreciation deduction is not allowable for the property when it was initially placed in service in Year 1 by the taxpayer pursuant to § 1.168(k)–2(g)(1)(i) of the 2019 Final Regulations. The additional first year depreciation deduction also is not allowable when the same property is subsequently placed in service in Year 1 by the same taxpayer under the De Minimis Use Rule in the 2019 Proposed Regulations. The commenter asserted that the additional first year depreciation deduction should be allowable for the property when it is placed in service

again in Year 1 and is not disposed of again in Year 1, because the additional first year depreciation deduction is not allowable for the property when it initially was placed in service in Year 1 by the taxpayer. The Treasury Department and the IRS agree with this comment if the property is originally acquired by the taxpayer after September 27, 2017. The Treasury Department and the IRS decline to adopt this comment with respect to property that was originally acquired by the taxpayer before September 28, 2017, as the exception to the De Minimis Use Rule was intended to prevent certain churning transactions involving such property. The Treasury Department and the IRS believe that property that is placed in service, disposed of, and reacquired in the same taxable year is more likely to be part of a predetermined churning plan.

In situation 2, the additional first year depreciation deduction is allowable for the same property by the same taxpayer twice (in Year 1 when the property is initially placed in service, and in Year 2 when the property is placed in service again). This result is consistent with the De Minimis Use Rule in the 2019 Proposed Regulations, and this result is not changed in these final regulations.

In situation 3, the De Minimis Use Rule provides only one 90-day period that is disregarded in determining whether the taxpayer had a depreciable interest in the property prior to its reacquisition. That 90-day period is measured from the original placed-in-service date of the property by the taxpayer. As a result, the second 90-day period in situation 3 (during which the taxpayer reacquired the property in Year 1, again placed it in service in Year 1, and then disposed of it in Year 2) is taken into account in determining whether the taxpayer previously used the property when the taxpayer again places in service the property in Year 4.

The De Minimis Use Rule in these final regulations is clarified to reflect these results. These final regulations also include additional examples to illustrate the application of the De Minimis Use Rule in these situations and conforming changes to § 1.168(k)–2(g)(1)(i) of the 2019 Final Regulations.

2. Application to Partnerships

The Treasury Department and the IRS received several comments regarding the Partnership Lookthrough Rule in § 1.168(k)–2(b)(3)(iii)(B)(*5*) of the 2019 Proposed Regulations, which addresses the extent to which a partner is deemed to have a depreciable interest in property held by a partnership. The Partnership Lookthrough Rule provides that a person is treated as having a depreciable interest in a portion of property prior to the person's acquisition of the property if the person was a partner in a partnership at any time the partnership owned the property. The Partnership Lookthrough Rule further provides that the portion of property in which a partner is treated as having a depreciable interest is equal to the total share of depreciation deductions with respect to the property allocated to the partner as a percentage of the total depreciation deductions allocated to all partners during the current calendar year and the five calendar years immediately prior to the partnership's current year.

One commenter requested that the Treasury Department and the IRS withdraw the Partnership Lookthrough Rule and replace it with a rule that treats a taxpayer as having a depreciable interest in an item of property only if the taxpayer was a controlling partner in a partnership at any time the partnership owned the property during the applicable lookback period. The Treasury Department and the IRS agree with the commenter that the Partnership Lookthrough Rule should be withdrawn. The Treasury Department and the IRS have determined that the complexity of applying the Partnership Lookthrough Rule would place a significant administrative burden on both taxpayers and the IRS. For this reason, these final regulations do not retain the Partnership Lookthrough Rule. Therefore, under these final regulations, a partner will not be treated as having a depreciable interest in partnership property solely by virtue of being a partner in the partnership. The Treasury Department and the IRS have determined that a replacement rule that applies only to controlling partners is not necessary because the related party rule in section 179(d)(2)(A) applies to a direct purchase of partnership property by a current majority partner, and the series of related transactions rules in § 1.168(k)–2(b)(3)(iii)(C) prevents avoidance of the related party rule through the use of intermediary parties.

The same commenter recommended a number of changes to the Partnership Lookthrough Rule if it were to be retained. It is not necessary to address these comments, because these final regulations do not retain the Partnership Lookthrough Rule.

Additionally, one commenter recommended that the Treasury Department and the IRS clarify the operation of the section 168(k) regulations with respect to section 743(b) adjustments after transfers of partnership interests in section 168(i)(7) transactions, as described in the 2019 Final Regulations. The Treasury Department and the IRS have determined that this comment is outside of the scope of these final regulations.

3. Series of Related Transactions

Section 1.168(k)–2(b)(3)(iii)(C) of the 2019 Proposed Regulations provides special rules for a series of related transactions (Proposed Related Transactions Rule). The Proposed Related Transactions Rule generally provides that the relationship between the parties under section 179(d)(2)(A) or (B) in a series of related transactions is tested immediately after each step in the series, and between the original transferor and the ultimate transferee immediately after the last transaction in the series. The Proposed Related Transactions Rule also provides that the relationship between the parties in a series of related transactions is not tested in certain situations. For example, a party in the series that is neither the original transferor nor the ultimate transferee is disregarded in applying the relatedness test if the party placed in service and disposed of the property in the party's same taxable year or did not place the property in service. The relationship between the parties also is not tested if the step is a transaction described in § 1.168(k)–2(g)(1)(iii) (that is, a transfer of property in a transaction described in section 168(i)(7) in the same taxable year that the property is placed in service by the transferor). Finally, the 2019 Proposed Regulations provide that the Proposed Related Transactions Rule does not apply to syndication transactions or when all transactions in the series are described in § 1.168(k)–2(g)(1)(iii).

A commenter stated that the Proposed Related Transactions Rule may disregard significant relationships that existed before the series, or that are formed as a result of the series. The commenter also stated that the rule does not address how relatedness should be tested when the relationship between the parties changes over the course of the series or when a party ceases to exist.

The commenter recommended that the final regulations test relatedness immediately before the first step in the series of related transactions and immediately after the last step in the series, similar to § 1.197–2(h)(6)(ii)(B). The commenter also recommended simplifying the Proposed Related Transactions Rule and alleviating knowledge burdens imposed on transferees and the IRS as to whether a transfer is pursuant to a series of related transactions, the date that a transferee in

a series placed the asset in service, and whether a transferee is related to a transferor.

The Treasury Department and the IRS have determined that the rule in § 1.197–2(h)(6)(ii)(B) is not appropriate for testing relatedness for purposes of the additional first year depreciation deduction. Section 1.197–2(h)(6)(ii)(B) provides that relatedness is tested immediately before the first step in a series of related transactions and immediately after the last step in the series. The purpose of this rule is to prevent the churning of assets, and the relationship that is of importance is that of the first and last acquisition. In contrast, the purpose of the Proposed Related Transactions Rule is to determine whether each transferee in the series qualifies to claim the additional first year depreciation deduction for the assets and, therefore, testing for relatedness is done immediately after each step in the series. Testing for relatedness at no point in time other than immediately before the first step and immediately after the last step in the series would preclude all intermediaries in the series from claiming the additional first year depreciation deduction. Accordingly, the Treasury Department and the IRS do not adopt this recommendation.

The commenter also recommended several alternative approaches to testing relatedness: (1) Any transferee in a series of related transactions tests its relatedness to every prior transferor in the series; or (2) a transferee tests its relatedness only to its immediate transferor if the transferee demonstrated that it did not know, or have reason to know, that the transfer occurred pursuant to a series of related transactions.

The Treasury Department and the IRS have determined that requiring each transferee in a series of related transactions to test its relatedness to every prior transferor in the series would impose a significant administrative burden. Therefore, these final regulations do not adopt the commenter's first alternative approach.

The Treasury Department and the IRS also have determined that, because a series of related transactions generally is undertaken among the relevant parties pursuant to a preconceived plan, the rule in the commenter's second alternative approach would have limited application. Because the application of this approach would depend upon the taxpayer's demonstration that it did not know, and did not have reason to know, that a transfer occurred pursuant to a series, this rule also may be difficult for both taxpayers and the IRS to administer. Furthermore, this approach fails to adequately address situations where the parties other than the original transferor and the ultimate transferee in a series may be related or may become related pursuant to the series. Thus, these final regulations do not adopt the commenter's second alternative approach.

However, the Treasury Department and the IRS agree that the Proposed Related Transactions Rule should be simplified. The Treasury Department and the IRS also agree that this rule should be modified to take into account changes in the relationship between the parties, including a party ceasing to exist, over the course of a series of related transactions. For example, assume that, pursuant to a series of related transactions, A transfers property to B, B transfers property to C, and C transfers property to D. Under the Proposed Related Transactions Rule, relatedness is tested after each step and between D and A. Assume further that, at the beginning of the series, C was related to A but, prior to acquiring the property, C ceases to be related to A, or A ceases to exist. The Proposed Related Transactions Rule does not address how to treat such changes.

Accordingly, these final regulations provide that each transferee in a series of related transactions tests its relationship under section 179(d)(2)(A) or (B) with the transferor from which the transferee directly acquires the depreciable property (immediate transferor) and with the original transferor of the depreciable property in the series. The transferee is treated as related to the immediate transferor or the original transferor if the relationship exists either immediately before the first transfer of the depreciable property in the series or when the transferee acquires the property. Any transferor in a series of related transactions that ceases to exist during the series is deemed to continue to exist for purposes of testing relatedness.

These final regulations also provide a special rule that disregards certain transitory relationships created pursuant to a series of related transactions. More specifically, if a party acquires depreciable property in a series of related transactions in which the acquiring party acquires stock, meeting the requirements of section 1504(a)(2), of a corporation in a fully taxable transaction, followed by a liquidation of the acquired corporation under section 331, any relationship created as part of such series of transactions is disregarded in determining whether any party is related to such acquired corporation for purposes of testing relatedness. This rule is similar to § 1.197–2(h)(6)(iii) and properly reflects the change in ownership of depreciable property in a series of related transactions without taking into account certain transitory relationships the purpose of which is unrelated to the additional first year depreciation deduction.

Finally, these final regulations provide that, if a transferee in a series of related transactions acquires depreciable property from a transferor that was not in existence immediately prior to the first transfer of the property in the series (new transferor), the transferee tests its relationship with the party from which the new transferor acquired the depreciable property. Examples illustrating these revised rules are provided in these final regulations.

4. Application to Members of a Consolidated Group

a. The 2019 Proposed Regulations

The 2019 Proposed Regulations provide special rules addressing the availability of the additional first year depreciation deduction upon the acquisition of depreciable property by a member of a consolidated group, as defined in § 1.1502–1(b) and (h), respectively. Under the 2019 Proposed Regulations, if a member acquires property in which the consolidated group had a depreciable interest at any time prior to the member's acquisition of such property, then the member is treated as previously having a depreciable interest in such property (Group Prior Use Rule). This rule was first included in the 2018 Proposed Regulations to address situations in which property is disposed of by one member of a consolidated group and subsequently is acquired by another member of the same consolidated group, because the Treasury Department and the IRS had determined that allowing the additional first year depreciation deduction in such situations would not clearly reflect the income of the consolidated group. See 83 FR 39292, 39295 (Aug. 8, 2018). For purposes of the Group Prior Use Rule, a consolidated group is treated as having a depreciable interest in property during the time any current or former member of the group had a depreciable interest while a member of the group. See § 1.168(k)–2(b)(3)(v)(A) of the 2019 Proposed Regulations.

Further, when members of a consolidated group acquire both depreciable property and the stock of a corporation that previously had a depreciable interest in such property

pursuant to the same series of related transactions, the 2019 Proposed Regulations treat the member that acquires the property as previously having a depreciable interest in such property (Stock and Asset Acquisition Rule). See § 1.168(k)–2(b)(3)(v)(B) of the 2019 Proposed Regulations. Like the Group Prior Use Rule, the Stock and Asset Acquisition Rule initially was included in the 2018 Proposed Regulations. As stated in the preamble to those regulations, the Treasury Department and the IRS have determined that, in substance, this series of related transactions is the same as a series of related transactions in which a consolidated group acquired the selling corporation, which subsequently reacquired the property in which it previously had a depreciable interest and then transferred it to another member of the consolidated group. In that situation, the additional first year depreciation deduction would not be allowed. See 83 FR 39292, 39295 (Aug. 8, 2018). Both the Group Prior Use Rule and the Stock and Asset Acquisition Rule are adopted in these final regulations with certain modifications, as discussed further in part I.B.4.b(2) of this Summary of Comments and Explanation of Revisions section.

The 2019 Proposed Regulations also include rules addressing transfers of depreciable property between members of the same consolidated group. One such rule (Proposed Consolidated Asset Acquisition Rule) applies if a member (transferee member) acquires depreciable property from another member of the same consolidated group in a taxable transaction and, as part of the same series of related transactions, the transferee member then ceases to be a member of that group within 90 calendar days of the date of the property acquisition. Under the Proposed Consolidated Asset Acquisition Rule, the transferee member is treated as (1) acquiring the property one day after the date on which the transferee member ceases to be a member of the consolidated group (Deconsolidation Date) for all Federal income tax purposes, and (2) placing the property in service no earlier than one day after the Deconsolidation Date for purposes of depreciation and the investment credit allowed by section 38. See § 1.168(k)–2(b)(3)(v)(C) of the 2019 Proposed Regulations.

The Treasury Department and the IRS also determined that, in general, deemed acquisitions of property pursuant to a section 338 election or a section 336(e) election should be subject to the same treatment as actual acquisitions of property because such deemed acquisitions generally are respected as actually occurring for Federal income tax purposes. See §§ 1.336–2(e) and 1.338–1(a)(2); see also § 1.336–1(a)(1) (generally providing that, except to the extent inconsistent with section 336(e), the results of section 336(e) should coincide with those of section 338(h)(10)). Accordingly, the Treasury Department and the IRS proposed a rule analogous to the Proposed Consolidated Asset Acquisition Rule for deemed acquisitions of property pursuant to such an election (Proposed Consolidated Deemed Acquisition Rule, and together with the Proposed Consolidated Asset Acquisition Rule, the Proposed Consolidated Acquisition Rules).

Section 338 and section 336(e) both provide elections to treat certain transfers of a target corporation's stock as transfers of the target corporation's assets. If a section 338 election is made for a ''qualified stock purchase'' (QSP), then the target corporation generally is treated as two separate corporations before and after the acquisition date for Federal income tax purposes. As a result of the election, ''old target'' is deemed to sell its assets to an unrelated person at the close of the acquisition date at fair market value, and ''new target'' is deemed to acquire those assets from an unrelated person at the beginning of the following day. See section 338(a). If the election is a section 338(h)(10) election, then old target is deemed to liquidate following the deemed sale of its assets. See § 1.338–1(a)(1).

Generally, a similar sale and liquidation are deemed to occur if a section 336(e) election is made for a ''qualified stock disposition'' (QSD) of target corporation stock. However, if a section 336(e) election is made for a QSD described in section 355(d)(2) or (e)(2), then a different transaction is deemed to occur. In that case, old target is deemed to sell its assets to an unrelated party and then reacquire those assets from an unrelated party, and old target is not deemed to liquidate (sale-to-self model). See § 1.336–2(b).

The Proposed Consolidated Deemed Acquisition Rule changes certain aspects of the deemed acquisitions that result from a section 338 election or a section 336(e) election. This proposed rule applies if a member (transferee member) acquires, in a QSP or QSD, stock of another member (target) that holds depreciable property and, as part of the same series of related transactions, the transferee member and target cease to be members of the selling consolidated group within 90 calendar days of the QSP or QSD. Under this proposed rule, (1) the acquisition date or disposition date, as applicable, is treated as the day that is one day after the Deconsolidation Date for all Federal income tax purposes, and (2) new target is treated as placing the property in service no earlier than one day after the Deconsolidation Date for purposes of depreciation and the investment credit allowed by section 38. The Proposed Consolidated Deemed Acquisition Rule does not apply to QSDs described in section 355(d)(2) or (e)(2). See § 1.168(k)–2(b)(3)(v)(D) of the 2019 Proposed Regulations.

b. Comments on Consolidated Group Rules in the 2019 Proposed Regulations

The Treasury Department and the IRS received comments regarding the foregoing consolidated group rules in the 2019 Proposed Regulations.

(1) The Proposed Consolidated Acquisition Rules

(a) Issues Under the Proposed Consolidated Acquisition Rules

The Proposed Consolidated Acquisition Rules were intended to make the additional first year depreciation deduction available to the buyer of depreciable property in an intercompany transaction, as defined in § 1.1502–13(b)(1)(i), if the buyer member leaves the consolidated group within 90 calendar days pursuant to the same series of related transactions that includes the property acquisition. As discussed in the preamble to the 2019 Proposed Regulations, the Treasury Department and the IRS have determined that, in substance, such a transaction should be treated the same as if the buyer member first left the consolidated group and then purchased the depreciable property (in which case the buyer member would be allowed to claim the additional first year depreciation deduction). See 84 FR 50152, 50156 (Sep. 24, 2019). Treating the property acquisition as occurring after the buyer member leaves the consolidated group reduces the likelihood that the transfer fails to satisfy the ''purchase'' requirements in section 179(d)(2) and (3), helps ensure that the buyer member is not attributed the seller member's prior use of the property, and precludes the application of section 168(i)(7).

Commenters appreciated the Proposed Consolidated Acquisition Rules. However, commenters also argued that, because these rules treat certain actual or deemed asset acquisitions as occurring on a date that is different than the date on which the

acquisitions occurred up to 90 calendar days after the date of such an acquisition for all Federal income tax purposes, these rules create some uncertainty and raise certain implementation issues.

Many of the questions raised by commenters regarding the Proposed Consolidated Acquisition Rules concern the period beginning on the date of the actual or deemed asset acquisition and ending on the Deconsolidation Date (interim period). In particular, commenters noted that tax items may arise during the interim period from both the depreciable property acquired by the transferee member and the consideration received by the transferor member. Commenters asked how income, deductions, or other tax items from the transferred depreciable property during the interim period should be reported, particularly if the asset acquisition occurs in one taxable year and the Deconsolidation Date occurs in the subsequent taxable year. Additionally, commenters suggested that the consideration used to acquire depreciable property from the transferor member may consist of stock or debt instruments that produce dividends or interest during the interim period. According to commenters, the Proposed Consolidated Acquisition Rules do not address how such income should be reported. Commenters also asked how changes in the depreciable property (or the seller consideration) during the interim period—such as a change in value, or a change in use that affects eligibility for the additional first year depreciation deduction—should be taken into account, and how tax items associated with the property should be reported if the transferor member leaves the selling group during the interim period.

Commenters also raised questions about the interim period relating specifically to the Proposed Consolidated Deemed Acquisition Rule. Commenters noted that additional transaction steps, such as property transfers by the transferee member to target, or the assumption of additional liabilities of the transferee member by target, may occur between the date of the QSP and the Deconsolidation Date. If these transaction steps occur, commenters asked whether the aggregate deemed sale price (ADSP) and adjusted grossed-up basis (AGUB) (see §§ 1.338–4 and 1.338–5, respectively) are adjusted and, if so, how.

Additionally, commenters asked about the interaction of the Proposed Consolidated Acquisition Rules with section 355. More specifically, if the transferee member is relying on the acquired assets to satisfy the ''active trade or business'' requirements of section 355(b) in connection with the distribution of the transferee member's stock, commenters asked whether the Proposed Consolidated Acquisition Rules could prevent the distribution from qualifying under section 355 because the asset acquisition would be treated as occurring one day after the transferee member has left the selling group. See section 355(b)(1)(A) (providing that the distributing corporation and the controlled corporation must be ''engaged immediately after the distribution in the active conduct of a trade or business'').

The Treasury Department and the IRS appreciate the comments received with regard to the Proposed Consolidated Acquisition Rules. The Treasury Department and the IRS agree that these proposed rules could create uncertainty and raise implementation issues. As a result, these final regulations adopt an alternative approach (Delayed Bonus Approach) that would alleviate many of the concerns raised by commenters. See the discussion in part I.B.4.b(1)(e) of this Summary of Comments and Explanation of Revisions section.

(b) The 90-Day Requirement

The Proposed Consolidated Acquisition Rules apply only if, as part of the same series of related transactions, the transferee member leaves (or, in the case of a deemed asset purchase, the transferee member and target leave) the transferor member's consolidated group within 90 calendar days of the date of the property acquisition (90-day requirement). See part I.B.4.a of this Summary of Comments and Explanation of Revisions section. The 90-day requirement was based in part on the rule for syndication transactions in section 168(k)(2)(E)(iii) and § 1.168(k)–2(b)(3)(vi) and (b)(4)(iv). By capping the period of time that could elapse between the property transfer date and the Deconsolidation Date, the 90-day requirement was intended to limit the scope of certain issues created by treating the asset acquisition as occurring after the actual transfer date under the Proposed Consolidated Acquisition Rules. See the discussion in part I.B.4.b(1)(a) of this Summary of Comments and Explanation of Revisions section.

The Treasury Department and the IRS received several comments recommending the elimination of the 90-day requirement. The commenters generally argued that, in many cases, the 90-day requirement will be difficult for taxpayers to satisfy. In business transactions, an intercompany asset transfer may be a preparatory step undertaken well in advance of the Deconsolidation Date, particularly if the transaction involves the transfer of legal title to assets. Additionally, delays in regulatory approval for the transaction may preclude the transferee member from leaving the consolidated group within 90 days. Moreover, one commenter argued that the rationale for the 90-day requirement for syndication transactions differs from the rationale for such a requirement in the Proposed Consolidated Acquisition Rules. The commenter noted that the syndication exception in section 168(k)(2)(E)(iii) specifies a period of time that ownership of an asset (rather than the relationship between the transferor and transferee, as in the Proposed Consolidated Acquisition Rules) should be disregarded, and the commenter suggested that the primary authority for disregarding periods of transitory ownership is the step transaction doctrine rather than section 168(k). Commenters also suggested that the 90-day requirement does not further the policy goals of section 168(k). In other words, so long as there is a series of related transactions, whether the asset acquisition and the deconsolidation occur within 90 days should not be determinative. Based on the foregoing, the commenters recommended removing the 90-day requirement and simply retaining the ''series of related transactions'' requirement.

The Treasury Department and the IRS agree with commenters that the 90-day requirement would be difficult for taxpayers to satisfy in many ordinary-course business transactions. The Treasury Department and the IRS also have determined that the Delayed Bonus Approach would eliminate many of the aforementioned issues with the Proposed Consolidated Acquisition Rules by respecting the date on which each transaction in the series actually occurs. Consequently, the Delayed Bonus Approach does not include a 90-day requirement. See the discussion in part I.B.4.b(1)(e) of this Summary of Comments and Explanation of Revisions section.

(c) Assets to Which the Proposed Consolidated Acquisition Rules Apply

Under the 2019 Proposed Regulations, the Proposed Consolidated Acquisition Rules apply to actual or deemed acquisitions of ''depreciable property,'' regardless of whether such property is of a type that is eligible for the additional first year depreciation deduction (eligible property) or of a type that is ineligible for the additional first year depreciation deduction (ineligible

property). For example, under a literal reading of the Proposed Consolidated Asset Acquisition Rule, a member's acquisition of several parcels of depreciable real estate that is not eligible property from another member would be subject to this rule (assuming that all other requirements for application of this rule are satisfied), even though none of the transferred property is eligible property. Similarly, a member's acquisition of the stock of a target corporation whose assets largely consist of depreciable real estate that is not eligible property would be subject to the Proposed Consolidated Deemed Acquisition Rule (again, assuming that all other requirements for application of this rule are satisfied), even though most of the target corporation's assets are not eligible property.

One commenter recommended that the final regulations limit the application of the Proposed Consolidated Acquisition Rules to actual or deemed acquisitions of eligible property. The commenter explained that application of the Proposed Consolidated Acquisition Rules to ineligible property would not further the purposes of section 168(k) and might lack statutory authority. The commenter also asserted that such an application might create a trap for unwary taxpayers who do not consult the regulations under section 168(k) when planning transfers of ineligible property.

The Treasury Department and the IRS agree that the Proposed Consolidated Acquisition Rules should apply only to eligible property. Thus, the Delayed Bonus Approach applies solely to depreciable property, as defined in § 1.168(b)–1(a)(1), that meets the requirements in § 1.168(k)–2(b)(2), determined without regard to § 1.168(k)–2(b)(2)(ii)(C) (election not to claim the additional first year depreciation for a class of property) except on the day after the Deconsolidation Date. See the discussion in part I.B.4.b(1)(e) of this Summary of Comments and Explanation of Revisions section.

(d) Application of the Proposed Consolidated Deemed Acquisition Rule to Qualified Stock Dispositions Described in Section 355(d)(2) or (e)(2)

The Proposed Consolidated Deemed Acquisition Rule does not apply to QSDs described in section 355(d)(2) or (e)(2). As explained in part 2(D)(iv) of the Explanation of Provisions section in the 2019 Proposed Regulations and part II(C)(2)(c) of the Summary of Comments and Explanation of Revisions section in the 2019 Final Regulations, the Treasury Department and the IRS determined that this limitation would be appropriate because the rules applicable to such QSDs do not treat a new target corporation as acquiring assets from an unrelated person. See § 1.336–2(b)(2).

One commenter argued that, although the sale-to-self model in § 1.336–2(b)(2) could be construed as violating the ''no prior use'' requirement in section 168(k)(2)(E)(ii)(I) and § 1.168(k)–2(b)(3)(iii)(A)(*1*), this model should not control eligibility for the additional first year depreciation deduction, for several reasons. First, the commenter argued that there is no policy rationale under section 168(k) for treating QSDs described in section 355(d)(2) or (e)(2) differently than other transactions for which an election under section 336(e) is made. Second, the commenter argued that the sale-to-self model was not intended to be applied, and has not been applied, for all Federal income tax purposes. See, for example, § 1.336–2(b)(2)(ii)(C) (for purposes of section 197(f)(9), section 1091, and any other provision designated in the Internal Revenue Bulletin by the Internal Revenue Service, old target in its capacity as the deemed seller of assets is treated as separate and distinct from, and unrelated to, old target in its capacity as the deemed acquirer of assets). Third, the commenter suggested that taxpayers will structure around the exclusion for these QSDs in order to avail themselves of the Proposed Consolidated Deemed Acquisition Rule. Thus, the commenter recommended expanding this rule to include all types of QSD for which an election under section 336(e) is made.

The Treasury Department and the IRS do not agree with the commenter's recommendation to expand the scope of the Proposed Consolidated Deemed Acquisition Rule to include all types of QSD for which an election under section 336(e) is made. In general, a section 336(e) election should not affect the tax consequences to which the purchaser or the distributee would have been subject with respect to the acquisition of target stock if a section 336(e) election had not been made. See § 1.336–2(c). As explained in the preamble to the final section 336(e) regulations, the Treasury Department and the IRS believe that ''the predominant feature of the section 336(e) election with respect to a section 355(d)(2) or (e)(2) transaction is the section 355 transaction.'' 78 FR 28347, 28469 (May 15, 2013). Following such a transaction, the controlled corporation (that is, old target) generally remains in existence, and it retains its earnings and profits and other tax attributes. Because old target remains in existence under this construct, such attributes would include old target's prior use of its depreciable property. Accordingly, the Treasury Department and the IRS decline to expand the scope of the Proposed Consolidated Deemed Acquisition Rule.

(e) Alternative Approaches

Commenters recommended several alternative approaches to alleviate the uncertainties and implementation issues raised by the Proposed Consolidated Acquisition Rules. This part I.B.4.b(1)(e) of this Summary of Comments and Explanation of Revisions section discusses each alternative approach.

(i) Delayed Bonus Approach

The first alternative approach recommended by commenters (Delayed Bonus Approach) would treat the asset acquisition as occurring on the date such acquisition actually occurred for all Federal income tax purposes and, thus, as generally being subject to all Federal income tax rules that ordinarily would apply (with the exception of the series of related transactions rules in § 1.168(k)–2(b)(3)(iii)(C)). For example, during the interim period, the transferee member would recognize depreciation on all depreciable transferred assets (including the eligible property), and the transferor member would recognize gain or loss in accordance with section 168(i)(7) and § 1.1502–13(c)(2).

Absent additional rules, the transferee member would not be able to claim the additional first year depreciation deduction (see sections 179(d)(2)(A) and (B) and the Group Prior Use Rule). To enable the transferee member to claim this deduction, the Delayed Bonus Approach treats the transferee member as (1) selling the eligible property to an unrelated third party one day after the Deconsolidation Date for an amount equal to the member's basis in the eligible property at such time, and then (2) acquiring identical, but different, eligible property from another unrelated third party for the same amount (deemed sale and purchase of eligible property). For this purpose, the transferee member's basis in the eligible property on the day after the Deconsolidation Date is the value of the consideration paid by the transferee member for the property less any depreciation deductions taken by the member with respect to such property during the interim period.

The Treasury Department and the IRS have determined that the Delayed Bonus Approach would achieve the objectives of the Proposed Consolidated Acquisition Rules (that is, permitting

additional first year depreciation to the transferee member after the member leaves the selling group pursuant to a series of related transactions) while creating fewer collateral consequences. Moreover, because the Delayed Bonus Approach would respect the asset acquisition as occurring on the actual acquisition date for all Federal income tax purposes, this approach would provide taxpayers with greater certainty regarding the tax consequences of the acquisition and the treatment of tax items arising during the interim period.

Thus, these final regulations adopt the Delayed Bonus Approach for actual and deemed acquisitions of eligible property that satisfy certain requirements. As noted in part I.B.4.b(1)(b) of this Summary of Comments and Explanation of Revisions section, the Delayed Bonus Approach does not include a 90-day requirement because this approach would not raise the same issues as the Proposed Consolidated Acquisition Rules. Furthermore, as noted in part I.B.4.b(1)(c) of this Summary of Comments and Explanation of Revisions section, the transferee member's (or target's) deemed sale and purchase of assets the day after the Deconsolidation Date under the Delayed Bonus Approach applies solely to eligible property (rather than to all depreciable assets).

Under the Delayed Bonus Approach in these final regulations, the transferee member (or target) is treated as selling and then purchasing eligible property for cash. Accordingly, the deemed sale and purchase of eligible property cannot be characterized as an exchange of property that is eligible for nonrecognition treatment under section 1031. Moreover, in the deemed sale and purchase of eligible property, the transferee member (or target) is treated as acquiring used property (deemed replacement property). Accordingly, the original use of such property does not commence with the transferee member (or target). As a result, the deemed sale and purchase of eligible property does not allow the deemed replacement property to be eligible for federal income tax credits or deductions that require new property. For example, such property does not satisfy the original use requirement in section 48(a)(3)(B)(ii) for the energy credit.

Because the cost of the deemed replacement property (and, consequently, the adjusted basis in such property) is identical to the transferee member's (or target's) adjusted basis in the eligible property, a question has arisen as to whether section 179(d)(3) and § 1.168(k)–2(b)(3)(iii)(A)(*3*) potentially could apply to prevent the transferee member (or target) from claiming the additional first year depreciation deduction for such property. To avoid any potential uncertainty in this regard, these final regulations expressly provide that the acquisition of the deemed replacement property does not result in the basis in such property being determined, in whole or in part, by reference to the basis of other property held at any time by the transferee member or target.

The Treasury Department and the IRS note that, under the Delayed Bonus Approach in these final regulations, the deemed sale and purchase of eligible property are treated as occurring for all Federal income tax purposes. Treating the deemed sale and purchase of eligible property as applicable solely for purposes of sections 168 and 179 (and not for all Federal income tax purposes) could lead to complications and inconsistencies. Under such an approach, taxpayers would be required to treat each piece of eligible property as two separate assets: (1) An asset that exists for purposes of sections 168 and 179; and (2) an asset that exists for all other Federal income tax purposes. Therefore, this approach could present difficulties in determining, for instance, (1) how any depreciation claimed with respect to the asset that exists for purposes of sections 168 and 179 affects the taxpayer's adjusted basis in the asset that exists for all other Federal income tax purposes, and (2) how to calculate the gain or loss recognized on a future disposition of the eligible property.

The Delayed Bonus Approach does not apply to property unless such property is eligible property as of the time of its acquisition by the transferee member, the Deconsolidation Date, and the day after the Deconsolidation Date. For this purpose, the status of acquired property as ''eligible property'' is generally determined without regard to § 1.168(k)–2(b)(2)(ii)(C) (property subject to an election not to claim the additional first year depreciation deduction for a class of property). As a result, a series of related transactions may be subject to the Delayed Bonus Approach even if the common parent of the selling consolidated group makes an election under section 168(k)(7) not to claim the additional first year depreciation deduction for a class of property placed in service by the transferee member for the short taxable year ending on the Deconsolidation Date. However, to avoid creating a trap for the unwary, the definition of ''eligible property'' takes into account any such election made for the taxable year that includes the day after the Deconsolidation Date. Accordingly, one component in the definition of eligible property effectively provides that for such taxable year, the transferee member cannot have made an election under section 168(k)(7) not to claim the additional first year depreciation deduction for the class of property to which the acquired property belongs. By extension, the Delayed Bonus Approach does not apply to acquired property belonging to a class of property with respect to which the transferee makes an election under section 168(k)(7), for property placed in service in the taxable year that includes the day after the Deconsolidation Date.

Additionally, these final regulations allow taxpayers to elect out of the application of the Delayed Bonus Approach with respect to all eligible property that otherwise would be subject to the Delayed Bonus Approach. If a taxpayer makes this election for a transaction, the taxpayer also is deemed to have made such an election for all other transactions in the same series of related transactions that otherwise would be subject to the Delayed Bonus Approach and that involve the same (or a related) transferee member or target. To provide clarity and uniformity with the other elections in § 1.168(k)–2, these final regulations provide that the election may be revoked only by filing a request for a private letter ruling and obtaining the Commissioner of Internal Revenue's written consent to revoke the election.

A commenter requested confirmation that the deemed sale and purchase of eligible property under the Delayed Bonus Approach would not prevent the transferee member's deconsolidation in a stock distribution from qualifying under section 355. In other words, if such eligible property comprises the transferee member's entire trade or business, the deemed sale and purchase might be viewed as precluding the distribution from satisfying the ''active trade or business'' requirement in section 355(b). See section 355(b)(2)(C) (a corporation is treated as engaged in the active conduct of a trade or business only if, among other things, such trade or business was not acquired in a recognition transaction during the five-year period ending on the date of the distribution). The Treasury Department and the IRS are considering this issue and request comments for purposes of potential future guidance.

(ii) Other Alternative Approaches

The second alternative approach recommended by commenters (Modified Consolidated Acquisition Approach) would be identical to the Proposed Consolidated Acquisition Rules, except

that the asset acquisition would not be treated as occurring on the day after the Deconsolidation Date for all Federal income tax purposes. Instead, the asset acquisition would be treated as occurring on the day after the Deconsolidation Date solely for purposes of determining (1) whether the requirements of section 168(k) are satisfied and, if so, (2) the amount, location, and timing of the transferee member's (or new target's) additional first year depreciation deduction with respect to the depreciable property. For all other Federal income tax purposes, the asset acquisition would be treated as occurring on the date such acquisition actually occurred.

The third alternative approach recommended by commenters (Frozen Depreciation Approach) is the same as the Delayed Bonus Approach, except that the transferee member would not be permitted to claim depreciation deductions during the interim period for the acquired assets (and the transferor member would not be required to take into account gain or loss from the asset acquisition under § 1.1502–13(c)).

The Treasury Department and the IRS have determined that, although the Modified Consolidated Acquisition Approach would address certain issues and uncertainties created by the Proposed Consolidated Acquisition Rules, this approach would create other issues and uncertainties by delaying the asset acquisition date for purposes of section 168(k) but not for other Federal income tax purposes. For instance, if the Modified Consolidated Acquisition Approach were applied to a deemed asset acquisition pursuant to a section 338(h)(10) election, the acquisition date would be delayed until one day after the Deconsolidation Date for purposes of section 168(k), but old target would be deemed to sell its assets and liquidate pursuant to § 1.338(h)(10)–1(d)(4)(i) on the actual acquisition date for all other Federal income tax purposes. This duality could complicate the calculation and allocation of the ADSP and AGUB among the target's assets by creating two separate acquisition dates, and thus two different dates on which such calculation and allocation must be determined. Therefore, these final regulations do not adopt the Modified Consolidated Acquisition Approach.

Similarly, with respect to the Frozen Depreciation Approach, the Treasury Department and the IRS have determined that holding the transferee member's depreciation deductions (and the transferor member's gain or loss on the asset acquisition) in abeyance could create some of the same issues as those identified by commenters with regard to the Proposed Consolidated Acquisition Rules. Such issues include the proper manner for reporting transactions that are part of a series of related transactions spanning multiple taxable years, and the appropriate way to account for changes in the depreciable property during the interim period. Accordingly, if the Frozen Depreciation Approach were to be adopted, the 90-day requirement might be required to limit the scope of such issues. Thus, these final regulations also do not adopt this approach.

(2) Application of the Five-Year Safe Harbor

As discussed in part I.B.1.a of this Summary of Comments and Explanation of Revisions section, the Five-Year Safe Harbor in § 1.168(k)–2(b)(3)(iii)(B)(*1*) of these final regulations provides that, in determining if the taxpayer or a predecessor previously had a depreciable interest in property, ''only the five calendar years immediately prior to the current calendar year in which the property is placed in service by the taxpayer, and the portion of such current calendar year before the placed-in-service date of the property without taking into account the applicable convention, are taken into account.'' Commenters requested confirmation that the Five-Year Safe Harbor applies for purposes of the Group Prior Use Rule and the Stock and Asset Acquisition Rule.

The Treasury Department and the IRS did not intend to require a different (and longer) ''look back'' period for consolidated group members than for other taxpayers. Accordingly, these final regulations clarify the Group Prior Use Rule to provide that a member of a consolidated group is treated as having a depreciable interest in property only if the group had a depreciable interest within the ''lookback period.'' This period, which is defined in these final regulations in accordance with the Five-Year Safe Harbor, includes both the five calendar years immediately prior to the current calendar year in which the property is placed in service by the member and the portion of such current calendar year before the placed-in-service date of the property, without taking into account the applicable convention. Similarly, these final regulations clarify that the Stock and Asset Acquisition Rule applies only if the corporation that joins the consolidated group had a depreciable interest in the property within the lookback period. These final regulations have modified *Examples 26, 27,* and *30* in § 1.168(k)–2(b)(3)(vii) of the 2019 Proposed Regulations (*Examples 1, 2,* and *3* in § 1.1502–68(d) of these final regulations) accordingly.

(3) Request for Additional Examples

One commenter requested several additional examples to clarify the application of the aforementioned special rules for consolidated groups. One such example would illustrate that the Group Prior Use Rule does not apply to situations in which an asset is acquired by a former group member (other than the member that directly held the asset) following the termination of the group. Another such example would address the consequences of an asset acquisition by one member of a consolidated group if, in an unrelated transaction, a corporation that previously had a depreciable interest in the property becomes a member of the same consolidated group.

The Treasury Department and the IRS agree that such examples would be helpful and have included them in these final regulations.

(4) Movement of Consolidated Rules to Regulations Under Section 1502

The Treasury Department and the IRS have determined that moving the section 168(k) rules for consolidated groups to the regulations under section 1502 would facilitate the identification and application of these rules by practitioners. Thus, these rules have been moved from § 1.168(k)–2(b)(3)(v) of the 2019 Proposed Regulations to new § 1.1502–68.

C. Acquisition of Property

1. Acquisition of a Trade or Business or an Entity

Section 1.168(k)–2(b)(5)(iii)(G) of the 2019 Proposed Regulations provides that a contract to acquire all or substantially all of the assets of a trade or business or to acquire an entity is binding if it is enforceable under State law against the parties to the contract and that certain conditions do not prevent the contract from being a binding contract. This proposed rule also provides that it applies to a contract for the sale of stock of a corporation that is treated as an asset sale as a result of an election under section 338.

The Treasury Department and the IRS are aware of potential questions regarding whether § 1.168(k)–2(b)(5)(iii)(G) of the 2019 Proposed Regulations also applies to a contract for the sale of stock of a corporation that is treated as an asset sale as a result of an election under section 336(e). The Federal income tax consequences of a section 336(e) election made with respect to a qualified stock disposition

not described, in whole or in part, in section 355(d)(2) or (e)(2) are similar to the Federal income tax consequences of a section 338 election. See §§ 1.336–1(a)(1) and 1.336–2(b)(1). Accordingly, these final regulations clarify that § 1.168(k)–2(b)(5)(iii)(G) applies to a contract for the sale of stock of a corporation that is treated as an asset sale as a result of an election under section 336(e) made for a disposition described in § 1.336–2(b)(1).

2. Property Not Acquired Pursuant to a Written Binding Contract

Section 1.168(k)–2(b)(5)(v) of the 2019 Proposed Regulations provides that, in general, the acquisition date of property that the taxpayer acquires pursuant to a contract that does not meet the definition of a written binding contract in § 1.168(k)–2(b)(5)(iii) of the 2019 Final Regulations is the date on which the taxpayer paid or incurred more than 10 percent of the total cost of the property, excluding the cost of any land and preliminary activities. A commenter on the 2019 Proposed Regulations requested the bifurcation of a particular type of contract that the taxpayer has determined does not meet the definition of a written binding contract in § 1.168(k)–2(b)(5)(iii) of the 2019 Final Regulations. The contract at issue is cancelable at any time by the taxpayer/customer without penalty and requires the taxpayer to reimburse the contractor only for the costs the contractor has incurred, plus the contractor's profit margin, prior to the date the contractor receives a notice of cancellation by the taxpayer. For such a contract, the commenter requested that the final regulations allow the contract to be bifurcated into a binding contract for the period prior to the effective date of section 13201 of the TCJA and a separate non-binding contract for the period after the effective date of section 13201 of the TCJA. If the final regulations allow such a bifurcation, the commenter asserted that, if more than 10 percent of the costs of the project are paid or incurred by the taxpayer before the effective date of section 13201 of the TCJA, none of such costs are eligible for the 100-percent additional first year depreciation deduction, but all costs paid or incurred by the taxpayer after the effective date of section 13201 of the TCJA would meet the acquisition date requirements for the 100-percent additional first year depreciation deduction.

The Treasury Department and the IRS have determined that the change made in these final regulations to the component election (see part I.C.3 of this Summary of Comments and Explanation of Revisions section) generally addresses this comment. Therefore, the Treasury Department and the IRS decline to provide a special rule for this particular type of contract.

3. Component Election

Section 1.168(k)–2(c) of the 2019 Proposed Regulations allows a taxpayer to elect to treat one or more components acquired or self-constructed after September 27, 2017, of certain larger self-constructed property as being eligible for the additional first year depreciation deduction (Component Election). The larger self-constructed property must be qualified property under section 168(k)(2), as in effect before the enactment of the TCJA, for which the manufacture, construction, or production began before September 28, 2017. However, the election is not available for components of larger self-constructed property when such components are not otherwise eligible for the additional first year depreciation deduction.

a. Eligible Larger Self-Constructed Property

Pursuant to § 1.168(k)–2(c)(2)(ii) of the 2019 Proposed Regulations, larger self-constructed property that is placed in service by the taxpayer after December 31, 2019, or larger self-constructed property described in section 168(k)(2)(B) or (C), as in effect on the day before enactment of the TCJA, that is placed in service after December 31, 2020, is not eligible larger self-constructed property. Accordingly, any components of such property that are acquired or self-constructed after September 27, 2017, do not qualify for the Component Election. A commenter on the 2019 Proposed Regulations requested that the final regulations remove this cut-off date for when the larger self-constructed property must be placed in service because it does not reflect the intent of section 13201 of the TCJA of promoting capital investment, modernization, and growth. If a taxpayer constructs a building, the Treasury Department and the IRS are aware that taxpayers have questioned whether the larger self-constructed property is the building or the tangible personal property constructed as part of the building.

After considering these comments and the comment for property not acquired pursuant to a written binding contract (see part I.C.2 of this Summary of Comments and Explanation of Revisions section), the Treasury Department and the IRS have determined to expand the larger self-constructed property that is eligible for the Component Election. These final regulations provide that eligible larger self-constructed property also includes property that is manufactured, constructed, or produced for the taxpayer by another person under a written contract that does not meet the definition of a binding contract under § 1.168(k)–2(b)(5)(iii) of the 2019 Final Regulations (written non-binding contract) and that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or for its production of income. Further, these final regulations remove the requirement that the larger self-constructed property be qualified property under section 168(k)(2), as in effect on the day before the enactment of the TCJA, and instead provide that the larger self-constructed property must be (i) MACRS property with a recovery period of 20 years or less, computer software, water utility property, or qualified improvement property under section 168(k)(3) as in effect on the day before the enactment date of the TCJA, and (ii) qualified property under § 1.168(k)–2(b) of the 2019 Final Regulations and these final regulations, determined without regard to the acquisition date requirement in § 1.168(k)–2(b)(5), for which the taxpayer begins the manufacture, construction, or production before September 28, 2017. As a result of this change, the cut-off dates for when the larger self-constructed property must be placed in service by the taxpayer now align with the placed-in-service dates under section 168(k)(6) and § 1.168(k)–2(b)(4)(i). Because the Component Election is an exception to the acquisition date requirements in § 1.168(k)–2(b)(5)(iv) of the 2019 Final Regulations and § 1.168(k)–2(b)(5)(v) of these final regulations, and such rules do not apply to qualified film, television, and live theatrical productions, the Treasury Department and the IRS have determined to retain the rule in § 1.168(k)–2(c) of the 2019 Proposed Regulations to exclude these productions from being eligible for the Component Election.

With regard to the taxpayers' question of whether the larger self-constructed property is the building constructed by the taxpayer or the tangible personal property constructed as part of the building, all tangible personal property constructed as part of that building generally is MACRS property with a recovery period of 20 years or less. As a result, the Treasury Department and the IRS have determined that such tangible personal property is the larger self-constructed property for purposes

of the Component Election if the construction of all tangible personal property of the building began before September 28, 2017, and any eligible component of such tangible personal property is eligible for the Component Election. Accordingly, these final regulations clarify that all property that is constructed as part of residential rental property, nonresidential real property, or an improvement to such property, and that is MACRS property with a recovery period of 20 years or less, computer software, water utility property, or qualified improvement property under section 168(k)(3) as in effect on the day before the enactment date of the TCJA, is the larger self-constructed property for purposes of the Component Election.

b. Eligible Components

To be eligible for the Component Election, § 1.168(k)–2(c)(3) of the 2019 Proposed Regulations provides that a component of the larger self-constructed property must be qualified property under § 1.168(k)–2(b) of the 2019 Final Regulations and these final regulations that is acquired or self-constructed by the taxpayer after September 27, 2017. These final regulations retain this rule. In addition, these final regulations clarify that the acquisition date of a component acquired pursuant to a written binding contract is determined under § 1.168(k)–2(b)(5)(ii)(B) of the 2019 Final Regulations. If a component is acquired or self-constructed pursuant to a written non-binding contract, these final regulations provide that the rules under § 1.168(k)–2(b)(5)(v) of these final regulations determine the acquisition date of such component or when manufacture, construction, or production of such component begins. These final regulations also include a conforming change to § 1.168(k)–2(b)(5)(v) clarifying that these rules apply to property that is self-constructed pursuant to a written non-binding contract, and amend § 1.168(k)–2(d)(3) to provide a rule similar to the rule in § 1.168(k)–2(b)(5)(v) for property that is described in section 168(k)(2)(B) or (C) and is not acquired pursuant to a written binding contract.

D. Property Described in Section 168(k)(2)(B)

Section 1.168(k)–2(e)(1)(iii) of the 2019 Proposed Regulations provides that rules similar to the rules in section 4.02(1)(b) of Notice 2007–36 (2007–17 I.R.B. 1000) apply for determining the amounts of unadjusted depreciable basis attributable to the manufacture, construction, or production of property described in section 168(k)(2)(B) before January 1, 2027. These final regulations clarify that such rules apply regardless of whether the manufacture, construction, or production of such property is pursuant to a written binding contract or a written non-binding contract.

II. Definitions

A. Depreciable Property

Section 1.168(b)–1(a)(1) defines the term ''depreciable property'' for purposes of section 168. See also § 1.168(k)–2(b)(1). In connection with its comments on the special rules for consolidated groups in § 1.168(k)–2(b)(3)(v) of the 2019 Proposed Regulations, a commenter requested the final regulations provide either an explicit definition of that term or an alternate term that is expressly limited to property the nature of which is eligible for the additional first year depreciation deduction.

The definition of ''depreciable property'' in § 1.168(b)–1(a)(1) is the same definition of that term in § 1.168(k)–1(a)(2)(i) for purposes of section 168(k) as in effect before the enactment of the TCJA. The Treasury Department and the IRS are not aware of problems with applying the definition under either § 1.168(b)–1(a)(1) or § 1.168(k)–1(a)(2)(i). Moreover, the Treasury Department and the IRS have determined that such definition clearly describes which property is depreciable property. Accordingly, the Treasury Department and the IRS decline to adopt this comment. However, the rules in § 1.1502–68 for consolidated groups use the term ''eligible property'' to identify the types of depreciable property eligible for the additional first year depreciation deduction.

B. Qualified Improvement Property

Section 1.168(b)–1(a)(5) of the 2019 Final Regulations defines the term ''qualified improvement property'' for purposes of section 168. Section 168(e)(6), as amended by section 13204 of the TCJA, and § 1.168(b)–1(a)(5)(i)(A) and (a)(5)(ii) provide the definition of that term for improvements placed in service after December 31, 2017. Section 2307 of the CARES Act amended section 168(e)(3)(E), (e)(6), and (g)(3)(B). Section 2307(a)(1)(A) of the CARES Act added a new clause (vii) to the end of section 168(e)(3)(E) to provide that qualified improvement property is classified as 15-year property. Section 2307(a)(1)(B) of the CARES Act amended the definition of qualified improvement property in section 168(e)(6) by providing that the improvement must be ''made by the taxpayer.'' In addition, section 2307(a)(2) of the CARES Act amended the table in section 168(g)(3)(B) to provide a recovery period of 20 years for qualified improvement property for purposes of the alternative depreciation system under section 168(g). These amendments to section 168(e) and (g) are effective as if included in section 13204 of the TCJA and, therefore, apply to property placed in service after December 31, 2017.

As a result of these changes by section 2307 of the CARES Act, these final regulations amend § 1.168(b)–1(a)(5)(i)(A) to provide that the improvement must be made by the taxpayer. The Treasury Department and the IRS are aware of questions regarding the meaning of ''made by the taxpayer'' with respect to third-party construction of the improvement and the acquisition of a building in a transaction described in section 168(i)(7)(B) (pertaining to treatment of transferees in certain nonrecognition transactions) that includes an improvement previously made by, and placed in service by, the transferor or distributor of the building. In this regard, the Treasury Department and the IRS believe that an improvement is made by the taxpayer if the taxpayer makes, manufactures, constructs, or produces the improvement for itself or if the improvement is made, manufactured, constructed, or produced for the taxpayer by another person under a written contract. In contrast, if a taxpayer acquires nonresidential real property in a taxable transaction and such nonresidential real property includes an improvement previously placed in service by the seller of such nonresidential real property, the improvement is not made by the taxpayer.

Consistent with section 168(i)(7) (pertaining to treatment of transferees in certain nonrecognition transactions), the Treasury Department and the IRS also believe that if a transferee taxpayer acquires nonresidential real property in a transaction described in section 168(i)(7)(B) (for example, section 351 or 721), any improvement that was previously made by, and placed in service by, the transferor or distributor of such nonresidential real property and that is qualified improvement property in the hands of the transferor or distributor is treated as being made by the transferee taxpayer, and thus is qualified improvement property in the hands of the transferee taxpayer, but only for the portion of its basis in such property that does not exceed the transferor's or distributor's adjusted depreciable basis of this property.

However, because the basis is determined by reference to the transferor's or distributor's adjusted basis in the improvement, the transferee taxpayer's acquisition does not satisfy section 179(d)(2)(C) and § 1.179–4(c)(1)(iv) and thus, does not satisfy the used property acquisition requirements of § 1.168(k)–2(b)(3)(iii). Accordingly, the qualified improvement property is not eligible for the additional first year depreciation deduction in the hands of the transferee taxpayer, except as provided in § 1.168(k)–2(g)(1)(iii).

An example has been added to § 1.168(k)–2(b)(2)(iii) to illustrate the eligibility of qualified improvement property for the additional first year depreciation deduction.

C. Predecessor and Class of Property

Section 1.168(k)–2(a)(2)(iv)(B) of the 2019 Final Regulations defines a predecessor as including a transferor of an asset to a transferee in a transaction in which the transferee's basis in the asset is determined, in whole or in part, by reference to the basis of the asset in the hands of the transferor. A commenter requested clarification of whether this definition was intended to apply only with respect to the specific property transferred or more broadly. The Treasury Department and the IRS intended the definition of a ''predecessor'' in § 1.168(k)–2(a)(2)(iv)(B) of the 2019 Final Regulations to be property-specific. Similarly, the Treasury Department and the IRS intended the definition of a ''class of property'' in § 1.168(k)–2(f)(1)(ii)(G) of the 2019 Final Regulations (regarding basis adjustments in partnership assets under section 743(b)) to be partner-specific. Accordingly, these final regulations amend § 1.168(k)–2(a)(2)(iv)(B) of the 2019 Final Regulations to substitute ''the'' for ''an'', and these final regulations amend § 1.168(k)–2(f)(1)(ii)(G) of the 2019 Final Regulations to substitute ''Each'' for ''A''.

Pursuant to § 1.168(k)–2(a)(2)(iv)(E) of the 2019 Final Regulations, a transferor of an asset to a trust is a predecessor with respect to the trust. The Treasury Department and the IRS intended that this provision apply only to transfers involving carryover basis. Because § 1.168(k)–2(a)(2)(iv)(B) of the 2019 Final Regulations applies to such transfers, these final regulations remove § 1.168(k)–2(a)(2)(iv)(E) of the 2019 Final Regulations.

Statement of Availability of IRS Documents

The IRS Revenue Procedures and Revenue Rulings cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Applicability Date

The definition of qualified improvement property in § 1.168(b)–1(a)(5)(i)(A) of these final regulations applies to depreciable property placed in service by the taxpayer after December 31, 2017. Sections 1.168(k)–2 and 1.1502–68 of these final regulations apply to depreciable property, including certain components, acquired after September 27, 2017, and placed in service, or certain plants planted or grafted, as applicable, by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021. However, a taxpayer may choose to apply §§ 1.168(k)–2 and 1.1502–68 of these final regulations to depreciable property, including certain components, acquired and placed in service after September 27, 2017, or certain plants planted or grafted after September 27, 2017, as applicable, by the taxpayer during a taxable year ending on or after September 28, 2017, provided the taxpayer applies all rules in §§ 1.168(k)–2 and 1.1502–68 (to the extent relevant) in their entirety and in a consistent manner. See section 7805(b)(7).

In the case of property described in § 1.1502–68(e)(2)(i) of these final regulations that is acquired in a transaction that satisfies the requirements of § 1.1502–68(c)(1)(ii) or (c)(2)(ii) of these final regulations, the taxpayer may apply §§ 1.168(k)–2 and 1.1502–68 of these final regulations for such property only if the rules are applied, in their entirety and in a consistent manner, by all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, and the consolidated groups of which they are members, for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the deconsolidation date, as defined in § 1.1502–68(a)(2)(iii) of these final regulations.

Additionally, once a taxpayer applies §§ 1.168(k)–2 and 1.1502–68 of these final regulations, in their entirety, for a taxable year, the taxpayer must continue to apply §§ 1.168(k)–2 and 1.1502–68 of these final regulations, in their entirety, for the taxpayer's subsequent taxable years.

Alternatively, a taxpayer may rely on the proposed regulations under section 168(k) in regulation project REG–106808–19 (84 FR 50152; 2019–41 I.R.B. 912), with respect to depreciable property, including certain components, acquired and placed in service after September 27, 2017, or certain plants planted or grafted after September 27, 2017, as applicable, by the taxpayer during a taxable year ending on or after September 28, 2017, and before the taxpayer's first taxable year that begins on or after January 1, 2021, if (1) the taxpayer follows the proposed regulations in their entirety, except for the Partnership Lookthrough Rule in proposed § 1.168(k)–2(b)(3)(iii)(B)(*5*), and in a consistent manner, and (2) all members of a consolidated group consistently rely on the same set of rules. Further, if such property is acquired in a transaction described in proposed § 1.168(k)–2(b)(3)(v)(C) or (D), the taxpayer may rely on the proposed regulations under section 168(k) for such property only if the rules are followed, in their entirety and in a consistent manner, by all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, and the consolidated groups of which they are members, for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the Deconsolidation Date. For this purpose, the terms transferor member, transferee member, and target have the meaning provided in proposed § 1.168(k)–2(b)(3)(v)(C) and (D), and the term Deconsolidation Date has the meaning provided in proposed § 1.168(k)–2(b)(3)(v)(C)(*1*).

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 12866, 13563, and 13771 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including (i) potential economic, environmental, and public health and safety effects, (ii) potential distributive impacts, and (iii) equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11,

2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these regulations as economically significant under section 1(c) of the MOA. Accordingly, the OMB has reviewed these regulations.

A. Background

i. Bonus Depreciation

In general, section 168(k) allows taxpayers to immediately deduct some portion of investment in certain types of capital assets referred to as the ''bonus percentage.'' This provision is colloquially referred to as ''bonus depreciation.'' Public Law 115–97, commonly referred to as the Tax Cuts and Jobs Act (TCJA), increased the bonus percentage from 50 percent to 100 percent for qualified property acquired after September 27, 2017, which accelerates depreciation deductions relative to previous law. The TCJA also removed the ''original use'' requirement, meaning that taxpayers could claim bonus depreciation on certain ''used'' property. The TCJA made several other modest changes to the operation of section 168(k). First, it excluded from the definition of qualified property any property used by rate-regulated utilities and certain firms (primarily automobile dealerships) with ''floor plan financing indebtedness'' as defined under section 163(j). Furthermore, section 168(k)(2)(a)(ii)(IV) and (V) allowed qualified film, television, and live theatrical productions (as defined under Section 181) to qualify for bonus depreciation.

The Treasury Department and the IRS promulgated regulations under § 1.168(k)–2 to generally provide structure and clarity for the implementation of section 168(k). Such regulations were proposed as REG–104397–18 (2018 Proposed Regulations) and finalized as TD 9874 (2019 Final Regulations). However, the Treasury Department and the IRS determined that there remained several outstanding issues requiring clarification that should be subject to notice and comment. In response, the Treasury Department and the IRS issued an additional notice of proposed rulemaking as REG 106808–19 (2019 Proposed Regulations). These final regulations finalize the 2019 Proposed Regulations with only minor changes.

These final regulations (these regulations) address ambiguities related to the operation of section 168(k)(9), which describes property that is ineligible for bonus depreciation. Second, these regulations create a de minimis rule which provides that a taxpayer will be deemed not to have had a prior depreciable interest in a property—and thus that property will be eligible for bonus depreciation in that taxpayer's hands (assuming it otherwise qualifies)—if the taxpayer previously disposed of that property within 90 days of the date on which that property was originally placed in service. Third, these regulations provide for the treatment of an asset acquisition as part of a sale of a member of a consolidated group from one group to another. Fourth, these regulations clarify the treatment of a series of related transactions. Finally, these regulations provide an election to treat certain components of larger self-constructed property as eligible for the increased bonus percentage even if the construction of such larger self-constructed property began before September 28, 2017.

B. Economic Analysis

1. No-Action Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

These regulations provide certainty and consistency in the application of section 168(k) by providing definitions and clarifications regarding the statute's terms and rules. In the absence of the guidance provided in these regulations, the chance that different taxpayers might interpret the statute differently is exacerbated. For example, two similarly situated taxpayers might interpret the statutory provisions pertaining to the definition of property eligible for bonus depreciation differently, with one taxpayer pursuing a project that another comparable taxpayer might decline because of a different interpretation of whether property is eligible for bonus depreciation under 168(k). If this second taxpayer's activity is more profitable, an economic loss arises. Similar situations may arise under each of the provisions addressed by these regulations. Certainty and clarity over tax treatment generally also reduce compliance costs for taxpayers and increase overall economic performance.

An economic loss might also arise if all taxpayers have similar interpretations under the baseline of the tax treatment of particular deductible items but those interpretations differ slightly from the interpretation Congress intended for deductions of these items. For example, these regulations may specify a tax treatment that few or no taxpayers would adopt in the absence of specific guidance but that nonetheless advances Congressional intent. In these cases, guidance provides value by bringing economic decisions closer in line with the intent and purpose of the statute.

While no guidance can curtail all differential or inaccurate interpretations of the statute, these regulations significantly mitigate the chance for differential or inaccurate interpretations and thereby increase economic efficiency.

Because these regulations clarify the tax treatment of bonus depreciation for certain taxpayers, there is the possibility that business decisions may change as a result of these regulations relative to the no-action baseline. Averaged across taxpayers in the economy, these regulations will tend to expand the pool of property that is eligible for bonus depreciation, thus reducing effective tax rates for affected taxpayers, relative to the no-action baseline. This reduction in effective tax rates, viewed in isolation, is generally projected to increase economic activity by these taxpayers relative to the no-action baseline.

3. Economic Analysis of Specific Provisions

i. Property Excluded From Bonus by Section 168(k)(9)

Section 168(k)(9) provides that property used by certain businesses is not eligible for bonus depreciation. These businesses include certain rate-regulated utilities and certain firms (primarily motor vehicle dealerships) with floor plan financing indebtedness and total interest expense that exceeds certain thresholds.

These regulations clarify that those taxpayers that lease property to such businesses described by section 168(k)(9) may claim bonus depreciation, so long as other requirements of section 168(k) are met. This approach broadly follows existing normalization rules (which pre-date TCJA and which provide generally for the reconciliation of tax income and book income for regulatory purposes for utilities), which provide that lessors to public utilities are not bound by such rules so long as they themselves are not a public utility. The Treasury Department and the IRS expect that this guidance will be easy for taxpayers to interpret and comply with. To the extent that lessors can claim bonus depreciation, it is plausible that the market-clearing lease price for

such assets will fall, potentially enabling some expansions of output and contributing to economic growth.

These regulations next clarify which businesses fall under the umbrella of section 168(k)(9)(A) (utilities) and section 168(k)(9)(B) (firms with floor plan financing indebtedness). In regards to section 168(k)(9)(A), which applies to property that is ''primarily used'' in certain utilities businesses, these regulations provide that the ''primary use'' of property is consistent with how primary use is determined in existing regulations under section 167. This application should be familiar to taxpayers, and thus relatively easy to comply with.

The statutory language of section 168(k)(9)(B) is somewhat ambiguous, requiring more substantive clarifications. First, section 168(k)(9)(B) provides that firms with floor plan financing indebtedness are ineligible for bonus depreciation ''if the floor plan financing interest [from such indebtedness] was taken into account under [section 163(j)(1)(C)].'' These regulations clarify that such interest is in fact ''taken into account'' only if the firm in fact received a benefit from section 163(j)(1)(C)—*i.e.,* if total business interest expense (including floor plan financing interest) exceeds business interest income plus 30 percent (50 percent for taxable years beginning during 2019 and 2020) of adjusted taxable income. This decision allows more firms to claim bonus depreciation than if the Treasury Department and the IRS had made the opposite interpretation (deeming all firms with floor plan financing interest to be ineligible for bonus depreciation, regardless of whether the firm received a benefit from section 163(j)(1)(C)). However, the Treasury Department and the IRS expect that most taxpayers would have interpreted the phrase ''taken into account'' in the same manner as these regulations in the absence of these regulations, implying that the economic effects of this provision are modest.

An additional ambiguity in section 168(k)(9)(B) pertains to the length of time that the section applies to a given firm. The section refers to a ''trade or business that *has had* floor plan financing indebtedness . . . if the floor plan financing interest related to such indebtedness *was taken into account* under [section 163(j)(1)(C)]'' (emphasis added). Consider a firm (Example A) that received a benefit from section 163(j)(C)(1) in the 2021 tax year (meaning that its interest deduction would have been smaller if not for section 163(j)(C)(1)) but not in the 2022 tax year or any other later year. The Treasury Department and the IRS considered two options to address the length of time to which this designation would apply: (i) In perpetuity, such that such businesses would be forever ineligible for bonus depreciation; or (ii) annually; that is, section 168(k)(9)(B) is determined on an annual basis. Under this option, the firm in Example A would not be eligible for bonus depreciation in 2021, but so long as the other requirements were met, it would be eligible for bonus depreciation in 2022.

These regulations adopt the second option. This interpretation enables more firms to be eligible for bonus depreciation in more years, relative to the alternative regulatory approach, and would thus potentially increase investment by such firms. The Treasury Department and the IRS expect that a substantial proportion of taxpayers would have come to a different conclusion regarding the interpretation of this timing in the absence of these regulations. Therefore, this provision could be expected to affect economic activity by these taxpayers relative to the no-action baseline.

The Treasury Department and the IRS engaged in an analysis of these effects based on historical tax data, parameter values from the economic literature for the effect of bonus depreciation on investment, and assumptions regarding taxpayer interpretations in the absence of these regulations. This analysis projects that this provision will cause investment to increase in this industry by no greater than $55 million in any year, and approximately $25 million per year on average over the period from 2019–2028, relative to the no-action baseline. Additionally, this analysis projects that some share of this increased investment will reduce investment in other industries through crowd-out effects.

ii. Prior Depreciable Interest

In general, to be statutorily eligible for bonus depreciation, a given property may not have been owned and depreciated by the same firm in the past. This requirement has the effect of penalizing any tax-driven ''churning'' of assets, whereby a firm could sell and soon thereafter repurchase the same asset in order to claim the 100 percent deduction. The 2019 Final Regulations defined ''ownership'' for this purpose as having a prior depreciable interest. These regulations create an exception that provides that a taxpayer does not have a prior depreciable interest in a given property if the taxpayer disposed of the property within 90 days of the initial date when the property was placed in service (additional requirements apply to the extent the original acquisition occurred prior to September 28, 2017). The Treasury Department and the IRS instituted this rule to address situations where temporary ownership of property is necessary to facilitate certain lease arrangements so that the property subsequently purchased off-lease is not ineligible for bonus depreciation and to coordinate with the syndication transaction rules of section 168(k)(2)(E)(iii).

The Treasury Department and the IRS do not anticipate substantial economic effects of this provision. Nevertheless, it will generally have the effect of causing more property to be eligible for bonus depreciation (increasing incentives to invest) relative to the no-action baseline. This provision is not expected to meaningfully increase tax-driven or economically wasteful churning of assets relative to the no-action baseline.

iii. Group Prior Use Rule

These regulations clarify several aspects of the ''Group Prior Use Rule'' as introduced in the 2018 Proposed Regulations. Under that rule, all members of a consolidated group are treated as having had a depreciable interest in a property if *any* member of the consolidated group had such a depreciable interest. First, these final regulations clarify that the rule ceases to be in effect once the consolidated group terminates as a result of joining another consolidated group. Second, these regulations clarify that the Group Prior Use Rule does not apply to a corporation after it deconsolidates from the consolidated group, so long as that corporation did not in fact previously own that property. As is the case with the prior use rules generally, the Treasury Department and the IRS do not anticipate large economic effects as a result of this section of these regulations relative to the no-action baseline.

iv. Purchases of Assets as Part of Acquisition of Entire Business

These regulations clarify the procedure for certain purchases of assets by a given corporation from a related party that are a part of an integrated plan involving the selling of that corporation from one group to another. Specifically, these regulations provide that the deduction for bonus depreciation is allowed in such circumstances and should be claimed by the acquiring group. These regulations provide for a similar treatment in the case of deemed acquisitions in the case of an election under section 338(h)(10)

or section 336(e). These rules cause the tax treatment to reflect the economic reality, in which the acquiring group is bearing the economic outlay of the asset purchase, and that acquiring group had no economic prior depreciable interest. By aligning the tax consequences with the economic allocations, this treatment minimizes potential distortions caused by the anti-churning rules relative to the no-action baseline.

v. Component Rule Election

In 2010, Congress increased the bonus percentage from 50 percent to 100 percent for property placed in service between September 9, 2010 and December 31, 2011. In 2011, the IRS issued Revenue Procedure 2011–26 to allow taxpayers to elect to have the 100 percent bonus rate apply to components of larger self-constructed property whose construction began before September 9, 2010, so long as (1) the components were acquired (or self-constructed) after that date and (2) the larger self-constructed property itself otherwise qualifies for bonus depreciation generally. These regulations provide an analogous rule, replacing September 9, 2010 with September 28, 2017. This provision will allow more property to qualify for 100 percent bonus depreciation relative to the no-action baseline. Furthermore, this provision provides neutrality between taxpayers who acquire distinct, smaller pieces of depreciable property and those taxpayers that invest a similar amount in fewer, larger pieces of depreciable property whose construction takes place over a longer period of time. By treating similar taxpayers (and similar choices) similarly, this rule enhances economic efficiency by minimizing tax-related distortions. However, the Treasury Department and the IRS project these rules to have only a modest effect on future economic decisions relative to the no-action baseline. These rules affect only taxpayers (1) that acquire (or self-construct) components after September 27, 2017 and (2) that began construction of the larger self-constructed property prior to September 28, 2017 (approximately 32 months ago). The Treasury Department and the IRS expect relatively few taxpayers to be affected by this provision going forward.

vi. Series of Related Transactions

The 2018 Proposed Regulations provided that, in a series of related transactions, the relationship between the transferor and transferee of an asset was determined only after the final transaction in the series (Series of Related Transactions Rule). Commenters had expressed confusion regarding whether this rule applies to testing whether parties are related under section 179(d)(2), or whether it applies more broadly (*e.g.,* in determining whether the taxpayer had a prior depreciable interest). These regulations clarify that this Series of Related Transactions Rule is intended only to test the relatedness of the parties involved in the series of related transactions.

These regulations further revise the Series of Related Transactions Rule to address its application in various situations. Under these regulations, relatedness is tested after each step of the series of related transactions and between the original transferor in the series and the direct transferor, with a substantial exception that any intermediary (*i.e.,* a taxpayer other than the original transferor or ultimate transferee) is disregarded so long as that intermediary (1) never places the property in service or (2) disposes of the property in the same taxable year in which it was placed in service. Testing relatedness after each step in the transaction allows certain intermediaries in the series to claim bonus depreciation if they maintained use of the property for a non-trivial length of time. The Treasury Department and the IRS do not predict substantial economic effects of this provision relative to the no-action baseline.

vii. Miscellaneous

These regulations put forward rules to the extent existing regulations apply in slightly new contexts. In particular, these regulations clarify when a binding contract is in force to acquire all or substantially all the assets of a trade or business. Additionally, consistent with the rules of § 1.168(d)–1(b)(4), these regulations provide that, for the purpose of determining whether the mid-quarter convention applies, depreciable basis is not reduced by the amount of bonus depreciation.

The Treasury Department and the IRS do not anticipate large economic effects of these clarifications relative to the no-action baseline, though the additional clarity provided by these regulations will likely reduce compliance burdens.

4. Number of Affected Taxpayers

The most substantial components of these regulations affect the ability of dealers of motor vehicles to claim bonus depreciation. Based on data from tax year 2017, the Treasury Department and the IRS estimate that there are approximately 94,000 taxpayers in that industry who may be affected by these regulations based on the taxpayer's voluntarily reported NAICS code. Of this 94,000, 14,000 are filers of Form 1120, 42,000 are filers of Form 1120S, 12,000 are filers of Form 1065, and 26,000 are filers of Form 1040. Additionally, other components of these regulations may have a very slight effect on all taxpayers that claim bonus depreciation. Including such taxpayers, these regulations may affect approximately 2.85 million taxpayers, including 160,000 filers of Form 1120, 560,000 filers of Form 1120S, 400,000 filers of Form 1065, and 1.75 million filers of Form 1040.

II. Paperwork Reduction Act

The collections of information in these final regulations are in §§ 1.168(k)–2(c) and 1.1502–68(c)(4). The collection of information in § 1.168(k)–2(c) is an election that a taxpayer may make to treat one or more components acquired or self-constructed after September 27, 2017, of certain larger self-constructed property as being eligible for the 100-percent additional first year depreciation deduction under section 168(k). The larger self-constructed property must be MACRS property with a recovery period of 20 years or less, computer software, water utility property, or qualified improvement property placed in service by the taxpayer after September 27, 2017, and before January 1, 2018, that is qualified property under section 168(k)(2) for which the manufacture, construction, or production began before September 28, 2017. The election is made by attaching a statement to a Federal income tax return indicating that the taxpayer is making the election under § 1.168(k)–2(c) and whether the taxpayer is making the election for all or some of the components described in § 1.168(k)–2(c).

The collection of information in § 1.1502–68(c)(4) is an election that a taxpayer may make to not claim the additional first year depreciation deduction for qualified property, and which § 1.1502–68(c)(1) or (2) would otherwise require the taxpayer to claim such deduction when a member of a consolidated group acquires from another member property eligible for the additional first year depreciation deduction (or stock of a third member holding such property), and the acquirer member (and acquired member, if applicable) then leaves the consolidated group. To make the election, the corporation must attach a statement to its timely filed federal income tax return (including extensions) for the taxable year that begins after the date on which it leaves the consolidated group. The

statement must describe the transaction(s) to which § 1.1502–68(c)(1) or (2) would apply and state that the corporation elects not to claim the additional first year depreciation deduction for any property transferred in such transaction(s).

For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (PRA), the reporting burden associated with § 1.168(k)–2(c) will be reflected in the PRA submission associated with income tax returns in the Form 1120 series, Form 1040 series, Form 1041 series, and Form 1065 series (for OMB control numbers, see chart at the end of this part II of this Special Analysis section). The estimate for the number of impacted filers with respect to the collection of information described in this part is 0 to 41,775 respondents. Partial data was available to directly estimate the upper bound for the number of impacted filers. The upper bound estimate is based on the change in volume of federal income tax return filers that amended a 2017 or 2018 filing a nonzero entry on Form 4562 Line 14 (additional first year depreciation deduction).

For purposes of the PRA, the reporting burden associated with § 1.1502–68(c)(4) will be reflected in the PRA submission associated with income tax returns in the Form 1120 series (for OMB control number, see chart at the end of this part II of this Special Analysis section). The estimate for the number of impacted filers with respect to the collection of information described in this part is 0 to 500 respondents. Partial data was available to estimate the upper bound for the number of impacted filers. The upper bound estimate is based on the observed volume of federal income tax return filers that are a subsidiary corporation of a parent, have a history of reporting depreciation on a Form 4562, and based on the parent's consolidated federal tax return filing in 2017 and 2018, the subsidiary deconsolidated from the consolidated group.

The IRS estimates the number of affected filers to be the following:

TAX FORMS IMPACTED

Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
Section 1.168(k)–2(c) Election for components of larger self-constructed property for which the manufacture, construction, or production begins before September 28, 2017.	0–41,775	Form 1120 series, Form 1040 series, Form 1041 series, and Form 1065 series.
Section 1.1502–68(c)(4) Election to not claim the additional first year depreciation deduction under § 1.1502–68(c)(1) or (2) for property owned by a subsidiary corporation of a consolidated group that is qualified property after the subsidiary corporation leaves the consolidated group.	0–500	Form 1120 series.

Source: IRS:RAAS:KDA (CDW 5–16–20 for § 1.168(k)–2(c) election and CDW 5–15–20 for § 1.1502–68(c)(4)(i) election).

The current status of the PRA submissions related to the tax forms that will be revised as a result of the information collections in the section 168(k) regulations and the section 1502 regulations is provided in the accompanying table. As described earlier, the reporting burdens associated with the information collections in the regulations are included in the aggregated burden estimates for OMB control numbers 1545–0123 (which represents a total estimated burden time for all forms and schedules for corporations of 3.344 billion hours and total estimated monetized costs of $61.558 billion ($2019)), 1545–0074 (which represents a total estimated burden time, including all other related forms and schedules for individuals, of 1.721 billion hours and total estimated monetized costs of $33.267 billion ($2019)), and 1545–0092 (which represents a total estimated burden time, including all other related forms and schedules for trusts and estates, of 307,844,800 hours and total estimated monetized costs of $9.950 billion ($2016)). The IRS is currently in the process of revising the methodology it uses to estimate burden and costs for OMB control number 1545–0092. It is expected that future estimates under this OMB control number will include dollar estimates of annual burden costs to taxpayers calculated using this revised methodology. The overall burden estimates provided for the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the applicable OMB control number and will in the future include, but not isolate, the estimated burden of the tax forms that will be created or revised as a result of the information collections in the regulations. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the regulations. These burdens have been reported for other regulations that rely on the same OMB control numbers to conduct information collections under the PRA, and the Treasury Department and the IRS urge readers to recognize that these numbers are duplicates and to guard against over counting the burden that the regulations that cite these OMB control numbers imposed prior to the TCJA. No burden estimates specific to the forms affected by the regulations are currently available. The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the regulations. For the OMB control numbers discussed earlier, the Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis. Those estimates would capture changes made by the TCJA and those that arise out of discretionary authority exercised in these final regulations and other regulations that affect the compliance burden for those forms.

The Treasury Department and the IRS request comments on all aspects of information collection burdens related to these final regulations, including estimates for how much time it would take to comply with the paperwork burdens described earlier for each relevant form and ways for the IRS to minimize the paperwork burden. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.* IRS forms are available at *https://www.irs.gov/forms-instructions.* Forms will not be finalized until after they have been approved by OMB under the PRA.

Form	Type of filer	OMB No(s).	Status
Form 1040	Individual (NEW Model)	1545–0074	Approved by OIRA through 1/31/2021.
	Link: *https://www.federalregister.gov/documents/2019/09/30/2019-21066/proposed-collection-comment-request-for-form-1040-form-1040nr-form-1040nr-ez-form-1040x-1040-sr-and*		
Form 1041	Trusts and estates	1545–0092	Approved by OIRA through 5/3/2022.
	Link: *https://www.federalregister.gov/documents/2018/04/04/2018-06892/proposed-collection-comment-request-for-form-1041*		
Forms 1065 and 1120	Business (NEW Model)	1545–0123	Approved by OIRA through 1/31/2021.
	Link: *https://www.federalregister.gov/documents/2019/09/30/2019-21068/proposed-collection-comment-request-for-forms-1065-1066-1120-1120-c-1120-f-1120-h-1120-nd-1120-s*		

III. Regulatory Flexibility Act

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Section 168(k) generally affects taxpayers that own and use depreciable property in their trades or businesses or for their production of income. The reporting burden in § 1.168(k)–2(c) generally affects taxpayers that elect to have the 100-percent additional first year depreciation deduction apply to components that are acquired or self-constructed after September 27, 2017, of depreciable property for which the manufacture, construction, or production began before September 28, 2017. The election is made by attaching a statement to a Federal income tax return indicating that the taxpayer is making the election under § 1.168(k)–2(c) and whether the taxpayer is making this election for all or some of the components described in § 1.168(k)–2(c).

The reporting burden in § 1.1502–68(c)(4) generally affects taxpayers that elect to not claim the additional first year depreciation deduction for qualified property, and which § 1.1502–68(c)(1) or (2) would otherwise require the taxpayer to claim such deduction when a member of a consolidated group acquires from another member property eligible for the additional first year depreciation deduction (or stock of a third member holding such property), and the acquirer member (and acquired member, if applicable) then leaves the consolidated group. To make the election, the corporation must attach a statement to its timely filed federal income tax return (including extensions) for the taxable year that begins after the date on which it leaves the consolidated group. The statement must describe the transaction(s) to which § 1.1502–68(c)(1) or (2) would apply and state that the corporation elects not to claim the additional first year depreciation deduction for any property transferred in such transaction(s).

For purposes of the PRA, the Treasury Department and the IRS estimate that there are 0 to 41,775 respondents of all sizes that are likely to be impacted by the collection of information in § 1.168(k)–2(c). Most of these filers are likely to be small entities (business entities with gross receipts of $25 million or less pursuant to section 448(c)(1)). The Treasury Department and the IRS estimate the number of filers affected by § 1.168(k)–2(c) to be the following:

Form	Gross receipts of $25 million or less	Gross receipts over $25 million
Form 1040	0–7,000 Respondents (estimated)	0–25 Respondents (estimated).
Form 1065	0–12,000 Respondents (estimated)	0–500 Respondents (estimated).
Form 1120	0–1,500 Respondents (estimated)	0–750 Respondents (estimated).
Form 1120S	0–19,000 Respondents (estimated)	0–1,000 Respondents (estimated).
Total	0–39,500 Respondents (estimated)	0–2,275 Respondents (estimated).

Source: IRS:RAAS:KDA (CDW 5–6–20).

For purposes of the PRA, the Treasury Department and the IRS estimate that there are 0 to 500 respondents of all sizes that are likely to be impacted by the collection of information in § 1.1502–68(c)(4). Only a small number of these filers are likely to be small entities, business entities with gross receipts of $25 million or less pursuant to section 448(c)(1). The Treasury Department and the IRS estimate the number of filers affected by § 1.1502–68(c)(4)(i) to be the following:

Form	Gross receipts of $25 million or less	Gross receipts over $25 million
Form 1120	0–67 Respondents (estimated)	0–433 Respondents (estimated).

Source: IRS:RAAS:KDA (CDW 5–15–2020).

Regardless of the number of small entities potentially affected by these final regulations, the Treasury Department and the IRS have concluded that §§ 1.168(k)–2(c) and 1.1502–68(c)(4) will not have a significant economic impact on a substantial number of small entities. As a result of all changes in these final regulations, the Treasury Department and the IRS estimate that individual taxpayers who have gross receipts of $25 million or less

and experience an increase in burden will incur an average increase of 0 to 3 hours, and business taxpayers that have gross receipts of $25 million or less and experience an increase in burden will incur an average increase of 0 to 2 hours (Source: IRS:RAAS (8–28–2019)). Because the elections in §§ 1.168(k)–2(c) and 1.1502–68(c)(4) are one of several changes in these final regulations, the Treasury Department and the IRS expect the average increase in burden to be less for the collections of information in §§ 1.168(k)–2(c) and 1.1502–68(c)(4) than the average increase in burden in the preceding sentence. The Treasury Department and the IRS also note that many taxpayers with gross receipts of $25 million or less may experience a reduction in burden as a result of all changes in these final regulations.

Additionally: (1) Many small businesses are not required to capitalize under section 263(a) the amount paid or incurred for the acquisition of depreciable tangible property that costs $5,000 or less if the business has an applicable financial statement or costs $500 or less if the business does not have an applicable financial statement, pursuant to § 1.263(a)–1(f)(1); (2) many small businesses are no longer required to capitalize under section 263A the costs to construct, build, manufacture, install, improve, raise, or grow depreciable property if their average annual gross receipts are $26,000,000 or less (2020 inflation adjusted amount); and (3) a small business that capitalizes costs of depreciable tangible property may deduct under section 179 up to $1,040,000 (2020 inflation adjusted amount) of the cost of such property placed in service during the taxable year if the total cost of depreciable tangible property placed in service during the taxable year does not exceed $2,590,000 (2020 inflation adjusted amount). Therefore, the Treasury Department and the IRS have determined that a substantial number of small entities will not be subject to these final regulations. Further, §§ 1.168(k)–2(c) and 1.1502–68(c)(4) apply only if the taxpayer chooses to make an election. Finally, no comments regarding the economic impact of these regulations on small entities were received. Accordingly, the Secretary of the Treasury's delegate certifies that these final regulations will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the proposed rule preceding this final rule was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold is approximately $154 million. These final regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

VI. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the OMB has determined that this Treasury decision is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (CRA). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**. Accordingly, the Treasury Department and IRS are adopting these final regulations with the delayed effective date generally prescribed under the Congressional Review Act.

Drafting Information

The principal authors of these final regulations are Kathleen Reed and Elizabeth R. Binder of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry for § 1.1502–68 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.1502–68 also issued under 26 U.S.C. 1502.

* * * * *

■ **Par. 2.** Section 1.168(b)–1 is amended by:

■ 1. Revising paragraph (a)(5)(i)(A);

■ 2. In paragraph (b)(2)(i), removing ''paragraphs (b)(2)(ii) and (iii)'' and adding ''paragraphs (b)(2)(ii) through (iv)'' in its place; and

■ 3. Adding paragraph (b)(2)(iv).

The addition and revision read as follows:

§ 1.168(b)–1 Definitions.

(a) * * *

(5) * * *

(i) * * *

(A) For purposes of section 168(e)(6), the improvement is made by the taxpayer and is placed in service by the taxpayer after December 31, 2017;

* * * * *

(b) * * *

(2) * * *

(iv) *Addition of language in paragraph (a)(5)(i)(A) of this section.* The language ''is made by the taxpayer and'' in paragraph (a)(5)(i)(A) of this section applies to property placed in service by the taxpayer after December 31, 2017.

■ **Par. 3.** Section 1.168(k)–0 is amended under § 1.168(k)–2 by:

■ 1. Adding entries for (b)(3)(iii)(C), (b)(3)(v), (b)(5)(iii)(G), (b)(5)(v), (c), (c)(1) and (2), (c)(2)(i) through (iv), (c)(3), (c)(3)(i) through (iii), (c)(4), (c)(4)(i) and (ii), (c)(5), (c)(5)(i) and (ii), (c)(6), (c)(6)(i) and (ii), (c)(7), (c)(7)(i) and (ii), and (c)(8) and (c)(9);

■ 2. Revising the entry for (d)(3)(iv);

■ 3. Adding entries for (d)(4), (f)(7), and (g)(11);

■ 4. Revising the entries for (h)(2) and (3); and

■ 5. Adding entries for (h)(3)(i) through (iii).

The additions and revisions read as follows:

§ 1.168(k)–0 Table of contents.

* * * * *

§ 1.168(k)–2 Additional first year depreciation deduction for property acquired and placed in service after September 27, 2017.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(C) Special rules for a series of related transactions.

* * * * *

(v) Application to members of a consolidated group.

* * * * *

(5) * * *

(iii) * * *

(G) Acquisition of a trade or business or an entity.

* * * * *

(v) Determination of acquisition date for property not acquired pursuant to a written binding contract.

* * * * *

(c) Election for components of larger self-constructed property for which the manufacture, construction, or production begins before September 28, 2017.

(1) In general.

(2) Eligible larger self-constructed property.

(i) In general.

(ii) Residential rental property or nonresidential real property.

(iii) Beginning of manufacture, construction, or production.

(iv) Exception.

(3) Eligible components.

(i) In general.

(ii) Acquired components.

(iii) Self-constructed components.

(4) Special rules.

(i) Installation costs.

(ii) Property described in section 168(k)(2)(B).

(5) Computation of additional first year depreciation deduction.

(i) Election is made.

(ii) Election is not made.

(6) Time and manner for making election.

(i) Time for making election.

(ii) Manner of making election.

(7) Revocation of election.

(i) In general.

(ii) Automatic 6-month extension.

(8) Additional procedural guidance.

(9) Examples.

(d) * * *

(3) * * *

(iv) Determination of acquisition date for property not acquired pursuant to a written binding contract.

(4) Examples.

* * * * *

(f) * * *

(7) Additional procedural guidance.

(g) * * *

(11) Mid-quarter convention.

(h) * * *

(2) Applicability of this section for prior taxable years.

(3) Early application of this section and § 1.1502–68.

(i) In general.

(ii) Early application to certain transactions.

(iii) Bound by early application.

■ **Par. 4.** Section 1.168(k)–2 is amended by:

■ 1. At the end of paragraph (a)(1), removing the period and adding ‘‘, except as provided in paragraph (c) of this section.’’ in its place;

■ 2. In paragraph (a)(2)(iv)(B), removing ‘‘an asset’’ and adding ‘‘the asset’’ in its place;

■ 3. After the semicolon at the end of paragraph (a)(2)(iv)(C), adding the word ‘‘or’’;

■ 4. In paragraph (a)(2)(iv)(D), removing ‘‘; or’’ and adding a period in its place;

■ 5. Removing paragraph (a)(2)(iv)(E);

■ 6. Revising paragraphs (b)(2)(ii)(F) and (G);

■ 7. Adding paragraphs (b)(2)(iii)(F) through (I);

■ 8. Revising the second and third sentences in paragraph (b)(3)(iii)(B)(*1*);

■ 9. Adding paragraphs (b)(3)(iii)(B)(*4*), (b)(3)(iii)(C), (b)(3)(v), and (b)(3)(vii)(Y) through (OO);

■ 10. Revising the last sentence in paragraph (b)(5)(ii)(A);

■ 11. In the first sentence in paragraph (b)(5)(iii)(A), removing the word ‘‘A’’ at the beginning of the sentence and adding ‘‘Except as provided in paragraph (b)(5)(iii)(G) of this section, a’’ in its place;

■ 12. In the first sentence in paragraph (b)(5)(iii)(B), removing the word ‘‘A’’ at the beginning of the sentence and adding ‘‘Except as provided in paragraph (b)(5)(iii)(G) of this section, a’’ in its place;

■ 13. Adding paragraph (b)(5)(iii)(G);

■ 14. In the fourth sentence in paragraph (b)(5)(iv)(C)(*1*), removing the period at the end of the sentence and adding ‘‘, except as provided in paragraph (c) of this section.’’ in its place;

■ 15. In the fourth sentence in paragraph (b)(5)(iv)(C)(*2*), removing the period at the end of the sentence and adding ‘‘, except as provided in paragraph (c) of this section.’’ in its place;

■ 16. Adding paragraph (b)(5)(v);

■ 17. Revising the second sentence in paragraph (b)(5)(viii) introductory text;

■ 18. Adding paragraph (c);

■ 19. Redesignating paragraph (d)(3)(iv) as paragraph (d)(4) and adding new paragraph (d)(3)(iv);

■ 20. Adding three sentences at the end of paragraph (e)(1)(iii);

■ 21. In paragraph (f)(1)(ii)(D), removing ‘‘(a)(5)(ii),’’ and adding ‘‘(a)(5)(ii) (acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer after September 27, 2017, and before January 1, 2018),’’ in its place;

■ 22. In paragraph (f)(1)(ii)(G), removing the word ‘‘A’’ at the beginning of the sentence and adding the word ‘‘Each’’ in its place;

■ 23. Adding paragraph (f)(7);

■ 24. In paragraph (g)(1)(i):

■ i. In the first sentence, after ‘‘paragraphs (g)(1)(ii) and (iii) of this section’’ adding ‘‘and by the application of paragraph (b)(3)(iii)(B)(*4*) of this section’’; and

■ ii. In the last sentence, removing the period at the end of the sentence and adding ‘‘, except as otherwise provided by the application of paragraph (b)(3)(iii)(B) of this section.’’ in its place;

■ 25. Adding paragraph (g)(11); and

■ 26. Revising paragraphs (h)(1), (2), and (3).

The additions and revisions read as follows:

§ 1.168(k)–2 Additional first year depreciation deduction for property acquired and placed in service after September 27, 2017.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(F) Primarily used in a trade or business described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and 1.163(j)–10(c)(3)(iii)(C)(*3*), and placed in service by the taxpayer in any taxable year beginning after December 31, 2017. For purposes of section 168(k)(9)(A) and this paragraph (b)(2)(ii)(F), the term *primarily used* has the same meaning as that term is used in § 1.167(a)–11(b)(4)(iii)(*b*) and (e)(3)(iii) for classifying property. This paragraph (b)(2)(ii)(F) does not apply to property that is leased to a lessee's trade or business described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and 1.163(j)–10(c)(3)(iii)(C)(*3*), by a lessor's trade or business that is not described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and 1.163(j)–10(c)(3)(iii)(C)(*3*) for the taxable year; or

(G) Used in a trade or business that has had floor plan financing indebtedness, as defined in section 163(j)(9)(B) and § 1.163(j)–1(b)(18), if the floor plan financing interest expense, as defined in section 163(j)(9)(A) and § 1.163(j)–1(b)(19), related to such indebtedness is taken into account under section 163(j)(1)(C) for the taxable year. Such property also must be placed in service by the taxpayer in any taxable year beginning after December 31, 2017. Solely for purposes of section 168(k)(9)(B) and this paragraph (b)(2)(ii)(G), floor plan financing interest expense is taken into account for the taxable year by a trade or business that has had floor plan financing

indebtedness only if the business interest expense, as defined in section 163(j)(5) and § 1.163(j)–1(b)(3), of the trade or business for the taxable year (which includes floor plan financing interest expense) exceeds the sum of the amounts calculated under section 163(j)(1)(A) and (B) for the trade or business for the taxable year. If the trade or business has taken floor plan financing interest expense into account pursuant to this paragraph (b)(2)(ii)(G) for a taxable year, this paragraph (b)(2)(ii)(G) applies to any property placed in service by that trade or business in that taxable year. This paragraph (b)(2)(ii)(G) does not apply to property that is leased to a lessee's trade or business that has had floor plan financing indebtedness, by a lessor's trade or business that has not had floor plan financing indebtedness during the taxable year or that has had floor plan financing indebtedness but did not take into account floor plan financing interest expense for the taxable year pursuant to this paragraph (b)(2)(ii)(G).

(iii) * * *

(F) *Example 6.* In 2019, a financial institution buys new equipment for $1 million and then leases this equipment to a lessee that primarily uses the equipment in a trade or business described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and 1.163(j)–10(c)(3)(iii)(C)(*3*). The financial institution is not described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and § 1.163(j)–10(c)(3)(iii)(C)(*3*). As a result, paragraph (b)(2)(ii)(F) of this section does not apply to this new equipment. Assuming all other requirements are met, the financial institution's purchase price of $1 million for the new equipment qualifies for the additional first year depreciation deduction under this section.

(G) *Example 7.* During its taxable year beginning in 2020, *F,* a corporation that is an automobile dealer, buys new computers for $50,000 for use in its trade or business of selling automobiles. For purposes of section 163(j), *F* has the following for 2020: $700 of adjusted taxable income, $40 of business interest income, $400 of business interest expense (which includes $100 of floor plan financing interest expense). The sum of the amounts calculated under section 163(j)(1)(A) and (B) for *F* for 2020 is $390 ($40 + ($700 × 50 percent)). *F*'s business interest expense, which includes floor plan financing interest expense, for 2020 is $400. As a result, *F*'s floor plan financing interest expense is taken into account by *F* for 2020 pursuant to paragraph (b)(2)(ii)(G) of this section. Accordingly, *F*'s purchase price of $50,000 for the computers does not qualify for the additional first year depreciation deduction under this section.

(H) *Example 8.* The facts are the same as in *Example 7* in paragraph (b)(2)(iii)(G) of this section, except *F* buys new computers for $30,000 for use in its trade or business of selling automobiles and, for purposes of section 163(j), *F* has $1,300 of adjusted taxable income. The sum of the amounts calculated under section 163(j)(1)(A) and (B) for *F* for 2020 is $690 ($40 + ($1,300 × 50 percent)). *F*'s business interest expense, which includes floor plan financing interest expense, for 2020 is $400. As a result, *F*'s floor plan financing interest expense is not taken into account by *F* for 2020 pursuant to paragraph (b)(2)(ii)(G) of this section. Assuming all other requirements are met, *F*'s purchase price of $30,000 for the computers qualifies for the additional first year depreciation deduction under this section.

(I) *Example 9.* (*1*) *G,* a calendar-year taxpayer, owns an office building for use in its trade or business and *G* placed in service such building in 2000. In November 2018, *G* made and placed in service an improvement to the inside of such building at a cost of $100,000. In January 2019, *G* entered into a written contract with *H* for *H* to construct an improvement to the inside of the building. In March 2019, *H* completed construction of the improvement at a cost of $750,000 and *G* placed in service such improvement. Both improvements to the building are section 1250 property and are not described in § 1.168(b)–1(a)(5)(ii).

(*2*) Both the improvement to the office building made by *G* in November 2018 and the improvement to the office building that was constructed by *H* for *G* in 2019 are improvements made by *G* under § 1.168(b)–1(a)(5)(i)(A). Further, each improvement is made to the inside of the office building, is section 1250 property, and is not described in § 1.168(b)–1(a)(5)(ii). As a result, each improvement meets the definition of qualified improvement property in section 168(e)(6) and § 1.168(b)–1(a)(5)(i)(A) and (a)(5)(ii). Accordingly, each improvement is 15-year property under section 168(e)(3) and is described in § 1.168(k)–2(b)(2)(i)(A). Assuming all other requirements of this section are met, each improvement made by *G* qualifies for the additional first year depreciation deduction for *G* under this section.

(3) * * *

(iii) * * *

(B) * * *

(*1*) * * * To determine if the taxpayer or a predecessor had a depreciable interest in the property at any time prior to the acquisition, only the five calendar years immediately prior to the current calendar year in which the property is placed in service by the taxpayer, and the portion of such current calendar year before the placed-in-service date of the property without taking into account the applicable convention, are taken into account (lookback period). If either the taxpayer or a predecessor, or both, have not been in existence for the entire lookback period, only the portion of the lookback period during which the taxpayer or a predecessor, or both, as applicable, have been in existence is taken into account to determine if the taxpayer or a predecessor had a depreciable interest in the property at any time prior to the acquisition. * * *

(*4*) *De minimis use of property.* If a taxpayer acquires and places in service property, the taxpayer or a predecessor did not previously have a depreciable interest in the property, the taxpayer disposes of the property to an unrelated party within 90 calendar days after the date the property was originally placed in service by the taxpayer, without taking into account the applicable convention, and the taxpayer reacquires and again places in service the property, then the taxpayer's depreciable interest in the property during that 90-day period is not taken into account for determining whether the property was used by the taxpayer or a predecessor at any time prior to its reacquisition by the taxpayer under paragraphs (b)(3)(iii)(A)(*1*) and (b)(3)(iii)(B)(*1*) of this section. If the taxpayer originally acquired the property before September 28, 2017, as determined under § 1.168(k)–1(b)(4), and the taxpayer reacquires and again places in service the property during the same taxable year the taxpayer disposed of the property to the unrelated party, then this paragraph (b)(3)(iii)(B)(*4*) does not apply. For purposes of this paragraph (b)(3)(iii)(B)(*4*), an *unrelated party* is a person not described in section 179(d)(2)(A) or (B), and § 1.179–4(c)(1)(ii) or (iii) or (c)(2).

(C) *Special rules for a series of related transactions*—(*1*) *In general.* Solely for purposes of paragraph (b)(3)(iii) of this section, each transferee in a series of related transactions tests its relationship under section 179(d)(2)(A) or (B) with the transferor from which the transferee directly acquires the depreciable property (immediate transferor) and with the original transferor of the depreciable property in the series. The transferee is treated as related to the immediate transferor or the original

transferor if the relationship exists either when the transferee acquires, or immediately before the first transfer of, the depreciable property in the series. A series of related transactions may include, for example, a transfer of partnership assets followed by a transfer of an interest in the partnership that owned the assets; or a disposition of property and a disposition, directly or indirectly, of the transferor or transferee of the property. For special rules that may apply when the transferor and transferee of the property are members of a consolidated group, as defined in § 1.1502–1(h), see § 1.1502–68.

(*2*) *Special rules*—(*i*) *Property placed in service and disposed of in same taxable year or property not placed in service.* Any party in a series of related transactions that is neither the original transferor nor the ultimate transferee is disregarded (disregarded party) for purposes of testing the relationships under paragraph (b)(3)(iii)(C)(*1*) of this section if the party places in service and disposes of the depreciable property subject to the series, other than in a transaction described in paragraph (g)(1)(iii) of this section, during the party's same taxable year, or if the party does not place in service the depreciable property subject to the series for use in the party's trade or business or production of income. In either case, the party to which the disregarded party disposed of the depreciable property tests its relationship with the party from which the disregarded party acquired the depreciable property and with the original transferor of the depreciable property in the series. If the series has consecutive disregarded parties, the party to which the last disregarded party disposed of the depreciable property tests its relationship with the party from which the first disregarded party acquired the depreciable property and with the original transferor of the depreciable property in the series. The rules for testing the relationships in paragraph (b)(3)(iii)(C)(*1*) of this section continue to apply for the other transactions in the series.

(*ii*) *All section 168(i)(7) transactions.* This paragraph (b)(3)(iii)(C) does not apply if all transactions in a series of related transactions are described in paragraph (g)(1)(iii) of this section (section 168(i)(7) transactions in which property is transferred in the same taxable year that the property is placed in service by the transferor).

(*iii*) *One or more section 168(i)(7) transactions.* Any step in a series of related transactions that is neither the original step nor the ultimate step is disregarded (disregarded step) for purposes of testing the relationships under paragraph (b)(3)(iii)(C)(*1*) of this section if the step is a transaction described in paragraph (g)(1)(iii) of this section. In this case, the relationship is not tested between the transferor and transferee of that transaction. Instead, the relationship is tested between the transferor in the disregarded step and the party to which the transferee in the disregarded step disposed of the depreciable property, the transferee in the disregarded step and the party to which the transferee in the disregarded step disposed of the depreciable property, and the original transferor of the depreciable property in the series and the party to which the transferee in the disregarded step disposed of the depreciable property. If the series has consecutive disregarded steps, the relationship is tested between the transferor in the first disregarded step and the party to which the transferee in the last disregarded step disposed of the depreciable property, the transferee in the last disregarded step and the party to which the transferee in the last disregarded step disposed of the depreciable property, and the original transferor of the depreciable property in the series and the party to which the transferee in the last disregarded step disposed of the depreciable property. The rules for testing the relationships in paragraph (b)(3)(iii)(C)(*1*) of this section continue to apply for the other transactions in the series.

(*iv*) *Syndication transaction.* This paragraph (b)(3)(iii)(C) does not apply to a syndication transaction described in paragraph (b)(3)(vi) of this section.

(*v*) *Certain relationships disregarded.* If a party acquires depreciable property in a series of related transactions in which the party acquires stock, meeting the requirements of section 1504(a)(2), of a corporation in a fully taxable transaction followed by a liquidation of the acquired corporation under section 331, any relationship created as part of such series of related transactions is disregarded in determining whether any party is related to such acquired corporation for purposes of testing the relationships under paragraph (b)(3)(iii)(C)(*1*) of this section.

(*vi*) *Transferors that cease to exist for Federal tax purposes.* Any transferor in a series of related transactions that ceases to exist for Federal tax purposes during the series is deemed, for purposes of testing the relationships under paragraph (b)(3)(iii)(C)(*1*) of this section, to be in existence at the time of any transfer in the series.

(*vii*) *Newly created party.* If a transferee in a series of related transactions acquires depreciable property from a transferor that was not in existence immediately prior to the first transfer of such property in such series (new transferor), the transferee tests its relationship with the party from which the new transferor acquired such property and with the original transferor of the depreciable property in the series for purposes of paragraph (b)(3)(iii)(C)(*1*) of this section. If the series has consecutive new transferors, the party to which the last new transferor disposed of the depreciable property tests its relationship with the party from which the first new transferor acquired the depreciable property and with the original transferor of the depreciable property in the series. The rules for testing the relationships in paragraph (b)(3)(iii)(C)(*1*) of this section continue to apply for the other transactions in the series.

(*viii*) *Application of paragraph (g)(1) of this section.* Paragraph (g)(1) of this section applies to each step in a series of related transactions.

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(v) *Application to members of a consolidated group.* For rules applicable to the acquisition of depreciable property by a member of a consolidated group, see § 1.1502–68.

* * * * *

(vii) * * *

(Y) *Example 25.* (*1*) *JL* is a fiscal year taxpayer with a taxable year ending June 30. On April 22, 2020, *JL* acquires and places in service a new machine for use in its trade or business. On May 1, 2022, *JL* sells this machine to *JM,* an unrelated party, for use in *JM*'s trade or business. *JM* is a fiscal year taxpayer with a taxable year ending March 31. On February 1, 2023, *JL* buys the machine from *JM* and places the machine in service. *JL* uses the machine in its trade or business for the remainder of its taxable year ending June 30, 2023.

(*2*) *JL*'s acquisition of the machine on April 22, 2020, satisfies the original use requirement in paragraph (b)(3)(ii) of this section. Assuming all other requirements are met, *JL*'s purchase price of the machine qualifies for the additional first year depreciation deduction for *JL* for the taxable year ending June 30, 2020, under this section.

(*3*) *JM* placed in service the machine on May 1, 2022, and disposed of it on February 1, 2023. As a result, *JM* placed in service and disposed of the machine during the same taxable year (*JM*'s taxable year beginning April 1, 2022, and ending March 31, 2023). Accordingly, *JM*'s acquisition of the machine on May 1, 2022, does not qualify for the additional first year

depreciation deduction pursuant to paragraph (g)(1)(i) of this section.

(*4*) Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is calendar years 2018 through 2022 and January 1, 2023, through January 31, 2023, to determine if *JL* had a depreciable interest in the machine when *JL* reacquired it on February 1, 2023. As a result, *JL*'s depreciable interest in the machine during the period April 22, 2020, to April 30, 2022, is taken into account for determining whether the machine was used by *JL* or a predecessor at any time prior to its reacquisition by *JL* on February 1, 2023. Accordingly, the reacquisition of the machine by *JL* on February 1, 2023, does not qualify for the additional first year depreciation deduction.

(Z) *Example 26.* (*1*) *EF* has owned and had a depreciable interest in Property since 2012. On January 1, 2016, *EF* contributes assets (not including Property) to existing *Partnership T* in a transaction described in section 721, in exchange for a partnership interest in *Partnership T,* and *Partnership T* placed in service these assets for use in its trade or business. On July 1, 2016, *EF* sells Property to *EG,* a party unrelated to either *EF* or *Partnership T.* On April 1, 2018, *Partnership T* buys Property from *EG* and places it in service for use in its trade or business.

(*2*) *EF* is not *Partnership T*'s predecessor with respect to Property within the meaning of paragraph (a)(2)(iv)(B) of this section. Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is 2013–2017, plus January through March 2018, to determine if *Partnership T* had a depreciable interest in Property that *Partnership T* acquired on April 1, 2018. *EF* need not be examined in the lookback period to see if *EF* had a depreciable interest in Property, because *EF* is not *Partnership T*'s predecessor. Because *Partnership T* did not have a depreciable interest in Property in the lookback period prior to its acquisition of Property on April 1, 2018, *Partnership T*'s acquisition of Property on April 1, 2018, satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(B)(*1*) of this section. Assuming all other requirements of this section are satisfied, *Partnership T*'s purchase price of Property qualifies for the additional first year depreciation deduction under this section.

(AA) *Example 27.* (*1*) The facts are the same as in *Example 26* of paragraph (b)(3)(vii)(Z)(*1*) of this section, except that on January 1, 2016, *EF*'s contribution of assets to *Partnership T* includes Property. On July 1, 2016, *Partnership T* sells Property to *EG.*

(*2*) *Partnership T*'s acquisition of Property on January 1, 2016, does not satisfy the original use requirement of § 1.168(k)–1(b)(3) and is not eligible for the additional first year depreciation deduction under section 168(k) as in effect prior to the enactment of the Act.

(*3*) With respect to *Partnership T*'s acquisition of Property on April 1, 2018, *EF* is *Partnership T*'s predecessor with respect to Property within the meaning of paragraph (a)(2)(iv)(B) of this section. Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is 2013–2017, plus January through March 2018, to determine if *EF* or *Partnership T* had a depreciable interest in Property that *Partnership T* acquired on April 1, 2018. Because *EF* had a depreciable interest in Property from 2013 to 2015 and *Partnership T* had a depreciable interest in Property from January through June 2016, *Partnership T*'s acquisition of Property on April 1, 2018, does not satisfy the used property acquisition requirement of paragraph (b)(3)(iii)(B)(*1*) of this section and is not eligible for the additional first year depreciation deduction.

(BB) *Example 28.* (*1*) X Corporation has owned and had a depreciable interest in Property since 2012. On January 1, 2015, X Corporation sold Property to *Q,* an unrelated party. Y Corporation is formed July 1, 2015. On January 1, 2016, Y Corporation merges into X Corporation in a transaction described in section 368(a)(1)(A). On April 1, 2018, X Corporation buys Property from *Q* and places it in service for use in its trade or business.

(*2*) Pursuant to paragraph (a)(2)(iv)(A) of this section, Y Corporation is X Corporation's predecessor. Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is 2013–2017, plus January through March 2018, to determine if Y Corporation or X Corporation had a depreciable interest in Property that X Corporation acquired on April 1, 2018. Y Corporation did not have a depreciable interest in Property at any time during the lookback period. Because X Corporation had a depreciable interest in Property from 2013 through 2014, X Corporation's acquisition of Property on April 1, 2018, does not satisfy the used property acquisition requirement of paragraph (b)(3)(iii)(B)(*1*) of this section and is not eligible for the additional first year depreciation deduction.

(CC) *Example 29.* (*1*) Y Corporation has owned and had a depreciable interest in Property since 2012. On January 1, 2015, Y Corporation sells Property to *Q,* an unrelated party. X Corporation is formed on July 1, 2015. On January 1, 2016, Y Corporation merges into X Corporation in a transaction described in section 368(a)(1)(A). On April 1, 2018, X Corporation buys Property from *Q* and places it in service for use in its trade or business.

(*2*) Pursuant to paragraph (a)(2)(iv)(A) of this section, Y Corporation is X Corporation's predecessor. Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is 2013–2017, plus January through March 2018, to determine if X Corporation or Y Corporation had a depreciable interest in Property that X Corporation acquired on April 1, 2018. Because Y Corporation had a depreciable interest in Property from 2013 through 2014, X Corporation's acquisition of Property on April 1, 2018, does not satisfy the used property acquisition requirement of paragraph (b)(3)(iii)(B)(*1*) of this section and is not eligible for the additional first year depreciation deduction.

(DD) *Example 30.* (*1*) On September 5, 2017, *Y,* a calendar-year taxpayer, acquires and places in service a new machine (Machine #1), and begins using Machine #1 in its manufacturing trade or business. On November 1, 2017, *Y* sells Machine #1 to *Z,* then *Z* leases Machine #1 back to *Y* for 4 years, and *Y* continues to use Machine #1 in its manufacturing trade or business. The lease agreement contains a purchase option provision allowing *Y* to buy Machine #1 at the end of the lease term. On November 1, 2021, *Y* exercises the purchase option in the lease agreement and buys Machine #1 from *Z.* The lease between *Y* and *Z* for Machine #1 is a true lease for Federal tax purposes.

(*2*) Because *Y,* a calendar-year taxpayer, placed in service and disposed of Machine #1 during 2017, Machine #1 is not eligible for the additional first year depreciation deduction for *Y* pursuant to § 1.168(k)–1(f)(1)(i).

(*3*) The use of Machine #1 by *Y* prevents *Z* from satisfying the original use requirement of paragraph (b)(3)(ii) of this section. However, *Z*'s acquisition of Machine #1 satisfies the used property acquisition requirements of paragraph (b)(3)(iii) of this section. Assuming all other requirements are met, *Z*'s purchase price of Machine #1 qualifies for the additional first year depreciation deduction for *Z* under this section.

(*4*) During 2017, *Y* sold Machine #1 within 90 calendar days of placing Machine #1 in service originally on September 5, 2017. Pursuant to paragraph (b)(3)(iii)(B)(*4*) of this section, *Y*'s depreciable interest in Machine #1 during that 90-day period is not taken

into account for determining whether Machine #1 was used by *Y* or a predecessor at any time prior to its reacquisition by *Y* on November 1, 2021. Accordingly, assuming all other requirements are met, *Y*'s purchase price of Machine #1 on November 1, 2021, qualifies for the additional first year depreciation deduction for *Y* under this section.

(EE) *Example 31.* (*1*) On October 15, 2019, *FA,* a calendar-year taxpayer, buys and places in service a new machine for use in its trade or business. On January 10, 2020, *FA* sells this machine to *FB* for use in *FB*'s trade or business. *FB* is a calendar-year taxpayer and is not related to *FA.* On March 30, 2020, *FA* buys the machine from *FB* and places the machine in service. *FA* uses the machine in its trade or business for the remainder of 2020.

(*2*) *FA*'s acquisition of the machine on October 15, 2019, satisfies the original use requirement in paragraph (b)(3)(ii) of this section. Assuming all other requirements are met, *FA*'s purchase price of the machine qualifies for the additional first year depreciation deduction for *FA* for the 2019 taxable year under this section.

(*3*) Because *FB* placed in service the machine on January 10, 2020, and disposed of it on March 30, 2020, *FB*'s acquisition of the machine on January 10, 2020, does not qualify for the additional first year depreciation deduction pursuant to § 1.168(k)–2(g)(1)(i).

(*4*) *FA* sold the machine to *FB* in 2020 and within 90 calendar days of placing the machine in service originally on October 15, 2019. Pursuant to paragraph (b)(3)(iii)(B)(*4*) of this section, *FA*'s depreciable interest in the machine during that 90-day period is not taken into account for determining whether the machine was used by *FA* or a predecessor at any time prior to its reacquisition by *FA* on March 30, 2020. Accordingly, assuming all other requirements are met, *FA*'s purchase price of the machine on March 30, 2020, qualifies for the additional first year depreciation deduction for *FA* for the 2020 taxable year under this section.

(FF) *Example 32.* (*1*) The facts are the same as in *Example 31* of paragraph (b)(3)(vii)(EE)(*1*) of this section, except that on November 1, 2020, *FB* buys the machine from *FA* and places the machine in service. *FB* uses the machine in its trade or business for the remainder of 2020.

(*2*) Because *FA* placed in service the machine on March 30, 2020, and disposed of it on November 1, 2020, *FA*'s reacquisition of the machine on March 30, 2020, does not qualify for the additional first year depreciation deduction pursuant to paragraph (g)(1)(i) of this section.

(*3*) During 2020, *FB* sold the machine to *FA* within 90 calendar days of placing the machine in service originally on January 10, 2020. After *FB* reacquired the machine on November 1, 2020, *FB* did not dispose of the property during the remainder of 2020. Pursuant to paragraph (b)(3)(iii)(B)(*4*) of this section, *FB*'s depreciable interest in the machine during that 90-day period is not taken into account for determining whether the machine was used by *FB* or a predecessor at any time prior to its reacquisition by *FB* on November 1, 2020. Accordingly, assuming all other requirements are met, *FB*'s purchase price of the machine on November 1, 2020, qualifies for the additional first year depreciation deduction for *FB* under this section.

(GG) *Example 33.* (*1*) The facts are the same as in *Example 32* of paragraph (b)(3)(vii)(FF)(*1*) of this section, except *FB* sells the machine to *FC,* an unrelated party, on December 31, 2020.

(*2*) Because *FB* placed in service the machine on November 1, 2020, and disposed of it on December 31, 2020, *FB*'s reacquisition of the machine on November 1, 2020, does not qualify for the additional first year depreciation deduction pursuant to paragraph (g)(1)(i) of this section.

(*3*) *FC*'s acquisition of the machine on December 31, 2020, satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *FC*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(HH) *Example 34.* (*1*) In August 2017, *FD,* a calendar-year taxpayer, entered into a written binding contract with *X* for *X* to manufacture a machine for *FD* for use in its trade or business. Before September 28, 2017, *FD* incurred more than 10 percent of the total cost of the machine. On February 8, 2020, *X* delivered the machine to *FD* and *FD* placed in service the machine. The machine is property described in section 168(k)(2)(B) as in effect on the day before the date of the enactment of the Act. *FD*'s entire unadjusted depreciable basis of the machine is attributable to the machine's manufacture before January 1, 2020. *FD* uses the safe harbor test in § 1.168(k)–1(b)(4)(iii)(B)(*2*) to determine when manufacturing of the machine began. On March 26, 2020, *FD* sells the machine to *FE* for use in *FE*'s trade or business. *FE* is a calendar-year taxpayer and is not related to *FD.* On November 7, 2020, *FD* buys the machine from *FE* and places in service the machine. *FD* uses the machine in its trade or business for the remainder of 2020.

(*2*) Because *FD* incurred more than 10 percent of the cost of the machine before September 28, 2017, and *FD* uses the safe harbor test in § 1.168(k)–1(b)(4)(iii)(B)(*2*) to determine when the manufacturing of the machine began, *FD* acquired the machine before September 28, 2017. If *FD* had not disposed of the machine on March 26, 2020, the cost of the machine would have qualified for the 30-percent additional first year depreciation deduction pursuant to section 168(k)(8), assuming all requirements are met under section 168(k)(2) as in effect on the day before the date of the enactment of the Act. However, because *FD* placed in service the machine on February 8, 2020, and disposed of it on March 26, 2020, FD's acquisition of the machine on February 8, 2020, does not qualify for the additional first year depreciation deduction pursuant to § 1.168(k)–1(f)(1)(i).

(*3*) Because *FE* placed in service the machine on March 26, 2020, and disposed of it on November 7, 2020, *FE*'s acquisition of the machine on March 26, 2020, does not qualify for the additional first year depreciation deduction pursuant to paragraph (g)(1)(i) of this section.

(*4*) During 2020, *FD* sold the machine to *FE* within 90 calendar days of placing the machine in service originally on February 8, 2020. After *FD* reacquired the machine on November 7, 2020, *FD* did not dispose of the machine during the remainder of 2020. *FD* originally acquired this machine before September 28, 2017. As a result, paragraph (b)(3)(iii)(B)(*4*) of this section does not apply. Pursuant to paragraph (b)(3)(iii)(B)(*1*) of this section, the lookback period is 2015 through 2019 and January 1, 2020, through November 6, 2020, to determine if *FD* had a depreciable interest in the machine when *FD* reacquired it on November 7, 2020. As a result, *FD*'s depreciable interest in the machine during the period February 8, 2020, to March 26, 2020, is taken into account for determining whether the machine was used by *FD* or a predecessor at any time prior to its reacquisition by *FD* on November 7, 2020. Accordingly, the reacquisition of the machine by *FD* on November 7, 2020, does not qualify for the additional first year depreciation deduction.

(II) *Example 35.* (*1*) In a series of related transactions, a father sells a machine to an unrelated individual on

December 15, 2019, who sells the machine to the father's daughter on January 2, 2020, for use in the daughter's trade or business. Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. As a result, the following relationships are tested under section 179(d)(2)(A): The unrelated individual tests its relationship to the father as of December 15, 2019; and the daughter tests her relationship to the unrelated individual as of January 2, 2020, and December 15, 2019, and to the father as of January 2, 2020, and December 15, 2019.

(*2*) Because the individual is not related to the father within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of December 15, 2019, the individual's acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming the unrelated individual placed the machine in service for use in its trade or business in 2019 and all other requirements of this section are satisfied, the unrelated individual's purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*3*) The individual and the daughter are not related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of January 2, 2020, or December 15, 2019. However, the father and his daughter are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of January 2, 2020, or December 15, 2019. Accordingly, the daughter's acquisition of the machine does not satisfy the used property acquisition requirements of paragraph (b)(3)(iii) of this section and is not eligible for the additional first year depreciation deduction.

(JJ) *Example 36.* (*1*) The facts are the same as in *Example 35* of paragraph (b)(3)(vii)(II)(*1*) of this section, except that instead of selling to an unrelated individual, the father sells the machine to his son on December 15, 2019, who sells the machine to his sister (the father's daughter) on January 2, 2020. Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. As a result, the following relationships are tested under section 179(d)(2)(A): The son tests his relationship to the father as of December 15, 2019; and the daughter tests her relationship to her brother as of January 2, 2020, and December 15, 2019, and to the father as of January 2, 2020, and December 15, 2019.

(*2*) Because the father and his son are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of December 15, 2019, the son's acquisition of the machine does not satisfy the used property acquisition requirements of paragraph (b)(3)(iii) of this section. Accordingly, the son's acquisition of the machine is not eligible for the additional first year depreciation deduction.

(*3*) The son and his sister are not related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of January 2, 2020, or December 15, 2019. However, the father and his daughter are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of January 2, 2020, or December 15, 2019. Accordingly, the daughter's acquisition of the machine does not satisfy the used property acquisition requirements of paragraph (b)(3)(iii) of this section and is not eligible for the additional first year depreciation deduction.

(KK) *Example 37.* (*1*) In June 2018, *BA,* an individual, bought and placed in service a new machine from an unrelated party for use in its trade or business. In a series of related transactions, *BA* sells the machine to *BB* and *BB* places it in service on October 1, 2019, *BB* sells the machine to *BC* and *BC* places it in service on December 1, 2019, and *BC* sells the machine to *BD* and *BD* places it in service on January 2, 2020. *BA* and *BB* are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii). *BB* and *BC* are related parties within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *BC* and *BD* are not related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *BA* is not related to *BC* or to *BD* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii). All parties are calendar-year taxpayers.

(*2*) *BA*'s purchase of the machine in June 2018 satisfies the original use requirement of paragraph (b)(3)(ii) of this section and, assuming all other requirements of this section are met, *BA*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*3*) Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. However, because *BB* placed in service and disposed of the machine in the same taxable year, *BB* is disregarded pursuant to paragraph (b)(3)(iii)(C)(*2*)(*i*) of this section. As a result, the following relationships are tested under section 179(d)(2)(A) and (B): *BC* tests its relationship to *BA* as of December 1, 2019, and October 1, 2019; and *BD* tests its relationship to *BC* as of January 2, 2020, and October 1, 2019, and to *BA* as of January 2, 2020, and October 1, 2020.

(*4*) Because *BA* is not related to *BC* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of December 1, 2019, or October 1, 2019, *BC*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *BC*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*5*) Because *BC* is not related to *BD* and *BA* is not related to *BD* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2020, or October 1, 2019, *BD*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *BD*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(LL) *Example 38.* (*1*) In June 2018, *CA,* an individual, bought and placed in service a new machine from an unrelated party for use in his trade or business. In a series of related transactions, *CA* sells the machine to *CB* and *CB* places it in service on September 1, 2019, *CB* transfers the machine to *CC* in a transaction described in paragraph (g)(1)(iii) of this section and *CC* places it in service on November 1, 2019, and *CC* sells the

machine to *CD* and *CD* places it in service on January 2, 2020. *CA* and *CB* are not related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii). *CB* and *CC* are related parties within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *CB* and *CD* are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *CC* and *CD* are not related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *CA* is not related to *CC* or to *CD* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii). All parties are calendar-year taxpayers.

(*2*) *CA*'s purchase of the machine in June 2018 satisfies the original use requirement of paragraph (b)(3)(ii) of this section and, assuming all other requirements of this section are met, *CA*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*3*) Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. However, because *CB* placed in service and transferred the machine in the same taxable year in a transaction described in paragraph (g)(1)(iii) of this section, the section 168(i)(7) transaction between *CB* and *CC* is disregarded pursuant to paragraph (b)(3)(iii)(C)(*2*)(*iii*) of this section. As a result, the following relationships are tested under section 179(d)(2)(A) and (B): *CB* tests its relationship to *CA* as of September 1, 2019; and *CD* tests its relationship to *CB, CC,* and *CA* as of January 2, 2020, and September 1, 2019.

(*4*) Because *CA* is not related to *CB* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) as of September 1, 2019, *CB*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *CB*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section. Pursuant to paragraph (g)(1)(iii) of this section, *CB* is allocated 2/12 of its 100-percent additional first year depreciation deduction for the machine, and *CC* is allocated the remaining portion of *CB*'s 100-percent additional first year depreciation deduction for the machine.

(*5*) *CC* is not related to *CD* and *CA* is not related to *CD* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2020, or September 1, 2019. However, *CB* and *CD* are related parties within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii), or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2020, or September 1, 2019. Accordingly, *CD*'s acquisition of the machine does not satisfy the used property acquisition requirements of paragraph (b)(3)(iii) of this section and is not eligible for the additional first year depreciation deduction.

(MM) *Example 39.* (*1*) In a series of related transactions, on January 2, 2018, *DA,* a corporation, bought and placed in service a new machine from an unrelated party for use in its trade or business. As part of the same series, *DB* purchases 100 percent of the stock of *DA* on January 2, 2019, and such stock acquisition meets the requirements of section 1504(a)(2). *DB* and *DA* were not related prior to the acquisition within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). Immediately after acquiring the *DA* stock, and *DB* liquidates *DA* under section 331. In the liquidating distribution, *DB* receives the machine that was acquired by *DA* on January 2, 2018. As part of the same series, on March 1, 2020, *DB* sells the machine to *DC* and *DC* places it in service. Throughout the series, *DC* is not related to *DB* or *DA* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii).

(*2*) *DA*'s purchase of the machine on January 2, 2018, satisfies the original use requirement of paragraph (b)(3)(ii) of this section and, assuming all other requirements of this section are met, *DA*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*3*) Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. Although *DA* is no longer in existence as of the date *DC* acquires the machine, pursuant to paragraph (b)(3)(iii)(C)(*2*)(*vi*) of this section, *DA* is deemed to be in existence at the time of each transfer for purposes of testing relationships under paragraph (b)(3)(iii)(C)(*1*). As a result, the following relationships are tested under section 179(d)(2)(A) and (B): *DB* tests its relationship to *DA* as of January 2, 2019, and January 2, 2018; and *DC* tests its relationship to *DB* and *DA* as of March 1, 2020, and January 2, 2018.

(*4*) Because *DB* acquired the machine in a series of related transactions in which *DB* acquired stock, meeting the requirements of section 1504(a)(2), of *DA* followed by a liquidation of *DA* under section 331, the relationship of *DB* and *DA* created thereof is disregarded for purposes of testing the relationship pursuant to paragraph (b)(3)(iii)(C)(*2*)(*v*) of this section. Therefore, *DA* is not related to *DB* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2019, or January 2, 2018, and *DB*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *DB*'s depreciable basis of the machine as a result of the liquidation of *DA* qualifies for the additional first year depreciation deduction under this section.

(*5*) Because *DC* is not related to *DB* or *DA* within the meaning of section 179(d)(2)(A) and § 1.179–4(c)(1)(ii) or section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of March 1, 2020, or January 2, 2018, *DC*'s acquisition of the machine satisfies the used property acquisition requirements of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *DC*'s purchase price of the machine qualifies for the additional first year depreciation deduction.

(NN) *Example 40.* (*1*) Pursuant to a series of related transactions, on January 2, 2018, *EA* bought and placed in service a new machine from an unrelated party for use in its trade or business. As part of the same series, *EA* sells the machine to *EB* and *EB* places it in service on January 2, 2019. As part of the same series, *EB* sells the machine to *EC* and *EC* places it in service on January 2, 2020. Throughout the series, *EA* is not related to *EB* or *EC* within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii). *EB* and *EC* were related parties within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) until July 1, 2019, at which time, they ceased to be related.

(*2*) *EA*'s purchase of the machine on January 2, 2018, satisfies the original use requirement of paragraph (b)(3)(ii) of this section and, assuming all other requirements of this section are met, *EA*'s purchase price of the machines qualifies for the additional first year depreciation deduction under this section.

(*3*) Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. As a result, the following relationships are tested under section 179(d)(2)(A) and (B): *EB* tests its relationship to *EA* as of January 2, 2019, and January 2, 2018; and *EC* tests its relationship to *EA* and *EB* as of January 2, 2020, and January 2, 2018.

(*4*) Because *EA* is not related to *EB* within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2019, or January 2, 2018, *EB*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *EB*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*5*) *EC* and *EA* are not related parties within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2020, or January 2, 2018. Within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii), *EC* is not related to *EB* as of January 2, 2020; however, *EC* is related to *EB* as of January 2, 2018. Accordingly, *EC*'s acquisition of the machine does not satisfy the used property acquisition requirement of paragraph (b)(3)(iii) of this section and is not eligible for the additional first year depreciation deduction.

(OO) *Example 41.* (*1*) The facts are the same as in *Example 40* of paragraph (b)(3)(vii)(NN)(*1*) of this section, except that instead of selling to *EC, EB* sells the machine to *EE,* and *EE* places in service on January 2, 2020, and *EE* sells the machine to *EC* and *EC* places in service on January 2, 2021. *EE* was not in existence until July 2019 and is not related to *EA* or *EB.*

(*2*) *EA*'s purchase of the machine on January 2, 2018, satisfies the original use requirement of paragraph (b)(3)(ii) of this section and, assuming all other requirements of this section are met, *EA*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*3*) Pursuant to paragraph (b)(3)(iii)(C)(*1*) of this section, a transferee tests its relationship with the transferor from which the transferee directly acquires the depreciable property, and with the original transferor of the depreciable property in the series. The relationship is tested when the transferee acquires, and immediately before the first transfer of, the depreciable property in the series. However, because *EE* was not in existence immediately prior to the first transfer of the depreciable property in the series, *EC* tests its relationship with *EB* and *EA* pursuant to paragraph (b)(3)(iii)(C)(*2*)(*vii*) of this section. As a result, the following relationships are tested under section 179(d)(2)(A) and (B): *EB* tests its relationship to *EA* as of January 2, 2019, and January 2, 2018; *EE* tests its relationship to *EA* and *EB* as of January 2, 2020, and January 2, 2018; and *EC* tests its relationship to *EA* and *EB* as of January 2, 2021, and January 2, 2018.

(*4*) Because *EA* is not related to *EB* within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2019, or January 2, 2018, *EB*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *EB*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*5*) Because *EE* is not related to *EA* or *EB* within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii) as of January 2, 2020, or January 2, 2018, *EE*'s acquisition of the machine satisfies the used property acquisition requirement of paragraph (b)(3)(iii)(A)(*2*) of this section. Accordingly, assuming all other requirements of this section are satisfied, *EE*'s purchase price of the machine qualifies for the additional first year depreciation deduction under this section.

(*6*) Within the meaning of section 179(d)(2)(B) and § 1.179–4(c)(1)(iii), *EC* is not related to *EA* as of January 2, 2021, or January 2, 2018; however, *EC* is related to *EB* as of January 2, 2018. Accordingly, *EC*'s acquisition of the machine does not satisfy the used property acquisition requirement of paragraph (b)(3)(iii) of this section and is not eligible for the additional first year depreciation deduction.

* * * * *

(5) * * *

(ii) * * *

(A) * * * For determination of acquisition date, see paragraph (b)(5)(ii)(B) of this section for property acquired pursuant to a written binding contract, paragraph (b)(5)(iv) of this section for self-constructed property, and paragraph (b)(5)(v) of this section for property not acquired pursuant to a written binding contract.

* * * * *

(iii) * * *

(G) *Acquisition of a trade or business or an entity.* A contract to acquire all or substantially all of the assets of a trade or business or to acquire an entity (for example, a corporation, a partnership, or a limited liability company) is binding if it is enforceable under State law against the parties to the contract. The presence of a condition outside the control of the parties, including, for example, regulatory agency approval, will not prevent the contract from being a binding contract. Further, the fact that insubstantial terms remain to be negotiated by the parties to the contract, or that customary conditions remain to be satisfied, does not prevent the contract from being a binding contract. This paragraph (b)(5)(iii)(G) also applies to a contract for the sale of the stock of a corporation that is treated as an asset sale as a result of an election under section 338 or under section 336(e) made for a disposition described in § 1.336–2(b)(1).

* * * * *

(v) *Determination of acquisition date for property not acquired pursuant to a written binding contract.* Except as provided in paragraphs (b)(5)(iv), (vi), and (vii) of this section, the acquisition date of property that the taxpayer acquires pursuant to a contract that does not meet the definition of a written binding contract in paragraph (b)(5)(iii) of this section, is the date on which the taxpayer paid, in the case of a cash basis taxpayer, or incurred, in the case of an accrual basis taxpayer, more than 10 percent of the total cost of the property, excluding the cost of any land and preliminary activities such as planning and designing, securing financing, exploring, or researching. The preceding sentence also applies to property that is manufactured, constructed, or produced for the taxpayer by another person under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, and that is entered into prior to the manufacture, construction, or

production of the property for use by the taxpayer in its trade or business or for its production of income. This paragraph (b)(5)(v) does not apply to an acquisition described in paragraph (b)(5)(iii)(G) of this section.

* * * * *

(viii) * * * Unless the facts specifically indicate otherwise, assume that the parties are not related within the meaning of section 179(d)(2)(A) or (B) and § 1.179–4(c), paragraph (c) of this section does not apply, and the parties do not have predecessors:

* * * * *

(c) *Election for components of larger self-constructed property for which the manufacture, construction, or production begins before September 28, 2017*—(1) *In general.* A taxpayer may elect to treat any acquired or self-constructed component, as described in paragraph (c)(3) of this section, of the larger self-constructed property, as described in paragraph (c)(2) of this section, as being eligible for the additional first year depreciation deduction under this section, assuming all requirements of section 168(k) and this section are met. The taxpayer may make this election for one or more such components.

(2) *Eligible larger self-constructed property*—(i) *In general.* Solely for purposes of this paragraph (c), a larger self-constructed property is property that is manufactured, constructed, or produced by the taxpayer for its own use in its trade or business or production of income. Solely for purposes of this paragraph (c), property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract, as defined in paragraph (b)(5)(iii) of this section, or under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or production of income is considered to be manufactured, constructed, or produced by the taxpayer. Except as provided in paragraph (c)(2)(iv) of this section, such larger self-constructed property must be property—

(A) That is described in paragraph (b)(2)(i)(A), (B), (C), or (D) of this section. Solely for purposes of the preceding sentence, the requirement that property has to be acquired after September 27, 2017, is disregarded;

(B) That meets the requirements under paragraph (b) of this section, determined without regard to the acquisition date requirement in paragraph (b)(5) of this section; and

(C) For which the taxpayer begins the manufacture, construction, or production before September 28, 2017.

(ii) *Residential rental property or nonresidential real property.* If the taxpayer constructs, manufactures, or produces residential rental property or nonresidential real property, as defined in section 168(e)(2), or an improvement to such property, for use in its trade or business or production of income, all property that is constructed, manufactured, or produced as part of such residential rental property, nonresidential real property, or improvement, as applicable, and that is described in paragraph (c)(2)(i)(A) of this section is the larger self-constructed property for purposes of applying the rules in this paragraph (c).

(iii) *Beginning of manufacturing, construction, or production.* Solely for purposes of paragraph (c)(2)(i)(C) of this section, the determination of when manufacture, construction, or production of the larger self-constructed property begins is made in accordance with the rules in paragraph (b)(5)(iv)(B) of this section if the larger self-constructed property is manufactured, constructed, or produced by the taxpayer for its own use in its trade or business or production of income, or is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract, as defined in paragraph (b)(5)(iii) of this section, that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or production of income. If the larger self-constructed property is manufactured, constructed, or produced for the taxpayer by another person under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or production of income, the determination of when manufacture, construction, or production of the larger self-constructed property begins is made in accordance with the rules in paragraph (b)(5)(v) of this section. If the taxpayer enters into a written binding contract, as defined in paragraph (b)(5)(iii) of this section, before September 28, 2017, with another person to manufacture, construct, or produce the larger self-constructed property and the manufacture, construction, or production of this property begins after September 27, 2017, as determined under paragraph (b)(5)(iv)(B) of this section, this paragraph (c) does not apply. If the taxpayer enters into a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section before September 28, 2017, with another person to manufacture, construct, or produce the larger self-constructed property and the manufacture, construction, or production of this property begins after September 27, 2017, as determined under paragraph (b)(5)(v) of this section, this paragraph (c) does not apply.

(iv) *Exception.* This paragraph (c) does not apply to any larger self-constructed property that is included in a class of property for which the taxpayer made an election under section 168(k)(7) (formerly section 168(k)(2)(D)(iii)) not to deduct the additional first year depreciation deduction.

(3) *Eligible components*—(i) *In general.* Solely for purposes of this paragraph (c), a component of the larger self-constructed property, as described in paragraph (c)(2) of this section, must be qualified property under section 168(k)(2) and paragraph (b) of this section. Solely for purposes of the preceding sentence, a component will satisfy the acquisition date requirement in paragraph (b)(5) of this section if it satisfies the requirements in paragraph (c)(3)(ii) or (iii) of this section, as applicable.

(ii) *Acquired components.* If a component of the larger self-constructed property is acquired pursuant to a written binding contract, as defined in paragraph (b)(5)(iii) of this section, the component must be acquired by the taxpayer after September 27, 2017, as determined under the rules in paragraph (b)(5)(ii)(B) of this section. If a component of the larger self-constructed property is acquired pursuant to a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, the component must be acquired by the taxpayer after September 27, 2017, as determined under the rules in paragraph (b)(5)(v) of this section.

(iii) *Self-constructed components.* The manufacture, construction, or production of a component of a larger self-constructed property must begin after September 27, 2017. The determination of when manufacture, construction, or production of the component begins is made in accordance with the rules in—

(A) Paragraph (b)(5)(iv)(B) of this section if the component is manufactured, constructed, or produced by the taxpayer for its own use in its trade or business or for its production of

income, or is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract, as defined in paragraph (b)(5)(iii) of this section, that is entered into prior to the manufacture, construction, or production of the component for use by the taxpayer in its trade or business or for its production of income; or

(B) Paragraph (b)(5)(v) of this section if the component is manufactured, constructed, or produced for the taxpayer by another person under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, that is entered into prior to the manufacture, construction, or production of the component for use by the taxpayer in its trade or business or for its production of income.

(4) *Special rules*—(i) *Installation costs.* If the taxpayer pays, in the case of a cash basis taxpayer, or incurs, in the case of an accrual basis taxpayer, costs, including labor costs, to install a component of the larger self-constructed property, as described in paragraph (c)(2) of this section, such costs are eligible for the additional first year depreciation under this section, assuming all requirements are met, only if the component being installed meets the requirements in paragraph (c)(3) of this section.

(ii) *Property described in section 168(k)(2)(B).* The rules in paragraph (e)(1)(iii) of this section apply for determining the unadjusted depreciable basis, as defined in § 1.168(b)–1(a)(3), of larger self-constructed property described in paragraph (c)(2) of this section and in section 168(k)(2)(B).

(5) *Computation of additional first year depreciation deduction*—(i) *Election is made.* Before determining the allowable additional first year depreciation deduction for the larger self-constructed property, as described in paragraph (c)(2) of this section, for which the taxpayer makes the election specified in this paragraph (c) for one or more components of such property, the taxpayer must determine the portion of the unadjusted depreciable basis, as defined in § 1.168(b)–1(a)(3), of the larger self-constructed property, including all components, attributable to the component that meets the requirements of paragraphs (c)(3) and (c)(4)(i) of this section (component basis). The additional first year depreciation deduction for the component basis is determined by multiplying such component basis by the applicable percentage for the placed-in-service year of the larger self-constructed property. The additional first year depreciation deduction, if any, for the remaining unadjusted depreciable basis of the larger self-constructed property, as described in paragraph (c)(2) of this section, is determined under section 168(k), as in effect on the day before the date of the enactment of the Act, and section 168(k)(8). For purposes of this paragraph (c), the remaining unadjusted depreciable basis of the larger self-constructed property is equal to the unadjusted depreciable basis, as defined in § 1.168(b)–1(a)(3), of the larger self-constructed property, including all components, reduced by the sum of the component basis of the components for which the taxpayer makes the election specified in this paragraph (c).

(ii) *Election is not made.* If the taxpayer does not make the election specified in this paragraph (c), the additional first year depreciation deduction, if any, for the larger self-constructed property, including all components, is determined under section 168(k), as in effect on the day before the date of the enactment of the Act, and section 168(k)(8).

(6) *Time and manner for making election*—(i) *Time for making election.* The election specified in this paragraph (c) must be made by the due date, including extensions, of the Federal tax return for the taxable year in which the taxpayer placed in service the larger self-constructed property.

(ii) *Manner of making election.* The election specified in this paragraph (c) must be made by attaching a statement to such return indicating that the taxpayer is making the election provided in this paragraph (c) and whether the taxpayer is making the election for all or some of the components described in paragraph (c)(3) of this section. The election is made separately by each person owning qualified property (for example, for each member of a consolidated group by the agent for the group (within the meaning of § 1.1502–77(a) and (c)), by the partnership (including a lower-tier partnership), or by the S corporation).

(7) *Revocation of election*—(i) *In general.* Except as provided in paragraph (c)(7)(ii) of this section, the election specified in this paragraph (c), once made, may be revoked only by filing a request for a private letter ruling and obtaining the Commissioner of Internal Revenue's written consent to revoke the election. The Commissioner may grant a request to revoke the election if the taxpayer acted reasonably and in good faith, and the revocation will not prejudice the interests of the Government. See generally § 301.9100–3 of this chapter. The election specified in this paragraph (c) may not be revoked through a request under section 446(e) to change the taxpayer's method of accounting.

(ii) *Automatic 6-month extension.* If a taxpayer made the election specified in this paragraph (c), an automatic extension of 6 months from the due date of the taxpayer's Federal tax return, excluding extensions, for the placed-in-service year of the larger self-constructed property is granted to revoke that election, provided the taxpayer timely filed the taxpayer's Federal tax return for that placed-in-service year and, within this 6-month extension period, the taxpayer, and all taxpayers whose tax liability would be affected by the election, file an amended Federal tax return for the placed-in-service year in a manner that is consistent with the revocation of the election.

(8) *Additional procedural guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) that provides alternative procedures for complying with paragraph (c)(6) or (c)(7)(i) of this section.

(9) *Examples.* The application of this paragraph (c) is illustrated by the following examples. Unless the facts specifically indicate otherwise, assume that the larger self-constructed property is described in paragraph (c)(2) of this section, the components that are acquired or self-constructed after September 27, 2017, are described in paragraph (c)(3) of this section, the taxpayer is an accrual basis taxpayer, and none of the costs paid or incurred after September 27, 2017, are for the installation of components that do not meet the requirements of paragraph (c)(3) of this section.

(i) *Example 1.* (A) *BC,* a calendar year taxpayer, is engaged in a trade or business described in section 163(j)(7)(A)(iv) and §§ 1.163(j)–1(b)(15)(i) and 1.163(j)–10(c)(3)(iii)(C)(*3*). In December 2015, *BC* decided to construct an electric generation power plant for its own use. This plant is property described in section 168(k)(2)(B) as in effect on the day before the date of the enactment of the Act. However, the turbine for the plant had to be manufactured by another person for *BC.* In January 2016, *BC* entered into a written binding contract with *CD* to acquire the turbine. *BC* received the completed turbine in August 2017 at which time *BC* incurred the cost of the turbine. The cost of the turbine is 11 percent of the total cost of the electric generation power plant to be constructed by *BC. BC* began

constructing the electric generation power plant in October 2017 and placed in service this new power plant, including all component parts, in 2020.

(B) The larger self-constructed property is the electric generation power plant to be constructed by *BC*. For determining if the construction of this power plant begins before September 28, 2017, paragraph (b)(5)(iv)(B) of this section provides that manufacture, construction, or production of property begins when physical work of a significant nature begins. *BC* uses the safe harbor test in paragraph (b)(5)(iv)(B)(*2*) of this section to determine when physical work of a significant nature begins for the electric generation power plant. Because the turbine that was manufactured by *CD* for *BC* is more than 10 percent of the total cost of the electric generation power plant, physical work of a significant nature for this plant began before September 28, 2017.

(C) The power plant is described in section 168(k)(9)(A) and paragraph (b)(2)(ii)(F) of this section and, therefore, is not larger self-constructed property eligible for the election pursuant to paragraph (c)(2)(i)(B) of this section. Accordingly, none of *BC*'s expenditures for components of the power plant that are acquired or self-constructed after September 27, 2017, are eligible for the election specified in this paragraph (c). Assuming all requirements are met under section 168(k)(2) as in effect on the day before the date of the enactment of the Act, the unadjusted depreciable basis of the power plant, including all components, attributable to its construction before January 1, 2020, is eligible for the 30-percent additional first year depreciation deduction pursuant to section 168(k)(8).

(ii) *Example 2.* (A) In August 2017, *BD,* a calendar-year taxpayer, entered into a written binding contract with *CE* for *CE* to manufacture a locomotive for *BD* for use in its trade or business. Before September 28, 2017, *BD* acquired or self-constructed components of the locomotive. These components cost $500,000, which is more than 10 percent of the total cost of the locomotive, and *BD* incurred such costs before September 28, 2017. After September 27, 2017, *BD* acquired or self-constructed components of the locomotive and these components cost $4,000,000. In February 2019, *CE* delivered the locomotive to *BD* and *BD* placed in service the locomotive. The total cost of the locomotive is $4,500,000. The locomotive is property described in section 168(k)(2)(B) as in effect on the day before the date of the enactment of the Act. On its timely filed Federal income tax return for 2019, *BD* made the election specified in this paragraph (c).

(B) The larger self-constructed property is the locomotive being manufactured by *CE* for *BD*. For determining if the manufacturing of this locomotive begins before September 28, 2017, paragraph (b)(5)(iv)(B) of this section provides that manufacture, construction, or production of property begins when physical work of a significant nature begins. *BD* uses the safe harbor test in paragraph (b)(5)(iv)(B)(*2*) of this section to determine when physical work of a significant nature begins for the locomotive. Because *BD* had incurred more than 10 percent of the total cost of the locomotive before September 28, 2017, physical work of a significant nature for this locomotive began before September 28, 2017.

(C) Because *BD* made the election specified in this paragraph (c), the cost of $4,000,000 for the locomotive's components acquired or self-constructed after September 27, 2017, qualifies for the 100-percent additional first year depreciation deduction under this section, assuming all other requirements are met. The remaining cost of the locomotive is $500,000 and such amount qualifies for the 40-percent additional first year depreciation deduction pursuant to section 168(k)(8), assuming all other requirements in section 168(k) as in effect on the day before the date of the enactment of the Act are met.

(iii) *Example 3.* (A) In February 2016, *BF,* a calendar-year taxpayer, entered into a written binding contract with *CG* for *CG* to manufacture a vessel for *BF* for use in its trade or business. Before September 28, 2017, *BF* acquired or self-constructed components for the vessel. These components cost $30,000,000, which is more than 10 percent of the total cost of the vessel, and *BF* incurred such costs before September 28, 2017. After September 27, 2017, *BF* acquired or self-constructed components for the vessel and these components cost $15,000,000. In February 2021, *CG* delivered the vessel to *BF* and *BF* placed in service the vessel. The vessel is property described in section 168(k)(2)(B) as in effect on the day before the date of the enactment of the Act. The total cost of the vessel is $45,000,000. On its timely filed Federal income tax return for 2021, *BF* made the election specified in this paragraph (c).

(B) The larger self-constructed property is the vessel being manufactured by *CG* for *BF*. For determining if the manufacturing of this vessel begins before September 28, 2017, paragraph (b)(5)(iv)(B) of this section provides that manufacture, construction, or production of property begins when physical work of a significant nature begins. *BF* uses the safe harbor test in paragraph (b)(5)(iv)(B)(*2*) of this section to determine when physical work of a significant nature begins for the vessel. Because *BF* had incurred more than 10 percent of the total cost of the vessel before September 28, 2017, physical work of a significant nature for this vessel began before September 28, 2017.

(C) Because *BF* made the election specified in this paragraph (c), the cost of $15,000,000 for the vessel's components acquired or self-constructed after September 27, 2017, qualifies for the 100-percent additional first year depreciation deduction under this section, assuming all other requirements are met. Pursuant to section 168(k)(8) and because *BF* placed in service the vessel after 2020, none of the remaining cost of the vessel is eligible for any additional first year depreciation deduction under section 168(k) and this section nor under section 168(k) as in effect on the day before the date of the enactment of the Act.

(iv) *Example 4.* (A) In March 2017, *BG,* a calendar year taxpayer, entered into a written contract with *CH* for *CH* to construct a building for *BG* to use in its retail business. This written contract does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section. In September 2019, the construction of the building was completed and placed in service by *BG.* The total cost is $10,000,000. Of this amount, $3,000,000 is the total cost for all section 1245 properties constructed as part of the building, and $7,000,000 is for the building. Under section 168(e), section 1245 properties in the total amount of $2,400,000 are 5-year property and in the total amount of $600,000 are 7-year property. The building is nonresidential real property under section 168(e). Before September 28, 2017, *BG* acquired or self-constructed certain components and the total cost of these components is $500,000 for the section 1245 properties and $3,000,000 for the building. *BG* incurred these costs before September 28, 2017. After September 27, 2017, *BG* acquired or self-constructed the remaining components of the section 1245 properties and these components cost $2,500,000. *BG* incurred these costs of $2,500,000 after September 27, 2017. On its timely filed Federal income tax return for 2019, *BG* made the election specified in this paragraph (c).

(B) All section 1245 properties are constructed as part of the construction of the building and are described in paragraph (b)(2)(i)(A) of this section. The building is not described in paragraph (b)(2)(i)(A), (B), (C), or (D) of this section. As a result, under paragraph (c)(2)(ii) of this section, the larger self-constructed property is all section 1245 properties with a total cost of $3,000,000. For determining if the construction of these section 1245 properties begins before September 28, 2017, paragraph (b)(5)(v) of this section provides that manufacture, construction, or production of property begins when the taxpayer incurs more than 10 percent of the total cost of the property. Because *BG* incurred more than 10 percent of the total cost of the section 1245 properties before September 28, 2017, construction of the section 1245 properties began before September 28, 2017.

(C) Because *BG* made the election specified in this paragraph (c), the cost of $2,500,000 for the section 1245 components acquired or self-constructed by *BG* after September 27, 2017, qualifies for the 100-percent additional first year depreciation deduction under this section, assuming all other requirements are met. The remaining cost of the section 1245 components is $500,000 and such amount qualifies for the 30-percent additional first year depreciation deduction pursuant to section 168(k)(8), assuming all other requirements in section 168(k), as in effect on the day before the date of the enactment of the Act, are met. Because the building is not qualified property under section 168(k), as in effect on the day before the date of the enactment of the Act, none of the cost of $7,000,000 for the building is eligible for any additional first year depreciation deduction under section 168(k) and this section or under section 168(k), as in effect on the day before the date of the enactment of the Act.

(d) * * *

(3) * * *

(iv) *Determination of acquisition date for property not acquired pursuant to a written binding contract.* For purposes of the acquisition rules in paragraph (d)(1) of this section, the following property is acquired by the taxpayer before January 1, 2027, if the taxpayer paid, in the case of a cash basis taxpayer, or incurred, in the case of an accrual basis taxpayer, more than 10 percent of the total cost of the property before January 1, 2027, excluding the cost of any land and preliminary activities such as planning and designing, securing financing, exploring, or researching:

(A) Property that the taxpayer acquires pursuant to a contract that does not meet the definition of a written binding contract in paragraph (b)(5)(iii) of this section; or

(B) Property that is manufactured, constructed, or produced for the taxpayer by another person under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section, and that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or production of income.

* * * * *

(e) * * *

(1) * * *

(iii) * * * The amounts of unadjusted depreciable basis attributable to the property's manufacture, construction, or production before January 1, 2027, are referred to as ''progress expenditures.'' Rules similar to the rules in section 4.02(1)(b) of Notice 2007–36 (2007–17 I.R.B. 1000) (see § 601.601(d)(2)(ii)(*b*) of this chapter) apply for determining progress expenditures, regardless of whether the property is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract, as defined in paragraph (b)(5)(iii) of this section, or under a written contract that does not meet the definition of a binding contract in paragraph (b)(5)(iii) of this section. The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) that provides alternative procedures for complying with this paragraph (e)(1)(iii).

* * * * *

(f) * * *

(7) *Additional procedural guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) that provides alternative procedures for complying with paragraph (f)(1)(iii), (f)(1)(iv), (f)(2)(ii), (f)(2)(iii), (f)(3)(ii), (f)(3)(iii), or (f)(5)(i) of this section.

(g) * * *

(11) *Mid-quarter convention.* In determining whether the mid-quarter convention applies for a taxable year under section 168(d)(3) and § 1.168(d)–1, the depreciable basis, as defined in § 1.168(d)–1(b)(4), for the taxable year the qualified property is placed in service by the taxpayer is not reduced by the allowed or allowable additional first year depreciation deduction for that taxable year. See § 1.168(d)–1(b)(4).

(h) * * *

(1) *In general.* Except as provided in paragraphs (h)(2) and (3) of this section, this section applies to—

(i) Depreciable property acquired after September 27, 2017, by the taxpayer and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021;

(ii) A specified plant for which the taxpayer properly made an election to apply section 168(k)(5) and that is planted, or grafted to a plant that was previously planted, by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021; and

(iii) Components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in paragraph (c)(2) of this section and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021.

(2) *Applicability of this section for prior taxable years.* For taxable years beginning before January 1, 2021, see § 1.168(k)-2 as contained in 26 CFR part 1, revised as of April 1, 2020.

(3) *Early application of this section and § 1.1502–68*—(i) *In general.* Subject to paragraphs (h)(3)(ii) and (iii) of this section, and provided that all members of a consolidated group consistently apply the same set of rules, a taxpayer may choose to apply both the rules of this section and the rules of § 1.1502–68 (to the extent relevant), in their entirety and in a consistent manner, to—

(A) Depreciable property acquired after September 27, 2017, by the taxpayer and placed in service by the taxpayer during a taxable year ending on or after September 28, 2017;

(B) A specified plant for which the taxpayer properly made an election to apply section 168(k)(5) and that is planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during a taxable year ending on or after September 28, 2017; and

(C) Components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in paragraph (c)(2) of this section and placed in service by the taxpayer during a taxable year ending on or after September 28, 2017.

(ii) *Early application to certain transactions.* In the case of property described in § 1.1502–68(e)(2)(i) that is acquired in a transaction that satisfies the requirements of § 1.1502–68(c)(1)(ii) or (c)(2)(ii), the taxpayer may apply the rules of this section and the rules of § 1.1502–68 (to the extent relevant), in their entirety and in a consistent manner, to such property only if those

rules are applied, in their entirety and in a consistent manner, by all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, and the consolidated groups of which they are members, for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the deconsolidation date, as defined in § 1.1502–68(a)(2)(iii).

(iii) *Bound by early application.* Once a taxpayer applies the rules of this section and the rules of § 1.1502–68 (to the extent relevant), in their entirety, for a taxable year, the taxpayer must continue to apply the rules of this section and the rules of § 1.1502–68 (to the extent relevant), in their entirety, for the taxpayer's subsequent taxable years.

■ **Par. 5.** Section 1.1502–68 is added immediately following § 1.1502–59A to read as follows:

§ 1.1502–68 Additional first year depreciation deduction for property acquired and placed in service after September 27, 2017.

(a) *In general*—(1) *Overview.* This section provides rules governing the availability of the additional first year depreciation deduction allowable under section 168(k) for qualified property that is acquired and placed in service after September 27, 2017, by a member of a consolidated group. Except as otherwise provided in paragraph (c) of this section, the rules in § 1.168(k)–2 apply to members of a consolidated group in addition to the rules in this section. Paragraph (a)(2) of this section provides definitions of terms used in this section. Paragraph (b) of this section provides rules addressing the application of § 1.168(k)–2(b)(3)(iii)(A)(*1*) (requiring that a taxpayer claiming the additional first year depreciation deduction for used property not previously have used the property) to members of a consolidated group. Paragraph (c) of this section provides rules addressing certain transfers of eligible property (as defined in paragraph (a)(2)(vii) of this section) between members of a consolidated group if the transferee member (as defined in paragraph (a)(2)(xii) of this section) leaves the group pursuant to the same series of related transactions. Paragraph (d) of this section provides examples illustrating the application of the rules of this section. Paragraph (e) of this section provides the applicability dates.

(2) *Definitions.* The following definitions apply for purposes of this section.

(i) *Consolidated Asset Acquisition Rule.* The term *Consolidated Asset Acquisition Rule* refers to the rule set forth in paragraph (c)(1)(i) of this section addressing certain intercompany transfers of eligible property.

(ii) *Consolidated Deemed Acquisition Rule.* The term *Consolidated Deemed Acquisition Rule* refers to the rule set forth in paragraph (c)(2)(i) of this section addressing certain intercompany transfers of the stock of target (as defined in paragraph (a)(2)(xi) of this section).

(iii) *Deconsolidation date.* The term *deconsolidation date* means the date on which a transferee member ceases to be a member of a consolidated group.

(iv) *Designated transaction.* The term *designated transaction* has the meaning provided in paragraph (c)(4)(i) of this section.

(v) *Deemed replacement property.* The term *deemed replacement property* means used property that is identical to (but is separate and distinct from) the eligible property that the transferee member or target is deemed to sell to an unrelated party under the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule. For all Federal income tax purposes, the deemed purchase of deemed replacement property by the transferee member or target under paragraph (c)(1)(i)(B) or (c)(2)(i)(B) of this section, respectively, does not result in the basis in such property being determined, in whole or in part, by reference to the basis of other property held at any time by the transferee member or target. See section 179(d)(3) and § 1.168(k)–2(b)(3)(iii)(A)(*3*).

(vi) *Deemed sale amount.* The term *deemed sale amount* means an amount equal to the transferee member's or the target's adjusted basis in the eligible property immediately before the transferee member or target is deemed to sell the property to an unrelated party under the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule.

(vii) *Eligible property.* The term *eligible property* means depreciable property (as defined in § 1.168(b)–1(a)(1)) that meets the requirements in § 1.168(k)–2(b)(2), determined without regard to § 1.168(k)–2(b)(2)(ii)(C) (property subject to an election not to claim the additional first year depreciation for a class of property) except on the day after the deconsolidation date.

(viii) *Group Prior Use Rule.* The term *Group Prior Use Rule* refers to the rule set forth in paragraph (b)(1) of this section addressing when a member of a consolidated group is attributed another member's depreciable interest in property.

(ix) *Lookback Period.* The term *lookback period* means, with respect to a member of a consolidated group, the period that includes the five calendar years immediately prior to the current calendar year in which the property is placed in service by such member, as well as the portion of such current calendar year before the date on which the member placed the property in service (without taking into account the applicable convention).

(x) *Stock and Asset Acquisition Rule.* The term *Stock and Asset Acquisition Rule* refers to the rule set forth in paragraph (b)(2) of this section addressing when a member of a consolidated group is attributed a new member's depreciable interest in property.

(xi) *Target.* The term *target* means the member whose stock is transferred in a transaction that is subject to the Consolidated Deemed Acquisition Rule.

(xii) *Transferee member.* The term *transferee member* means the member that acquires eligible property or target stock, respectively, in a transaction that is subject to the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule.

(xiii) *Transferor member.* The term *transferor member* means the member that transfers eligible property or target stock, respectively, in a transaction that is subject to the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule.

(b) *Acquisitions of depreciable property by a member of a consolidated group*—(1) *General rule (Group Prior Use Rule).* Solely for purposes of applying § 1.168(k)–2(b)(3)(iii)(A)(*1*), if a member of a consolidated group acquires depreciable property in which the group had a depreciable interest at any time within the lookback period, the member is treated as having a depreciable interest in the property prior to the acquisition. For purposes of this paragraph (b)(1), a consolidated group is treated as having a depreciable interest in property during the time any current or previous member of the group had a depreciable interest in the property while a member of the group. For special rules that apply when a member of a consolidated group acquires depreciable property in an intercompany transaction (as defined in § 1.1502–13(b)(1)(i)) and then leaves the group pursuant to the same series of related transactions, see paragraph (c) of this section.

(2) *Certain acquisitions pursuant to a series of related transactions (Stock and Asset Acquisition Rule).* Solely for purposes of applying § 1.168(k)–2(b)(3)(iii)(A)(*1*), if a series of related

transactions includes one or more transactions in which property is acquired by a member of a consolidated group, and one or more transactions in which a corporation that had a depreciable interest in the property (determined without regard to the application of the Group Prior Use Rule) within the lookback period becomes a member of the group, then the member that acquires the property is treated as having a depreciable interest in the property prior to the acquisition.

(c) *Certain intercompany transfers of eligible property followed by deconsolidation*—(1) *Acquisition of eligible property by a member that leaves the group*—(i) *General rule (Consolidated Asset Acquisition Rule).* This paragraph (c)(1) applies to certain transactions pursuant to which one member of a consolidated group (transferee member) acquires from another member of the same consolidated group (transferor member) eligible property. Except as otherwise provided in paragraph (c)(3) or (4) of this section, if a transaction satisfies the requirements of paragraph (c)(1)(ii) of this section, then § 1.168(k)–2(b)(3)(iii)(C) (providing special rules when depreciable property is acquired as part of a series of related transactions) does not apply to the transaction, and for all Federal income tax purposes—

(A) The transferee member is treated as selling the eligible property to an unrelated person on the day after the deconsolidation date in exchange for an amount of cash equal to the deemed sale amount; and

(B) Immediately after the deemed sale in paragraph (c)(1)(i)(A) of this section, the transferee member is treated as purchasing deemed replacement property from an unrelated person for an amount of cash equal to the deemed sale amount.

(ii) *Requirements.* A transaction satisfies the requirements of this paragraph (c)(1)(ii) if—

(A) The transferee member's acquisition of the eligible property meets the requirements of § 1.168(k)–2(b)(3)(iii)(A) without regard to section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii) or the Group Prior Use Rule;

(B) As part of the same series of related transactions that includes the acquisition, the transferee member ceases to be a member of the consolidated group and ceases to be related, within the meaning of section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii), to the transferor member; and

(C) The acquired eligible property continues to be eligible property on the deconsolidation date and the day after the deconsolidation date.

(2) *Deemed acquisition of eligible property pursuant to an election under section 338 or 336(e) by a member that leaves the group*—(i) *General rule (Consolidated Deemed Acquisition Rule).* This paragraph (c)(2) applies to certain transactions pursuant to which a transferee member acquires from a transferor member the stock of another member of the same consolidated group that holds eligible property (target) in either a qualified stock purchase for which a section 338 election is made or a qualified stock disposition described in § 1.336–2(b)(1) for which a section 336(e) election is made. Except as otherwise provided in paragraph (c)(3) or (4) of this section, if a transaction satisfies the requirements of paragraph (c)(2)(ii) of this section, then § 1.168(k)–2(b)(3)(iii)(C) does not apply to the transaction, and for all Federal income tax purposes—

(A) The target is treated as selling the eligible property to an unrelated person on the day after the deconsolidation date in exchange for an amount of cash equal to the deemed sale amount; and

(B) Immediately after the deemed sale in paragraph (c)(2)(i)(A) of this section, the target is treated as purchasing deemed replacement property from an unrelated person for an amount of cash equal to the deemed sale amount.

(ii) *Requirements.* A transaction satisfies the requirements of this paragraph (c)(2)(ii) if:

(A) The target's acquisition of the eligible property meets the requirements of § 1.168(k)–2(b)(3)(iii)(A) without regard to the Group Prior Use Rule;

(B) As part of the same series of related transactions that includes the qualified stock purchase or qualified stock disposition, the transferee member and the target cease to be members of the transferor member's consolidated group and cease to be related, within the meaning of section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii), to the transferor member; and

(C) The target's eligible property on the acquisition date (within the meaning of § 1.338–2(c)(1)) or the disposition date (within the meaning of § 1.336–1(b)(8)) continues to be eligible property on the deconsolidation date and the day after the deconsolidation date.

(3) *Disposition of depreciable property pursuant to the same series of related transactions.* Paragraph (c)(1) of this section does not apply if, following the acquisition of eligible property, the transferee member disposes of such property pursuant to the same series of related transactions that includes the property acquisition. Paragraph (c)(2) of this section does not apply if, following the deemed acquisition of eligible property, the target disposes of such property pursuant to the same series of related transactions that includes the qualified stock purchase or qualified stock disposition. See § 1.168(k)–2(b)(3)(iii)(C) for rules regarding the transfer of property in a series of related transactions. See also § 1.168(k)–2(g)(1) for rules regarding property placed in service and disposed of in the same taxable year. For purposes of this paragraph (c)(3), the deemed sale of eligible property by the transferee member or the target pursuant to paragraph (c)(1)(i)(A) or (c)(2)(i)(A) of this section is not treated as a ''disposition'' of such property.

(4) *Election to not apply paragraph (c)(1)(i) or (c)(2)(i) of this section*—(i) *In general.* If a transaction satisfies the requirements of the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule in paragraph (c)(1)(ii) or (c)(2)(ii) of this section, respectively, the transferee member or the target nonetheless may elect not to apply the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule, respectively, to all eligible property that is acquired or deemed acquired in such transaction. If a transferee member or target makes an election under this paragraph (c)(4) with respect to any transaction (designated transaction), then—

(A) The transferee member or target is deemed to have made such an election for all other transactions—

(*1*) That satisfy the requirements of the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule;

(*2*) That are part of the same series of related transactions as the designated transaction; and

(*3*) In which the transferee member or target either is the same transferee member or target as in the designated transaction or is related, within the meaning of section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii), to the transferee member or target in the designated transaction immediately after the end of the series of related transactions; and

(B) Any eligible property acquired or deemed acquired in the designated transaction and in any transactions described in paragraph (c)(4)(i)(A) of this section does not satisfy either the original use requirement or the used property acquisition requirements in § 1.168(k)–2(b)(3) and, thus, is not ''qualified property'' within the meaning of § 1.168(k)–2(b)(1).

(ii) *Time and manner for making election*—(A) *Time to make election.* An

election under this paragraph (c)(4) must be made by the due date, including extensions, for the Federal tax return for the taxable year of the transferee member or target that begins on the day after the deconsolidation date.

(B) *Manner of making election.* A transferee member or target, as applicable, makes the election under this paragraph (c)(4) by attaching a statement to its return for the taxable year that begins on the day after the deconsolidation date. The statement must describe the transaction(s) to which the Consolidated Asset Acquisition Rule or Consolidated Deemed Acquisition Rule otherwise would apply and state that the transferee member or the target, as applicable, is not claiming the additional first year depreciation deduction for any eligible property transferred in such transaction(s). If, at the time the election is made, the transferee member or the target is a member of a consolidated group, the statement is made by the agent for the group (within the meaning of § 1.1502–77(a) and (c)) on behalf of the transferee member or the target and is attached to the consolidated return of the group for the taxable year of the group that includes the taxable year of the transferee member or target that begins on the day after the deconsolidation date.

(C) *Additional procedural guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) that provides alternative procedures for complying with paragraph (c)(4)(ii)(A) or (B) of this section.

(iii) *Revocation of election.* An election specified in this paragraph (c)(4), once made, may be revoked only by filing a request for a private letter ruling and obtaining the Commissioner of Internal Revenue's written consent to revoke the election. The Commissioner may grant a request to revoke the election if the taxpayer acted reasonably and in good faith, and the revocation will not prejudice the interests of the Government. See generally § 301.9100–3 of this chapter. An election specified in this paragraph (c)(4) may not be revoked through a request under section 446(e) to change the taxpayer's method of accounting.

(d) *Examples.* For purposes of the examples in this section, unless otherwise stated: Parent, S, B, Controlled, and T are members of a consolidated group of which Parent is the common parent (Parent group); Parent owns all of the only class of stock of each of S, B, Controlled, and T; X is the common parent of the X consolidated group (X group); no member of the X group is related, within the meaning of section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii) (Related), to any member of the Parent group; G and U are corporations that are not Related to each other or to any member of the Parent group or the X group; the Equipment in each example is eligible property; no member of the Parent group or the X group has had a depreciable interest in the Equipment within the lookback period; § 1.168(k)–2(b)(3)(iii)(A)(*1*) is referred to as the No Prior Use Requirement; and § 1.168(k)–2(b)(3)(iii)(A)(*2*) is referred to as the Unrelated Party Requirement. The rules of this section are illustrated by the following examples.

(1) *Example 1: Intercompany sale of eligible property*—(i) *Facts.* S has a depreciable interest in Equipment #1. In 2018, S sells Equipment #1 to B, and B places Equipment #1 in service in the same year.

(ii) *Analysis.* B's acquisition of Equipment #1 does not satisfy either the No Prior Use Requirement or the Unrelated Party Requirement. Under the Group Prior Use Rule, B is treated as previously having a depreciable interest in Equipment #1 because B (a member of the Parent group) acquired Equipment #1 and S, while a member of the Parent group, had a depreciable interest in Equipment #1 within the lookback period. In addition, B acquires Equipment #1 from S, and B and S are Related at the time of the acquisition. Accordingly, B is not eligible to claim the additional first year depreciation deduction for Equipment #1 in 2018.

(2) *Example 2: Sale outside of the consolidated group followed by a reacquisition within the lookback period*—(i) *Facts.* S has a depreciable interest in Equipment #2. In 2018, S sells Equipment #2 to G. In 2019, in an unrelated transaction, B acquires Equipment #2 from G and places it in service in the same year.

(ii) *Analysis.* B's acquisition of Equipment #2 does not satisfy the No Prior Use Requirement as a result of the Group Prior Use Rule. Pursuant to the Group Prior Use Rule, B is treated as previously having a depreciable interest in Equipment #2 because B is a member of the Parent group and S, while a member of the Parent group, had a depreciable interest in Equipment #2 within the lookback period. Thus, B is not eligible to claim the additional first year depreciation deduction for Equipment #2 in 2019. The result would be the same if, after selling Equipment #2 to G, S had ceased to be a member of the Parent group prior to B's acquisition of Equipment #2.

(iii) *Sale outside of the consolidated group followed by a reacquisition beyond the lookback period.* The facts are the same as in paragraph (d)(2)(i) of this section, except that B acquires Equipment #2 and places it in service in 2024 instead of 2019. B's acquisition of Equipment #2 satisfies the No Prior Use Requirement. B would not be treated as previously having a depreciable interest in Equipment #2 under the Group Prior Use Rule because the Parent group did not have a depreciable interest in Equipment #2 within the lookback period. Further, B itself did not have a prior depreciable interest in Equipment #2 within the lookback period. Assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation deduction for Equipment #2 in 2024. The result would be the same if S, rather than B, acquired and placed in service Equipment #2 in 2024.

(3) *Example 3: Acquisition of eligible property by the consolidated group followed by a corporation with a prior depreciable interest joining the group as part of the same series of related transactions*—(i) *Facts.* G has a depreciable interest in Equipment #3. During 2018, G sells Equipment #3 to U. In a series of related transactions that does not include the 2018 sale, Parent acquires all of the stock of G in 2019. Later in 2019, B purchases Equipment #3 from U and places it in service immediately thereafter.

(ii) *Analysis.* B's acquisition of Equipment #3 does not satisfy the No Prior Use Requirement as a result of the Stock and Asset Acquisition Rule. In a series of related transactions, G became a member of the Parent group and B acquired Equipment #3. Because G had a depreciable interest in Equipment #3 within the lookback period, B is treated as having a depreciable interest in Equipment #3 under the Stock and Asset Acquisition Rule. Thus, B is not eligible to claim the additional first year depreciation deduction for Equipment #3 in 2019.

(iii) *B purchases Equipment #3 in 2024.* The facts are the same as in paragraph (d)(3)(i) of this section, except that B acquires and places in service Equipment #3 in 2024 instead of 2019. B is not treated under the Stock and Asset Acquisition Rule as having a prior depreciable interest in Equipment #3 because G (which sold Equipment #3 to U in 2018) did not have a depreciable interest in Equipment #3 within the lookback period. In addition, B is not treated under the Group Prior Use Rule as having a prior depreciable interest in

Equipment #3 at the time of the purchase because neither G nor any other member of the Parent group had a depreciable interest in Equipment #3 while a member of the Parent group within the lookback period. Further, B itself did not have a depreciable interest in Equipment #3 within the lookback period. Accordingly, B's acquisition of Equipment #3 satisfies the No Prior Use Requirement. Assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation deduction for Equipment #3 in 2024.

(iv) *No series of related transactions.* The facts are the same as in paragraph (d)(3)(i) of this section, except that Parent's acquisition of the G stock and B's purchase of Equipment #3 are not part of the same series of related transactions. Because B's purchase of Equipment #3 and Parent's acquisition of the G stock did not occur pursuant to the same series of related transactions, the Stock and Asset Acquisition Rule does not apply. In addition, B is not treated under the Group Prior Use Rule as having a prior depreciable interest in Equipment #3 at the time of the purchase because neither G nor any other member of the Parent group had a depreciable interest in Equipment #3 while a member of the Parent group within the lookback period. Further, B itself did not have a depreciable interest in Equipment #3 within the lookback period. Accordingly, B's acquisition of Equipment #3 satisfies the No Prior Use Requirement. Assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation deduction for Equipment #3 in 2019.

(4) *Example 4: Termination of the consolidated group*—(i) *Facts.* S owns Equipment #4. In 2018, S sells Equipment #4 to U. In 2019, X acquires all of the stock of Parent in a transaction that causes the Parent group to terminate and Parent, B, and S to become members of the X group. In 2020, in a transaction that is not part of a series of related transactions, B purchases Equipment #4 from U and places it in service in the same year.

(ii) *Analysis.* B's acquisition of Equipment #4 satisfies the No Prior Use Requirement. The Group Prior Use Rule does not apply to treat B as having a prior depreciable interest in Equipment #4 because B is a member of the X group and no member of the X group had a depreciable interest in Equipment #4 while a member of the X group within the lookback period. Further, B itself did not have a prior depreciable interest in Equipment #4 within the lookback period. Assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation deduction for Equipment #4 in 2020.

(iii) *S purchases Equipment #4 in 2020.* The facts are the same as in paragraph (d)(4)(i) of this section, except that S rather than B purchases and places in service Equipment #4 in 2020. S's purchase of Equipment #4 does not satisfy the No Prior Use Requirement because S had a depreciable interest in Equipment #4 within the lookback period. Thus, S is not eligible to claim the additional first year depreciation deduction for Equipment #4 in 2020.

(iv) *Acquisitions are part of the same series of related transactions.* The facts are the same as in paragraph (d)(4)(i) of this section, except that X's acquisition of the Parent stock and B's purchase of Equipment #4 are part of the same series of related transactions. Thus, pursuant to the same series of related transactions, S became a member of the X group and B (another member of the X group) acquired Equipment #4. Because S had a depreciable interest in Equipment #4 within the lookback period, B is treated as having a depreciable interest in Equipment #4 under the Stock and Asset Acquisition Rule. As a result, B's acquisition of Equipment #4 does not satisfy the No Prior Use Requirement, and B is not eligible to claim the additional first year depreciation deduction for Equipment #4 in 2020.

(5) *Example 5: Intercompany sale of eligible property followed by sale of B stock as part of the same series of related transactions*—(i) *Facts.* S has a depreciable interest in Equipment #5. On January 1, 2019, B purchases Equipment #5 from S and places it in service. On June 1, 2019, as part of the same series of related transactions that includes B's purchase of Equipment #5, Parent sells all of the stock of B to X. Thus, B leaves the Parent group at the end of the day on June 1, 2019, and B is a member of the X group starting June 2, 2019. See § 1.1502–76(b). As of June 1, 2019, Equipment #5 remains eligible property.

(ii) *Analysis*—(A) *Application of the Consolidated Asset Acquisition Rule.* B was a member of the Parent group when it acquired Equipment #5. Because S, another member of the Parent group, had a depreciable interest in Equipment #5 while a member of the group within the lookback period, B would be treated as having a prior depreciable interest in Equipment #5 under the Group Prior Use Rule and B's acquisition of Equipment #5 would not satisfy the No Prior Use Requirement. However, B's acquisition of Equipment #5 satisfies the requirements of the Consolidated Asset Acquisition Rule in paragraph (c)(1)(ii) of this section. First, B's acquisition of Equipment #5 meets the requirements of § 1.168(k)–2(b)(3)(iii)(A) without regard to the related-party tests under section 179(d)(2)(A) or (B) and § 1.179–4(c)(1)(ii) or (iii) or the Group Prior Use Rule. Second, as part of the same series of related transactions that includes B's acquisition of Equipment #5, B ceases to be a member of the Parent group and ceases to be Related to S. Third, Equipment #5 continues to be eligible property on the deconsolidation date (June 1, 2019).

(B) *Consequences of the Consolidated Asset Acquisition Rule.* Under the Consolidated Asset Acquisition Rule, B is treated for all Federal income tax purposes as transferring Equipment #5 to an unrelated person on June 2, 2019, in exchange for an amount of cash equal to the deemed sale amount and, immediately thereafter, acquiring deemed replacement property (New Equipment #5) from an unrelated person for an amount of cash equal to the deemed sale amount. Accordingly, assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation for an amount equal to the deemed sale amount for the taxable year in which it places New Equipment #5 in service.

(iii) *Distribution of B.* The facts are the same as in paragraph (d)(5)(i) of this section, except that, on June 1, 2019, Parent distributes the stock of B to its shareholders (which are not Related to S) in a distribution that qualifies for nonrecognition under section 355(a). Accordingly, the Consolidated Asset Acquisition Rule applies. As in paragraph (d)(5)(ii)(B) of this section, assuming all other requirements in § 1.168(k)–2 are satisfied, B is eligible to claim the additional first year depreciation deduction for an amount equal to the deemed sale amount for the taxable year in which it places New Equipment #5 in service.

(iv) *Equipment #5 ceases to be eligible property.* The facts are the same as in paragraph (d)(5)(i) of this section, except that, on June 1, 2019, Equipment #5 is no longer eligible property. The Consolidated Asset Acquisition Rule does not apply because B's acquisition of Equipment #5 fails to satisfy the requirement in paragraph (c)(1)(ii)(C) of this section that the acquired eligible property continue to be eligible property on the deconsolidation date. Therefore, B's acquisition of Equipment #5 on January 1, 2019, fails to satisfy the No Prior Use Requirement. Under the Group Prior Use Rule, B is treated as

having a prior depreciable interest in Equipment #5 because B is a member of the Parent group and S, while a member of the Parent group, had a depreciable interest in Equipment #5 within the lookback period. Accordingly, B is not eligible to claim the additional first year depreciation deduction with respect to Equipment #5 in 2019.

(6) *Example 6: Intercompany sale of member stock for which a section 338(h)(10) election is made followed by sale of B stock as part of a series of related transactions*—(i) *Facts.* S owns all of the stock of T, which has a depreciable interest in Equipment #6. On January 1, 2019, B purchases all of the T stock from S in a qualified stock purchase for which a section 338(h)(10) election is made. On June 1, 2019, as part of the same series of related transactions that includes B's purchase of the T stock, Parent sells all of the stock of B to X. Thus, B and T leave the Parent group at the end of the day on June 1, 2019, and B and T are members of the X group starting June 2, 2019. See § 1.1502–76(b). As of June 1, 2019, Equipment #6 remains eligible property.

(ii) *Analysis*—(A) *Section 338(h)(10) election.* Pursuant to the section 338(h)(10) election, Old T is treated as transferring all of its assets, including Equipment #6, to an unrelated person in a single transaction in exchange for consideration at the close of the acquisition date (January 1, 2019), and New T is treated as acquiring all of its assets, including Equipment #6, from an unrelated person in exchange for consideration. Old T is deemed to liquidate following the deemed asset sale. See § 1.338–1(a)(1).

(B) *Application of the Consolidated Deemed Acquisition Rule.* New T was a member of the Parent group when New T acquired Equipment #6 from an unrelated person. Because Old T, another member of the Parent group, had a depreciable interest in Equipment #6 while a member of the group within the lookback period, New T would be treated as having a prior depreciable interest in Equipment #6 under the Group Prior Use Rule and New T's acquisition of Equipment #6 would not satisfy the No Prior Use Requirement. However, New T's acquisition of Equipment #6 satisfies the requirements of the Consolidated Deemed Acquisition Rule in paragraph (c)(2)(ii) of this section. First, New T's acquisition of Equipment #6 meets the requirements of § 1.168(k)–2(b)(3)(iii)(A) without regard to the Group Prior Use Rule. Second, as part of the same series of related transactions that includes B's qualified stock purchase of the T stock, B and New T cease to be members of the Parent group and cease to be Related to S. Third, Equipment #6 continues to be eligible property on the deconsolidation date (June 1, 2019).

(C) *Consequences of the Consolidated Deemed Acquisition Rule.* Under the Consolidated Deemed Acquisition Rule, New T is treated for all Federal income tax purposes as transferring Equipment #6 to an unrelated person on June 2, 2019, in exchange for an amount of cash equal to the deemed sale amount and, immediately thereafter, acquiring deemed replacement property (New Equipment #6) from an unrelated person for an amount of cash equal to the deemed sale amount. Accordingly, assuming all other requirements in § 1.168(k)–2 are satisfied, New T is eligible to claim the additional first year depreciation deduction for an amount equal to the deemed sale amount for the taxable year in which it places New Equipment #6 in service.

(iii) *T owns multiple assets.* The facts are the same as in paragraph (d)(6)(i) of this section, except that, in addition to Equipment #6, T also owns Asset A (depreciable real estate that is not eligible property). With respect to Equipment #6, the results are the same as in paragraph (d)(6)(ii) of this section. However, the Consolidated Deemed Acquisition Rule does not apply to Asset A because it is not eligible property. Accordingly, New T is not treated as transferring Asset A to an unrelated person on June 2, 2019 and then, immediately thereafter, acquiring deemed replacement property for Asset A. If Equipment #6 had ceased to be eligible property as of June 1, 2019, the Consolidated Deemed Acquisition Rule also would not apply to Equipment #6.

(7) *Example 7: Section 355 transaction following a section 338(h)(10) transaction pursuant to the same series of related transactions*—(i) *Facts.* T has a depreciable interest in Equipment #7. On January 1, 2019, Parent contributes all of the stock of T to B in exchange for common and non-voting preferred stock of B and sells the non-voting preferred stock of B to U pursuant to a binding commitment entered into prior to the contribution (T Exchange). The non-voting preferred stock is not treated as ''stock'' for purposes of section 1504(a). See section 1504(a)(4). Parent and B jointly make an election under section 338(h)(10) with respect to the T Exchange. On June 1, 2019, as part of the same series of related transactions that includes the T Exchange, Parent contributes the stock of B and assets comprising an active trade or business (within the meaning of section 355(b)) to Controlled in exchange for Controlled common stock and then distributes the Controlled common stock to Parent's shareholders in a distribution qualifying under section 355(a) (Controlled Distribution). In the Controlled Distribution, T and B cease to be Related to Parent. Equipment #7 remains eligible property on June 1, 2019.

(ii) *Section 338(h)(10) election.* Immediately after the Controlled Distribution, Parent and B are not related as determined under section 338(h)(3)(A)(iii). Further, B's basis in the T stock is not determined, in whole or in part, by reference to the adjusted basis of the T stock in the hands of Parent, and the stock is not acquired in an exchange to which section 351, 354, 355, or 356 applies. Accordingly, the T Exchange qualifies as a ''purchase'' within the meaning of section 338(h)(3). Pursuant to the section 338(h)(10) election, Old T is treated as transferring all of its assets, including Equipment #7, to an unrelated person in a single transaction in exchange for consideration at the close of the acquisition date (January 1, 2019), and New T is treated as acquiring all of its assets, including Equipment #7, from an unrelated person in exchange for consideration. Old T is deemed to liquidate following the deemed asset sale. See § 1.338–1(a)(1).

(iii) *Application of the Consolidated Deemed Acquisition Rule.* New T was a member of the Parent group when New T acquired Equipment #7 from an unrelated person. Because Old T, another member of the Parent group, had a depreciable interest in Equipment #7 while a member of the group within the lookback period, New T would be treated as having a prior depreciable interest in Equipment #7 under the Group Prior Use Rule and New T's acquisition of Equipment #7 would not satisfy the No Prior Use Requirement. However, New T's acquisition of Equipment #7 satisfies the requirements of the Consolidated Deemed Acquisition Rule in paragraph (c)(2)(ii) of this section. Thus, New T is treated for all Federal income tax purposes as transferring Equipment #7 to an unrelated person on June 2, 2019, in exchange for an amount of cash equal to the deemed sale amount and, immediately thereafter, acquiring deemed replacement property (New Equipment #7) from an unrelated person for an amount of cash equal to the deemed sale amount. Accordingly, assuming all other requirements in § 1.168(k)–2 are satisfied, New T is eligible to claim the additional first year depreciation deduction for an amount equal to the deemed sale amount for the

taxable year in which it places New Equipment #7 in service.

(e) *Applicability dates*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, this section applies to—

(i) Depreciable property acquired after September 27, 2017, by the taxpayer and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021;

(ii) A specified plant for which the taxpayer properly made an election to apply section 168(k)(5) and that is planted, or grafted to a plant that was previously planted, by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021; and

(iii) Components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in § 1.168(k)–2(c)(2) and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021.

(2) *Early application of this section and § 1.168(k)–2*—(i) *In general.* Subject to paragraphs (e)(2)(ii) and (iii) of this section, and provided that all members of a consolidated group consistently apply the same set of rules, a taxpayer may choose to apply both the rules of this section and the rules of § 1.168(k)–2, in their entirety and in a consistent manner, to—

(A) Depreciable property acquired after September 27, 2017, by the taxpayer and placed in service by the taxpayer during a taxable year ending on or after September 28, 2017;

(B) A specified plant for which the taxpayer properly made an election to apply section 168(k)(5) and that is planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during a taxable year ending on or after September 28, 2017; and

(C) Components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in § 1.168(k)–2(c)(2) and placed in service by the taxpayer during a taxable year ending on or after September 28, 2017.

(ii) *Early application to certain transactions.* In the case of property described in paragraph (e)(2)(i) of this section that is acquired in a transaction that satisfies the requirements of paragraph (c)(1)(ii) or (c)(2)(ii) of this section, the taxpayer may apply the rules of this section and the rules of § 1.168(k)–2, in their entirety and in a consistent manner, to such property only if those rules are applied, in their entirety and in a consistent manner, by all parties to the transaction (including the transferor member, the transferee member, and the target, as applicable) and the consolidated groups of which they are members, for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the deconsolidation date.

(iii) *Bound by early application.* Once a taxpayer applies the rules of this section and the rules of § 1.168(k)–2, in their entirety, for a taxable year, the taxpayer must continue to apply the rules of this section and the rules of § 1.168(k)–2, in their entirety, for the taxpayer's subsequent taxable years.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: September 16, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

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Part IV

Commodity Futures Trading Commission

17 CFR Part 4

Compliance Requirements for Commodity Pool Operators on Form CPO–PQR; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AE98

Compliance Requirements for Commodity Pool Operators on Form CPO–PQR

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting amendments (the Final Rule) to Commission regulations on additional reporting by commodity pool operators (CPOs) and commodity trading advisors and to Form CPO–PQR (also, the form). The Commission is: Eliminating existing Schedules B and C of Form CPO–PQR, except for the Pool Schedule of Investments; amending the information requirements and instructions to request Legal Entity Identifiers (LEIs) for CPOs and their operated pools that have them, and to delete questions regarding pool auditors and marketers; and making certain other changes due to the rescission of Schedules B and C, including the elimination of all existing reporting thresholds. Pursuant to the Final Rule, all reporting CPOs will be required to file the revised Form CPO–PQR (Revised Form CPO–PQR, or the Revised Form) quarterly. The Final Rule also amends Commission regulations to permit reporting CPOs to file NFA Form PQR, a comparable form required by the National Futures Association (NFA), in lieu of filing the Commission's Revised Form. Conversely, Form PF will no longer be accepted in lieu of the Revised Form, though it will remain a Commission form.

DATES: *Effective Date:* The effective date for the Final Rule, including the adoption of the Revised Form, is December 10, 2020.

Compliance Date: All reporting CPOs will be required to file the Revised Form with respect to their operated pools for the first calendar quarter of 2021, which ends on March 31, 2021. The deadline for filing the Revised Form for that reporting period is sixty days after the quarter-end, or May 30, 2021.

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I. Introduction and Background

Section 1a(11) of the Commodity Exchange Act (CEA or the Act) [1] defines the term ''commodity pool operator,'' as any person [2] engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests.[3] CEA section 4m(1) generally requires each person who satisfies the CPO definition to register as such with the Commission.[4] CEA section 4n(3)(A) requires registered CPOs to maintain books and records and file such reports in such form and manner as may be prescribed by the Commission.[5]

Following the enactment in 2010 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [6] and subsequent joint adoption with the Securities and Exchange Commission (SEC) of Form PF (Joint Form PF) for advisers to large private funds,[7] the CFTC adopted a new reporting requirement for CPOs through Commission regulation at § 4.27, which, among other things, requires certain CPOs to report periodically on Form CPO–PQR.[8] The Commission proposed this new reporting requirement after reevaluating its regulatory approach to CPOs due to the 2008 financial crisis and the purposes and goals of the Dodd-Frank Act in light of the then-current economic environment. Amendments to the CPO regulatory program adopted at that time, including Form CPO–PQR and § 4.27, were intended to: (1) Align the Commission's regulatory structure for CPOs with the purposes of the Dodd-Frank Act; (2) encourage more congruent and consistent regulation by Federal financial regulatory agencies of similarly-situated entities, such as dually registered CPOs required to file Joint Form PF; (3) improve accountability and increase transparency of the activities of CPOs and the commodity pools that they operate or advise; and (4) facilitate a data collection that would potentially assist the Financial Stability Oversight

[1] 7 U.S.C. 1a(11). The Act is found at 7 U.S.C. 1, *et seq.* (2018), and is accessible through the Commission's website, *https://www.cftc.gov.*

[2] 7 U.S.C. 1a(38); 17 CFR 1.3, ''person'' (defining ''person'' to include individuals, associations, partnerships, corporations, and trusts). The Commission's regulations are found at 17 CFR ch. I (2020), and are accessible through the Commission's website, *https://www.cftc.gov.*

[3] 7 U.S.C. 1a(11); *see also* 17 CFR 1.3, ''commodity pool operator.''

[4] 7 U.S.C. 6m(1).

[5] 7 U.S.C. 6n(3)(A). Registered CPOs have regulatory reporting obligations with respect to their operated pools. *See, e.g.,* 17 CFR 4.22.

[6] Public Law 111–203, 124 Stat. 1376 (2010).

[7] Section 202(a)(29) of the Investment Advisers Act of 1940 (Advisers Act) defines the term ''private fund'' as ''an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.'' Advisers Act Section 202(a)(29), 15 U.S.C. 80ab–2(a)(29).

[8] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012) (Form CPO–PQR Final Rule); 17 CFR part 4, app. A; 17 CFR 4.27.

Counsel (FSOC).[9] To that end, the requirements of Form CPO–PQR were modeled closely after those of Joint Form PF.[10]

In adopting Form CPO–PQR, the Commission indicated that the collected data would be used for several broad purposes, including: (1) Increasing the Commission's understanding of its registrant population; (2) assessing the market risk associated with pooled investment vehicles under its jurisdiction; and (3) monitoring for systemic risk.[11] Specifically, the Commission was interested in receiving information regarding the operations of CPOs and their pools, including their participation in commodity interest markets, their relationships with intermediaries, and their interconnectedness with the financial system at large.[12] In proposing the majority of the more pool-specific questions in the form, in particular, the Commission believed the incoming data would assist it in monitoring commodity pools in such a way as to allow the Commission to identify trends over time, including a pool's exposure to asset classes, the composition and liquidity of a commodity pool's portfolio, and a pool's susceptibility to failure in times of stress.[13] Although the Commission recognized that the requested data may have some limitations, it believed that, in light of the 2008 financial crisis and the sources of risk delineated in the Dodd-Frank Act with respect to private funds, the detailed, pool-specific information to be collected by Form CPO–PQR was both necessary and appropriately balanced to assess the risks posed by a single pool, or a CPO's operations as a whole.[14]

On April 16, 2020, the Commission unanimously approved, and, on May 4, 2020, subsequently published in the **Federal Register**, a notice of proposed rulemaking (Proposal or NPRM) that proposed to amend both Commission § 4.27 and Form CPO–PQR.[15] In the Proposal, the Commission stated that, after seven years of experience with the form, the Commission was reassessing the form's scope and alignment with the Commission's current regulatory priorities.[16] The Commission explained that its ability to make full use of the more detailed information collected under the form has not met the Commission's initial expectations.[17] The Commission emphasized that, since the form's adoption, it has devoted substantial resources to developing other data streams and regulatory initiatives, which are designed to enhance the Commission's ability to broadly surveil financial markets for risk posed by *all* manner of market participants, including CPOs and their operated pools.[18]

Thus, as further explained in the discussion that follows, the Commission has concluded that the form should be revised to better facilitate the Commission's oversight of CPOs and their operated pools, as well as its coordination of other Commission data streams and regulatory initiatives, while reducing the overall reporting burdens for CPOs required to file the Revised Form.

A. Overview of Form CPO–PQR, as Originally Adopted

Pursuant to § 4.27, any CPO registered or required to be registered with the Commission is a ''reporting person,'' except for a CPO that operates only pools for which it maintains an exclusion from the CPO definition available under § 4.5, and/or an exemption from CPO registration available under § 4.13.[19] The amount of information that a reporting CPO has been required to disclose on the form varies depending on the size of the operator and the quantity and size of the operated pools.[20]

The form, as adopted in 2012, identifies three classes of filers: Large CPOs, Mid-Sized CPOs, and Small CPOs. The thresholds for determining Large and Mid-Sized CPO status, and thus their reporting obligations, generally align with those in Joint Form PF.[21] A Large CPO is a CPO that had at least $1.5 billion in aggregated pool assets under management (AUM)[22] as of the close of business on any day during the reporting period; a Mid-Sized CPO is a CPO that had at least $150 million, but less than $1.5 billion, in aggregated pool AUM as of the close of business on any day during the reporting period.[23] Although not defined in the form, ''Small CPO,'' as used herein, refers to a CPO that had less than $150 million in aggregated pool AUM during the reporting period. The reporting period for Large CPOs is any of the individual calendar quarters (ending March 31, June 30, September 30, and December 31), whereas, for Small and Mid-Sized CPOs, the reporting period is the calendar year.[24]

Prior to the Final Rule amendments adopted herein, Form CPO–PQR consisted of three schedules: Schedules A, B, and C.[25] Schedule A requires reporting CPOs to disclose basic identifying information about the CPO (Part 1) and about each of the CPO's pools and the service providers they use (Part 2).[26] Consistent with the ''Reporting Period'' definitions described above, Large CPOs submit Schedule A on a quarterly basis, whereas all other reporting CPOs submit it annually.[27] Schedule B requires additional detailed information for each pool operated by Mid-Sized and Large CPOs, in particular regarding each operated pool's investment strategy, borrowings and types of creditors, counterparty credit exposure, trading and clearing mechanisms, value of aggregated derivative positions, and

[9] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 76 FR 7976, 7978 (Feb. 11, 2011) (Form CPO–PQR Proposal).

[10] *Id.* (''The Commission proposes [Form CPO–PQR] to solicit information that is generally identical to that sought through Form PF''). Commission regulation at § 4.27 further permits the filing of Joint Form PF in lieu of Commission filing requirements (*i.e.,* Form CPO–PQR) for CPOs that are dually registered with the SEC as investment advisers. 17 CFR 4.27(d).

[11] Form CPO–PQR Final Rule, 77 FR 11253–54 (Feb. 24, 2012).

[12] *Id.* at 77 FR 11266–67 (Feb. 24, 2012).

[13] Form CPO–PQR Proposal, 76 FR at 7981 (Feb. 11, 2011).

[14] *Id.*

[15] Amendments to Compliance Requirements for Commodity Pool Operators on Form CPO–PQR, 85 FR 26378 (May 4, 2020) (2020 CPO–PQR NPRM).

[16] 2020 CPO–PQR NPRM, 85 FR at 26380 (May 4, 2020).

[17] *Id.*

[18] *Id.*

[19] 17 CFR 4.27(b)(1)(i); *see also* 17 CFR 4.27(b)(2)(i) (establishing that CPOs operating only pools for which they claim relief under 17 CFR 4.5 or 4.13 are not considered ''reporting persons'' for purposes of the Form CPO–PQR filing requirement).

[20] *See generally* 17 CFR part 4 app. A, ''Reporting Instructions.''

[21] *See generally* Instructions to Form PF, available at *http://www.sec.gov/about/forms/formpf.pdf.* Private fund investment advisers with ''regulatory AUM,'' as that term is defined in Joint Form PF, of at least $150 million are required to file Section 1 of Joint Form PF; private fund investment advisers with regulatory AUM equal to or exceeding $1.5 billion are required to file Sections 1 and 2 of Joint Form PF. *Id.*

[22] As used in the form, AUM refers to the amount of all assets that are under the control of the CPO. 17 CFR part 4, app. A, ''Definitions of Terms'' (providing specific definitions for terminology used in the form, including AUM). The ''Definitions of Terms'' section of the form is renamed by this Final Rule ''Defined Terms'' in the Revised Form.

[23] *Id.*

[24] *Id.* (defining ''Reporting Period''). The form additionally defines, ''Reporting Date,'' as the last calendar day of the Reporting Period for which this Form CPO–PQR is required to be completed and filed,'' *e.g.,* ''the Reporting Date for the first calendar quarter of a year is March 31. *Id.* For Mid-Sized and Small CPOs, their Reporting Date would therefore be December 31. *Id.*

[25] 17 CFR part 4, app. A, ''Reporting Instructions.''

[26] *Id.* at ''Reporting Instructions,'' no. 2.

[27] *Id.*

schedule of investments.[28] Large CPOs also submit Schedule B on a quarterly basis; Mid-Sized CPOs are required to complete and submit Schedule B annually.[29]

Schedule C requires further detailed information about the pools operated by Large CPOs on an aggregate and pool-by-pool basis. Part 1 of Schedule C requires aggregate information for all pools operated by a Large CPO, including (1) a geographical breakdown of the pools' investment on an aggregated basis, and (2) the turnover rate of the aggregate portfolio of pools.[30] Part 2 of Schedule C requires certain detailed information for each ''Large Pool'' the Large CPO operates,[31] where a ''Large Pool'' is a commodity pool that has a net asset value (NAV)[32] individually, or in combination with any parallel pool structure,[33] of at least $500 million as of the close of business on any day during the reporting period.[34] Specifically, Part 2 requires information with respect to each Large Pool the Large CPO operates during the given reporting period; this section of the form elicits information regarding the Large Pool's: (1) Identity; (2) liquidity; (3) counterparty credit exposure; (4) risk metrics; (5) borrowing; (6) derivative positions and posted collateral; (7) financing liquidity; (8) participant information; and (9) the duration of its fixed income assets.[35] Large CPOs complete and file Schedule C on a quarterly basis: This filing includes Part 1 of Schedule C, as well as a separate Part 2 for each Large Pool that a Large CPO operates during the reporting period.[36] If a CPO is also registered with the SEC as an investment adviser, and is therefore required to file Joint Form PF regarding its advisory services to private funds,[37] the CPO is deemed to have satisfied its Schedule B and C filing requirements, provided that the CPO completes and files the referenced sections of Joint Form PF with respect to the pool(s) operated during the reporting period.[38]

In addition to Joint Form PF and Form CPO–PQR, in 2010, NFA adopted and implemented its own NFA Form PQR to elicit data in support of NFA's risk-based examination program for its CPO membership.[39] Pursuant to NFA Compliance Rule 2–46, all CPO NFA members, which includes all CPOs registered with the Commission, must file NFA Form PQR on a quarterly basis with respect to all of their operated pools.[40] NFA accepts the filing of Form CPO–PQR (but not Joint Form PF) in lieu of filing NFA Form PQR for any quarter in which a Form CPO–PQR filing is required under § 4.27.[41] Consequently, dually registered CPO-investment advisers that file Joint Form PF in lieu of a Form CPO–PQR filing, consistent with § 4.27(d), as it reads prior to these Final Rule amendments, are also required to file NFA Form PQR with NFA quarterly.

B. The Proposal

As noted above, the Commission published the NPRM on May 4, 2020, proposing substantial revisions to Form CPO–PQR, as well as several amendments to § 4.27.[42] Specifically, the Commission proposed to eliminate the requirement to complete and submit Schedules B or C of the form, with the exception of the Pool Schedule of Investments (PSOI) (currently, question 6 of Schedule B). The Commission proposed to retain the questions set forth in current Schedule A with certain amendments, notably the addition of questions regarding LEIs, and the deletion of questions regarding pool marketers and auditors.[43] Thus, the Commission proposed the Revised Form consisting of a revised Schedule A, plus the PSOI and the instructions and definitions in the current form that remain relevant.[44] The Proposal required all reporting CPOs to file the Revised Form on a quarterly basis, regardless of AUM or size of operations, and such reporting CPOs would be permitted to file NFA Form PQR in lieu of the Revised Form.[45] The Proposal included an amendment to § 4.27(d) that would eliminate the substituted compliance currently available for dually registered CPO-investment advisers required to file Joint Form PF with respect to their operated private funds, while retaining Joint Form PF as a Commission form. The comment period for the Proposal expired on June 15, 2020, and the Commission received ten relevant[46] comment letters: Two from individuals; one from a registered futures association; and seven from industry professional and trade associations.[47]

[28] 17 CFR part 4, app. A, Sched. B, ''Detailed Information About the Pools Operated by Mid-Sized CPOs and Large CPOs.''

[29] 17 CFR part 4, app. A, ''Reporting Instructions,'' no. 2.

[30] 17 CFR part 4, app. A, Sched. C, pt. 1.

[31] 17 CFR part 4, app. A, Sched. C, pt. 2, ''Information About the Large Pools of Large CPOs.''

[32] As used in Form CPO–PQR, the term ''net asset value'' has the same meaning as in § 4.10(b). *See* 17 CFR 4.10(b) (defining ''net asset value'' as total assets minus total liabilities, determined in accord with generally accepted accounting principles, with each position in a commodity interest transaction accounted for at a fair market value).

[33] As used in the form, the term ''parallel pool structure'' means any structure in which one or more Pools pursues substantially the same investment objective and strategy and invests side by side in substantially the same assets as another Pool. 17 CFR part 4, app. A, ''Definitions of Terms.''

[34] 17 CFR part 4, app. A, Sched. C, pt. 2, ''Information About the Large Pools of Large CPOs.''

[35] *Id.*

[36] 17 CFR part 4, app. A, ''Reporting Instructions,'' no. 2.

[37] As used in the form, the term ''private fund'' has the same meaning as the definition of ''private fund'' in Joint Form PF. 17 CFR part 4, app. A, ''Definitions of Terms.''

[38] 17 CFR part 4, app. A, ''Reporting Instructions,'' no. 2.

[39] NFA Compliance Rule 2–46 (2017), *available at https://www.nfa.futures.org/rulebook/rules.aspx?RuleID=RULE%202-46&Section=4* (noting this rule was initially adopted effective March 31, 2010, and subsequently amended in 2013, 2016, and most recently, 2017). Commission regulations require each person registered as a CPO to become and remain a member of at least one registered futures association, of which there is currently one, *i.e.,* NFA. 17 CFR 170.17.

[40] NFA Compliance Rule 2–46(a). CFTC staff has previously advised that reporting CPOs should exclude all pools operated subject to relief provided in either 17 CFR 4.5 or 4.13 from their Form CPO–PQR filings, including with respect to any applicable reporting threshold calculations. CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CPO–PQR (Nov. 5, 2015), *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf* (2015 CPO–PQR FAQs). NFA Form PQR similarly focuses its data collection efforts on the listed pools of registered CPO Members. NFA may, however, use NFA Form PQR to collect information beyond that collected by the Commission's Revised Form. *See, e.g.,* NFA Compliance Rule 2–46(b). Nothing in the Commission's Proposal or the Final Rule restricts NFA's ability to require reporting beyond that required by the Commission, provided that such NFA requirements are consistent with the CEA and Commission regulations promulgated thereunder. *See* 7 U.S.C. 17(j).

[41] NFA Compliance Rule 2–46(b).

[42] 2020 CPO–PQR NPRM.

[43] 2020 CPO–PQR NPRM, 85 FR at 26381, 26383 (May 4, 2020).

[44] 2020 CPO–PQR NPRM, 85 FR at 26381 (May 4, 2020).

[45] 2020 CPO–PQR NPRM, 85 FR at 26381 and 26389 (May 4, 2020) (proposing to amend § 4.27(c)(1) by adding substituted compliance for this filing requirement with respect to NFA Form PQR).

[46] The Commission received a total of 14 comment letters, four of which were either spam or otherwise not substantively relevant to the Proposal in any respect.

[47] Comments were submitted by Mr. Chris Barnard (Barnard) (May 8, 2020); NFA (June 10, 2020); the Alternative Investment Management Association (AIMA) (June 11, 2020); the Depository Trust and Clearing Corporation (DTCC) (June 15, 2020); the Global Legal Entity Identifier Foundation (GLEIF) (June 15, 2020); the Managed Funds Association (MFA) (June 15, 2020); the Investment Adviser Association (IAA) (June 15, 2020); the Securities Industry and Financial Market Association Asset Management Group (SIFMA AMG) (June 15, 2020); Ms. Talece Y. Hunter (Hunter) (June 15, 2020); and the Investment Company Institute (ICI) (June 15, 2020). The complete comment file for the 2020 CPO–PQR NPRM can be found on the Commission's website. Comments for Proposed Rule 85 FR 26378 (May 4, 2020), available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?3098.*

II. Final Rule

A. General Comments and Adopting the Revised Form

The comments that the Commission received were, in general, strongly supportive of the Proposal.[48] Commenters largely agreed with the proposed amendments and viewed the proposal of the Revised Form as a ''helpful improvement to the current system.'' [49] Multiple commenters stated that the Proposal, if adopted, would simplify CPO reporting requirements, significantly reduce filers' reporting burdens, increase the regulatory integrity and utility of the data collected by the Revised Form, and serve as a critical step in the development of a ''holistic market surveillance program,'' with respect to registered CPOs and the pools they operate.[50] Similarly, NFA stated its support of ''the Commission's efforts to streamline and simplify the reporting requirements for CPOs,'' and its belief that ''the [P]roposal will satisfy the Commission's goal of reducing reporting requirements in a manner that continues to facilitate effective oversight of CPOs and the pools they operate.'' [51]

Although MFA stated its preference for a consolidated form for both SEC and CFTC filings with respect to pooled investment vehicles and their operators or advisers, MFA nonetheless expressed its strong support for the Proposal's Revised Form.[52] Similarly, SIFMA AMG stated that the Proposal is well-aligned with the Commission's intended purpose for it, and subject to recommended revisions, strongly recommended it be adopted.[53] Encouraged by the Commission's proposed amendments eliminating significant pool-specific sections of the form, AIMA requested that the Commission consider further reducing the scope of the Revised Form, if at all possible.[54]

After considering the public comments received, the Commission has determined to adopt the Revised Form and the amendments to § 4.27, largely as proposed, in furtherance of its regulatory goals with respect to registered CPOs and their operated pools,[55] for the reasons it explained in the Proposal.[56] Today's Final Rule constitutes the first of several steps in the Commission's ongoing reassessment of Form CPO–PQR, the substantive information it seeks to collect, and the form and manner in which the Commission collects and uses that information.

B. The Elimination of Schedules B and C From the Revised Form

In proposing to eliminate a majority of the pool-specific reporting requirements in Schedules B and C of Form CPO–PQR, the Commission observed that, challenges with the data collected in Schedules B and C, combined with the resource constraints of broader Commission priorities, have frustrated the Commission's ability to fully realize its vision for this data collection.[57] As described above, the eliminated data elements in Schedules B and C include detailed pool-specific information, asset liquidity and concentration of positions, clearing relationships, risk metrics, financing, and investor composition.[58] In explaining the proposed rescission of Schedules B and C, the Commission stated that its ability to identify trends across CPOs or pools using Form CPO–PQR data has been substantially challenged, due to the post hoc nature of the previous filings and the substantial amount of flexibility the Commission permitted for CPOs completing the form.[59] In the Proposal, the Commission noted that certain of its alternate data streams provide a more timely, standardized, and reliable view into relevant market activity than that provided under Form CPO–PQR, which make them much easier to combine into a holistic surveillance program.[60]

The proposed removal of Schedules B and C was broadly supported by commenters.[61] For instance, IAA supported the Commission's efforts to streamline the process, stating, ''We appreciate the CFTC tailoring the regulatory reporting requirements for CPOs to limit data collection that the Commission will make use of[,] and eliminating the more detailed information in Form CPO–PQR that has not been helpful for the CFTC's oversight purposes.'' [62] Furthermore, ICI concurred with the Commission that the agency's limited resources should not be spent on trying to make use of the ''voluminous and very specific pool-level data sought in Schedules B and C.'' [63] Expressing support for the elimination of Schedules B and C, as well as the retention of a revised PSOI for each pool, SIFMA AMG praised the Commission for recognizing ''lessons learned'' from seven years of experience with the form and the data it has elicited.[64] SIFMA AMG described the Proposal as a demonstration of the CFTC's consideration of the utility of the data currently collected by the form, and balancing that against the successful use of other Commission data streams, which were developed after the form was initially adopted.[65] In addition, SIFMA AMG strongly supported the adoption of a streamlined Revised Form for all CPOs and their pools, thereby eliminating the CPO and pool threshold calculations that dictated the scope and burden of each CPO's Form CPO–PQR filing.[66]

Due to the logistical and timing difficulties the Commission explained in detail in the NPRM,[67] the Commission has determined to forego the collection of the detailed information requested by Schedules B and C of Form CPO–PQR, in part, because the Commission was not able to fully incorporate the resulting data set into its oversight program for registered CPOs and their operated pools. The Commission acknowledges the strong support from commenters with respect to this particular amendment, and believes that, in conjunction with other amendments explained below, the Commission will receive more complete and usable data regarding reporting CPOs' pool operations due to the more targeted data collected in the Revised Form. Accordingly, Schedules B and C, along with all references to the thresholds associated therewith, have been removed in their entirety from the Revised Form adopted by the Final Rule.

[48] *See, e.g.,* DTCC, at 2.

[49] ICI, at 4 (noting that ''the Proposal would significantly reduce the reporting burdens to which registered fund CPOs are currently subject'').

[50] Hunter, at 1; AIMA, at 2; SIFMA AMG, at 2; Barnard, at 1.

[51] NFA, at 1.

[52] MFA, at 1–2.

[53] SIFMA AMG, at 2.

[54] AIMA, at 2–3 (stating also that AIMA welcomed the Proposal, instead of ''incremental and non-transformative change,'' and was ''in favour of making better use of data obtained through other reporting obligations'').

[55] Consistent with past Commission staff guidance, ''operated pools,'' as used in this document, means those pools for which a CPO is required to be registered with the Commission.

[56] 2020 CPO–PQR Proposal, 85 FR at 26381–84 (May 4, 2020).

[57] 2020 CPO–PQR NPRM, 85 FR at 26381 (May 4, 2020).

[58] 2020 CPO–PQR NPRM, 85 FR at 26380 (May 4, 2020).

[59] 2020 CPO–PQR NPRM, 85 FR at 26381 (May 4, 2020).

[60] 2020 CPO–PQR NPRM, 85 FR at 26382 (May 4, 2020).

[61] E.g., IAA, at 3–4; NFA, at 1–2.

[62] IAA, at 4.

[63] ICI, at 6.

[64] SIFMA AMG, at 4.

[65] SIFMA AMG, at 4–5.

[66] SIFMA AMG, at 6 (noting that these threshold calculations for CPO and pool size have proved difficult to practically apply and calculate).

[67] 2020 CPO–PQR NPRM, 85 FR at 26381 (May 4, 2020).

C. Adoption of the Proposed Schedule of Investments in the Revised Form

One of the specific questions posed by the Commission in the Proposal was: Should the Commission consider amending the Schedule of Investments to align with the simpler schedule that appeared in NFA Form PQR in 2010?[68] The Commission received several comments on the content of the proposed PSOI, including multiple recommendations that the Commission adopt a schedule in the Revised Form that aligned with the former Schedule of Investments originally adopted by NFA in 2010 for its NFA Form PQR (2010 Schedule of Investments).[69] The 2010 Schedule of Investments is less detailed than the PSOI currently in use by both Form CPO–PQR and NFA Form PQR.[70]

Several of the commenters argued that the detailed information required by the proposed PSOI is no longer necessary in the broader context of the Revised Form. For instance, NFA, in a comment that was supported by both MFA and ICI, supported aligning with the 2010 Schedule of Investments because a ''more streamlined schedule will significantly alleviate filing burdens on CPOs without negatively impacting the usefulness of the information that is collected.'' [71] NFA explained that it does not need the more granular information in the PSOI, and that this granularity has not, in NFA's experience, improved their analysis, in part, because ''very few CPOs include balances on a significant number of line items set forth in the current schedule.'' [72] IAA also expressed its support, stating that the specific data fields in the PSOI should be aligned with that of NFA Form PQR.[73]

The Commission acknowledges and understands commenters' arguments supporting a more narrowly focused PSOI in the Revised Form. Nevertheless, the Commission has determined not to make material revisions at this time. Events in the bond and energy markets, both recently and in its past experience, have reinforced the Commission's understanding of the interconnectedness of financial markets, and emphasized the importance of understanding how CPOs are positioned vis-à-vis their counterparties and the economy as a whole.[74] Moreover, incorporating a PSOI that is aligned with the 2010 Schedule of Investments, particularly the 10% asset threshold discussed below, in the Revised Form results in a material loss of information from reporting CPOs on their operated pools' alternative investment or derivatives positions, which are the primary focus of the Commission's jurisdiction. For instance, the Commission notes that the 2010 Schedule of Investments lacks specific line items for crude oil, natural gas, and some precious metals like gold, all of which have been subject to significant volatility.[75]

At this time, the Commission believes that reducing the amount of information collected with respect to multiple asset classes, particularly those that are under the Commission's primary jurisdictional mandate,[76] is premature. The resulting diminished dataset would provide the Commission an insufficient view into the actual holdings of operated commodity pools in markets subject to the Commission's oversight, which, in turn, potentially undermines the Commission's assessment of the risk posed by CPOs and their operated pools within the commodity interest markets and their vulnerabilities when faced with challenging market conditions. This information is currently essential to the Commission's ability to identify CPOs and pools with whom the Commission should engage more deeply depending on market events, especially in times of unpredictable market volatility. Therefore, the Commission has decided to collect the more detailed PSOI, as it continues to reassess its data needs in this space.

In the Commission's experience, commodity interest markets change over time, as do the Commission's own technological applications, surveillance capabilities, and access to real-time data streams, and thus, require the ongoing, careful review of the appropriateness of existing regulatory approaches. Accordingly, the Commission hereby instructs its staff to evaluate the ongoing utility of the PSOI information in the Revised Form, including comparing it to the 2010 Schedule of Investments, within 18–24 months following the Final Rule's Compliance Date. As part of its review, Commission staff should consider whether or not it is appropriate to adopt the 2010 Schedule of Investments, in light of such utility. After completing this review, and taking into consideration the Commission's current regulatory needs, the Commission expects its staff to develop recommendations or a proposed rulemaking for the Commission's further review to effectuate staff's findings.

In addition, as part of this review, Commission staff should continue to explore the use of data available from designated contract markets, swap execution facilities, and swap data repositories—*i.e.,* existing sources of transaction and position data—and its application to effecting robust oversight of CPOs and commodity pools, as compared to the information received from Revised Form CPO–PQR. In addition, the Commission expects its staff to continue engaging with their counterparts at the SEC during this 18–24 month period regarding potential modifications to Joint Form PF, which should inform further revisions to Revised Form CPO–PQR.

Consistent with the views expressed by other commenters, NFA stated its belief that the more limited dataset collected on the 2010 Schedule of

[68] 2020 CPO–PQR NPRM, 85 FR at 26384 (May 4, 2020).

[69] IAA, at 4; ICI, at 6; NFA, at 1–2; MFA, at 3.

[70] *See infra* pt. II.G.i for additional discussion on permissible substituted compliance for § 4.27 with respect to NFA Form PQR.

[71] NFA, at 2 (discussing how the 2010 Schedule of Investments elicits the information necessary for NFA's risk assessment purposes). *See also* ICI, at 4; MFA, at 4. ICI further emphasized that the overall success of the Proposal's revisions to Form CPO–PQR will depend on whether the resulting dataset is appropriately calibrated to the Commission's regulatory interests and limited to data the Commission will employ in regulating CPOs and their commodity pools. ICI, at 4.

[72] NFA, at 2 (concluding that its 2010 Schedule of Investments ''elicits the information necessary for both the CFTC's and NFA's needs'').

[73] IAA, at 5. MFA also supported this alignment and strongly advocates for consistency between the Schedules of Investment in the Revised Form and NFA Form PQR. MFA, at 3–4.

[74] ''Options trading firm blows up amid natural gas volatility,'' Financial Times (Nov. 19, 2018), *available at https://ft.com/content/b7c525f6-ec44/11e8/89c8/d36339d835c0;* ''The Shine Is Off,'' Slate (June 9, 2013), *available at https://www.slate.com/business/2013/06/gold-bubble-paranoid-investors-pushed-gold-to-1900-an-ounce-in-2011-but-the-bubble-has-burst;* ''Bond investors say some energy companies 'will not survive' oil rout slamming markets,'' Market Watch (Mar. 10, 2020), *available at https://www.marketwatch.com/story/bond-investors-say-some-energy-companies-will-not-survive-oil-rout-slamming-markets-2020-03-09;* ''Global stocks, oil prices, and government bonds tumble,'' Financial Times (Mar. 18, 2020), *available at https://www.ft.com/content/1b1b47d4-68bd-11ea-a3c9/1fe6fedcca75;* ''Oil plunges into negative territory for the first time ever as demand evaporates,'' Business Insider (Apr. 20, 2020), *available at https://markets.businessinsider.com/commodities/news/us-crude-oil-wti-falls-to-21-year-low-1029106364#.*

[75] *Id.*

[76] ''Gold prices settle at 1-week low as U.S. stock market tumbles,'' MarketWatch (Sept. 3, 2020), *available at https://www.marketwatch.com/story/gold-heads-for-back-to-back-loss-amid-vaccine-hope-us-dollar-strength-2020-09-03;* ''Oil sinks with equities on wavering hopes for demand pickup,'' Bloomberg (Sept. 3, 2020, updated Sept. 4, 2020), *available at https://www.bloomberg.com/news/articles/2020-09-03/oil-extends-biggest-weekly-drop-since-june-as-demand-woes-return;* ''U.S. oil prices settle at lowest in nearly a month as supplies, output log sharp but temporary hurricane-related drop,'' Market Watch (Sept. 2, 2020), *available at https://www.marketwatch.com/story/oil-prices-lifted-by-lackluster-bounce-in-opec-crude-output-inventory-fall-2020/09/02;* ''Oil prices continue to slide as U.S. data feeds fuel demand worry,'' Reuters (Sept. 2, 2020), *available at https://www.reuters.com/article/us-global-oil/oil-prices-continue-to-slide-as-us-data-feeds-fuel-demand-worry-idUSKBN25U04D.*

Investments would be sufficient for both NFA's and the Commission's purposes.[77] The Commission notes, however, that direct oversight of reporting CPOs and their operated pools is only one of the uses of the data collected by the Revised Form's PSOI. This information is also useful to the Commission in developing its understanding of the commodity interest markets more broadly, including how various asset classes are being utilized by reporting CPOs and their operated pools. Although there may be certain subcategories of asset classes that have not had many, if any, responses over the past six reporting periods, that does not mean that such subcategories of asset classes may not become more widely used in the future, or that a pool's exposure to asset classes that are currently less widely utilized would not be useful in overseeing the operations of reporting CPOs and their pools going forward. Eliminating questions due solely to a lack of past responses seems to presume that the operations and pool trading activity of reporting CPOs will remain static going forward. The Commission knows from its direct regulatory experience in overseeing CPOs that such a presumption is false because these registrants and their pools exhibit high levels of variability and dynamism in their investment strategies.

D. Retaining the Five Percent Threshold for Reportable Assets

Aligning the Revised Form's PSOI with the 2010 Schedule of Investments would include increasing the threshold for reportable assets of a pool from 5% of a pool's NAV to 10%, which multiple commenters specifically addressed and supported.[78] As discussed above, MFA also requested the Commission align its PSOI with NFA's 2010 Schedule of Investments, and increase the reportable asset threshold from 5% to 10%.[79] SIFMA AMG stated that revising the PSOI in this manner would greatly reduce or eliminate the burden on CPOs to provide information on pool assets or investments that are, ''either nominal or so minimal they do not affect the daily risk of a CPO.'' [80] As an alternative to adopting the 2010 Schedule of Investments, SIFMA AMG also would support a more holistic analysis by the Commission of the proposed PSOI: rather than simply doubling the percentage threshold for reportable assets, SIFMA AMG argued that the Commission should carefully review the proposed PSOI, weigh the utility of the asset sub-categories, and eliminate those deemed to be unnecessary or not implicating the Commission's regulatory interests.[81]

Upon consideration of the comments, and consistent with the overall PSOI analysis above, the Commission is declining to increase the threshold for a pool's reportable assets from 5% to 10% at this time. The Commission has reviewed data from past Form CPO–PQR filings, and concludes that, if it were to raise the threshold from 5% to 10%, the Commission would lose a material portion of the data that it has been receiving regarding pool positions in derivatives and alternative investments. Specifically, the Commission reviewed the first level of subcategory data within the seven headings of asset classes from the 2019 year-end Form CPO–PQR filings. There was a total of 5,574 PSOIs filed, with 1,240 of those filings reporting at least one balance that was between 5% and 10% of NAV, which means that 22% of the total filed PSOIs reported an asset balance that would be lost to the Commission, if the Commission increased the reporting threshold to 10%.

Looking at the data further, the Commission found that, of those 1,240 PSOIs reporting at least one asset between 5 and 10% of a pool's NAV, 660 of them reported balances in either alternative investments or derivatives—asset classes in which the Commission retains a significant regulatory interest. Those 660 PSOIs constitute 53% of all PSOIs reporting an asset as 5–10% of the pool's NAV, and amount to approximately 12% of the total PSOI population. Losing data on 12% of its total PSOI filings by reporting CPOs regarding alternative investment or derivatives positions, which are the primary focus of the Commission's jurisdiction, is a material loss, because it would provide the Commission with an incomplete picture of the actual holdings of a pool in markets subject to the Commission's oversight, which could undermine the Commission's assessment of the market risk posed by CPOs and their operated pools.[82] This is of particular importance to the Commission given the recent unprecedented market conditions discussed above. Accordingly, the Revised Form adopted herein retains the 5% asset reporting threshold, and the Commission reiterates its direction to Commission staff to evaluate the ongoing utility of the PSOI information in the Revised Form, within 18–24 months of the Compliance Date for the Final Rule.

E. Adding LEI Fields to the Revised Form

The Commission also proposed adding fields to the Revised Form requesting LEIs for reporting CPOs and their operated pools that are otherwise required to have them, due to their activity in the swaps market.[83] The Commission emphasized in the Proposal that the inclusion of existing LEIs within the smaller dataset on Revised Form CPO–PQR should enable the Commission to more efficiently and accurately synthesize the various Commission data streams on an entity-by-entity basis and may permit better use of other data to illuminate the risk inherent in pools and pool families.[84] Specifically, the NPRM queried, Should the Commission include LEIs on Revised Form CPO–PQR? Why or why not? [85]

Commenters supported the inclusion of LEIs because of their low cost, ability to facilitate standardization across multiple data streams and generally enhance reporting, and ''their risk management capabilities.'' [86] SIFMA AMG also supported the addition of questions on LEIs, stating that it understood that ''[requiring LEIs in the Revised Form CPO–PQR] is the key to integrating the information collected in multiple data streams,'' and would make information collected by the

[77] NFA, at 2.

[78] IAA, at 5; MFA, at 4; SIFMA, at 14.

[79] MFA, at 4.

[80] SIFMA AMG, at 14.

[81] SIFMA AMG, at 14 (describing such an analysis as ''weighing the difficulty of certain CPOs to provide data for the more granular sub-categories compared with the usefulness of such data for the Commission, with a focus on categories of assets where the Commission does not have a specific regulatory interest or otherwise would have limited use for such detail''). *See also* IAA, at 5 (questioning the relevance and necessity of certain line items in the proposed PSOI); MFA, at 6–14 (providing line edits to the proposed PSOI, and recommending the deletion of multiple asset classes).

[82] In concluding that losing Form CPO–PQR data for 22% of its total filing population was material, staff was guided by the SEC's Staff Accounting Bulletin 99, which addresses accounting materiality thresholds. Materiality, SEC Staff Accounting Bulletin No. 99, 64 FR 45150 (Aug. 19, 1999), *available at https://www.sec.gov/interps/account/sab99.htm.*

[83] 2020 CPO–PQR NPRM, 85 FR at 26378 (May 4, 2020).

[84] 2020 CPO–PQR NPRM, 85 FR at 26383 (May 4, 2020) (anticipating that the inclusion of LEIs would greatly facilitate the aggregation of data from commodity pools under different levels of common control).

[85] 2020 CPO–PQR NPRM, 85 FR at 26384 (May 4, 2020).

[86] DTCC, at 2; SIFMA AMG, at 6; GLEIF, at 1. *See also* Hunter, at 1, and Barnard, at 1. GLEIF noted further that standardizing the LEI requirement would also contribute to the harmonization of rules and standards across regulatory regimes. GLEIF, at 2.

Revised Form ''much easier to combine into a holistic surveillance program'' for registered CPOs and their operated pools.[87] Citing a list of benefits associated with LEIs, GLEIF and DTCC advocated for further expanding the LEI requirement to all reporting CPOs and pools, instead of only requiring them from entities that currently have them.[88]

GLEIF also requested the Commission consider two specific recommendations regarding LEIs: (1) Adopting a requirement that only LEIs that are maintained and duly renewed would satisfy this reporting obligation in the Revised Form; and (2) requiring LEIs for *all* reporting entities submitting the Revised Form, as well as for a reporting CPO's miscellaneous service providers, like a third-party administrator, broker, trading manager, and/or custodian.[89] DTCC argued that expanding the LEI requirement to cover all reporting CPOs and all of their operated pools would allow the Commission to obtain a more complete picture of pool activity across all derivatives transactions, rather than just with respect to swaps.[90] DTCC also provided specific cost estimates for LEI acquisition, renewal, and maintenance, positing that these costs would not be a significant burden on CPOs. Moreover, DTCC argued that expanding the requirement could instead ease CPOs' reporting burden, ''through the standardization of a common identifier,'' *i.e.,* an LEI for each reporting entity and each operated pool, and further facilitate the synthesis of CPO and pool data.[91]

MFA suggested that the Commission collect LEI data separately from the Revised Form for purposes of protecting highly confidential information in these filings from potential cyber breaches.[92] Specifically, MFA recommended that the Commission incorporate alphanumeric identifiers to conceal the identities of reporting CPOs in the Revised Form, and that the Commission separate this data to mitigate potential breaches and enhance protections for collected registrant data.[93] According to MFA, registered CPOs should be permitted to file their LEIs for the Revised Form in a separate submission, such that the LEIs and identifying information of the CPO and its pools are separated from the confidential information the Revised Form otherwise collects.[94]

The Commission is adopting this provision as proposed. The LEI fields included in the Revised Form should provide significant regulatory benefits, particularly with respect to the Commission's stated goal of developing a holistic surveillance program for registered CPOs and their operated pools.[95] At this time, the Commission will not require CPOs that do not currently have LEIs to obtain them solely for the purposes of reporting on the Revised Form.[96] The Commission's regulations currently only require entities to obtain LEIs if they are engaged in swaps transactions. Specifically, the Commission's regulations regarding swap data reporting, which were amended in September 2020, require CPOs or commodity pools that are counterparties to swaps to use LEIs in all swap data recordkeeping and reporting.[97] The Commission would therefore expect that any CPO or commodity pool entering into swap transactions would have an LEI. Conversely, if a reporting CPO and its pools do not engage in swap transactions, they would not be required to have LEIs. Moreover, futures market participants are not required to have LEIs generally, and as such, LEIs are not collected by the designated contract markets or derivatives clearing organizations with respect to futures transactions. Therefore, imposing such a requirement on reporting CPOs and their pools that do not engage in swaps would not assist the Commission in utilizing the other data streams available to it regarding futures trading activity.

Additionally, allowing only those LEIs that are maintained and duly renewed to satisfy the reporting requirement in the Revised Form runs counter to the Commission's stated purpose of the Revised Form. Currently, swap dealers and other registered entities[98] are the only Commission registrants required to *maintain and renew* their LEIs.[99] Notably, CPOs and their operated pools are not among those entities. Additionally, because CPOs and their operated pools are *not* required to obtain, maintain, or renew LEIs to participate in the futures market, the Commission believes that imposing such a requirement solely for Form CPO–PQR reporting purposes would not, at this time, advance the Commission's goal of monitoring CPOs and their operated pools for market and systemic risk.

The Commission notes that this approach to LEIs in the Final Rule does not preclude expanding the LEI requirement in the Revised Form in the future. As noted herein, and in the Proposal, the Final Rule is intended to leverage the other data developed by the Commission as they currently exist. The Commission currently does not require LEIs to participate in the commodity interest markets beyond the swaps market; however, in the future, the LEI requirement could be expanded to other commodity interest asset classes. If that should happen, reporting CPOs and their pools would be required to report those LEIs on the Revised Form as well. As LEIs become more ubiquitous in the market, and as more CPOs obtain and use them in operating their pools, the Commission anticipates that there will be a corresponding increase of reported LEIs on the Revised Form.

With respect to commenters' concerns about cybersecurity, determining the feasibility of filing LEI information separately from the Revised Form would hinder the Commission's ability to adopt the Final Rule in a timely manner. The Commission believes that such delay serves neither its own regulatory interests nor the interests of Commission registrants required to file Form CPO–PQR. In arriving at this conclusion, the Commission weighed the benefits of adopting Revised Form CPO–PQR sooner, including the opportunity to begin fully incorporating the Revised Form's dataset into the Commission's oversight program for registered CPOs and their operated pools, as well as operational efficiencies for the Revised Form's filers, against whether the Commission should modify how data on the Revised Form is

[87] SIFMA AMG, at 2.

[88] GLEIF, at 1 (stating that the Proposal's current LEI requirement would not allow the Commission to aggregate all derivatives transactions by pools under common control); DTCC, at 2.

[89] GLEIF, at 1.

[90] DTCC, at 2.

[91] DTCC, at 2–3 (discussing the average costs associated with obtaining and maintaining an LEI: average cost for an LEI is $111, and the renewal fee is $91; the annual one-time cost for all CPOs without an LEI would total $64,828; the annual renewal fee combined for all 1326 registered CPOs would total $120,666). Neither DTCC nor GLEIF provided any cost estimates with respect to expanding the LEI requirement to all operated pools or to all of a reporting CPO's service providers.

[92] MFA, at 3.

[93] MFA, at 3.

[94] *Id.*

[95] 2020 CPO–PQR NPRM, at 85 FR 26382 (May 4, 2020).

[96] *See infra* Form CPO–PQR, ''Reporting Instructions,'' no. 9.

[97] Swap Data Recordkeeping and Reporting Requirements, approved by the Commission on September 17, 2020. Publication in the **Federal Register** is pending.

[98] 17 CFR 1.3, ''registered entity'' (including, inter alia, designated contract markets, swap execution facilities, derivatives clearing organizations, and swap data repositories, in the ''registered entity'' definition).

[99] Swap Data Recordkeeping and Reporting Requirements, approved by the Commission on September 17, 2020. Publication in the **Federal Register** is pending.

collected. That analysis also included an assessment of the state of the Commission's current data security protocols.

With respect to the Commission's data security protocols, it is currently in full compliance with all of the relevant statutes relating to information security and protection.[100] The Commission's Office of Inspector General (OIG) audits the agency's security program annually, and as of the 2019 audit, OIG identified no material weaknesses and made no significant findings. Moreover, the OIG rated the Commission's security program as ''effective.'' [101] In addition to the OIG review, the U.S. Department of Homeland Security (DHS) also assesses the Commission on a semiannual basis, and DHS' most recent assessment of the CFTC's security program for compliance with the Cybersecurity Framework (CSF), as required by the Office of Management and Budget, resulted in ratings of ''managed and measurable'' in all five functions of the CSF.[102]

In the Commission's opinion, delaying the adoption of the Final Rule and of Revised Form CPO–PQR, specifically in order to separately collect a filing CPO's LEIs, would lead to an undesirable regulatory outcome. This approach would delay the adoption of Revised Form CPO–PQR significantly, if not indefinitely, thereby depriving filing CPOs of much-anticipated compliance relief, for the purpose of addressing arguably unwarranted (given the recent objective and favorable evaluations of this agency's information security and data protection protocols cited above) data security concerns only applicable to a limited portion of the Form CPO–PQR filing population. The Commission finds that the outcome of this approach would undermine and run counter to the Commission's stated purposes in the Proposal, *i.e.,* revising Form CPO–PQR in a way that supports the Commission's ability to exercise its oversight of CPOs and their operated pools, while reducing reporting burdens for market participants.[103] Taking all of this into account, the Commission concludes that adopting Revised Form CPO–PQR at this time, absent any significant modification as to how the information, including LEIs, is submitted, is appropriate. In conjunction with Commission staff's review of the Revised Form's PSOI within 18–24 months of this Final Rule's Compliance Date, the Commission further directs its staff to determine the feasibility, necessity, and advisability of separating a CPO's LEIs from the rest of Revised Form CPO–PQR in that same time frame. Lastly, the Commission remains committed to devoting significant resources to ensure its internal data security procedures are aligned with, or surpass, industry best practices, as they develop over time.

F. The Revised Form's Definitions, Instructions, and Questions

As discussed above, the Commission also proposed several amendments to the Instructions of the Revised Form.[104] For instance, the Commission proposed to require all reporting CPOs to file the Revised Form quarterly by redefining ''Reporting Period,'' to mean a calendar quarter.[105] Additionally, the Commission proposed significant changes to Instructions 2 and 3, in connection with deleting Form CPO–PQR's Schedules B and C, as well as the elimination of terms related to the various thresholds used for those schedules, *i.e.,* Mid-Sized CPO, Large CPO, and Large Pool.[106] The Commission further queried in the Proposal: Are there ways the Commission could further clarify and refine the reporting instructions for completing Revised Form CPO–PQR in order to provide CPOs with greater certainty that they are completing the form correctly? [107]

i. Quarterly Filing Schedule for All CPOs Completing the Revised Form

The simplified, uniform, quarterly filing schedule proposed for the Revised Form with respect to all reporting CPOs and their operated pools received broad support from commenters. NFA generally expressed strong support for the Commission's efforts to streamline and simplify the reporting regime for reporting CPOs, including the quarterly filing schedule, and stated its belief that, ''the proposal will satisfy the Commission's goal of reducing reporting requirements in a manner that continues to facilitate effective oversight of CPOs and the pools that they operate.'' [108] SIFMA AMG also expressed its support to increase the filing frequency of the Revised Form for all reporting CPOs because of the simplified filing schedule across all CPOs, regardless of size, and the consistency in filing schedules between the Revised Form and NFA Form PQR.[109]

In adopting the changes as proposed, the Commission still favors employing a simpler, more uniform filing requirement for all reporting CPOs. This straightforward filing structure and schedule should facilitate compliance and reporting under § 4.27, thereby enhancing the efficacy of the Commission's oversight of reporting CPOs and their operated pools.

ii. Instructions 3 and 5

Instruction 3 on Form CPO–PQR was carried over, in relevant part, to the Proposal's Revised Form and states: The CPO May Be Required to Aggregate Information Concerning Certain Types of Pools. For the parts of Form CPO–PQR that request information about individual Pools, you must report aggregate information for Parallel Managed Accounts and Master Feeder Arrangements as if each were an individual Pool, but not Parallel Pools. Assets held in Parallel Managed Accounts should be treated as assets of the Pools with which they are aggregated.[110] Paragraphs in Instruction 3 of the existing form describing how to determine if a CPO is a Mid-Sized or Large CPO required to complete Schedules B or C, or if a pool is a Large Pool for purposes of completing Schedule C, were proposed to be deleted from the Revised Form.[111] In the Proposal, the Commission also retained

[100] *See, e.g.,* the Federal Information Security Modernization Act of 2014, 44 U.S.C 3551, *et seq.* (Dec. 18, 2014).

[101] ''Office of the Inspector General Semiannual Report to Congress: October 1, 2019-March 31, 2020,'' CFTC Office of the Inspector General, p. 8 (Mar. 31, 2020), *available at https://www.cftc.gov/media/3946/oig_reporttocongress033120/download.*

[102] ''Federal Information Security Modernization Act of 2014 Annual Report to Congress: Fiscal Year 2019,'' Office of Management and Budget. Although DHS has not yet published the Fiscal Year 2019 report to its website, the Commission notes that it received similar ratings in fiscal year 2018. *See* ''Federal Information Security Modernization Act of 2014 Annual Report to Congress: Fiscal Year 2018,'' Office of Management and Budget, p. 49 (Aug. 23, 2019), *available at https://www.whitehouse.gov/wp-content/uploads/2019/08/FISMA/2018/Report-FINAL-to-post.pdf.* The CSF, developed by the National Institute of Standards and Technology, includes five function areas: ''Identify, Protect, Detect, Respond, and Recover.'' *Id.* at 17. A finding of ''managed and measurable,'' is the fourth highest of five levels and means, ''[q]uantitative and qualitative measures on the effectiveness of policies, procedures, and strategies are collected across the organization and used to assess them and make necessary changes.'' Id. at 31. Per the IG Reporting Metrics, a finding of ''managed and measurable'' ''is considered to be effective at the domain, function, and overall level[s].'' *Id.* at 32.

[103] 2020 CPO–PQR NPRM, 85 FR at 26380 (May 4, 2020).

[104] 2020 CPO–PQR NPRM, 85 FR at 26378 (May 4, 2020).

[105] 2020 CPO–PQR NPRM, 85 FR at 26396 (May 4, 2020).

[106] 2020 CPO–PQR NPRM, 85 FR at 26391 (May 4, 2020).

[107] 2020 CPO–PQR NPRM, 85 FR at 26384 (May 4, 2020).

[108] NFA, at 1.

[109] SIFMA AMG, at 4.

[110] 2020 CPO–PQR NPRM, 85 FR at 26391 (May 4, 2020) (proposing Instruction 3 of the Revised Form).

[111] 2020 CPO–PQR NPRM, 85 FR at 26391 (May 4, 2020).

Instruction 5, which read as follows: I am required to aggregate funds or accounts to determine whether I meet a reporting threshold, or I am electing to aggregate funds for reporting purposes. How do I ''aggregate'' funds or accounts for these purposes? [112] Instruction 5 then provided substantive examples on how to aggregate funds as if they were one pool with respect to parallel managed accounts (PMAs) and/or Master-Feeder Arrangements.[113]

NFA responded to the Commission's question on additional clarifications to the Revised Form's instructions, stating that, if the Revised Form is adopted as proposed, the reporting requirements for CPOs will no longer be dependent on reporting thresholds, and therefore, a detailed instruction on PMAs is not necessary.[114] NFA recommended accordingly that the Commission ''consider whether these instructions and the related definitional terms should be eliminated.'' [115] SIFMA AMG also stated that the purpose of aggregating pool assets would no longer be relevant under the Revised Form, and it would be unclear what these instructions mean under the Revised Form, absent those reporting thresholds.[116] Therefore, SIFMA AMG also requested the Commission remove Instructions 3 and 5 related to PMAs, given the proposed deletion of Schedules B and C and the associated thresholds for CPOs and pools. SIFMA AMG, like NFA, believed that the concept of PMAs and pool asset aggregation, as a whole, is no longer relevant to completing the Revised Form.[117] SIFMA AMG also recommended the Commission revise the Revised Form further to permit the filing of Master-Feeder Arrangements as one pool, rather than requiring each fund to report separately.[118] Finally, SIFMA AMG suggested the Commission adopt the approach taken in Joint Form PF with respect to Master-Feeder Arrangements, specifically in Joint Form PF Instruction 5.[119]

The Commission generally agrees with commenters with respect to PMAs and the remaining references to reporting thresholds in the proposed Revised Form. Consequently, the Commission believes that much of the language in these instructions should be deleted for internal consistency in the Revised Form. Therefore, the Commission is revising Instruction 3 to remove all references to PMAs and Parallel Pools, focusing solely on reporting information concerning pools in a Master-Feeder Arrangement. Thus, Instruction 3 in the Revised Form only addresses how Master-Feeder Arrangements should be reported.[120]

With respect to the treatment of Master-Feeder Arrangements under the Revised Form, commenters raise an interesting question as to the proper requirements to impose on structures meeting the form's definition of a Master-Feeder Arrangement. Specifically, the form provides that a Master-Feeder Arrangement is ''an arrangement in which one or more funds (''Feeder Funds'') invest all or substantially all of their assets in a single fund (''Master Fund'').'' [121] This definition encompasses many variations of fund complexes from funds with wholly-owned subsidiaries, to funds with multiple levels of intermediary funds between the feeder and master funds, to the more traditional structures where two or more feeder funds invest substantially all of their assets into a commonly owned master fund. The Commission believes that, to adequately consider the propriety of permitting all such fund structures to consolidate their filings on the Revised Form, additional analysis is required to determine the appropriate parameters to impose on such relief. Therefore, the Commission declines to change the reporting approach for Master-Feeder Arrangements at this time and instead, instructs staff to engage in such an analysis to determine what modifications may be needed to provide for consolidated reporting where appropriate.

Upon consideration of the comments, the Commission is deleting Instruction 5 in its entirety because this instruction was originally included to explain how a reporting CPO should determine if it is a Large, Mid-Sized, or Small CPO, and what the resulting scope of its filing should be, *i.e.,* whether Schedules B or C (or both) were required. Accordingly, because Instruction 5 is no longer applicable, the Commission has removed it from the Revised Form.

iii. Instruction 4

The Proposal also retained Instruction 4, which provided the following: I advise a Pool that invests in other Pools or funds (*e.g.,* a ''fund of funds''). How should I treat these investments for purposes of Form CPO–PQR? [122] The Instruction states, in pertinent part, that for purposes of this Form CPO–PQR, you may disregard any Pool's equity investments in other Pools.[123] NFA requested that the Commission ''consider eliminating the guidance in Instruction 4 regarding the 'investments in other Pools generally' heading'' because that guidance allows a CPO to disregard a pool's equity investments in other pools, and NFA would like these assets included.[124] This reporting helps NFA ''identify pool assets that may also be reported by another pool or fund.'' [125] However, IAA disagreed ''with any recommendation to eliminate Instruction 4,'' because IAA would consider that ''a significant change in how CPOs currently report on the form.'' [126] Consequently, IAA stated that this particular change should be considered, if at all, ''as part of a formal rulemaking, with notice and comment.'' [127]

Instruction 4, in the original form, was generally intended to provide clear instruction that investments in other pools should not be included in a specific reporting CPO's or operated pool's applicable reporting threshold. For example, a pool's fund-of-funds investments, in which the reporting CPO may have little to no control over the management or performance of those assets, should not cause a pool to be considered a ''Large Pool,'' which would require additional, highly detailed reporting with respect to that pool. Similarly, a reporting CPO should not also have been categorized as a Large or Mid-Sized CPO, with consequences to the scope and breadth of their filings, solely due to the fact that its aggregated pool AUM included

[112] 2020 CPO–PQR NPRM, 85 FR at 26392 (May 4, 2020) (proposing Instruction 5 of the Revised Form).

[113] *Id.*

[114] NFA, at 3.

[115] *Id.*

[116] SIFMA AMG, at 8–9 (stating its belief that these instructions were borrowed from Joint Form PF and the main function of this instruction is to aggregate pool assets of a CPO, for the purpose of determining whether a firm is a Large, Mid-Sized, or Small CPO, and whether a pool is a Large Pool).

[117] *Id.*

[118] *Id.* at 9.

[119] SIFMA AMG, at 11–13 (explaining further that, ''[t]o align with the Commission's proposal to require pool LEIs on the CPO–PQR, we are suggesting that should a single filing be permitted for Master-Feeder Arrangements, a CPO should provide the LEI of a Master Fund'').

[120] *See infra* Revised Form CPO–PQR, ''Reporting Instructions,'' no. 3.

[121] 17 CFR part 4, app. A, ''Definitions of Terms,'' ''Master-Feeder Arrangement.''

[122] 2020 CPO–PQR NPRM, 85 FR at 26391–92 (May 4, 2020) (proposing to retain Instruction 4 in the Revised Form).

[123] *Id.*

[124] NFA, at 3.

[125] *Id.* (emphasizing that NFA would like to see these ''other pool investments'' reflected in multiple answers in the Revised Form, in particular to Questions 2 and 8 on assets under management, Question 9 for the calculation of monthly rates of return, and the PSOI in Question 11 on investments in other funds).

[126] IAA, at 6, n.28.

[127] IAA, at 6.

investments in other pools that it does not operate.

Although NFA presents a compelling argument regarding its anticipated use of information regarding pools' investments in other pools, the Commission has determined to continue to provide CPOs with the discretion to include or exclude such investments, provided that their treatment is consistent throughout the Revised Form. The Commission understands from IAA that this would be a significant change in how CPOs of pools that invest in other pools engage with the form and could be quite burdensome for CPOs that may be reporting such information for the first time. Moreover, the Commission believes that retaining the obligation to include such investments in the reported pool's AUM and NAV (Question 8 of the Revised Form), as well as requiring the investments to be enumerated in the PSOI, as discussed below, provides adequate information about a pool's investments in other pools for the Commission to oversee their activities, while the Commission continues to develop its abilities to integrate its data regarding reporting CPOs and their operated pools. Therefore, consistent with Instruction 4 as originally adopted, the Commission will continue to require that such investments be included in a reporting CPO's response to Question 10 in the current form, which solicits information regarding the pool's statement of changes concerning AUM, and which has been redesignated as Question 8 in the Revised Form, as well as in the PSOI in the Revised Form, but will not otherwise require such CPO to include a pool's investments in other pools in its responses to the Revised Form.

The Final Rule's revisions to Instruction 4 also require the reporting CPO to include such investments in other pools in the PSOI. In the Proposal, the Commission amended the form by removing detailed pool information set out in Schedules B and C, but retained the PSOI, which has now become the only section on Revised Form CPO–PQR that provides detailed pool investment information. In the original form, the PSOI supplemented the rest of the information provided; going forward, with the amendments removing Schedules B and C, the PSOI's value and status has changed, as it is now the key collection of information through which the Commission can analyze the market activities and risks of CPOs and their operated pools. Therefore, due to the change of importance and status of the PSOI, along with its plain language, which includes line items for various classes of funds, such as mutual funds, private funds, and money market funds, reporting CPOs must disclose their pools' investments in other funds as part of the PSOI. The Commission further believes that requiring these investments to be listed in the PSOI is necessary for it to make full use of the information provided on Question 8 in the Revised Form, for which such investments must also be included. Without this detail in the PSOI, it would be very difficult to determine the asset classes influencing the movement in a pool's AUM and NAV from one reporting period to the next. Therefore, the Revised Form retains the current general treatment of investments in other pools currently set forth in Instruction 4, with the additional clarification that they are included in the PSOI.

With respect to pools that invest substantially all of their assets in other pools, their investments in other pools were required to be included in the reporting CPO's responses to Schedule A of Form CPO–PQR. Because under the Revised Form, Schedule A comprises the entirety of the Revised Form, with the exception of the addition of the PSOI, the Commission is revising Instruction 4 to provide that such other pool investments must be reported on in the Revised Form.

iv. Definition of ''Broker''

Like the original iteration of the form, the Proposal defined ''broker'' as any entity that provides clearing, prime brokerage, or similar services to the Pool.[128] IAA recommended that the Commission clarify whether a ''broker'' in the Revised Form refers to only commodity-related brokers, or includes non-commodity brokers.[129] IAA further explained that CPOs may have many relationships with executing brokers for non-commodity interest transactions, and absent a clarification of this definition, this prompt would constitute a substantial burden for CPOs to include all brokers in the Revised Form.[130] Finally, IAA queried what regulatory interest or benefit the Commission would gain from a broad definition of ''broker,'' and concluded that, ''we do not believe this information is necessary to implement [Revised] Form CPO–PQR or to assist the CFTC in its oversight of the commodities markets.'' [131] ICI also supported clarifying the ''broker'' definition in this manner, and limiting the responses to the Revised Form ''to brokers that a CPO uses with respect to commodity interest transactions,'' because, ICI explained, such an approach would be consistent with the Proposal's stated purpose of refining reporting, ''in order to better monitor the commodity interest markets.'' [132]

The Commission has consistently understood the term ''broker,'' in the context of Form CPO–PQR, to include more than just those service providers engaging in the commodity interest markets,[133] and has not limited the definition of the term ''broker,'' as used either in the current form or the Revised Form, in any manner. Moreover, Form CPO–PQR, as a general matter, has consistently requested information on *all* enumerated service providers used by a reporting CPO for its operated pool(s), regardless of the asset class or markets involved.[134] Consistent with this position, which is supported by the plain meaning of the Form CPO–PQR's definition of ''broker,'' reporting CPOs currently filing the form should identify any broker used in any transactions for any pool not operated pursuant to an exemption or exclusion during the reporting period. This is also consistent with other aspects of the form and the Revised Form, *e.g.,* the PSOI, which are not limited to collecting data solely on the commodity interest transactions of a reporting CPO and its operated pools.

The Commission notes elsewhere in this release that the trading activity or investments of pools in asset classes other than commodity interests may impact the viability of that pool and/or the overall operations of its CPO.[135] This fact has been highlighted by the recent unprecedented market movements and difficulties resulting from the Covid–19 pandemic and its broad negative effects on the U.S. and global economies. Therefore, the Commission finds that collecting data on CPO and pool activity outside of commodity interests is also of general

[128] 2020 CPO–PQR NPRM, 85 FR at 26394 (May 4, 2020).

[129] IAA, at 5.

[130] *Id.* (stating that large numbers of non-commodity interest transactions and differences in brokerage firm names could make answering this question completely particularly difficult for CPOs that have hundreds of relationships with approved brokers for their non-commodity interest trading).

[131] IAA, at 6. IAA further stated its expectation that, should the Commission clarify the ''broker'' definition to refer only to brokers involved in commodity interest transactions, then NFA would likewise adopt an identical interpretation for NFA Form PQR. *Id.*

[132] ICI, at 5.

[133] *See* 17 CFR part 4, app. A, ''Definitions of Terms,'' ''broker'' (defining ''broker'' as ''an entity that provides clearing, prime brokerage or similar services to the Pool'').

[134] *See, e.g.,* 2015 CPO–PQR FAQs, in which Commission staff further echoed this broad understanding of ''broker'' in its discussion of pool custodians, marketers, and underwriters.

[135] *See supra* II.C.

regulatory interest and concern to the Commission with respect to its effective oversight of reporting CPOs and their operated pools. The Commission has concluded that limiting the brokers reported solely to those used in connection with commodity interest transactions would not be conducive to its effective oversight, would be a significant departure from its clear past positions and interpretations of the form, and further, would result in internal inconsistency in the Revised Form, where some aspects of the data collection would be limited to commodity interests, whereas others would not. Therefore, after considering the comments, the Commission is not changing the scope of the definition of the term ''brokers,'' and confirms, in the context of the Revised Form as adopted, that the term is not limited to those brokers used in connection with commodity interest transactions.

v. Elimination of Questions Regarding Auditors and Marketers

The Proposal also would remove questions regarding a CPO's auditors and marketers employed for its operated pools because the Commission and NFA have access to this information through other regulatory sources, ''which the Commission preliminarily believes obviates the need for obtaining this information through Revised Form CPO–PQR.'' [136] SIFMA AMG specifically supported the removal of these questions, stating this proposed deletion is especially appropriate where the information is already required elsewhere by other regulations or filings, and is therefore, easily accessible to the CFTC and NFA.[137] With respect to questions regarding a CPO's auditors or marketers, the Commission is adopting the Revised Form as proposed, omitting those questions, for the reasons articulated in the Proposal.

vi. FAQs and Glossary

The Revised Form includes a list of ''Defined Terms,'' which was entitled ''Definitions of Terms'' in its prior iteration. In 2015, Commission staff published responses to frequently asked questions (the 2015 CPO–PQR FAQs, or FAQs) providing detailed answers to questions from CPOs attempting to complete Form CPO–PQR.[138] SIFMA AMG requested that the Commission align the 2015 CPO–PQR FAQs with the Revised Form, such that these items can be clarified and updated for completeness and accuracy.[139] IAA recommended that the Commission improve the clarity of the FAQs by removing language that would not apply to the Revised Form, specifically referencing PMAs, parallel pool structures, and aggregating funds for reporting threshold purposes.[140] MFA suggested the Commission amend the instructions in the Revised Form to ''incorporate relevant, substantive FAQs into the instructions of Form CPO–PQR.'' [141] Furthermore, SIFMA AMG requested an additional change to the FAQs to create a complete Glossary of Terms for use by filers of the Revised Form.[142]

The Commission understands commenters' concerns that the form will be significantly revised by the Final Rule, resulting in large portions of the 2015 CPO–PQR FAQs becoming obsolete or inaccurate, absent commensurate revisions. Therefore, while reviewing comments and developing the Revised Form for the Commission's consideration, Commission staff has also reviewed the 2015 CPO–PQR FAQs in light of the revisions adopted herein. The Commission expects staff to complete this review and to publish updated FAQs regarding the Revised Form, as soon as practicable, following the adoption of the Final Rule.

The Commission is also making some technical changes to regulatory citations and cross-references in the Revised Form, and further clarifying its definitions and instructions to facilitate completion of the Revised Form. The technical clarifications include revising the definition of ''GAAP'' in the Revised Form to reflect the ability of reporting CPOs to use certain ''alternative accounting principles, standards, or practices'' currently permitted under § 4.27(c)(2), which is redesignated by the Final Rule as § 4.27(c)(4). The Commission is also reorganizing the Revised Form, so that the Defined Terms precede its Instructions, which the Commission hopes will facilitate understanding of the Revised Form.

G. Substituted Compliance

The Proposal also included amendments to § 4.27 that would allow CPOs to file NFA Form PQR in lieu of filing the Revised Form with the Commission,[143] and eliminate the ability of dually registered CPO-investment advisers filing Joint Form PF to file such form in lieu of the Revised Form.[144]

i. NFA Form PQR

In general, commenters supported the proposed amendment permitting CPOs to file NFA Form PQR in lieu of the Revised Form for the purpose of improving filing efficiencies.[145] IAA commended the Commission ''for offering CPOs additional filing efficiencies without compromising the Commission's ability to obtain affected data.'' [146] IAA further recommended that the Commission add a specific instruction to the Revised Form to reflect this allowing the filing of NFA Form PQR as substituted compliance.[147] IAA stated that by explaining this substituted compliance for NFA Form PQR within the Revised Form's instructions, the Commission would ''assist CPOs that frequently review the instructions for the form in addition to or instead of the text of the rule to ensure the filing is accurate and complete.'' [148] Additionally, as noted with respect to the proposed uniform, quarterly filing schedule above, SIFMA AMG expressed its strong support for a single filing schedule across the Revised Form and NFA Form PQR, as well as for the adoption of substituted compliance with respect to NFA Form PQR.[149]

The Commission has determined that, upon NFA's inclusion of questions eliciting LEIs, NFA Form PQR will be substantively consistent with Revised Form CPO–PQR. The Commission recognizes, however, that absent a condition requiring NFA Form PQR to be substantively consistent with Form CPO–PQR on an ongoing basis, it is possible for the two forms to diverge

[136] 2020 CPO–PQR NPRM, 85 FR at 26383 (May 4, 2020).

[137] SIFMA AMG, at 7.

[138] 2015 CPO–PQR FAQs.

[139] SIFMA AMG, at 17 (recommending further the creation of a centralized ''Glossary of Terms'' for use by filers of the Revised Form and/or NFA Form PQR). Currently, SIFMA AMG states that some definitions may be found in NFA Form PQR, while others are solely in the Revised Form, and still other definitions or information solely published in the FAQs. SIFMA AMG would like to see this information centralized and easily accessible for CPOs filing the Revised Form. *Id.*

[140] IAA, at 6.

[141] MFA, at 3. MFA stated that otherwise, Commission staff would need to separately issue FAQs with respect to the adopted Revised Form to replace the existing 2015 CPO–PQR FAQs, which MFA views as less effective than centralizing and incorporating FAQs and instruction examples in the Revised Form. *Id.* at 4.

[142] SIFMA AMG, at 17.

[143] 2020 CPO–PQR NPRM, 85 FR at 26378 (May 4, 2020).

[144] 2020 CPO–PQR NPRM, 85 FR at 26378 (May 4, 2020) (citing the lack of similarities between Joint Form PF and the Proposal's Revised Form).

[145] Barnard, at 1–2; Hunter, at 1; IAA, at 4.

[146] IAA, at 4.

[147] IAA, at 6 (requesting that ''the instruction state that a CPO 'required to file NFA Form PQR with the NFA for the reporting period may make the NFA filing in lieu of the Form CPO–PQR report required under Rule 4.27(c)'''').

[148] IAA, at 6.

[149] SIFMA AMG, at 15–16.

over time while still being eligible for substituted compliance, and that this could undermine the Commission's collection of vital information regarding reporting CPOs and their operated pools. Therefore, the Commission will review any proposed changes to NFA Form PQR consistent with the procedure set forth in CEA section 17(j).[150] This will ensure the continued alignment of the forms. Because any alterations to NFA Form PQR would be accomplished through amendments to NFA membership rules, which are subject to review by Commission staff and either notice to, or review by, the Commission, ongoing monitoring of the continued substantive consistency of the forms should be easily implemented through this existing process.

Therefore, the Commission is adopting, as proposed, the amendments to § 4.27(c)(2) clearly establishing substituted compliance for the Revised Form with respect to NFA Form PQR. Finally, upon consideration of the comments, the Commission is adding a new Instruction 2 in the Revised Form that explicitly states that to the extent a CPO has timely filed the National Futures Association's Form PQR, such filing shall be deemed to satisfy this Form CPO–PQR.[151]

ii. Joint Form PF

The decision to rescind substituted compliance with respect to Joint Form PF elicited differing opinions from commenters. For instance, NFA did not support the alternative of filing all or part of Joint Form PF, in lieu of the Revised Form, because Joint Form PF is at least as burdensome as the Commission's form, and further, it includes ''significantly more information than NFA needs.'' [152] ICI also disagreed with replacing the form with all or part of Joint Form PF because that would impose additional burdens on dually registered CPOs, who are not currently required to file Joint Form PF for their registered funds, and therefore, would be required to adapt their current systems and processes to Joint Form PF.[153]

Conversely, AIMA requested that the Commission and NFA allow dually registered CPOs to file Joint Form PF in satisfaction of the reporting obligations in § 4.27 and NFA Compliance Rule 2–46, because this approach would reduce the reporting burden, ''while still assuring NFA has the necessary information from a supervisory perspective.'' [154] Rather than eliminate § 4.27(d) entirely, SIFMA AMG requested that the Commission preserve substituted compliance with respect to Joint Form PF on a voluntary basis because some of its members believe there would be efficiencies in allowing Joint Form PF to be filed for both private fund and non-private fund pools.[155]

The Commission specifically asked in the Proposal, For CPOs dually-registered with the CFTC and the SEC, if Form CPO–PQR is amended as proposed, would you cease reporting data for these pools on Joint Form PF?'' [156] AIMA responded that these CPOs are likely to continue including them rather than incurring the costs of a separate filing obligation, if ''the inclusion of such non-private fund pools on Form PF can be treated as satisfaction of separate Form CPO–PQR and NFA Form PQR filing obligations, and those pools have been included in the Form PF previously.'' [157] ICI argued that, although adopting the Proposal may mean less data with respect to commodity pools would be reported on Joint Form PF, that prospect, in general, should not be the driving factor in this policy decision—rather, the Commission should focus on whether the Revised Form elicits the information it needs and will use in pursuit of its regulatory mission with respect to CPOs and their pools.[158] SIFMA AMG noted, however, that it generally supports the elimination of detailed reporting requirements for CPOs, and it does not believe there would be regulatory harm, if information is no longer being provided on Joint Form PF with respect to non-private fund pools.[159]

After considering the comments received, the Commission is adopting the amendments to § 4.27, eliminating the substituted compliance for a dually registered CPO-investment adviser completing Joint Form PF in lieu of the Revised Form, as proposed for the reasons stated in the Proposal.[160] The original § 4.27(d), which provided that substituted compliance mechanism with respect to Joint Form PF, is no longer appropriate because: (1) The Revised Form will differ from Joint Form PF, both in substance and filing schedule; and (2) continuing to accept Joint Form PF in lieu of the Revised Form would frustrate an intended and clearly stated purpose of the Proposal, *i.e.,* is to enhance and better coordinate the Commission's own internal data streams to more efficiently and effectively oversee its registered, reporting CPOs and their operated pools.

iii. Substituted Compliance for CPOs of Registered Investment Companies

ICI also commented particularly on the burdens imposed by the proposed amendments on CPOs of registered investment companies (RICs). Specifically, ICI requested that, to eliminate duplicative reporting between the SEC and CFTC regimes applicable to the operations of RICs, the Commission consider adopting a substituted compliance approach with respect to periodic reporting by CPOs of RICs, similar to its 2013 rulemaking to harmonize RIC and CPO/pool regulatory requirements.[161] Although the Commission noted in the Proposal that RICs are subject to comprehensive regulation by the SEC, it did not discuss the possibility of deferring to the SEC with respect to collecting information from CPOs of RICs. Under these circumstances, the Commission would be unable to address the issue of providing additional substituted compliance to CPOs of RICs without re-proposing and reopening the comment period for the NPRM.[162]

Moreover, the Commission believes that the suggested approach by ICI would simply not be practical. As explained by ICI, RICs file numerous

[150] 7 U.S.C. 21(j).

[151] *See infra* Revised Form CPO–PQR, ''Reporting Instructions,'' no. 2.

[152] NFA, at 2 (stating there is no need to ensure similar reporting obligations between the SEC and CFTC, where ''the Commission believes it will have sufficient tools with [the Revised Form] and other data streams to effectively oversee registered CPOs and the commodity interest markets''). NFA noted further that, even if the CFTC were to rescind Form CPO–PQR in favor of Joint Form PF, NFA would still require its CPO Members to file NFA Form PQR, ''which is tailored to NFA's needs and is not a significant burden on Members to complete.'' *Id.*

[153] ICI, at 5 (agreeing that ''the proposed changes to Form CPO–PQR, relative to the alternatives, would permit the Commission to discharge its regulatory duties with respect to CPOs and their operated pools that might have the greatest impact on market and systemic risk, while easing reporting obligations on a significant number of CPOs'').

[154] AIMA, at 2.

[155] SIFMA AMG, at 16.

[156] 2020 CPO–PQR NPRM, 85 FR at 26384 (May 4, 2020).

[157] AIMA, at 2 (noting that if the Commission decides against allowing Joint Form PF as substituted compliance for § 4.27, ''it is likely that non-private fund commodity pools will no longer be included in Form PF to reduce the filing burden as far as possible'').

[158] ICI, at 5–6.

[159] SIFMA AMG, at 16.

[160] 2020 CPO–PQR NPRM, 85 FR at 26383 (May 4, 2020).

[161] ICI, at 2–3, n.6. ICI suggested that the CFTC use the SEC filings and reports already filed by CPO/IAs of RICs, which require disclosure of LEIs, to glean data on the commodity interest activities of these operators and pools. *Id. See also* Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 78 FR 52308 (Aug. 22, 2013).

[162] 5 U.S.C. 553(c).

regulatory filings, [163] each of which are designed for a particular purpose by the SEC. Incorporating those filings into the Commission's filing regime via substituted compliance would be difficult to accomplish and would require the devotion of significant time and resources by both the Commission and NFA. None of these filings, however, is a direct analog to the Revised Form, which adds to the complexity of any undertaking to create a substituted compliance regime with respect to those filings. Finally, the Commission has identified limited benefit in providing such relief, if it were possible, because such CPOs would remain subject to NFA's independent reporting requirement in NFA Form PQR. Therefore, the Commission declines to provide additional substituted compliance for CPOs of RICs in the amendments to § 4.27 adopted by the Final Rule.

H. Compliance Date

MFA requested that the Commission consider providing registered CPOs with six months from the adoption of a Final Rule with respect to Form CPO–PQR to permit reporting CPOs to make ''coding and software changes'' to accommodate Revised Form CPO–PQR's requirements.[164] The Commission has determined not to require filing of reports on the Revised Form for the reporting period ending December 31, 2020. However, to the extent reporting CPOs are required to file NFA Form PQR for the reporting period ending December 31, 2020, that filing must still be submitted in accordance with applicable NFA membership rules. Therefore, reporting CPOs will be required to submit the Revised Form sixty days after the first 2021 reporting period ends on March 31, 2021, making initial compliance with the Revised Form due on May 30, 2021. The Commission has determined that this schedule allows for adequate time for CPOs and NFA to prepare their systems and procedures with respect to the Revised Form.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking.[165]

The Final Rule adopted by the Commission will affect only persons registered or required to be registered as CPOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the requirements of the RFA.[166] With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under § 4.13(a)(2).[167] Because the Final Rule generally applies to persons registered or required to be registered as CPOs with the Commission, the RFA is not applicable to the Final Rule.[168]

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Final Rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

i. Overview

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[169] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The amendments set forth in the Proposal would result in a collection of information within the meaning of the PRA, as discussed below. The Commission therefore submitted the Proposal to OMB for review. The Proposal also invited the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed therein; [170] however, no such comments were received.

The Final Rule affects a single collection of information for which the Commission has previously received a control number from OMB. This collection of information is, ''Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038–0005'' (Collection 3038–0005). Collection 3038–0005 primarily accounts for the burden associated with part 4 of the Commission's regulations that concern compliance obligations generally applicable to CPOs and commodity trading advisors (CTAs), as well as certain enumerated exemptions from registration as such, exclusions from those definitions, and available relief from compliance with certain regulatory requirements.

As discussed above, the Final Rule includes substantive changes to the current form, such as (1) amending Schedule A, (which, together with the PSOI that is currently part of Schedule B, will constitute the entirety of the Revised Form), to add a requirement to disclose the LEIs (if any) for each reporting CPO and operated pool; (2) moving Schedule B's ''Schedule of Investments'' section to Schedule A; and (3) rescinding the remainder of the current form's current Schedules B and C. Additionally, § 4.27(c)(2) will now permit the filing of NFA Form PQR with NFA in lieu of reporting CPOs filing the Revised Form with the Commission. Therefore, the Commission is amending Collection 3038–0005 to be consistent with the finalized restructuring of the Revised Form. Specifically, the Commission is amending the collection to reflect the expected adjustment in burden hours for registered CPOs filing the Revised Form for their operated pools, and also to include in the collection, a reporting CPO's ability to file NFA Form PQR in lieu of filing the Revised Form, provided that it is determined to be substantively consistent with the Revised Form.

This Final Rule is not expected to impose any significant new burdens on CPOs, but rather will constitute a

[163] ICI, at 2, n.7. These reports include N–PORT and N–CEN and address information about the RIC's portfolio, investment policies and practices, and other information. *Id.*

[164] MFA, at 4.

[165] 5 U.S.C. 601 *et seq.*

[166] *See, e.g.,* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18620 (Apr. 30, 1982).

[167] *Id.* at 47 FR 18619–20 (Apr. 30, 1982). Commission regulation at § 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed $400,000. 17 CFR 4.13(a)(2).

[168] Moreover, § 4.27(b)(2)(i) specifically excludes from the obligation to file Form CPO–PQR any CPO that operates only pools for which it maintains . . . an exemption from registration as a commodity pool operator as provided in § 4.13.

[169] 44 U.S.C. 3501, *et seq.*

[170] 2020 CPO–PQR NPRM, 85 FR at 26386 (May 4, 2020).

substantial reduction in reporting burden for most impacted registrants. Approximately half of all registered CPOs are currently considered Mid-Sized CPOs or Large CPOs under the existing form and filing regime. Due to the Final Rule and its significant revisions to the form, these reporting CPOs will be required to answer far fewer questions, when compared to the historical Form CPO–PQR's requirements.[171] CPOs classified as Small CPOs may experience a slight increase in burden, due to an increase in the frequency of reporting to a quarterly basis rather than annually, and the addition of the PSOI to the Revised Form for all reporting CPOs. The Commission believes, however, that for many of these CPOs, this burden increase will practically be slight or very technical in nature, because all reporting CPOs currently complete NFA Form PQR, which also includes a schedule of investments identical to the Revised Form's PSOI, on a quarterly basis pursuant to NFA membership rules. The Commission anticipates that going forward, pursuant to amended § 4.27(c)(2), reporting CPOs, regardless of their size or classification under the original form, will complete and file NFA Form PQR in lieu of the Revised Form, which will further allow them to maximize efficiency by fulfilling both NFA and CFTC reporting requirements with one filing.[172]

Therefore, the Commission infers that the Final Rule and the Revised Form will generally prove to be less burdensome for reporting CPOs, or at least, will not create any new net burdens for them. As a result, the Commission is amending Collection 3038–0005, as proposed, to reflect the elimination of reporting thresholds and classifications of CPO by size, as well as the multiple Schedules in the original form; to account for the uniform quarterly filing schedule adopted for all reporting CPOs for their operated pools; and to adopt an overall estimated burden for all filings that includes the retained questions from Schedule A, as well as the adopted PSOI (from original Schedule B) discussed above. Although the Final Rule results in an increase in the burden hours associated with completing the Revised Form, the Commission anticipates that, in practice, reporting CPOs will either experience no change in their burden, or some decrease in burden. As discussed above, the Commission has determined to accept the filing of NFA Form PQR in lieu of filing the Revised Form. Because any data on NFA Form PQR submitted as substituted compliance for required § 4.27 reporting would thereby become data collected by the Commission, the burden associated with NFA Form PQR must also be included in a collection of information with an OMB control number. Therefore, the Commission is amending the current burden associated with OMB Control Number 3038–0005 to also reflect the burden resulting from NFA Form PQR, which the Commission estimates to be substantively identical to that derived from the Revised Form.[173]

Despite the fact that the Commission will accept the filing of NFA Form PQR in lieu of a filing on the Revised Form, the Commission has determined that it should retain its own form for data collection purposes and to ensure that it retains the ability to perform its regulatory duties and satisfy its data needs regarding CPOs in the future on a unilateral basis, if necessary. Moreover, the Commission anticipates that it will incorporate the information collected on the Revised Form more consistently with its other data streams. To that end, retaining its own form independent of NFA confirms and preserves the Commission's independent and primary role in developing its regulatory and compliance program with respect to registered CPOs and their pools generally, notwithstanding its history of delegating certain registration and compliance functions to NFA. Furthermore, retaining the Revised Form should ensure that the public is able to exercise its rights to receive notice and provide comment as to the content and structure of the Revised Form, as required by the Administrative Procedure Act, and consistent with prior practice for the original form.[174] Therefore, the Commission concludes that the final Revised Form announced today in the Final Rule is not unnecessarily duplicative to information otherwise reasonably accessible to the Commission.

ii. Revisions to the Collection of Information: OMB Control Number 3038–0005

Collection 3038–0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on January 30, 2019.[175] As stated above, Collection 3038–0005 governs responses made pursuant to part 4 of the Commission's regulations, pertaining to the operations of CPOs and CTAs, including the required responses of registered CPOs on Form CPO–PQR pursuant to § 4.27. Generally, the Commission is adjusting, as discussed below, the information collection to reflect an increase in the burden hours associated with the collection of information in the Revised Form. The Commission anticipates, however, that (1) CPOs currently categorized as either Mid-Sized or Large CPOs are expected to experience a substantial reduction in burden relative to the current filing requirements under § 4.27 and Form CPO–PQR; and (2) CPOs considered Small CPOs under the current filing requirements will experience no practical or substantial increase in burden because, like all other registered CPOs, they are currently required to file NFA Form PQR, which already includes a schedule of investments identical to the Revised Form's PSOI, on a quarterly basis, and such Small CPOs, as well as all other reporting CPOs, will be permitted to file NFA Form PQR in lieu of filing the Revised Form.

The currently approved total burden associated with Collection 3038–0005, in the aggregate, is as follows:

Estimated number of respondents: 45,097.

Annual responses for all respondents: 118,824.

Estimated average hours per response: 3.16.[176]

Annual reporting burden: 375,484.

The portion of the aggregate burden that is derived from the current Form CPO–PQR filing requirements is as follows:

Schedule A (for non-Large CPOs and Large CPOs filing Joint Form PF):

Estimated number of respondents: 1,450.

Annual responses for all respondents: 1,450.

Estimated average hours per response: 6.

Annual reporting burden: 8,700.

Schedule A (for Large CPOs not filing Joint Form PF):

Estimated number of respondents: 250.

[171] *See, e.g., supra* pt. II.B (discussing the elimination of Schedules B and C from the Revised Form).

[172] *See infra* § 4.27(c)(2), as amended by this Final Rule (permitting the filing of NFA Form PQR in lieu of filing the Revised Form with the Commission).

[173] As stated in the Proposal, ''the PRA estimates . . . assume that all registered CPOs will either file Revised Form CPO–PQR on a quarterly basis, or NFA Form PQR, but in no event will a CPO be required to file both.'' 2020 CPO–PQR NPRM, 85 FR at 26386 (May 4, 2020).

[174] APA, 5 U.S.C. 553(c).

[175] *See* Notice of Office of Management and Budget Action, OMB Control No. 3038–0005, *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005.*

[176] The Commission rounded the average hours per response to the second decimal place for ease of presentation.

Annual responses for all respondents: 1,000.

Estimated average hours per response: 6.

Annual reporting burden: 6,000.

Schedule B (for Mid-Sized CPOs):

Estimated number of respondents: 400.

Annual responses for all respondents: 400.

Estimated average hours per response: 4.

Annual reporting burden: 1,600.

Schedule B (for Large CPOs not filing Joint Form PF):

Estimated number of respondents: 250.

Annual responses for all respondents: 1,000.

Estimated average hours per response: 4.

Annual reporting burden: 4,000.

Schedule C (for Large CPOs not filing Joint Form PF):

Estimated number of respondents: 250.

Annual responses for all respondents: 1,000.

Estimated average hours per response: 18.

Annual reporting burden: 18,000.

The burden associated with NFA Form PQR was proposed as follows:

Estimated number of respondents: 1,700.

Annual responses by each respondent: 6,800.

Estimated average hours per response: 8.

Annual reporting burden: 54,400.

Total annual reporting burden for all CPOs for current Form CPO–PQR and NFA

Form PQR: 86,900.

The Commission will no longer be estimating burden hours according to each individual Schedule of the form, because, pursuant to the Final Rule, the Revised Form will not have schedules. Therefore, the Commission is amending the collection for Form CPO–PQR compliance to be a single burden-hours estimate for each reporting CPO completing the Revised Form in its entirety.[177] As noted above, the Commission is also requiring that the Revised Form be filed quarterly by each reporting CPO, regardless of the size of their operations, which would result in four (4) annual responses by each respondent. Further, in the Commission's experience, the PSOI comprised a considerable portion of the burden hours previously associated with completing Schedule B, depending on the complexity of a reporting CPO's operations and the number of pools it operated. Thus, the Commission is estimating average hours per response in such a way as to ensure that burden continues to be counted. As noted above, although the estimated hours per response is expected to increase due to the retention of the PSOI and the filing frequency increasing to quarterly for many reporting CPOs, CPOs should not practically experience an increase in burden. The Commission comes to this conclusion because all reporting CPOs are already required to provide a schedule of investments identical to the PSOI, as part of their existing NFA Form PQR filings, which NFA membership rules require on a quarterly basis, and because the Commission expects that those CPOs will continue to make such filings to take advantage of the substituted compliance for NFA Form PQR with respect to the Revised Form, as adopted by the Final Rule.

Therefore, the Commission estimates the burden to registered CPOs for completing the Revised Form and NFA Form PQR, because of the option to file this form in lieu of the Revised Form, to be as follows:

For the Revised Form and NFA Form PQR for All Registered CPOs:

Estimated number of respondents: 1,700.

Annual responses by each respondent: 6,800.

Estimated average hours per response: 8.

Annual reporting burden: 54,400.

The new total burden associated with Collection 3038–0005, in the aggregate, reflecting the adjustment in burden associated with § 4.27 and the Revised Form, is as follows:

Estimated number of respondents: 43,062.

Annual responses for all respondents: 113,980.

Estimated average hours per response: 3.25.

Annual reporting burden: 370,467.

C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions before promulgating a regulation under the CEA or issuing certain orders.[178] 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 swaps 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 CEA section 15(a) considerations.

As discussed above, the Commission is finalizing amendments to Form CPO–PQR that would significantly reduce the amount of reporting required thereunder. Specifically, the Final Rule: (1) Eliminates the pool-specific reporting requirements in existing Schedules B and C of Form CPO–PQR, other than the PSOI (question 6 of Schedule B); (2) amends the information in existing Schedule A of the form to request LEIs for CPOs and their operated pools and to eliminate questions regarding the pool's auditors and marketers; (3) requires all reporting CPOs to submit all information retained in the Revised Form on a quarterly basis; and (4) allows CPOs to file NFA Form PQR in lieu of filing the Revised Form, provided that NFA amends NFA Form PQR to include LEIs. In the sections that follow, the Commission considers the various costs and benefits associated with each aspect of the Final Rule. The baseline against which these costs and benefits are compared is the regulatory status quo, represented by Form CPO–PQR as codified in appendix A to part 4 prior to these amendments.

The consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with some leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following 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 this proposal on all activity subject to the proposed and amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i).[179] Some CPOs are located outside of the United States.

[177] Additionally, the Commission will be accepting the filing of NFA Form PQR in lieu of the Revised Form, which the Commission has designed purposefully to be very similar. *See supra* pt. II.G.i. The Commission reiterates that these PRA estimates assume that all registered CPOs will either file the Revised Form on a quarterly basis, or NFA Form PQR, but in no event will a CPO be required to file both.

[178] 7 U.S.C. 19(a).

[179] 7 U.S.C. 2(i).

i. The Elimination of Pool-Specific Reporting Requirements in Schedules B and C

The Commission is adopting as final amendments that eliminate the pool-specific reporting requirements in existing Schedules B and C of Form CPO–PQR, other than the PSOI (question 6 of Schedule B). The Commission acknowledges that this change could result in less information available to the Commission and, potentially, to FSOC. The detailed and specific information requested in Schedules B and C of Form CPO–PQR is not available to the Commission through any of its other data streams and, if put to its full use, would allow for monitoring of CPOs and their operated pools in a way that could help identify trends and points of stress. The challenges associated with the Form CPO–PQR dataset are a primary reason for the Commission's decision to discontinue its collection of this information, including challenges posed by the degree of flexibility afforded CPOs in reporting this information, and the fact that this information is only reported to the Commission on a quarterly basis, at its most frequent. Given these limitations associated with the data collected, the Commission has determined to prioritize its limited resources to pursue other key regulatory initiatives.

However, considering the alternate data streams currently available to the Commission, the Commission should nevertheless be able to effectively oversee registered CPOs and their operated pools, and potentially do so in a more efficient and effective manner, by adopting the Revised Form as proposed, with some additional clarifications to the Instructions and Defined Terms. Furthermore, due in part to the identified data quality issues, the Commission has not provided FSOC with any Form CPO–PQR data to date. The Commission acknowledges, though, that FSOC would now receive less data from the Commission, as a result of changes made by the Final Rule, as some CPOs that are filing CFTC-only pool information through Joint Form PF may stop. Nonetheless, the Commission does not believe that FSOC's monitoring abilities would be materially or negatively affected, compared to the status quo, by the Commission's rescission of most of Schedules B and C in Form CPO–PQR, as the Commission has not provided FSOC with any data.

The Commission anticipates that eliminating these pool-specific reporting requirements will also reduce the ongoing variable compliance costs for those CPOs considered Mid-Sized CPOs or Large CPOs, and which may move between those filing categories with some regularity, under the status quo. Consequently, those reporting CPOs would no longer need to devote their resources to compiling, analyzing, and reporting this data, which may have had limited utility with respect to their day-to-day operations, to the Commission. Additionally, reporting CPOs in general will no longer be required to monitor their AUMs for the specific purpose of determining their filing obligations because, pursuant to the Final Rule, there is now a single filing requirement for all reporting CPOs. It is possible that the resulting cost savings may allow those CPOs to devote their resources to other compliance or operational initiatives, or to potentially pass those cost savings on to pool participants through reduced fees. These cost savings will likely be reduced, however, for any CPO that is dually registered with the SEC and required to file Joint Form PF because that form requires reporting of information substantially similar to that required in the eliminated Schedules B and C, and the Final Rule does not alter any such CPO's Joint Form PF filing obligations. Finally, the Commission recognizes that the Final Rule also does not alleviate any of the fixed or long-term costs reporting CPOs may have already incurred in developing systems and procedures designed to meet the reporting requirements of the original form, including Schedules B and C.

ii. The Revised Form

This Final Rule adopts the Revised Form, which retains questions from existing Schedule A of Form CPO–PQR, and also adds questions to request LEIs for CPOs and their operated pools. The Commission anticipates that adding these LEI questions will allow it to integrate the data collected by the Revised Form with the Commission's other more current data streams. Leveraging these other data sources in combination with filings of the Revised Form will enable the Commission to continue its oversight and monitoring of counterparty and liquidity risk for some of the largest pools within the Commission's jurisdiction. The Commission thereby concludes that the Final Rule will allow it to focus on areas relevant for assessing and monitoring market and systemic risk, while eliminating the reporting burden associated with Schedules B and C, particularly with respect to pools that would be considered Large Pools.

The addition of these LEI fields may minimally increase the cost for reporting CPOs and their operated pools that engage in swaps with respect to the initial filing of the Revised Form, as LEIs do not change over time, potentially allowing fields for those questions to be prepopulated in subsequent filings. The Commission observes further that neither the Revised Form nor § 4.27 independently creates an affirmative requirement for CPOs to obtain LEIs for themselves and their operated pools, and that CPOs engaging in swaps already have LEIs for themselves and/or their pools. Additionally, the Commission has declined in the Final Rule to require the renewal or maintenance of LEIs for purposes of meeting this Revised Form requirement.[180] Accordingly, the Commission finds that there is likely no additional cost to consider for a reporting CPO related to LEIs beyond the minimal one-time expenditure for the initial Revised Form filing that includes LEIs.

The Final Rule also eliminates from the Revised Form questions regarding the pool's auditors and marketers. The Commission has determined that these amendments will result in reduced costs for reporting CPOs without affecting the scope of information available to the Commission, as the Commission already receives information regarding CPO's accountants and has alternate means of obtaining information about a pool's marketers. For example, persons soliciting for pool participation units are typically either associated persons of the CPO or registered representatives of a broker-dealer. Such persons are already subject to regulation by either the Commission and NFA, or the SEC and FINRA, and therefore readily identifiable by the Commission outside of Form CPO–PQR.

Currently, all CPOs other than Large CPOs submit the information required by the existing form's Schedule A annually. Increasing the frequency with which this information is reported will assist the Commission in its efforts to integrate the Revised Form with the Commission's other timelier data sources, which the Commission believes will improve the overall efficacy of its monitoring and oversight of CPOs and their operated pools. Although this amendment will result in an increased regulatory cost for CPOs considered to be Small and Mid-Sized CPOs under the existing form, when compared to the regulatory status quo, the Commission concludes that the costs actually realized by these CPOs will not be as significant, as they are already reporting

[180] *See supra* pt. II.E.

this information on a quarterly basis via NFA Form PQR, as required by NFA.

Under the current form, only Mid-Sized and Large CPOs are required to submit a PSOI, and Mid-Sized CPOs submit that information annually. The Revised Form, as adopted by the Final Rule, will require all CPOs to submit that information quarterly. The Commission believes that receiving this information from all reporting CPOs more frequently will, when combined with the new questions regarding LEIs, further enhance its ability to integrate the data collected by the Revised Form with other data streams and to identify trends on a timelier basis. As a result, the Commission concludes that adopting a quarterly filing schedule for all CPOs reporting on the Revised Form will ultimately support its goal of effectively monitoring CPOs and their operated pools for market and systemic risk, while also simplifying the reporting requirements applicable to registered CPOs.

The Commission realizes that requiring all information on the Revised Form, including a PSOI for each operated pool, from all reporting CPOs on a quarterly basis will result in an increased regulatory cost, when compared to the regulatory status quo, particularly for CPOs that would be considered Small and Mid-Sized CPOs under the existing filing regime. For instance, CPOs previously considered Small CPOs may be required to develop the procedures and systems necessary to meet the additional reporting obligations for the Revised Form's PSOI, and CPOs previously considered either Small CPOs or Mid-Sized CPOs will be required by the Final Rule to report that information to the Commission on a quarterly basis. The Commission emphasizes, however, that all registered CPOs, regardless of the size of their operations or AUM, are currently required to report the PSOI on a quarterly basis via NFA Form PQR, as required by NFA membership rules, meaning the actual costs as realized by these CPOs as a result of the Final Rule should not be as significant, given the Commission's goal of aligning the Revised Form with NFA Form PQR.

The Final Rule also amends § 4.27(c) such that it allows reporting CPOs to file NFA Form PQR in lieu of filing the Revised Form, provided that NFA amends NFA Form PQR to include questions regarding LEIs. Under NFA's membership rules, all CPOs regardless of size are currently required to file NFA Form PQR on a quarterly basis. This provision will help CPOs maintain their current filing costs without affecting the scope of information available to the Commission under the Revised Form.

As mentioned above, the Commission acknowledges that, through adopting this revision to § 4.27(d), the Final Rule could result in less data being collected on Joint Form PF, as compared to the current status quo. Many dually registered CPOs currently include commodity pools that are not private funds in data that they report on Joint Form PF, in lieu of filing Form CPO–PQR for such pools, in reliance on § 4.27(d). As a result of the Final Rule's revisions to § 4.27(d), these CPO-investment advisers could decide to stop including these pools in their Joint Form PF filings. The Commission concludes though that this loss of data to the SEC and FSOC will not meaningfully impact the efficacy and intent of Joint Form PF in furthering the oversight of the private fund industry, given that it would only result in the loss of data with respect to non-private fund pools; the Commission acknowledges, however, that FSOC may lose data for a specific type of private fund asset class, specifically, managed futures.[181]

Additionally, all CPOs will be required to make a certain amount of alterations to their reporting systems to accommodate the changes adopted herein, even if it is just to deactivate certain data elements that are no longer required and to add the questions regarding LEIs. The Commission anticipates that any such costs will generally be one-time expenditures, and moreover, should not be extensive, given the Commission's efforts in the Final Rule to align the Revised Form with NFA Form PQR, to the greatest extent possible.

iii. Alternatives

In lieu of amending Form CPO–PQR as proposed, the Commission also considered two alternative approaches in the Proposal, and requested comments and data on how those potential alternatives might impact the estimated costs and benefits to market participants and the public.[182] The first alternative considered by the Commission was requiring all CPOs, regardless of whether they are dually registered, to file Joint Form PF. ICI commented that this alternative would likely result in increased costs for registered fund CPOs, noting that, although CPOs of RICs are regulated by both the Commission and the SEC, such CPOs are not currently required to file Joint Form PF.[183] The Commission agrees that this alternative would likely increase the reporting burdens and costs for CPOs not so dually registered, as well as for CPOs that are dually registered, yet do not currently file Joint Form PF; under this alternative, those CPOs would incur increased reporting burdens and costs without providing information directly to the Commission that will be integrated with its other data sources to develop its internal oversight initiatives over CPOs and their operated pools.

The second alternative described in the Proposal that the Commission considered was to devote resources to rectifying the challenges with the data reported under the current form, and amend it to require greater consistency and frequency of reporting of the data fields eliminated by the Final Rule. However, the Commission stated in the Proposal its preliminarily belief that its limited resources could be better directed in line with its regulatory priorities, and that its objectives with respect to oversight of reporting CPOs and their operated pools could be effectively and potentially, more efficiently, achieved through integration with existing data streams.[184] ICI supported this preliminary conclusion by the Commission and argued that a ''more targeted data set is most useful for initial monitoring purposes.'' [185] After considering the alternatives and the responsive comments, the Commission concludes that the changes to the form and § 4.27 adopted by the Final Rule, relative to the alternatives, will facilitate the Commission's effective discharging of its regulatory duties in a manner that simultaneously has the greatest impact on market and systemic risk and eases reporting obligations on a significant number of reporting CPOs with respect to their operated pools.

iv. Section 15(a) Factors

a. Protection of Market Participants and the Public

The Commission believes that the Final Rule will enhance the ability of the Commission to protect derivatives

[181] ICI commented that it did not believe that the Commission should focus on any perceived data needs of the FSOC in determining the scope and focus of Form CPO–PQR, but rather the Commission should act in whatever manner best supports its own regulatory interests in revising the form. ICI, at 5–6.

[182] 2020 CPO–PQR NPRM, 85 FR at 26388 (May 4, 2020).

[183] ICI, at 5 (noting additionally that CPOs of RICs would thus incur costs related to adapting their current systems and processes for the purpose of filing Joint Form PF instead).

[184] 2020 CPO–PQR NPRM, 85 FR at 26388 (May 4, 2020).

[185] ICI, at 6.

markets, its participants, and the public by allowing it to integrate the data collected by the Revised Form with other existing, more up-to-date data streams in a way that will allow the Commission to better exercise its oversight of registered CPOs and their operated pools. As discussed above, the Final Rule may result in a loss of data available to FSOC, which could limit FSOC's visibility into the activities of CPOs and their operated pools.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that the Final Rule will assist the Commission in its efforts to support market efficiency, competitiveness, and financial integrity. Under the Final Rule, reporting CPOs will continue to provide useful information about themselves and their operated pools to the Commission in a way that will permit the Commission to incorporate that data with its other data streams. The Commission believes that consolidating the data collected in this manner will improve its oversight of reporting CPOs, their operated pools, and how they affect the derivatives markets. Additionally, the Commission believes that the specific requirement that a reporting CPO prepare a PSOI on a quarterly basis for each of its operated pools may result in heightened diligence by such CPOs, with respect to their pools' ongoing operations, and may encourage particularly smaller CPOs to adopt more formalized controls for their businesses. The Commission believes that both of those results will generally enhance the confidence of other market participants in transacting with registered CPOs and their operated pools, and generally, support the efficiency, competitiveness, and financial integrity of the markets.

c. Price Discovery

The Commission has not identified any impact that the Final Rule would have on price discovery.

d. Sound Risk Management Practices

Although the Commission is no longer requiring reporting CPOs and their operated pools to report certain risk information on the Revised Form, the Commission recognizes that CPOs will likely, in general, continue to benefit from establishing and possessing systems that collect and review risk-related information, even if it is no longer reported. The Commission has not identified any other impact that the Final Rule would have on sound risk management practices.

e. Other Public Interest Considerations

The Commission did not identify any other public interest considerations that the Final Rule would have.

D. Antitrust Laws

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 (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.'' [186]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicates any other specific public interest to be protected by the antitrust laws, but did not receive any comments on whether the Proposal was anticompetitive.

The Commission has considered the Final Rule to determine whether it is anticompetitive and has identified no anticompetitive effects. Because the Commission has determined the Final Rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission hereby amends 17 CFR part 4 as set forth below:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

■ 2. In § 4.27, revise paragraphs (c) and (d) to read as follows:

§ 4.27 Additional reporting by commodity pool operators and commodity trading advisors.

* * * * *

(c) *Reporting.* (1) Each reporting person shall file with the National Futures Association, a report with respect to the directed assets of each pool under the advisement of a commodity pool operator consistent with appendix A to this part, or a commodity trading advisor consistent with appendix C to this part.

(2) A reporting person required to file NFA Form PQR with the National Futures Association for the reporting period may make such filing in lieu of the report required under paragraph (c)(1) of this section; *provided that,* the Commission has determined that NFA Form PQR is substantively consistent with appendix A to this part.

(3) Nothing in this provision restricts the National Futures Association's ability to require reporting beyond that required by the Commission; *provided that,* such additional requirements are consistent with the Commodity Exchange Act and 17 CFR chapter I.

(4) All financial information shall be reported in accordance with generally accepted accounting principles consistently applied. A reporting person operating a pool that meets the conditions specified in § 4.22(d)(2)(i) to present and compute the commodity pool's financial statements contained in the Annual Report other than in accordance with United States generally accepted accounting principles and has filed notice pursuant to § 4.22(d)(2)(iii) may also use the alternative accounting principles, standards, or practices identified in that notice in reporting information required to be reported pursuant to paragraph (c)(1) of this section.

(d) *Investment advisers to private funds.* Commodity pool operators and commodity trading advisors that are dually registered as investment advisers with the Securities and Exchange Commission, and that are required to file Form PF under the rules promulgated under the Investment Advisers Act of 1940, shall file Form PF with the Securities and Exchange Commission, in addition to filings made pursuant to paragraph (c)(1) of this section. Dually registered commodity pool operators and commodity trading advisors that file Form PF with the Securities and Exchange Commission will be deemed to have filed Form PF with the Commission, for purposes of any enforcement action regarding any false or misleading statement of material fact in Form PF.

* * * * *

■ 3. Revise appendix A to part 4 to read as follows:

[186] 7 U.S.C. 19(b).

Appendix A to Part 4—Form CPO–PQR

BILLING CODE 6351–01–P

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION	CFTC Form CPO-PQR OMB No.: 3038-0005

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS

Instructions for Using Form CPO-PQR

READ THE DEFINITIONS AND FILING INSTRUCTIONS CAREFULLY BEFORE COMPLETING OR REVIEWING THE REPORTING FORM.

This document is not a reporting form. Do not send this document to NFA. It is a template that you may use to assist in filing the electronic reporting form with the NFA at: *https://www.nfa.futures.org*.

You may fill out the template online and save and/or print it when you are finished or you can download the template and/or print it and fill it out later.

DEFINED TERMS

Words that are underlined in this form are defined terms and have the meanings contained in the Defined Terms section.

GENERAL

Read the Instructions and Questions Carefully.

Please read the instructions and the questions in this Form CPO-PQR carefully.

In this Form CPO-PQR, "you" means the CPO.

Call the CFTC with Questions

If there is any question about whether particular information must be provided or about the manner in which particular information must be provided, contact the CFTC for clarification.

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION	CFTC Form CPO-PQR OMB No.: 3038-0005

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS

Instructions for Using Form CPO-PQR

DEFINED TERMS

Affiliated Entity: The term "Affiliated Entity" means any entity is an affiliate of another entity. An entity is an affiliate of another entity if the entity directly or indirectly controls, is controlled by or is under common control with the other entity.

Assets Under Management or AUM: The term "Assets Under Management" or "AUM" means the amount of all assets that are under the control of the CPO.

BP: The term "BP" means basis points.

Broker: The term "Broker" means any entity that provides clearing, prime brokerage or similar services to the Pool.

CDS: The term "CDS" means credit default swap.

CCP: The term "CCP" means a central counterparty or central clearing house, such as, but not limited to: CC&G, CME Clearing, The Depository Trust & Clearing Corporation (including FICC, NSCC and Euro CCP), EMCF, Eurex Clearing, Fedwire, ICE Clear Europe, ICE Clear U.S., ICE Trust, LCH Clearnet Limited, LCH Clearnet SA, Options Clearing Corporation, and SIX x-clear.

Commodity Futures Trading Commission or CFTC: The term "Commodity Futures Trading Commission" or "CFTC" means the United States Commodity Futures Trading Commission.

Commodity Pool or Pool: The term "Commodity Pool" or "Pool" has the same meaning as "commodity pool" as defined in section 1a(10) of the Commodity Exchange Act.

Commodity Pool Operator or CPO: The term "commodity pool operator" or "CPO" has the same meaning as "commodity pool operator" defined in section 1a(11) of the Commodity Exchange Act, except that, for purposes of this Form CPO-PQR, the term does not include a CPO that is registered, but operates only Pools for which it maintains an exclusion from the definition of the term "commodity pool operator" in 17 CFR 4.5 and/or an exemption from CPO registration in 17 CFR 4.13. See 17 CFR 4.27(b)(2)(i).

Commodity Trading Advisor or CTA: The term "commodity trading advisor" or "CTA" has the same meaning as "commodity trading advisor" as defined in section 1a(12) of the Commodity Exchange Act.

Feeder Fund: *See* Master-Feeder Arrangement.

Financial Institution: The term "financial institution" means any of the following: (i) a bank or savings association, in each case as defined in the Federal Deposit Insurance Act; (ii) a bank holding company or financial holding company, in each case as defined in the Bank Holding Company Act of 1956; (iii) a savings and loan holding company, as defined in the Home Owners' Loan Act; (iv) a Federal credit union, State credit union or State-chartered credit union, as those terms are defined in section 101 of the Federal Credit Union Act; (v) a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971; or (vi) an entity chartered or otherwise organized outside the United States that engages in banking activities.

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION	CFTC Form CPO-PQR OMB No.: 3038-0005

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS

Instructions for Using Form CPO-PQR

Form CPO-PQR: The term "Form CPO-PQR" means this Form CPO-PQR.

Form PF: The term "Form PF" refers to the Form PF.

GAAP: The term "GAAP" means U.S. Generally Accepted Accounting Principles or one of the alternative accounting principles, standards, or practices specified in 17 CFR 4.22(d)(2)(i). See 17 CFR 4.27(c)(4).

Investment Adviser: The term "Investment Adviser" has the same meaning as "investment adviser" as defined in Section 202(a)(11) of the Investment Advisers Act of 1940.

Legal Entity Identifier or LEI: The term "Legal Entity Identifier" or LEI refers to the identification number required by Commission Regulation 45.6 in all recordkeeping and swap data reporting, and which is issued by an LEI utility pursuant to that regulation. See 17 CFR 45.6.

Master Fund: See Master-Feeder Arrangement.

Master-Feeder Arrangement: The phrase "Master-Feeder Arrangement" means an arrangement in which one or more funds ("Feeder Funds") invest all or substantially all of their assets in a single fund ("Master Fund"). A fund would also be a Feeder Fund investing in a Master Fund for the purposes of this definition, if it issued multiple classes or series of shares or interests, and each class (or series) invests substantially all of its assets in shares (or other interests in) a single underlying Master Fund.

National Futures Association or NFA: The term "National Futures Association" or "NFA" refers to the National Futures Association, a registered futures association under section 17 of the Commodity Exchange Act.

Negative OTE: The term Negative OTE means negative open trade equity, or the amount of unrealized losses on open derivative positions.

Net Asset Value or NAV: The term "Net Asset Value" or "NAV" has the same meaning as "net asset value" as defined in 17 CFR 4.10(b).

Non-U.S. Financial Institution: A "non-U.S. Financial Institution" means any of the following Financial Institutions: (i) a Financial Institution chartered outside the United States; (ii) a subsidiary of a U.S. Financial Institution that is separately incorporated or otherwise organized outside the United States; or (iii) a branch or agency that resides in the United States but has a parent that is a Financial Institution chartered outside the United States.

OTC: The term "OTC" means over-the-counter.

Private Fund: The term "Private Fund" has the same meaning as "private fund" as defined in Form PF.

Positive OTE: The term "Positive OTE" means positive open trade equity, or the amount of unrealized gains on open derivative positions.

TEMPLATE: DO NOT SEND TO NFA

COMMODITY FUTURES TRADING COMMISSION	CFTC Form CPO-PQR OMB No.: 3038-0005

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS

Instructions for Using Form CPO-PQR

Reporting Date: The term "Reporting Date" means the last calendar day of the Reporting Period for which this Form CPO-PQR is required to be completed and filed. For example, the Reporting Date for the first calendar quarter of a year is March 31; the Reporting Date for the second calendar quarter is June 30.

Reporting Period: The term "Reporting Period" means any of the individual calendar quarters (ending March 31, June 30, September 30, and December 31) for all CPOs.

Trading Manager: The term "Trading Manager" means any entity or individual with sole or partial authority to invest Pool assets or to allocate Pool assets to other managers or investee Pools (including cash management firms). CTAs and other CPOs can be Trading Managers; however, a CPO should not identify itself as a Trading Manager.

Secured Borrowing: The term "Secured Borrowing" means obligations for borrowed money in respect of which the borrower has posted collateral or other credit support. For purposes of this definition, repos are secured borrowings.

Securities and Exchange Commission or SEC: The term "Securities and Exchange Commission" or "SEC" means the United States Securities and Exchange Commission.

Side Arrangements and Side Letters: The term "Side Arrangements" or the term "Side Letters" means any arrangement that is extended to less than 100% of the Pool's participants.

U.S. Financial Institution: The term "U.S. Financial Institution" means any of the following Financial Institutions: (i) a Financial Institution chartered in the United States (whether federally-chartered or state-chartered); (ii) a subsidiary of a Non-U.S. Financial Institution that is separately incorporated or otherwise organized in the United States; or (iii) a branch or agency that resides outside the United States but has a parent that is a Financial Institution chartered in the United States.

Unsecured Borrowing: The term "Unsecured Borrowing" means obligations for borrowed money in respect of which the borrower has not posted collateral or other credit support.

TEMPLATE: DO NOT SEND TO NFA

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Instructions for Using Form CPO-PQR

REPORTING INSTRUCTIONS

1. All CPOs Are Required to Complete and File the Form CPO-PQR.

All CPOs are required to complete and file a Form CPO-PQR for each Reporting Period during which they satisfy the definition of CPO and operate at least one Pool. Further, if a Pool is operated by Co-CPOs and one of them is an Investment Adviser, the non-Investment Adviser CPO must file relevant section(s) even though a Form PF was filed for that Pool by the Investment Adviser-CPO.

All CPOs must complete and file Form CPO-PQR within 60 days of the close of the most recent Reporting Period. The information provided herein should be as of the Reporting Date, the last business day of the Reporting Period.

Part 1 of Form CPO-PQR surveys basic information about the reporting CPO. Part 2 of Form CPO-PQR asks for more specific information about each of the CPO's Pools, including questions about the Pool's key relationships and about the Pool's investment positions.

2. Relationship to the National Futures Association's NFA Form PQR

To the extent that a CPO has timely filed the National Futures Association's NFA Form PQR, such filing shall be deemed to satisfy this Form CPO-PQR. See 17 CFR 4.27(c)(2).

3. CPOs Are Required to Separately Report Information Concerning Pools in a Master-Feeder Arrangement.

For the parts of Form CPO-PQR that request information about individual Pools, you must report information for each of the Pools in a Master-Feeder Arrangement individually.

4. I advise a Pool that invests in other Pools or funds (e.g., a "fund of funds"). How should I treat these investments for purposes of Form CPO-PQR?

Investments in other Pools generally. For purposes of this Form CPO-PQR, you may disregard any Pool's equity investments in other Pools. However, if you disregard these investments, you must do so consistently. For Question 9, even if you disregard these assets, you may report the performance of the entire Pool and are not required to recalculate performance to exclude these investments. Do not disregard any liabilities, even if incurred in connection with these investments.

Pools that invest substantially all of their assets in other Pools or funds. If you are the CPO for a Pool that: (i) invests substantially all of its assets in the equity of Pools for which you are not the CPO; and (ii) aside from such Pool investments, holds only cash and cash equivalents and instruments acquired for the purpose of hedging currency exposure, you must still complete this Form CPO-PQR for that Pool and include all assets of that Pool.

Notwithstanding the foregoing, you must include disregarded assets in responding to Questions 8 and 11 in this Form CPO-PQR.

TEMPLATE: DO NOT SEND TO NFA

CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Instructions for Using Form CPO-PQR

5. I advise a Pool that invests in entities that are not Pools, *or* are exempt. How should I treat these investments for purposes of Form CPO-PQR?

With respect to investments in entities that are not Pools or are exempt, these investments should be treated consistent with Instruction 4 above.

6. Form CPO-PQR Must Be Filed Electronically with NFA.

All CPOs must file Form CPO-PQR electronically using NFA's EasyFile System. NFA's EasyFile System can be accessed through NFA's website at www.nfa.futures.org. You will use the same logon and password for filing your Form CPO-PQR as you would for any other EasyFile filings. Questions regarding your NFA ID# or your use of NFA's EasyFile system should be directed to NFA staff. NFA's contact information is available on its website, *https://www.nfa.futures.org*.

7. All Figures Must Be Reported in U.S. Dollars.

All questions asking for amounts or investments must be reported in U.S. dollars. Any amounts converted to U.S. dollars must use the conversion rate in effect on the Reporting Date.

8. Use of U.S. GAAP or Alternative Accounting Principles, Standards, or Practices.

All financial information in this Report must be presented and computed in accordance with GAAP consistently applied. See 17 CFR 4.27(c)(4).

9. Reporting of Legal Entity Identifiers (LEIs)

Form CPO-PQR includes questions asking CPOs for LEIs for the CPO and its operated Pools. CPOs are **NOT** required to obtain LEIs for themselves or their operated Pools, solely for the purpose of completing this Form CPO-PQR, where such CPOs or Pools are not otherwise required to have them for their operations.

10. Oath and Affirmation

This Form CPO-PQR will not be accepted unless it is complete and contains an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; provided however, that is shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in this Form CPO-PQR is not accurate and complete.

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Form CPO-PQR Template

INTRODUCTION

Every CPO is required to complete and file this Form CPO-PQR. This Form CPO-PQR must be completed for every Reporting Period during which the CPO operated at least one Pool. Part 1 of this Form asks for information about the CPO. Part 2 asks for information about each individual Pool that the CPO operated during the Reporting Period. CPOs must complete and file a separate Part 2 for each Pool they operated any time during the Reporting Period.

Unless otherwise specified in a particular question, all information provided in this Form CPO-PQR should be accurate as of the Reporting Date.

PART 1 · INFORMATION ABOUT THE CPO

1. CPO INFORMATION

Provide the following general information concerning the CPO:

a. CPO's Name:

b. CPO's NFA ID#:

c. CPO's LEI #:

d. Person to contact concerning this Form CPO-PQR:

e. CPO's chief compliance officer:

f. Total number of employees of the CPO:

g. Total number of equity holders of the CPO:

h. Total number of Pools operated by the CPO:

i. Telephone number and email for person identified in d. above

2. CPO ASSETS UNDER MANAGEMENT

Provide the following information concerning the amount of Assets Under Management by the CPO:

a. CPO's Total Assets Under Management:

b. CPO's Total Net Assets Under Management:

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Form CPO-PQR Template

PART 2 · INFORMATION ABOUT THE POOLS OPERATED BY THE CPO

REMINDER: The CPO must complete and file a separate Part 2 for each Pool that the CPO operated during the Reporting Period.

3. POOL INFORMATION

Provide the following general information concerning the Pool:

a. CPO's Name:

b. Pool's Name:

c. Pool's NFA ID#:

d. Pool's LEI #:

4. POOL THIRD PARTY ADMINISTRATORS

Provide the following information concerning the Pool's third party administrator(s):

a. Does the CPO use third party administrators for the Pool?

If "Yes," provide the following information for each third party administrator:

i. Name of the administrator:

ii. NFA ID# of administrator:

iii. Address of the administrator:

iv. Telephone number of the administrator:

v. Starting date of the relationship with the administrator:

vi. Services performed by the administrator:

Preparation of Pool financial statements:

Maintenance of the Pool's books and records:

Calculation of Pool's performance:

Other:

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Form CPO-PQR Template

5. POOL BROKERS

Provide the following information concerning the Pool's Broker(s):

a. Does the CPO use Brokers for the Pool?

If "Yes," provide the following information for each Broker:

i. Name of the Broker:

ii. NFA ID# of Broker:

iii. Address of Broker

iv. Telephone number of the Broker:

v. Starting date of the relationship with the Broker:

vi. Services performed by the Broker:

Clearing services for the Pool:

Custodian services for some or all Pool assets:

Prime brokerage services for the Pool:

Other:

6. POOL TRADING MANAGERS

Provide the following information concerning the Pool's Trading Manager(s):

a. Has the CPO authorized Trading Managers to invest or allocate some or all of the Pool's Assets Under Management?

If "Yes," provide the following information for each Trading Manager:

i. Name of the Trading Manager:

ii. NFA ID# of the Trading Manager:

iii. Address of the Trading Manager:

iv. Telephone number of the Trading Manager:

v. Starting date of the relationship with the Trading Manager:

vi. What percentage of the Pool's Assets Under Management does the Trading Manager have authority to invest or allocate?

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Form CPO-PQR Template

7. POOL CUSTODIANS

Provide the following information concerning the Pool's custodian(s):

a. Does the CPO use custodians to hold some or all of the Pool's Assets Under Management?

If "Yes," provide the following information for each custodian:

i. Name of the custodian:

ii. NFA ID# of the custodian:

iii. Address of the custodian:

iv. Telephone number of the custodian:

v. Starting date of the relationship with the custodian:

vi. What percentage of the Pool's Assets Under Management is held by the custodian?

8. POOL'S STATEMENT OF CHANGES CONCERNING ASSETS UNDER MANAGEMENT

Provide the following information concerning the Pool's activity during the Reporting Period. For the purposes of this question:

a. The Assets Under Management and Net Asset Value at the beginning of the Reporting Period are considered to be the same as the Assets Under Management and Net Asset Value at the end of the previous Reporting Period, in accordance with 17 CFR 4.25(a)(7)(A).

b. The additions to the Pool include all additions whether voluntary or involuntary in accordance with 17 CFR 4.25(a)(7)(B).

c. The withdrawals and redemptions from the Pool include all withdrawals or redemptions whether voluntary or not, in accordance with 17 CFR 4.25(a)(7)(C).

d. The Pool's Assets Under Management and Net Asset Value on the Reporting Date must be calculated by adding or subtracting from the Assets Under Management and Net Asset Value at the beginning of the Reporting Period, respectively, any additions, withdrawals, redemptions and net performance, as provided in 17 CFR 4.25(a)(7)(E).

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
Form CPO-PQR Template

i. Pool's Assets Under Management at the beginning of the Reporting Period:

ii. Pool's Net Asset Value at the beginning of the Reporting Period:

iii. Pool's net income during the Reporting Period:

iv. Additions to the Pool during the Reporting Period:

v. Withdrawals and Redemptions from the Pool during the Reporting Period:

vi. Pool's Assets Under Management on the Reporting Date:

vii. Pool's Net Asset Value on the Reporting Date:

viii. Pool's base currency:

9. POOL'S MONTHLY RATES OF RETURN

Provide the Pool's monthly rate of return for each month that the Pool has operated. The Pool's monthly rate of return should be calculated in accordance with 17 CFR 4.25(a)(7)(F). Provide the Pool's annual rate of return for the appropriate year in the row marked "Annual."

	2021	2020	2019	2018	2017	2016	2015
Jan.							
Feb.							
March							
April							
May							
June							
July							
August							
Sept.							
Oct.							
Nov.							
Dec.							
ANNUAL							

10. POOL SUBSCRIPTIONS AND REDEMPTIONS

Provide the following information concerning subscriptions to and redemptions from the Pool during the Reporting Period.

a. Has the Pool imposed a halt or any other material limitation on redemptions during the Reporting Period?

If "Yes," provide the following information:

i. On what date was the halt or material limitation imposed?

ii. If the halt or material limitation has been lifted, on what date was it lifted?

iii. What disclosure was provided to participants to notify them that the halt or material limitation was being imposed? What disclosure was provided to participants to notify them that the halt or material limitation was being lifted?

iv. On what date(s) was this disclosure provided?

11. POOL SCHEDULE OF INVESTMENTS

Provide the Pool's investments in each of the subcategories listed under the following seven headings: (1) Cash; (2) Equities; (3) Alternative Investments; (4) Fixed Income; (5) Derivatives; (6) Options; and (7) Funds. First, determine how the Pool's investments should be allocated among each of these seven categories. Once you have determined how the Pool's investments should be allocated, enter the dollar value of the Pool's total investment in each applicable category on the top, boldfaced line. For example, under the "Cash" heading, the Pool's total investment should be listed on the line reading "Total Cash." After the top, boldfaced line is completed, proceed to the subcategories. For each subcategory, determine whether the Pool has investments that equal or exceed 5% of the Pool's Net Asset Value. If so, provide the dollar value of each such investment in the appropriate subcategory. If the dollar value of any investment in a subcategory equals or exceeds 5% of the Pool's Net Asset Value, you must itemize the investments in that subcategory.

CASH

Total Cash

At Carrying Broker

At Bank

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
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EQUITIES	Long	Short
Total Listed Equities		
Stocks		
a. Energy and Utilities		
b. Technology		
c. Media		
d. Telecommunication		
e. Healthcare		
f. Consumer Services		
g. Business Services		
h. Issued by Financial Institutions		
i. Consumer Goods		
j. Industrial Materials		
Exchange Traded Funds		
American Deposit Receipts		
Other		
Total Unlisted Equities		
Unlisted Equities Issued by Financial Institutions		

ALTERNATIVE INVESTMENTS	Long	Short
Total Alternative Investments		
Real Estate		
a. Commercial		
b. Residential		
Private Equity		
Venture Capital		
Forex		

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Spot

a. Total Metals

i. Gold

b. Total Energy

i. Crude oil

ii. Natural gas

iii. Power

c. Other

Loans to Affiliates

Promissory Notes

Physicals

a. Total Metals

i. Gold

b. Agriculture

c. Total Energy

i. Crude oil

ii. Natural gas

iii. Power

Other

FIXED INCOME	Long	Short
Total Fixed Income		
Notes, Bonds and Bills		
a. Corporate		
i. Investment grade		
ii. Non-investment grade		
b. Municipal		

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
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c. Government
    i. U.S. Treasury securities
    ii. Agency securities
    iii. Foreign (G10 countries)
    iv. Foreign (all other)
d. Gov't Sponsored
e. Convertible
    i. Investment grade
    ii. Non-investment grade

Certificates of Deposit

a. U.S.
b. Foreign

Asset Backed Securities

a. Mortgage Backed Securities
    i. Commercial Securitizations
        A. Senior or higher
        B. Mezzanine
        C. Junior/Equity
    ii. Commercial Resecuritizations
        A. Senior or higher
        B. Mezzanine
        C. Junior/Equity
    iii. Residential Securitizations
        A. Senior or higher
        B. Mezzanine
        C. Junior/Equity
    iv. Residential Resecuritizations
        A. Senior or higher
        B. Mezzanine
        C. Junior/Equity

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v. Agency Securitizations
   A. Senior or higher
   B. Mezzanine
   C. Junior/Equity

vi. Agency Resecuritizations
   A. Senior or higher
   B. Mezzanine
   C. Junior/Equity

b. CDO Securitizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

c. CDO Resecuritizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

d. CLOs Securitizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

e. CLO Resecuritizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

f. Credit Card Securitizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

g. Credit Card Resecuritizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

h. Auto-Loan Securitizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

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i. Auto-Loan Resecuritizations
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

j. Other
   i. Senior or higher
   ii. Mezzanine
   iii. Junior/Equity

Repos

Reverse Repos

DERIVATIVES	Positive OTE	Negative OTE
Total Derivatives		
Futures		
a. Indices		
i. Equity		
ii. Commodity		
b. Metals		
i. Gold		
c. Agriculture		
d. Energy		
i. Crude oil		
ii. Natural gas		
iii. Power		
e. Interest Rate		
f. Currency		
g. Related to Financial Institutions		
h. Other		
Forwards		

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Swaps

a. Interest Rate Swap

b. Equity/Index Swap

c. Dividend Swap

d. Currency Swap

e. Variance Swap

f. Credit Default Swap

i. Single name CDS

A. Related to Financial Institutions

ii. Index CDS

iii. Exotic CDS

g. OTC Swap

i. Related to Financial Institutions

h. Total Return Swap

i. Other

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS
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OPTIONS	Long Option Value	Short Option Value
Total Options		
Futures		
a. Indices		
i. Equity		
ii. Commodity		
b. Metals		
i. Gold		
c. Agriculture		
d. Energy		
i. Crude oil		
ii. Natural Gas		
iii. Power		
e. Interest Rate		
f. Currency		
g. Related to Financial Institutions		
h. Other		
Stocks		
a. Related to Financial Institutions		
Customized/OTC		
Physicals		
a. Metals		
i. Gold		
b. Agriculture		
c. Currency		
d. Energy		
i. Crude oil		
ii. Natural gas		
iii. Power		
e. Other		

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FUNDS **Long**

Total Funds

Mutual Fund
a. U.S.
b. Foreign

NFA Listed Fund

Hedge Fund

Equity Fund

Money Market Fund

Private Equity Fund

REIT

Other Private funds

Funds and accounts other than private funds (i.e., the remainder of your assets under management)

ITEMIZATION

a. If the dollar value of any investment in any subcategory under the heading "Equities," "Alternative Investments" or "Fixed Income" equals or exceeds 5% of the Pool's Net Asset Value, itemize the investment(s) in the table below.

Subheading	Description of Investment	Long/ Short	Cost	Fair Value	Year-to-Date Gain (Loss)

b. If the dollar value of any investment in any subcategory under the heading "Derivatives" or "Options" equals or exceeds 5% of the Pool's Net Asset Value, itemize the investment(s) in the table below.

Subheading	Description of Investment	Long/ Short	OTE	Counterparty	Year-to-Date Gain (Loss)

c. If the dollar value of any investment in any subcategory under the heading "Funds" equals or exceeds 5% of the Pool's Net Asset Value, itemize the investment(s) in the table below.

Subheading	Fund Name	Fund Type	Fair Value	Year-to-Date Gain (Loss)

– This Completes Form CPO-PQR –

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CFTC FORM CPO-PQR REPORT FOR COMMODITY POOL OPERATORS

Form CPO-PQR Template

OATH

BY FILING THIS REPORT, THE UNDERSIGNED AGREES THAT THE ANSWERS AND INFORMATION PROVIDED HEREIN are complete and accurate, and are not misleading in any material respect to the best of the undersigned's knowledge and belief. Furthermore, by filing this Form CPO-PQR, the undersigned agrees that he or she knows that it is unlawful to sign this Form CPO-PQR if he or she knows or should know that any of the answers and information provided herein is not accurate and complete.

Name of the individual signing this Form CPO-PQR on behalf of the CPO:

Capacity in which the above is signing on behalf of the CPO:

BILLING CODE 6351–01–C

Issued in Washington, DC, on October 9, 2020, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Compliance Requirements for Commodity Pool Operators on Form CPO–PQR—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

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—Supporting Statement of Chairman Heath P. Tarbert

When the Commission considered the proposed rule to amend the compliance requirements for commodity pool operators (CPOs) on Form CPO–PQR,[1] I observed that the esteemed 19th century mathematician Charles Babbage had asked ''if you put into the machine the wrong figures, will the right answers come out?'' [2] Baggage foresaw what would evolve in the 20th century as the ''garbage-in, garbage-out'' predicament—that is, the concept that flawed, or nonsense, input data produces nonsense output or ''garbage.''

Since becoming Chairman, I have prioritized improving the CFTC's approach to collecting data. As a federal agency, we must be selective about the data we collect, and then make sure we are actually making good use of the data for its intended purpose.[3] For example, we recently adopted three final rules to revise CFTC regulations for swap data reporting, dissemination, and public reporting requirements for market participants.[4] One purpose of those amendments was to simplify the swap data reporting process to ensure that market participants are not burdened with unclear or duplicative reporting obligations that do little to reduce market risk or facilitate price discovery.[5]

Today we are engaged in a similar exercise. The amendments to the compliance requirements for CPOs on Form CPO–PQR that we are considering reflect the CFTC's reassessment of the scope of the form and how it aligns with our current regulatory priorities. By refining our approach to data collection, the final rule—in conjunction with our current market surveillance efforts—will enhance the CFTC's ability to gain more timely insight into the activities of CPOs and their operated pools. At the same time, the final rule will reduce reporting burdens for market participants.

Background on Form CPO–PQR

Form CPO–PQR requests information regarding the operations of a CPO, and each pool that it operates, in varying degrees of frequency and complexity, depending upon the assets under management of both the CPO and the operated pool(s). When it adopted Form CPO–PQR in 2012, the Commission determined that form data would be used for several broad purposes, including:

- Increasing the CFTC's understanding of our registrant population;
- assessing the market risk associated with pooled investment vehicles under our jurisdiction; and
- monitoring for systemic risk.[6]

For the majority of pool-specific questions on Form CPO–PQR, the Commission believed the incoming data would assist the CFTC in monitoring commodity pools to identify trends over time. For example, the CFTC would get information regarding a pool's exposure to asset classes, the composition and liquidity of a pool's portfolio, and a pool's susceptibility to failure in times of stress.[7]

Shortcomings of Form CPO–PQR

Seven years of experience with Form CPO–PQR, however, have not borne out that vision. To begin with, in an effort to take into account the different ways CPOs maintain information, the Commission has allowed CPOs flexibility in how they calculate and present certain of the data elements. As a result, it has been challenging, to say the least, for the CFTC to identify trends across CPOs or pools using Form CPO–PQR data. In

[1] Amendments to Compliance Requirements for Commodity Pool Operators on Form CPO–PQR, 86 FR 26378 (May 4, 2020).

[2] Statement of Chairman Heath P. Tarbert in Support of Revising Form CPO–PQR (Apr. 14, 2020), available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement041420b. See* Charles Baggage, Passages from the Life of a Philosopher (London 1864).

[3] *See* Statement of Chairman Heath P. Tarbert in Support of Revising Form CPO–PQR, *supra* note 2.

[4] CFTC Finalizes Rules to Improve Swap Data Reporting, Approves Other Measures at September 17 Open Meeting, available at: *https://www.cftc.gov/PressRoom/PressReleases/8247/20.*

[5] *See* Statement of Chairman Heath P. Tarbert in Support of Final Rules on Swap Data Reporting (Sep. 17, 2020), available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement091720c.*

[6] *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012).

[7] *See* Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 FR 7976, 7981 (Form CPO–PQR Proposal) (Feb. 11, 2011).

addition, taking into account the volume and complexity of the data it was requesting, the Commission decided not to require the data to be provided in real-time, but instead mandated only post hoc quarterly or annual filings.

As the CFTC staff has reviewed the data over the years, it has become apparent that the disparate, infrequent, and delayed nature of CPO reporting has made it difficult to assess the impact of CPOs and their operated pools on markets. This is largely because conditions and relative CPO risk profiles may have changed, potentially significantly, by the time Form CPO–PQR is filed with the CFTC.

Sound Regulation Means Collecting Only Information We Intend to Use

What we need is not over-regulation or even de-regulation, but rather sound regulation. In the midst of the coronavirus pandemic, when we are facing the greatest economic challenge since the 2008 financial crisis, and possibly since the Great Depression, the fact that we are asking market participants to put significant time and effort into providing us data that is difficult to integrate with the CFTC's other more timely and standardized data streams is not sound regulation. Frankly, it is wasteful and an example of ineffective government.

My colleague Commissioner Dan Berkovitz made the following observation in connection with a different rulemaking: ''In addition to obtaining accurate data, the Commission must also develop the tools and resources to analyze that data.'' [8] He is spot on. But I believe the converse is also true. We should not collect data we cannot use effectively. In the case of Form CPO–PQR, this means not requiring market participants to provide information that the CFTC has neither the resources nor the ability to analyze with our other data streams. Our credibility as a regulator is strengthened when we honestly admit that our regulations ask for data that we both have not used effectively and have no intention of using going forward. That is what we are doing today.

Alternative, and Sometimes Better, Sources of Data Are Available to the Commission

Form CPO–PQR is not our only source of data regarding commodity pools. The CFTC has devoted substantial resources to developing other data streams and regulatory initiatives designed to enhance our ability to surveil financial markets for risk posed by all manner of market participants, including CPOs and their operated pools.

These alternative data streams, which include extensive information related to trading, reporting, and clearing of swaps, are in some cases more useful or robust than information from Form CPO–PQR. Importantly, most of the transaction and position information the CFTC uses for our surveillance activities is available on a more timely and frequent basis than the data received on the current iteration of Form CPO–PQR. Furthermore, CFTC programs to conduct surveillance of exchanges, clearinghouses, and futures commission merchants already include CPOs and do not rely on the information contained in Schedules B and C of Form CPO–PQR.

Taken together, the CFTC's other existing data efforts have enhanced our ability to surveil financial markets, including with respect to the activities of CPOs and the pools they operate. In general, the CFTC's alternate data streams provide a more prompt, standardized, and reliable view into relevant market activity than that provided under Form CPO–PQR. As revised, data from Form CPO–PQR will more easily be integrated with these existing and more developed data streams. This will enable the CFTC to oversee and assess the impact of CPOs and their operated pools in a way that is both more effective for us and less burdensome for those we regulate.

In keeping with these principles—particularly the principle that we should not collect data we cannot use effectively—I note that as part of this rulemaking the Commission is instructing the staff to evaluate the ongoing utility of the Pool Schedule of Investments information in revised Form CPO–PQR. This will include comparing it to the 2010 Schedule of Investments. The review will be completed within 18–24 months following the date upon which persons are required to comply with the final rule and may result in further recommended actions. During the review period, the staff also may identify and extend targeted relief for data fields that the CFTC receives from other sources.

Legal Entity Identifiers Are Something We Need

The final rule does more than simply eliminate certain data collections. It also requires the collection of an additional piece of key information: Legal entity identifiers (LEIs) for CPOs and their operated pools. LEIs are critical to understanding the activities and interconnectedness within financial markets. Although LEIs have been around since 2012 and authorities in over 40 jurisdictions have mandated the use of LEI codes to identify legal entities involved in a financial transaction,[9] this is a new requirement for Form CPO–PQR. The lack of LEI information for CPOs and their operated pools has made it challenging to align the data collected on Form CPO–PQR with the data received from exchanges, clearinghouses, swap data repositories, and futures commission merchants. As a result, we cannot always get a full picture of what is happening in the markets we regulate. Adding an LEI requirement for CPOs and their operated pools will help give us a complete perspective.

In addition, the final rule better aligns Form CPO–PQR with Form PQR of the NFA, which all CPOs must file quarterly and which the NFA may revise to include questions regarding LEIs. Under these circumstances, we could permit a CPO to file NFA Form PQR in lieu of our Form CPO–PQR as revised. In doing so, we would offer CPOs greater filing efficiencies without compromising our ability to obtain relevant data.

Form CPO–PQR, as Revised, has Other Regulatory Benefits

The Dodd-Frank Act established the Office of Financial Research (OFR) nearly a decade ago to look across our financial system for risks and potential vulnerabilities.[10] It was contemplated that, for the OFR to do its work, it would have access to data from other U.S. financial regulators. Yet to date, the CFTC has shared none of the Form CPO–PQR data with the OFR, largely because of the shortcomings outlined above.

Once Form CPO–PQR is revised, it has the potential to be useful not only to the CFTC. To this end, we have negotiated a memorandum of understanding (MOU) with the OFR, under which we will for the first time provide to the OFR the information we collect regarding CPOs. Under the MOU, the OFR will receive the Form CPO–PQR Information consistent with the provisions of Section 8(e) of the CEA, which establishes important protections for CFTC data sharing.[11]

Conclusion

For these reasons, I am pleased to support the Commission's final rule to amend the compliance requirements for CPOs on Form CPO–PQR. As revised, Form CPO–PQR will focus on the collection of data elements that can be used with other CFTC data streams and regulatory initiatives to facilitate oversight of CPOs and their operated pools. This will primarily reduce current data collection requirements, but also mandate disclosure of LEIs by CPOs and their operated pools. Focusing on enhancing data collection by the agency is no doubt tedious. Nonetheless, I am convinced it leads to smarter regulation that helps promote the integrity, resilience, and vibrancy of U.S. derivatives markets.

[8] Dan M. Berkovitz, Commissioner, CFTC, Statement on Proposed Amendments to Parts 45, 46, and 49: Swap Data Reporting Requirements (Feb. 20, 2020), available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement022020b.*

[9] *See* Financial Stability Board, Thematic Review on Implementation of the Legal Entity Identifier, Peer Review Report (May 28, 2019), available at: *https://www.fsb.org/2019/05/thematic-review-on-implementation-of-the-legal-entity-identifier/.*

[10] *See* Sections 151–56 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[11] In Section 8(e) of the CEA (7 U.S.C. 12(e)), Congress authorized the CFTC to share nonpublic information it obtains under the CEA with other federal agencies acting within the scope of their jurisdiction. Although Congress prohibited the CFTC from publishing data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers, Section 8(a) allows the CFTC to publish research and analysis based on such data and information where it has been appropriately aggregated, anonymized, or otherwise masked to avoid such separate disclosure. In conjunction, these two provisions of Section 8 give the CFTC the power to review the work product of other federal agencies with which it shares data and information to ensure that they do not separately disclose confidential information obtained from the CFTC, and to authorize those agencies to publish research and analysis based on such confidential information.

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I support today's final rule that would simplify and streamline the reporting obligations of commodity pool operators (CPOs) on Form CPO–PQR. The Commission first adopted Form CPO–PQR in 2012 and closely modeled the form on Form PF. The Commission adopted the Form of its own volition; unlike Form PF, which is specifically mandated by the Dodd-Frank Act, there is no similar statutory directive requiring the adoption of Form CPO–PQR.[1] In my opinion, since its adoption, the detailed information requested on Form CPO–PQR has not significantly enhanced the Commission's oversight over CPOs and has never been fully utilized by staff. I have long questioned the Commission's need to know the litany of data requested on the Form.

In my view, many of the questions on the existing form are more academic than pragmatic in nature—information that may be nice for the Commission to have, but data that is certainly not necessary for the Commission to effectively oversee commodity pools and the derivatives markets. This is why I am very pleased that the final rule eliminates the most burdensome sections on the current form—Schedules B and C, which together contain roughly 72 distinct questions, if one includes all the separately identifiable subparts. Many of these questions are challenging for CPOs to calculate precisely and require numerous underlying assumptions that vary from firm to firm, making it difficult, if not impossible, for the Commission to perform an apples-to-apples comparison across the commodity pool industry.

While today's final rule represents a marked improvement over the current CPO reporting regime, more work remains to be done. Importantly, the proposal requested comment about reverting back to the former Schedule of Investments originally adopted by the National Futures Association (NFA) in 2010 for its NFA Form PQR (2010 Schedule of Investments). In 2012, the Schedule of Investments adopted by the Commission went further than the 2010 Schedule of Investments, by lowering the itemized reporting thresholds and adding significantly more granular subcategories of investments. For example, the Commission sought information regarding the tranches of various types of securitizations and the types of bonds held by the pool. Historically, the information on the Schedule of Investments has mostly been used by the NFA for their CPO examination program. However, in its comment letter to the Commission, the NFA noted that it ''does not have a need for the more granular information currently in the Schedule'' and that it ''fully supports [aligning the current schedule with the 2010 Schedule of Investments] because [NFA] believe[s] a more streamlined schedule will significantly alleviate filing burdens on CPOs without negatively impacting the usefulness of the information that is collected.''[2]

I am disappointed that this final rule does not amend the form to adopt the 2010 Schedule of Investments, but I am encouraged that the preamble instructs DSIO staff to evaluate the ongoing utility of the current Schedule of Investments, including comparing it to the 2010 Schedule of Investments, within 18–24 months following the compliance date. As part of this review, staff is instructed to consider whether or not, in light of its utility, the Commission should revert back to the 2010 Schedule of Investments. After completing this review, in whole or in stages, staff will develop recommendations, provide relief, or propose a rulemaking for the Commission's further consideration to effectuate staff's findings. This review will allow staff to carefully consider which questions on the Schedule of Investments are necessary to effectively oversee CPOs and to propose eliminating any fields which are being received through other data channels or have no regulatory use case to the Commission's oversight function. I think this review is long overdue and is especially timely given the developments in other data streams, like part 45 swap data, that DSIO is actively working to combine with clearinghouse data to provide a complete picture of a CPO's derivatives activity. I believe that DSIO's ability to monitor, in real time, a fund's derivatives positions will be absolutely vital to the oversight and regulation of commodity pools in the future.

In closing, I deeply appreciate DSIO staff's efforts to address my concerns on this point in the weeks leading up to today's vote. Thank you all very much for your engagement and dedication.

Appendix 4—Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') issuance of today's final rule (the ''Final Rule'') amending Regulation 4.27 and Form CPO–PQR. As a whole, the Final Rule provides a thoughtfully balanced and complete evaluation of the issues identified in the notice of proposed rulemaking[1] and the responsive comments. Perhaps, just as importantly, the Final Rule clearly acknowledges that it is the first of several steps in the Commission's ongoing assessment of Form CPO–PQR not only for its utility as a regulatory tool, but as a yardstick to measure improvements to the Commission's data integration and analytical capabilities. The Final Rule makes smart, targeted corrections without forgoing the possibility of future adjustments should the Commission later determine that additional data would support evolving regulatory initiatives or Financial Stability Oversight Counsel (FSOC) requirements to fulfill statutorily mandated duties and initiatives aimed at identifying and monitoring risks to financial stability.[2]

In determining to reduce the frequency and scope of commodity pool operator (CPO) data reporting and collection, the Commission is pivoting away from what was an ambitious vision for ongoing oversight, monitoring, and trend analysis inspired by the events and fallout of the 2008 financial crisis.[3] To be sure, keeping pace with regulatory change and shifting priorities while exercising appropriate discipline in collecting, handling, and managing data is an endless endeavor. Nevertheless, I am pleased with today's outcome, and I am confident that as we continue moving forward, the tremendous abilities of the dedicated staff whose direct insight and experience informed our decisions will ensure we continue to act decisively in furthering our goals and supporting our mission critical duties.

The CFTC shares aspects of its regulatory initiatives, risk surveillance, and monitoring duties with respect to CPO and commodity pools with the Securities and Exchange Commission (SEC), the National Futures Association (NFA), and the FSOC. The Final Rule in its detailed preamble identifies areas of overlap in which commenters suggested that the Commission ought to retreat from its proposed baseline for data collection in Revised Form CPO–PQR. I am pleased that the Commission reasonably considered such comments and provides well-reasoned responses based on analysis of facts and data incorporated directly into the record. While the Commission and its staff must always be prudent and judicious in our allocation of data, resources, authority, and deference in working amicably towards common goals, we should exercise great care so as to avoid sacrificing primacy and independence when acting directly in support of Congressional mandates and statutory directives.

I appreciate the Commission and its staff's ongoing engagement with the SEC and FSOC, as well as with NFA, throughout the drafting of the NPRM and the Final Rule, and I am encouraged that discussions are ongoing. As we move forward, it is my intention to ensure that the Commission provides staff the support and resources necessary to effectuate its current plans for Form CPO–PQR data and make future amendments and adjustments, as appropriate.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I am voting for the final rule to amend Regulation 4.27 and Form CPO–PQR (''Final Rule''). This Final Rule makes adjustments to the reporting requirements for Commodity Pool Operators (''CPOs'') and their pools based on lessons learned over several years since the requirements were first adopted.

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[1] *See* section 404 of the Dodd-Frank Act.

[2] NFA Comment Letter (June 20, 2020), *https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=29369.*

[1] Amendments to Compliance Requirements for Commodity Pool Operators on Form CPO–PQR, 85 FR 26378 (proposed May 4, 2020) (the ''NPRM'').

[2] *See* NPRM, 85 FR at 26379. Not only is the Commission among those agencies that could be asked to provide information necessary for the FSOC to perform its statutorily mandated duties, but the FSOC may issue recommendations to the Commission regarding more stringent regulation of financial activities that FSOC determines may create or increase systemic risk. *See* Dodd-Frank Act sections 112(d)(1), 120; *See also* Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 FR 71128, 71129 (Nov. 16, 2011); Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252, 11253 (Feb. 24, 2012).

[3] *See, e.g.,* NPRM, 85 FR at 26381.

Eight years ago, the Commission began collecting information from CPOs on Form CPO–PQR. During that period, the Commission has come to learn that certain information in Form CPO–PQR has not materially improved the Commission's understanding of CPOs' participation in commodity interest markets, or its ability to assess the risks their pools may pose. The Final Rule eliminates information that has not proven to be of value to the Commission.

Several commenters suggested that the Commission collect less information on the Pool Schedule of Investments (''PSOI'') about CPO investments in various asset classes. I support the Commission's decision in the Final Rule to continue to collect position data about pool investments. To evaluate the risks posed by CPOs and the pools they operate, it is necessary to understand the total portfolio of each pool and its trading strategy. Recent market volatility—including historic price movements in crude oil—underscores the importance of the CFTC's ability to understand the nature of the participants in our markets and the scope of their activities in order to conduct timely oversight and spot emerging trends or risks.

Since joining the Commission I have supported and encouraged efforts to improve our data and analytical capabilities, and believe they should be expanded in the coming years. Commission staff currently is taking steps to better synthesize swap data for large account controllers and develop a more holistic surveillance program. Once these analytical tools have been further developed, staff will then be in a position to advise the Commission regarding whether any changes to the PSOI are appropriate.

To ensure that the Commission has a complete picture of pool activity across all derivatives markets, it should continue working to integrate swaps data with futures data. Some commenters have suggested that one way to do this would be to require all reporting CPOs and their pools—not just those that trade swaps—to obtain LEIs and submit them on Form CPO–PQR. I encourage the Commission and staff to continue to explore this approach, among others, so that the CFTC is able to aggregate all derivatives transactions by pools under common control.

I would like to thank the Division of Swap Dealer and Intermediary Oversight for their efforts in finalizing this rule in a form that I can support.

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